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# PRECLEARANCE UNDER SECTION FIVE OF THE VOTING RIGHTS ACT

HIROSHI MOTOMURA<sup>†</sup>

*Since 1965 the Voting Rights Act has provided crucial protection for the voting rights of minority citizens in jurisdictions covered by its provisions. Section 5 of the Act requires that any changes in laws affecting voting must be submitted for preclearance to either the United States Attorney General or to the United States District Court for the District of Columbia; over eight hundred such proposed changes have been blocked by the Attorney General or the district court as discriminatory in purpose or effect. By examining the objection letters issued by the Attorney General\* and the decisions of the district court, Professor Motomura seeks to articulate and define the contours of the analysis used in section 5 preclearance determinations. This examination reveals that the acceptability of at-large elections, changes in individual balloting, annexations and consolidations, and redistricting is determined only in part by the "retrogression" test adopted by the Supreme Court in Beer v. United States. A critical supplement to the limited analysis of the retrogression test is found in consideration of the factors enunciated in constitutional vote dilution cases arising under the fourteenth and fifteenth amendments.*

## I. INTRODUCTION

The Voting Rights Act of 1965, amended by Congress in 1970, 1975, and most recently in 1982,<sup>1</sup> protects minority citizens' right to vote throughout the United States.<sup>2</sup> In many parts of the country, the Act has been used to remove

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\* This article cites § 5 correspondence by the name of the submitting jurisdiction and the date of the letter.

1. For the legislative history of the 1982 amendments, see S. REP. NO. 417, 97th Cong., 2d Sess. 3-4 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 179-81; H.R. REP. NO. 227, 97th Cong., 1st Sess. 2-3 (1981).

2. 42 U.S.C. §§ 1973 to 1973bb-1 (1976), as amended by Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. See generally S. REP. NO. 417, 97th Cong., 2d Sess. 4-9 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 180-86; South Carolina v. Katzenbach, 383 U.S. 301, 308-15 (1966); Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980's*, 34 SW. L.J. 607, 662-64 (1980); Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973); Halpin & Engstrom, *Racial Gerrymandering and Southern State Legis-*

obstacles to voting and to correct unfair administration of the election process. In many Southern states, for example, it has led to dramatic increases in registration, voting, and election of blacks to public office.<sup>3</sup> Elsewhere, the law has helped to open the political process to participation by blacks, Hispanics, Native Americans, and Asian-Americans.<sup>4</sup>

Of the Act's many provisions, section 5 has emerged as perhaps the most important for the continuing protection of minority voting rights. Section 5 requires covered jurisdictions<sup>5</sup> to submit any change in a law, practice, or procedure affecting voting to either the United States Attorney General or a three-judge panel of the United States District Court for the District of Columbia<sup>6</sup> for a ruling that the change does not have the purpose or effect of discriminating against racial or language minorities. Thus, section 5 prevents covered jurisdictions from changing election laws to erode the Act's ban on literacy tests and other voting qualification devices, and from otherwise undermining the voting rights of minorities.<sup>7</sup>

Under section 5, the covered jurisdiction has the burden of proving by a preponderance of the evidence that a change does not have a discriminatory purpose or effect.<sup>8</sup> This shift in the burden of proof, together with the creation of an administrative preclearance procedure, gives effective protection to minority voters whose only remedy otherwise would be to litigate constitutional

*lative Redistricting: Attorney General Determinations Under the Voting Rights Act*, 22 J. PUB. L. 37, 46-48 (1973); Note, *Section 5: Growth or Demise of Statutory Voting Rights?*, 48 Miss. L.J. 818, 819-20 (1977).

3. See Bickerstaff, *supra* note 2, at 633-34; Derfner, *supra* note 2, at 551-52.

4. Persons of Spanish heritage, Alaskan natives, American Indians, and Asian-Americans are the language minorities specifically designated for coverage. See S. REP. NO. 295, 94th Cong., 1st Sess. 11, 31-32 (1975), reprinted in 1975 U.S. CODE CONG. & AD. NEWS 774, 797-98; Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55.1 (1981).

5. The basic coverage formula for § 5 is set forth in § 4(b) of the Act, 42 U.S.C. § 1973b(b) (1976). The jurisdictions presently subject to the § 5 preclearance procedure are: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia, and parts of California (4 counties), Colorado (1 county), Connecticut (3 towns), Florida (5 counties), Hawaii (Honolulu County), Idaho (1 county), Massachusetts (9 towns), Michigan (2 townships), New Hampshire (10 towns), New York (Bronx, Kings, and New York Counties), North Carolina (40 counties), South Dakota (2 counties), and Wyoming (1 county). Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. pt. 51 app. (1981).

The 1982 amendments provide covered jurisdictions with the opportunity to remove themselves from coverage (i.e., to "bail out") if they can show: (1) a ten-year record of full compliance with the Act, and (2) positive steps to afford full opportunity for minority participation in the political process. These new bailout standards take effect on August 5, 1984. See S. REP. NO. 417, 97th Cong., 2d Sess. 43-62, 68-75 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 221-41, 246-54.

6. Hereinafter sometimes referred to as the "district court."

7. See generally H.R. REP. NO. 439, 89th Cong., 1st Sess. 10-11 (1965); S. REP. NO. 162, pt. 3, 89th Cong., 1st Sess. 8, 12 (1965); *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966); *Allen v. State Bd. of Elections*, 393 U.S. 544, 548-49, 563-71 (1969); *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981).

8. *City of Port Arthur v. United States*, 517 F. Supp. 987, 1011 (D.D.C. 1981), *prob. juris. noted*, 102 S. Ct. 1272 (1982). The Supreme Court has upheld the constitutionality of this change in the burden of proof. See *South Carolina*, 383 U.S. at 335; *City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980); *Georgia v. United States*, 411 U.S. 526, 536-39 (1973). See also *Hale County v. United States*, 496 F. Supp. 1206, 1218 (D.D.C. 1980); 28 C.F.R. § 51.39(e) (1981).

claims based on the fourteenth and fifteenth amendments.<sup>9</sup>

In view of the expense and delay involved in a declaratory judgment action in the district court,<sup>10</sup> almost all covered jurisdictions first seek preclearance for their changes from the Attorney General.<sup>11</sup> If the Attorney General does not issue an objection letter<sup>12</sup> within sixty days, the jurisdiction may implement the change.<sup>13</sup> An objection, however, blocks enforcement of the change.<sup>14</sup> A jurisdiction may modify and resubmit an objectionable change, or it may seek a declaratory judgment in the district court that the change is not discriminatory in purpose or effect.<sup>15</sup> While the vast majority of section 5 submissions receive "preclearance," the Attorney General has issued over four hundred objections, which have prevented implementation of over eight hundred changes affecting voting.<sup>16</sup>

As of this writing, there exists no comprehensive published analysis of the substantive law of section 5.<sup>17</sup> Courts, covered jurisdictions, interested citi-

9. See *South Carolina*, 383 U.S. at 310-15; S. REP. NO. 417, 97th Cong., 2d Sess. 5 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 181-82; H.R. REP. NO. 227, 97th Cong., 1st Sess. 3-4 (1981). For a discussion of congressional efforts between 1957 and 1965 to facilitate litigation under the fourteenth and fifteenth amendments, see Derfner, *supra* note 2, at 545-50.

10. One commentator has pointed out that while a submission to the Attorney General may be less costly and time-consuming than a declaratory judgment action, approval by the Attorney General will not bar a fourteenth or fifteenth amendment vote dilution action attacking the plan's constitutionality. He suggests that jurisdictions may desire to litigate constitutionality as part of a declaratory judgment action. Bickerstaff, *supra* note 2, at 672.

11. The Attorney General has delegated responsibility and authority for determinations under § 5 to the Assistant Attorney General, Civil Rights Division. 28 C.F.R. § 51.3 (1981).

12. The Attorney General notifies the submitting jurisdiction of his determination by letter from the Assistant Attorney General, Civil Rights Division, or his delegate, to the representative of the submitting jurisdiction. Copies of these letters are included in the records kept on each § 5 submission and are available for inspection and copying. 28 C.F.R. § 51.49 (1981). The letters are not reported. Derfner, *supra* note 2, at 580 n.246.

13. 42 U.S.C. § 1973a(c) (1976). A change affecting voting that is precleared is still subject to challenge, but "only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." *Allen*, 393 U.S. at 549-50. See also *South Carolina*, 383 U.S. at 325; *Senate of Cal. v. Smith*, No. 81-2767 (D.D.C. Apr. 23, 1982) (order denying motion to intervene); *Apache County v. United States*, 256 F. Supp. 903, 906-07 (D.D.C. 1966).

14. 28 C.F.R. § 51.43 (1981).

15. Although the district court undertakes its own de novo § 5 inquiry, courts have stated repeatedly that they will accord some deference to the prior determination of the Attorney General as the officer who administers the statute. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 175 (1977) (Brennan, J., concurring in part); *Perkins v. Matthews*, 400 U.S. 379, 391 (1971); *City of Petersburg v. United States*, 354 F. Supp. 1021, 1031 (D.D.C. 1972) (per curiam), *aff'd*, 410 U.S. 962 (1973).

The Attorney General has stated:

In the conduct of our preclearance function under section 5 of the Voting Rights Act, we traditionally have considered ourselves to be a surrogate of the district court, seeking to make the kind of decision we believe the court would make if the matter were before it. In that role, therefore, as well as in our role as party to that lawsuit, we are bound by the district court's decision.

Objection letter to Port Arthur, Tex. (Mar. 12, 1982). See also 28 C.F.R. § 51.39(a) (1981).

16. H.R. REP. NO. 227, 97th Cong., 1st Sess. 11-12 (1981).

17. Partial treatments of the substantive law of § 5 are D. HUNTER, *FEDERAL REVIEW OF VOTING CHANGES: HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT* 20-32 (2d ed. 1975); Bickerstaff, *supra* note 2, at 667-69; Halpin & Engstrom, *supra* note 2, at 49-65; Note, *supra* note 2, at 822-25; Note, "Discriminatory Purpose," "Changes," and "Dilution": *Recent Judicial Interpretations of § 5 of the Voting Rights Act*, 51 NOTRE DAME LAW. 333 (1975).

zens, and even the Department of Justice lack guidance in determining how a particular covered change should be decided under section 5. Objection letters do not cite other objection letters or make any apparent effort to create an independent body of section 5 law based on precedent. As a result, the process runs a significant risk of inconsistent or haphazard adjudication.

This article attempts to discover, articulate, and analyze the principles of law that have governed the administration of section 5 by the Attorney General and the district court.<sup>18</sup> In so doing, the article attempts to provide a guide so that future section 5 determinations may be made with a greater awareness of the scheme that has emerged over time.

In part, the attainment of this goal is limited by the shortcomings of the objection letters as source materials. In contrast to judicial opinions in section 5 declaratory judgment actions, the Attorney General's objection letters often fail to impart complete information about a submission's factual context. The text of a typical objection letter begins with a brief description of the proposed change, recites the background facts that relate directly to the objection, and proceeds swiftly to its conclusion that the proposed change will have a discriminatory purpose or effect. The "analysis" in the typical letter is limited to general references to several of the key constitutional vote dilution cases.<sup>19</sup> Because the objection letters have not taken other objection letters into account in any deliberate effort to construct an analytical matrix, the task of ordering them sometimes resembles empirical investigation more than it does traditional legal research.

Fortunately, several aspects of the objections help make analysis possible. First, although they do not cite each other, the letters frequently refer to constitutional vote dilution cases as a concise way of invoking legal principles that have been developed in those cases. Second, decisions in section 5 declaratory judgment actions are considerably more complete than the objection letters and provide a rough outline by which the objection letters themselves may be ordered. And most importantly, the sheer number of objection letters allows the observer to discern general patterns. Taken together, these patterns constitute the substantive law of section 5.

The article begins with a general discussion in Part II of the statute's discriminatory "purpose or effect" standard, which the Attorney General and the district court must apply to each section 5 submission and declaratory judg-

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18. This article considers § 5 activity by the district court and the Attorney General through August 31, 1982.

This article does not attempt a comprehensive discussion of either the scope of § 5 coverage or enforcement of § 5. For discussion of these areas, see H. BALL, D. KRANE & T. LAUTH, *COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT* (1982); Engstrom, *Racial Vote Dilution: Supreme Court Interpretations of Section 5 of the Voting Rights Act*, 4 S.U.L. REV. 139 (1978); D. HUNTER, *supra* note 17, at 10-19, 33-39; MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U.L. REV. 107 (1979); Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U.L. REV. 111 (1972); Slawsky, *A Local Government's Guide to Section 5 of the Voting Rights Act*, 12 URB. LAW. 700 (1980).

19. H. BALL, D. KRANE & T. LAUTH, *supra* note 18, at 73-94, describes the internal Department of Justice procedures for examining submissions.

ment action. The key case in defining discriminatory purpose or effect is the 1976 Supreme Court decision in *Beer v. United States*.<sup>20</sup> Under *Beer*, a change subject to section 5 warrants preclearance if it meets two conditions. First, under the "retrogression" test, it must enhance or leave unchanged the current electoral position of minorities. Second, the change must not discriminate against minorities in violation of the Constitution.<sup>21</sup>

A central thesis of this article is that the retrogression test in *Beer* has been a slippery and unpredictable analytical tool that has had limited influence on the development of the substantive law of section 5. In support of this thesis, the article discusses the major types of court decisions and objection letters under section 5. Part III discusses section 5 submissions concerning voter registration procedures, polling place changes, and other changes affecting the individual vote. The article then turns to questions of vote dilution, first by discussing in Part IV at-large elections and election laws designed to prevent minority voters from concentrating support to elect one candidate of their choice. Part V discusses the special type of voting dilution that occurs when an annexation or consolidation changes the racial or ethnic composition of a jurisdiction. Finally, Part VI discusses another type of vote dilution—discriminatory redistricting.

The article concludes that the retrogression test in *Beer* does not provide a reliable guide to the growing body of section 5 law. While the courts and the Attorney General have generally remained faithful to the dictates of the test, they also have been forced to struggle with its limitations. The test has compelled decision-makers to define the "status quo" in the context of specific submissions, but has not preempted constitutional standards. Conceding the difficulties inherent in the inquiry into retrogression, and accepting the invitation in *Beer* itself to consider issues relating to constitutionality, the courts and the Attorney General have freely incorporated vote dilution indicators relevant to analysis under the fourteenth and fifteenth amendments into the jurisprudence of section 5 of the Voting Rights Act.

## II. *BEER V. UNITED STATES*

*Beer v. United States*<sup>22</sup> involved the redistricting of the New Orleans City Council. The 1954 city charter had provided for a seven-member council, with one member being elected from each of five districts and two being elected by the voters of the city at large. In 1961 the city redistricted on the basis of the 1960 census. In one district, blacks constituted a majority of the population but only half of the registered voters. In four other districts white voters clearly outnumbered black voters. No black won election to the council from 1960 to 1970. After the 1970 census, the council devised a redistricting

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20. 425 U.S. 130 (1976).

21. *Id.* at 141.

22. 425 U.S. 130 (1976). See generally Note, *Constitutional Law—Due Process—Non-retrogressive Reapportionment Plan Upheld*, 60 MARQ. L. REV. 173 (1976).

plan that provided for black population majorities in two districts but a black voter majority in only one district.

When the city submitted this plan to the Attorney General for preclearance under section 5 of the Voting Rights Act, the Attorney General objected on several grounds. The boundaries of the districts, he stated, "appear . . . to dilute black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts."<sup>23</sup> He added that "it does not appear that the district lines are drawn as they are because of any compelling governmental need," and that the lines "do not reflect numeric population configurations or considerations of district compactness or regularity of shape."<sup>24</sup> The city submitted a revised plan, to which the Attorney General again objected. This second objection raised essentially the same grounds as the first, with the additional point that the revised plan had districts running north-south while the city's predominantly black neighborhoods were located in an east-west direction.<sup>25</sup>

At that point, the city turned to the district court for a declaratory judgment that its revised plan did not have a discriminatory purpose or effect. The district court examined the plans and concluded that they diluted the black vote impermissibly in light of the fragmentation of black communities, the availability of alternative plans, and the history of racial discrimination in New Orleans.<sup>26</sup> While the district court recognized that the predictable failure of blacks under the proposed plan to elect representatives in proportion to their numbers did not in itself indicate impermissible vote dilution, it relied in part on the disparity between black population and black representation to conclude that the plan "minimized" black voting strength.<sup>27</sup>

The Supreme Court reversed, and in so doing sought to announce the general standards that govern the determination of when a change covered by section 5 should receive preclearance.<sup>28</sup> *Beer* held that a section 5 submission must be approved if it meets two requirements. Under the first prong of *Beer*, the "retrogression test," the change must enhance or leave unchanged the position of "minorities with respect to their effective exercise of the electoral franchise."<sup>29</sup> Second, the change must not otherwise discriminate on the basis of race or ethnic group so as to violate constitutional standards.<sup>30</sup>

Thus, under the retrogression test a change does not have a discrimina-

23. Objection letter to New Orleans, La. (Jan. 15, 1973).

24. *Id.*

25. Objection letter to New Orleans, La. (July 9, 1973).

26. *Beer v. United States*, 374 F. Supp. 363, 385-99 (D.D.C. 1974), *rev'd*, 425 U.S. 130 (1976). As a separate and independent ground for objection, the district court held that the failure of the plan to alter the city charter provision establishing two at-large seats had in itself an impermissible discriminatory effect. *Id.* at 399-402.

27. *Id.* at 389-90.

28. 425 U.S. at 139-42.

29. *Id.* at 141.

30. *Id.* With regard to constitutionality, the Court stated that the plan did not "remotely approach" a violation of the constitutional standards enunciated in the vote dilution cases that the Court had decided up to that date. *See id.* at 142-43 n.14.

tory "effect" if minorities are equally well off or better off after the change than before it, even if the change leaves undisturbed a status quo that still does not fairly reflect minority voting strength. The majority of the Court reasoned that "the purpose of § 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."<sup>31</sup> Applying this standard to the facts in *Beer*, the Court noted that under the 1961 redistricting none of the five districts had a clear black voter majority, and no blacks had been elected to the City Council. The proposed plan contained two districts in which blacks constituted a majority of the population. In one of those districts, blacks constituted a majority of the registered voters. In view of this enhancing effect, as compared with the plan previously in force, the Court concluded that the plan would have no discriminatory effect and did not even consider the issue of vote dilution in the submitted plan.<sup>32</sup>

*Beer's* "retrogression" standard has proved unwieldy in practice even though it appears straightforward at first glance. As a general standard for section 5, the "retrogression test" contains several inherent limitations. The struggle with these limitations has been a recurring theme in the district court's and the Attorney General's approach to each type of change covered by section 5. The district court and the Attorney General have responded by slowly developing the view that the section 5 cases are best addressed by considering the same factors that have dominated constitutional vote dilution cases. While the remainder of this article will discuss the standards that have evolved with respect to various types of submitted changes, a few general comments on *Beer* are in order by way of introduction.

One limitation of *Beer's* retrogression test is its requirement that the decision-maker ascertain a status quo with which to compare the submitted change.<sup>33</sup> *Beer* itself used a preexisting apportionment plan as a benchmark.<sup>34</sup> Defining the "status quo," however, has often proved to be difficult task, and in many cases the status quo has been a *hypothetical* ideal plan rather than the actual existing regime that *Beer* appears to require.<sup>35</sup>

A second limitation of *Beer's* retrogression test arises from the Supreme Court's use of the term "retrogression" to define discriminatory "effect" as a statutory term of art under section 5.<sup>36</sup> The second prong of *Beer*, however, further provides that a change, even if it is not "retrogressive," still violates section 5 if it discriminates so as to be unconstitutional.<sup>37</sup> Because section 5

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31. *Id.* at 141.

32. *Id.* at 141-42.

33. See *Apache County High School Dist. v. United States*, No. 77-1518, slip op. at 11-12 (D.D.C. June 12, 1980), discussed in greater detail *infra* text accompanying notes 98-102.

34. 425 U.S. at 141-42.

35. See *infra* text accompanying notes 138-41, 179-89, 256-61, 319-25.

36. 425 U.S. at 139.

37. *Id.* at 141.



places the burden of proof on the submitting jurisdiction,<sup>38</sup> a jurisdiction making a submission under section 5 may be unable to show that the change meets the standard of constitutionality, even when that same jurisdiction could withstand a constitutional claim with respect to the same practice in standard vote dilution litigation.

In response to the limitations of the retrogression test, and to *Beer's* invitation to consider constitutional standards, the district court and the Attorney General have relied on constitutional vote dilution cases as guides to analysis. While the burden of proof under section 5 and the Constitution differ,<sup>39</sup> the two groups of cases consider and rely on many of the same basic factors. This article attempts to demonstrate that the constitutional law of vote dilution, rather than the retrogression test, offers a more reliable guide to the substantive principles that have developed under section 5.<sup>40</sup>

In deciding these constitutional vote dilution cases, courts repeatedly have begun with the principle that there is no constitutional right to proportional representation as such.<sup>41</sup> Even consistent defeat at the polls is insufficient by itself to show vote dilution.<sup>42</sup> Beyond this starting point, vote dilution cases

38. The submitting jurisdiction has the burden of proving both nonretrogression and constitutionality. *E.g.*, objection letters to Selma, Ala. (Apr. 28, 1980); Medina County, Tex. (Dec. 11, 1979).

39. See *supra* notes 8-9 and accompanying text.

40. These judicial efforts define the *qualitative* dimensions of the constitutional right to vote. In *Nevett v. Sides*, 571 F.2d 209, 215-16 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980), the Fifth Circuit Court of Appeals noted the need to distinguish vote dilution cases from the traditional "one person, one vote" inquiry as exemplified by *Reynolds v. Sims*, 377 U.S. 533 (1964). Vote dilution cases concern the "qualitative" aspect of the right to vote. For a summary of the Supreme Court's shift of focus from the early quantitative reapportionment cases to the qualitative questions of "vote dilution," see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 737-50 (1978).

41. In *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971), the Supreme Court held the multimember district system in Marion County, Indiana did not violate the fourteenth amendment even though disproportionately fewer blacks had won election to public office. In *White v. Regester*, 412 U.S. 755, 765-67 (1972), the Supreme Court held that multimember districts in Dallas and Bexar Counties, Texas unconstitutionally diluted the votes of blacks and Mexican-Americans.

In both cases, the Court stated that no racial or ethnic group has a constitutional right to elect representatives in proportion to its numerical voting power in the community. *White*, 412 U.S. at 765-66; *Whitcomb*, 403 U.S. at 149-50. A minority group may find itself outvoted and without legislative seats of its own, but this situation alone provides no basis for a constitutional remedy when the minority group is not being denied political access. *Whitcomb*, 403 U.S. at 154-55. *Accord* *Rogers v. Lodge*, 102 S. Ct. 3272, 3276 (1982), *aff'g* *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981); *City of Mobile v. Bolden*, 446 U.S. 55, 77-80 (1980); *City of Richmond v. United States*, 422 U.S. 358, 370-72 (1975); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 143 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Gilbert v. Sterrett*, 509 F.2d 1389, 1394 (5th Cir.), *cert. denied*, 423 U.S. 951 (1975); *Turner v. McKeithen*, 490 F.2d 191, 197 (5th Cir. 1973); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds per curiam sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976); *Howard v. Adams County Bd. of Supervisors*, 453 F.2d 455, 458 (5th Cir.), *cert. denied*, 407 U.S. 925 (1972); *Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

A legislature may consider race and proportionality of representation in formulating a redistricting plan, especially when the purpose is to comply with § 5. *United Jewish Orgs.*, 430 U.S. at 159-61, 165-67. It is an abuse of discretion, however, for a court to formulate a plan to achieve proportional representation by race. *Zimmer v. Edwards*, 629 F.2d 425, 426 (5th Cir. 1980), *cert. denied sub nom. Marshall v. East Carroll Parish Police Jury*, 452 U.S. 938 (1981); *Marshall v. Edwards*, 582 F.2d 927, 934-38 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979).

42. See, *e.g.*, *Lodge v. Buxton*, 639 F.2d at 1362; *Nevett*, 571 F.2d at 216.

have turned on several recurring issues.<sup>43</sup> First, a key factor has been racially polarized voting, without which vote dilution along racial or ethnic lines could not occur.<sup>44</sup> Second, courts have considered any history of racial discrimination, both in general and in matters affecting voting,<sup>45</sup> because past discrimination has lingering adverse effects on minority political participation.<sup>46</sup> Third, chronic failure of minority candidates to win election, in conjunction with other factors, may indicate vote dilution.<sup>47</sup> Fourth, evidence of low minority participation in candidate selection or minimal access to other political processes has also been considered.<sup>48</sup> Finally, some courts have noted that the low socio-economic status of a minority group may decrease its level of political participation.<sup>49</sup> These factors, taken cumulatively, have provided the framework for analyzing a submission under section 5.<sup>50</sup>

43. This article, here and *infra* text accompanying notes 106-26, summarizes the factors that have emerged as critical in fourteenth and fifteenth amendment vote dilution cases, but it does not attempt to analyze those cases exhaustively. See generally *Rogers v. Lodge*, 102 S. Ct. at 3275-78; *Washington v. Finlay*, 664 F.2d 913 (4th Cir. 1981); *Leadership Roundtable v. City of Little Rock*, 499 F. Supp. 579 (E.D. Ark. 1980), *aff'd per curiam*, 661 F.2d 701 (8th Cir. 1981); *Bickerstaff*, *supra* note 2, at 644-57.

44. *E.g.*, *Rogers v. Lodge*, 102 S. Ct. at 3279; *City of Petersburg*, 354 F. Supp. at 1025-26; *Nevett*, 571 F.2d at 223. See also *United Jewish Orgs.*, 430 U.S. at 166 n.24.

Racially polarized voting, or racial bloc voting, has been defined as the propensity of voters, when presented with candidates of different races, to vote for the candidate of their own race. *Hale County*, 496 F. Supp. at 1212-13; *City of Rome v. United States*, 472 F. Supp. 221, 226 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980).

45. See, *e.g.*, *Rogers v. Lodge*, 102 S. Ct. at 3279-80; *White*, 412 U.S. at 766-67; *Lodge v. Buxton*, 639 F.2d at 1377-78; *Cross v. Baxter*, 604 F.2d 875, 878 (5th Cir. 1979); *Kirksey*, 554 F.2d at 143; *Robinson v. Commissioners Court*, 505 F.2d 674, 679 (5th Cir. 1974); *Turner*, 490 F.2d at 194.

46. See *Hale County*, 496 F. Supp. at 1216-17.

"Where . . . there is a history of 'sweeping and persuasive' past discrimination and a present disproportion in minority electoral participation, the plaintiffs [in a § 5 declaratory judgment action] have the burden of showing that the past discrimination no longer affects present voting patterns." *Id.* at 1216 (citing *McIntosh County Branch of the NAACP v. City of Darien*, 605 F.2d 753, 759 (5th Cir. 1979)). See also *Kirksey*, 554 F.2d at 146; *Wilkes County v. United States*, 450 F. Supp. 1171, 1176 (D.D.C.), *aff'd*, 439 U.S. 999 (1978).

47. *E.g.*, *White*, 412 U.S. at 766-67; *McMillan v. Escambia County*, 638 F.2d 1239, 1248 n.18 (5th Cir.), *appeal dismissed sub nom.* *City of Pensacola v. Jenkins*, 453 U.S. 946 (1981); *Kirksey*, 554 F.2d at 143; *Robinson*, 505 F.2d at 679. Nonetheless, election of minority candidates does not necessarily indicate equal access to the political process. *United States v. Board of Supervisors*, 571 F.2d 951, 956 (5th Cir. 1978); *Kirksey*, 554 F.2d at 149 n.21.

48. *E.g.*, *Rogers v. Lodge*, 102 S. Ct. at 3279-80; *Cross*, 604 F.2d at 878; *Nevett*, 571 F.2d at 223; *Turner*, 490 F.2d at 194.

49. *E.g.*, *Rogers v. Lodge*, 102 S. Ct. at 3280; *White*, 412 U.S. at 766-67; *Lodge v. Buxton*, 639 F.2d at 1378-79; *Kirksey*, 554 F.2d at 143, 145.

50. See also *Board of Supervisors*, 571 F.2d at 954; *Hendrix v. Joseph*, 559 F.2d 1265, 1268-71 (5th Cir. 1977); *David v. Garrison*, 553 F.2d 923 (5th Cir. 1977); *Leadership Roundtable*, 499 F. Supp. at 584-92. Evidence on these factors was conspicuously absent in *Whitcomb*. See 403 U.S. at 134-37, 149-53.

Responsiveness of white elected officials to the minority community is another factor that constitutional cases often have considered. See, *e.g.*, *Lodge v. Buxton*, 639 F.2d at 1375-77; *Cross*, 604 F.2d at 878; *Nevett*, 571 F.2d at 223; *Turner*, 490 F.2d at 194. While responsiveness has been considered in evaluating the local context of a § 5 submission, see *City of Petersburg*, 354 F. Supp. at 1026, responsiveness is probably less significant, and perhaps even misleading, when objective effect is at issue.

## III. THE INDIVIDUAL BALLOT

Changes affecting voter registration, polling places, and other aspects of casting the individual ballot are basic to voting rights and thus to section 5 protections. Political participation assumes the individual vote; unless the vote is cast, it is pointless to consider more complex questions such as whether that vote is effective or has been diluted.

The district court and the Attorney General have approached this group of changes by asking first whether a submission has a demonstrably disproportionate impact on minorities. In this situation, the district court and the Attorney General have recognized that minorities have had chronically low rates of voter registration and turnout, largely because of past discrimination.<sup>51</sup> Even when evidence of past discrimination is not clear, any change that makes it more difficult for an individual to register and vote has been regarded as having a probable disparate impact on minorities.<sup>52</sup>

## A. Voter Registration

The Attorney General has objected to changes that hinder registration of minority voters or remove them from the rolls in a discriminatory manner. These practices generally have fallen into three categories: (1) dual registration, (2) reregistration, and (3) registration methods. In addition, several objections have blocked hidden literacy tests.<sup>53</sup>

"Dual registration" refers to the requirement that voters must register twice—once for county, state, and federal elections, and again for municipal elections. The Attorney General objected, for example, to dual registration in Alapaha, Georgia. The requirement's apparent purpose was to curtail minority voting in response to the election of the city's first minority council member.<sup>54</sup> Similarly, the Attorney General has objected when the municipal registration would not make use of deputy registrars who had been instrumental in registering black voters at the county level.<sup>55</sup>

Purging voter lists, and thus requiring reregistration, also can discriminate against minorities. A reregistration requirement often neutralizes a regis-

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51. For example, the district court has stated:

The effect of Mississippi's past history of racial discrimination in voting and other areas continues to affect black people in many portions of the state today, which has resulted in a generally lower participation by blacks than whites in the political process. Consequently, proportionally fewer blacks are registered to vote than whites, and black voters turn out at the polls at a lower rate than white voters.

Mississippi v. United States, 490 F. Supp. 569, 575 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980). See also objection letters to Wilcox County, Ala. (Oct. 26, 1981); Perry County, Ala. (Sept. 25, 1981). Minority opposition to the submitted changes supports an inference of discriminatory purpose or effect. Objection letter to Wilcox County, Ala. (Oct. 26, 1981).

52. *E.g.*, objection letters to the State of Georgia (Sept. 18, 1981); State of Mississippi (Apr. 6, 1981).

53. See *infra* text accompanying notes 65-67.

54. Objection letter to Alapaha, Ga. (Mar. 24, 1980).

55. Objection letter to Stockbridge, Ga. (May 9, 1975).

tration campaign that registered minority voters at great effort and expense.<sup>56</sup> When reregistration has actually begun, reregistration statistics will show how the requirement has affected minorities.<sup>57</sup>

In situations in which the reregistration has not yet been implemented, the Attorney General has considered several factors in assessing the discriminatory potential of a reregistration proposal. An objection will issue if voters "were not provided adequate notice and opportunity to reregister."<sup>58</sup> In Jasper County, Mississippi the only publicity was through the county newspaper. There were no radio announcements, personal contacts, direct mailings, or any other efforts to reach voters who did not or could not read the newspaper. In addition, the newspaper notice was misleading because it implied that voters could reregister only at certain restricted times and places, and that they had to submit a legal description of the property on which they lived.<sup>59</sup> The Attorney General objected to mandatory reregistration in Lee County, Mississippi because voters had not been notified that they needed to reregister.<sup>60</sup> Similar lack of notice prompted an objection in 1981 to a reregistration requirement for the State of Mississippi.<sup>61</sup> The Attorney General also has examined the reregistration procedure. For example, Lee County, Mississippi restricted courthouse reregistration to regular working hours and a limited number of Saturdays; plans for more convenient reregistration were uncertain. Blacks had not been involved in formulating the plan, there were no black deputy registrars, and blacks were not "in any other way intended to be involved in the conduct of reregistration."<sup>62</sup>

Other registration objections concern changes in ongoing registration methods. In 1981 the Attorney General objected to the State of Georgia's proposal that all voter registration applications be required to furnish "proper identification" in order to register. Because individual registrars would have wide discretion to determine what identification would be "proper," the State failed to meet its burden of proving that the requirement would not have a disparate impact on blacks.<sup>63</sup>

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56. Section 6 of the Voting Rights Act, 42 U.S.C. § 1973d (1976), authorizes the appointment of federal examiners to register voters when there are indications of discrimination in the local registration process. The proposed reregistration in Jasper County, Mississippi would have purged over 650 federally registered voters. Entirely apart from § 5 preclearance, "the removal of such voters from voting lists, even though pursuant to a reregistration, cannot be accomplished except as provided by pertinent federal regulations." Objection letter to Jasper County, Miss. (June 8, 1971). *See also* objection letter to Wilcox County, Ala. (Oct. 26, 1981); Sumter County, Ala. (Oct. 2, 1981); Perry County, Ala. (Sept. 25, 1981).

57. *See* objection letter to Jasper County, Miss. (June 8, 1971).

58. *Id.*

59. *Id.*

60. Objection letter to Lee County, Miss. (Apr. 4, 1977).

61. Objection letter to the State of Mississippi (Apr. 6, 1981).

62. Objection letter to Lee County, Miss. (Apr. 4, 1977). Objecting to another reregistration requirement, the Attorney General cited the "limited hours and locations at which reidentification can be accomplished, and the generally restrictive manner in which one would have to go about perfecting his or her reidentification." Objection letter to Perry County, Ala. (Sept. 25, 1981).

63. Objection letter to the State of Georgia (Sept. 18, 1981). The Attorney General recently withdrew this objection after the State Elections Board issued an official list of forms of identification. Letter to the State of Georgia (July 26, 1982).

A 1980 case involved an attempt by DeKalb County, Georgia, to outlaw neighborhood voter registration drives, which had been successful in registering black voters. The county's registered voters included only twenty-four percent of the black voting age population, as contrasted to eighty-one percent of the white voting age population. Blacks constituted thirty-two percent of the voting age population, but only thirteen percent of the county's registered voters.<sup>64</sup>

Section 4(a) of the Voting Rights Act expressly prohibits the use of literacy tests, tests of "good moral character," or any similar "test or device" as a prerequisite to registration or voting.<sup>65</sup> On several occasions, the Attorney General has objected to hidden literacy tests or any similar prohibited "test or device." For example, an amendment to the North Carolina Constitution would have required voters to be able to read or write any section of the Constitution in the English language.<sup>66</sup> The Attorney General also objected to a North Carolina statute that would have required those registering to vote to make a "written" and "signed" statement.<sup>67</sup>

The Attorney General has acknowledged, however, that administrative considerations may justify some proposals that affect the registration process. Accordingly, preclearance may be granted when the jurisdiction tries to minimize discriminatory impact. For example, the Attorney General offered to reconsider his objection to registration in Lee County, Mississippi if the county made the procedure more "convenient and accessible to the minority community."<sup>68</sup> A 1981 objection to a reregistration program in Sumter County, Alabama gave a list of alternative procedures that the Attorney General would find "tentatively" acceptable.<sup>69</sup> Similarly, the Attorney General approved a series of Mississippi reregistrations on the condition that voters on the old rolls be allowed to vote in the next elections.<sup>70</sup> The Attorney General also has stated that he would preclear dual registration in some circumstances. For example, he offered to approve a dual registration requirement if it applied only to future registration and included "an accommodation to the black community at least comparable to that in the existing system . . ."<sup>71</sup>

Conversely, the Attorney General has objected when a jurisdiction has adopted registration procedures that are more restrictive than necessary to accomplish administrative goals.<sup>72</sup> In general, the jurisdiction must adopt an al-

64. Objection letter to DeKalb County, Ga. (Sept. 11, 1980). More recently, the Attorney General objected to DeKalb County's effort to restrict neighborhood voter registration drives to even-numbered years. Objection letter to DeKalb County, Ga. (Mar. 5, 1982).

65. 42 U.S.C. § 1973b(a) (1976).

66. Objection letter to the State of North Carolina (Mar. 18, 1971).

67. Objection letter to the State of North Carolina (Apr. 20, 1971).

68. Objection letter to Lee County, Miss. (Apr. 4, 1977). The Attorney General has made similar offers in objections to other reregistration requirements. Objection letters to Wilcox County, Ala. (Oct. 26, 1981); Perry County, Ala. (Sept. 25, 1981).

69. Objection letter to Sumter County, Ala. (Oct. 2, 1981).

70. See WASHINGTON RESEARCH PROJECT, *THE SHAMEFUL BLIGHT* 25-30 (1972).

71. Objection letter to Stockbridge, Ga. (May 9, 1975).

72. See objection letters to Wilcox County, Ala. (Oct. 26, 1981); Perry County, Ala. (Sept. 25, 1981).

ternative that eliminates or minimizes any discriminatory effect and must show that the change furthers a compelling state interest.<sup>73</sup>

### B. Polling Place Changes

In *Perkins v. Matthews*<sup>74</sup> the Supreme Court held that section 5 requires preclearance of any changes in the location of polling places. Such changes may be discriminatory if the proposed location is intimidating or inconvenient for minority voters, or if there is inadequate notice of the change to minorities.<sup>75</sup>

With respect to intimidating location, the Attorney General has blocked several attempts to transfer polling places to all-white clubs or other sites that could be expected to reduce minority turnout. For example, Lafayette County, Mississippi proposed to move a polling place to an all-white private academy,<sup>76</sup> and St. Landry Parish, Louisiana tried to move a polling place to the all-white Knights of Columbus hall.<sup>77</sup> The Attorney General also has objected to moving a polling place to a meeting hall owned by two all-white private organizations.<sup>78</sup> Similarly, an objection blocked an attempt to move a polling place to the local American Legion hall.<sup>79</sup>

The absence of minority officials at the new polling place may exacerbate any intimidating effect that may exist.<sup>80</sup> For this reason, the Attorney General based one objection to a polling place change on evidence that election day activities at the new site had been "threatening and intimidating to black citizens."<sup>81</sup>

Most polling place objections are based not on outright intimidation, but rather on an inconvenient location that will disproportionately affect minority

73. Objecting to statewide registration in Texas, the Attorney General stated:

We also have closely scrutinized the nature of the State's interest in implementing a statewide purge to determine whether it is compelling and whether alternative means of accomplishing its purpose are available. *Dunn v. Blumstein*, 405 U.S. 330 (1972). Under all the circumstances involved, we are unable to conclude that a total purge is necessary to achieve the State's purpose. Likewise, we are unable to conclude, as we must under the Voting Rights Act, that implementation of such a purge in Texas will not have the effect of discriminating on account of race or color and language minority status.

Objection letter to the State of Texas (Dec. 10, 1975).

74. 400 U.S. 379 (1971).

75. *Id.* at 387-88.

76. Objection letter to Lafayette County, Miss. (July 16, 1971).

77. Objection letter to St. Landry Parish, La. (Dec. 6, 1972).

78. Objection letter to Kingsland, Ga. (Aug. 4, 1978).

79. Objection letter to Raymondville, Tex., Indep. School Dist. (Mar. 25, 1977).

Objections have been interposed when the intimidation of minority voters was not obvious but was still a significant potential danger. For example, the Attorney General objected to a polling place change in the Southwest Texas Joint County Junior College District because "Mexican-Americans are generally less familiar with the Agricultural Exposition Building than with the S and L Building and feel less welcome there." Objection letter to Southwest Texas Joint County Junior College District (Mar. 24, 1978). In Warren County, Mississippi, an objection blocked a change to a location in a white residential area that could be expected to inhibit minority turnout. Objection letter to Warren County, Miss. (June 16, 1975).

80. *E.g.*, objection letter to Kingsland, Ga. (Aug. 4, 1978).

81. Objection letter to Pointe Coupee Parish, La. (Oct. 20, 1978) (withdrawn Oct. 10, 1980).

voters. Often, proposed polling places are significantly closer to white residential areas than to minority areas. In New York City, "the Board of Elections had made a practice of locating polling places in the 63rd Assembly District in large, predominantly white housing projects but had failed to located polling places in minority housing projects of comparable size."<sup>82</sup> A 1981 objection blocked a reduction in the number of polling places for the Burleson County Hospital District in Burleson County, Texas.<sup>83</sup> The district had reduced the number of polling places from thirteen to one, and voter turnout had dropped from 2300 to 300. The single remaining location was located thirty miles from the predominantly black part of the district and about nineteen miles from the predominantly Mexican-American area. Similar examples of discriminatory polling place changes are legion.<sup>84</sup>

In other situations, the discriminatory effect may be less obvious. The practical inconvenience may burden minority voters disproportionately because they depend more on public transportation. For example, a polling place change in Jones County, Georgia would have required "a significant number" of voters to travel an additional three and one-half miles.<sup>85</sup> The Attorney General objected to a polling place change in Martinsville, Virginia because "the substantial increase in distance of more than a mile, plus the existence of a main thoroughfare which would bisect the consolidated precinct, would make walking to the polls, as in the past, a significant but apparently unnecessary hardship for many persons in that precinct."<sup>86</sup> The Attorney General objected to a polling place change in New Orleans for similar reasons:

we understand that the new polling place is located approximately 16

82. Objection letter to New York, N.Y. (Dec. 13, 1976). See also Coalition for Educ. v. Board of Elections, 370 F. Supp. 42 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir. 1974); objection letter to New York, N.Y. (Sept. 3, 1974).

83. Objection letter to Burleson County, Tex. (June 5, 1981).

84. See, e.g., objection letter to Harris County, Tex. (Mar. 1, 1978). The proposed polling site would have been several miles from a heavy concentration of minority population without access to public transportation. Those minority voters, many elderly, would have had to cross a freeway that had no pedestrian overpass. *Id.*

In Wilson County, Texas, "the new polling place would be approximately one and one-half miles from the present polling place, . . . there is no public transportation to the proposed polling place, and . . . the present site is located in close proximity to a heavily minority populated area and is within walking distance to a great majority of the minority registered voters in that precinct." Objection letter to Wilson County, Tex. (Nov. 4, 1980).

In Taylor, Texas a centrally located site was to be replaced by a site in a predominantly white area at a "significant inconvenience" to minority voters. Objection letter to Taylor, Tex. (Dec. 3, 1979).

In Clay County, Mississippi the only polling places would be in the western part of the City of West Point, where most of the white population lived. The proposed sites were five to ten miles from certain predominantly black rural areas. Objection letter to Clay County, Miss. (July 25, 1975). See also objection letters to Ft. Bend County, Tex. (May 2, 1977); Newport News, Va. (May 17, 1974).

85. Objection letter to Jones County, Ga. (Aug. 12, 1974).

86. Objection letter to Martinsville, Va. (Apr. 19, 1974). See also objection letters to Pointe Coupee Parish, La. (Aug. 11, 1978 & Oct. 20, 1978); New Orleans, La. (May 12, 1978). One proposed polling place was located *outside* the precinct that it was intended to serve. Objection letter to New Orleans, La. (July 17, 1973).

blocks from the old polling place, that voters, many of whom are elderly, would have to cross an interstate highway approximately 170 feet wide to reach the new polling place, and that many voters do not have automobiles and no convenient public transportation is available.<sup>87</sup>

In a more unusual case, the Attorney General objected to a polling place change in Albany, Georgia that would have required a "substantial concentration" of black voters to vote on the same day in two polling places, one for county and one for city elections.<sup>88</sup>

Inadequate notice has been recognized as another justification for objections to polling place changes.<sup>89</sup> The Attorney General's treatment of a polling place change in San Antonio, Texas suggests that adequacy of notice depends on (1) actual means of notice, (2) prior familiarity of voters with the proposed site, and (3) actual turnout.<sup>90</sup> Objections based on inadequate notice have been filed most frequently when the adverse effect on minority voters was reasonable to infer. For example, the Attorney General objected to a last-minute polling place change for a ninety-two percent black precinct in New Orleans because the city had known for six months that the existing site would not be suitable for polling.<sup>91</sup> The Attorney General objected to a polling place change in Marshall County, Mississippi because "a substantial number of votes were not placed in their proper precincts for the November election and . . . this has a racial effect."<sup>92</sup>

An objection to a polling place change has been even more likely if an adequate alternative site is available, because the jurisdiction's rejection of these alternatives may evidence a discriminatory effect.<sup>93</sup> In one objection let-

87. Objection letter to New Orleans, La. (May 12, 1978). Other objections based specifically on the lack of public transportation include objection letters to Wilson County, Tex. (Nov. 4, 1980); Harris County, Tex. (Mar. 1, 1978); Ft. Bend County, Tex. (May 2, 1977); Warren County, Miss. (June 16, 1975); Newport News, Va. (May 17, 1974).

88. Objection letter to Albany, Ga. (Nov. 16, 1971). *See also* objection letter to Albany, Ga. (Jan. 7, 1972). The Attorney General also objected when Harris County, Texas changed school elections so that voters in predominantly minority areas would have fewer polling places for the same number of voters as white areas. Letters to Harris County, Tex. (May 28, 1980 & Sept. 1, 1978); objection letters to Harris County, Tex. (Jan. 17, 1980 & May 1, 1978).

89. *E.g.*, objection letters to San Antonio, Tex. (Aug. 17, 1979); Harris County, Tex. (Mar. 1, 1978); Ft. Bend County, Tex. (May 2, 1977); Webster County, Ga. (Dec. 12, 1968).

90. *See* letter to San Antonio, Tex. (Mar. 24, 1980) (withdrawing objection of Aug. 17, 1979). Upon reconsideration, the Attorney General withdrew his original objection to a proposed polling place change with the following explanation:

You have demonstrated that notice of the exact location of the polling place for Precinct 205 was published bilingually in two newspapers serving San Antonio, and that signs indicating alternate routes of access to the polling place were situated at several locations on election day. Furthermore, your random survey of voters in Precinct 205 has demonstrated that voters were generally familiar with the campus of Our Lady of the Lake University and the alternate routes of access to the polling place other than those blocked by construction on 24th Street. You have also presented information which shows that the voter turnout in Precinct 205 was not significantly different from that in comparable precincts during the May 7, 1979 municipal elections.

*Id.*

91. Objection letter to New Orleans, La. (May 12, 1978).

92. Objection letter to Marshall County, Miss. (Dec. 3, 1971).

93. *See* objection letters to Taylor, Tex. (Dec. 3, 1979); Pointe Coupee Parish, La. (Oct. 20,



ter, in fact, the Attorney General came very close to suggesting that the county's rejection of available alternative sites evidenced invidious purpose.<sup>94</sup>

By the same token, a jurisdiction may adopt alternative voting procedures to compensate for the objectionable features of a proposed new site. For example, the Apache County, Arizona, High School District closed fifteen polling places on the local Navajo reservation for a special election in 1980. Although the Attorney General objected because "those polling place changes imposed a greater burden upon Navajo than upon white voters," he also stated, "[O]ur analysis suggests that effective Navajo-language oral publicity regarding absentee voting opportunities, coupled with the implementation of a multilingual absentee voting procedure that addressed the special needs of the Navajo language minority, could have alleviated the burden imposed by the polling place reductions."<sup>95</sup> Several months later, the Attorney General withdrew the objection because absentee voting procedures had received sufficient Navajo-language publicity.<sup>96</sup>

### C. *The Individual Ballot and the Retrogression Test*

The analysis involved in registration and polling place objections remains relatively simple despite their fundamental importance in guaranteeing voting rights. Such changes directly affect the ability of the individual to cast a ballot, and their effects are more easily observed than is the dilution of group voting strength.<sup>97</sup> As the foregoing discussion has indicated, the Attorney General's inquiry has been whether the submitted change in the individual registration or voting process burdens minorities disproportionately. In practically all cases, the inquiry into disproportionate burden is consistent with the retrogression test set forth in *Beer*, and consideration of vote dilution indicators from constitutional cases would not have changed the result. If the submitted change disproportionately burdens the minority, then it represents *a fortiori* a "retrogression" from the status quo, because the burdens associated with voting fell more equally on whites and minorities prior to the change.

Although constitutional "access" analysis and *Beer's* "retrogression" test

1978 & Aug. 11, 1978); Ft. Bend County, Tex. (May 2, 1977); Raymondville, Tex., Indep. School Dist. (Mar. 25, 1977); Warren, Miss. (June 16, 1975); New Orleans, La. (July 17, 1973); St. Landry Parish, La. (Dec. 6, 1972); Lafayette County, Miss. (July 16, 1971).

94. Objection letter to Pasquotank County, N.C. (Jan. 3, 1978) ("[I]n choosing the new location, the county deliberately by-passed other suitable locations, such as the St. James Church site which would be more convenient to the black community in Elizabeth City."). See also the discussion of alternatives and invidious purpose in the redistricting context *infra* text accompanying notes 298-312. See also *Nevett v. Sides*, 571 F.2d 209, 221-25 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980). Cf. *Wilkes County v. United States*, 450 F. Supp. 1171, 1178 (D.D.C.), *aff'd*, 439 U.S. 999 (1978) (rejection of alternatives to at-large elections suggests discriminatory purpose).

95. Objection letter to Apache County, Ariz., High School Dist. (Mar. 20, 1980).

96. Letter to Apache County, Ariz., High School Dist. (May 7, 1980) (withdrawing Mar. 20, 1980 objection).

97. This distinction appears frequently in constitutional voting rights cases. See *Rogers v. Lodge*, 102 S. Ct. 3272, 3282, (1982) (Powell, J., dissenting); *City of Mobile v. Bolden*, 446 U.S. 55, 83 (1980) (Stevens, J., concurring,) (citing *Wright v. Rockefeller*, 376 U.S. 52, 58 (1964) (Harlan, J., concurring)).

are generally consistent in cases involving registration, polling places, and related changes, one recent case in these areas called upon the district court to decide how much weight to give the retrogression test when the two approaches potentially reach different results. In *Apache County High School District v. United States*<sup>98</sup> the school district submitted a proposal containing several changes affecting the Navajo minority in the district. The changes included a reduction in the number of polling places and a decision not to provide election information in oral Navajo. After the Attorney General objected,<sup>99</sup> the school district sought a declaratory judgment. The district court first held that one of several submitted changes, a reduction in the number of polling places, was clearly "retrogressive" under a simple analysis similar to the Attorney General's treatment of polling place changes.<sup>100</sup> The court then held that a second change, the failure to provide information in oral Navajo, could not have been "retrogressive" within the meaning of *Beer* because the school board had not previously disseminated information in oral Navajo.<sup>101</sup>

If the retrogression test were a standard to be read broadly and applied uniformly, the district court's analysis would have examined separately the lack of oral Navajo information and the reduction in polling places. It then would have found that failure to provide such information had no discriminatory "effect" under the retrogression test. Yet in *Apache County*, the district court considered all of the submitted changes as a package and held that the entire plan had a discriminatory effect even though one major element of the plan could not have been "retrogressive."<sup>102</sup> Since the two changes were not severed, the retrogression test was not given uniform effect. A change that should have passed the retrogression test because it was not retrogressive prompted an objection solely because the Attorney General or the district court happened to consider it together with another, "retrogressive" change. The result was avoidance of strict application of the retrogression test.

*Apache County* is unusual in that it is an "individual ballot" case that also touches upon some of the difficulties with applying the *Beer* retrogression test. The case is instructive, however, because it provides us with a glimpse of many more difficult questions regarding the retrogression test. These questions will become even more problematic in the analysis of the more complex changes that are subject to section 5 preclearance. When the inquiry into discriminatory purpose or effect turns to questions of *group* voting strength, recognized vote dilution indicators such as racially polarized voting, size of minority population, and past discrimination become more central to constitutional cases. The role of the second, constitutionality prong of *Beer* has potential for growth. At the same time, it becomes more difficult to apply the retrogression

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98. No. 77-1518 (D.D.C. June 12, 1980).

99. Objection letter to Apache County, Ariz., High School Dist. (Oct. 4, 1976). See also letters to Apache County, Ariz., High School Dist. (Dec. 23, 1976, May 3, 1977 & June 10, 1977).

100. No. 77-1518, slip op. at 13 (D.D.C. June 12, 1980).

101. *Id.*

102. *Id.*

test because a status quo against which to compare the submitted change becomes increasingly difficult to ascertain.

#### IV. AT-LARGE ELECTIONS AND ANTI-SINGLE-SHOT PROVISIONS

A minority population often has enough voting strength as a group to elect one or more members of a city or county governing body in elections that are conducted by single-member districts. If the election is at-large, however, all seats are elected from throughout the jurisdiction, and in many cases white majorities have maintained total or nearly total control.<sup>103</sup>

Even in at-large elections, a minority-supported candidate may win election through "single-shot" or "bullet" voting if he or she has concentrated support and white voters' support is dispersed among a larger number of white candidates.<sup>104</sup> Nevertheless, vote dilution in an at-large election system may be exacerbated by various devices that inhibit single-shot voting. Five major types of "anti-single-shot" or "anti-bullet-voting" devices prevent use of this strategy by dividing a multi-seat election into several one-on-one contests, each between one white candidate and one minority candidate.

One anti-single-shot device is a "majority vote requirement," which typically provides that a candidate can win only if he or she receives a majority of the votes cast. If no candidate receives a majority, a runoff election is held. Often, a candidate has enough concentrated minority support to be the top vote-getter, but then loses in a runoff. Another anti-single-shot device is the "full slate requirement," which compels each voter to vote for as many candidates as there are vacancies to be filled. Voters cannot vote only for candidates of their choice, but rather must vote for some candidates whom they do not support. If they do not cast the required number of votes, none of their votes will be counted. Third, some jurisdictions divide contests into "numbered posts." Each vacancy is filled separately, so that each candidate must choose to run for a specific slot. A minority-supported candidate's chances are diminished because a white majority can control the election for each seat. Without numbered posts, a candidate with concentrated minority support can win, even if he or she receives fewer votes than some white candidates. Fourth, a locality may use a "staggered terms" system under which only some seats are filled at each election. Narrowing the field increases the ability of a white vot-

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103. The Court in *Allen* held that § 5 covers changes from district to at-large elections. "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." 393 U.S. 544, 569 (1969) (citing *Reynolds v. Sims*, 377 U.S. at 555).

At-large elections and multimember districts were adopted for race-neutral reasons in many instances. See *Whitcomb v. Chavis*, 403 U.S. 124, 157 n.38, 158 n.39 (1971). Racial considerations, however, motivated adoption of multimember and at-large systems in many other areas, even when black and other minority voter participation was low or even nonexistent at the time. See S. REP. NO. 417, 97th Cong., 2d Sess. 26-27 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 203-04 (discussing the *Bolden* case on remand).

104. "Single-shot voting enables a minority group to win some at-large seats if it concentrates its votes behind a limited number of candidates." UNITED STATES COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 207 (1975) [hereinafter cited as TEN YEARS AFTER], quoted with approval in *City of Rome v. United States*, 446 U.S. 156, 184 n.19 (1980).

ing majority to control each available seat. Finally, a "residency requirement" can prevent single-shot voting. By requiring candidates to live in certain districts, the jurisdiction effectively can divide an at-large election into separate contests. As with numbered posts and staggered terms, this division allows a white voting majority to control each office to be filled.<sup>105</sup>

#### A. Constitutional Standards

Vote dilution cases under the fourteenth and fifteenth amendments<sup>106</sup> have figured prominently in the treatment of at-large elections, multimember districts, and anti-single-shot provisions under section 5 of the Voting Rights Act.<sup>107</sup> The seminal case employing constitutional "access" analysis was *Whitcomb v. Chavis*, a 1971 case, in which the United States Supreme Court held that multimember districts in Marion County, Indiana did not per se violate the equal protection clause of the fourteenth amendment.<sup>108</sup> At the same time, the Court also recognized that a multimember district could be unconstitutional under certain circumstances: "[multimember districts] may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" <sup>109</sup>

Constitutional cases also have considered anti-single-shot provisions in conjunction with at-large or multimember schemes. *White v. Regester*, the next key Supreme Court vote dilution case to follow *Whitcomb*, held that multimember districts with a majority vote requirement and numbered posts unconstitutionally diluted the voting strength of blacks and Mexican-Americans

105. See TEN YEARS AFTER, *supra* note 104, at 206-08. See also *City of Lockhart v. United States*, No. 80-364, slip op. at 5 (D.D.C. July 30, 1981), *prob. juris. noted*, 102 S. Ct. 1609 (1982); *City of Rome*, 446 U.S. at 184 n.19, 185 n.21.

106. According to Justice Stewart's plurality opinion in *Bolden*, the fifteenth amendment applies only to practices that directly affect access to the ballot and does not apply to vote dilution claims. 446 U.S. at 65. The Fifth Circuit Court of Appeals opinion in *Lodge v. Buxton* concluded that a majority of the *Bolden* Court had not adopted the Stewart position. 639 F.2d at 1372. On appeal, a majority of the Supreme Court expressly declined to decide this issue. *Rogers v. Lodge*, 102 S. Ct. at 3276 n.6. See also *Perkins v. City of West Helena*, 675 F.2d 201, 205-06 (8th Cir. 1982); *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981); *United States v. Uvalde Consol. Indep. School Dist.*, 625 F.2d 547, 552 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002 (1981). *But see* *McMillan v. Escambia County*, 638 F.2d 1239, 1243 n.9 (5th Cir.), *appeal dismissed sub nom.* *City of Pensacola v. Jenkins*, 453 U.S. 946 (1981).

107. Justice Stewart's plurality opinion in *Bolden* cautioned that it may be "rash" to assume that the standards governing at-large elections and multimember districts are the same. 446 U.S. at 70. Justice Stewart himself, however, assumed that the same standards apply to both. *Id.* Numerous courts and the Attorney General have agreed. See *Cross v. Baxter*, 604 F.2d 875, 878 (5th Cir. 1979); *Corder v. Kirksey*, 585 F.2d 708, 713 n.11 (5th Cir. 1978); *Turner v. McKeithen*, 490 F.2d 191, 194 (5th Cir. 1973); objection letter to the State of South Carolina (Feb. 14, 1974).

108. 403 U.S. 124, 142 (1971). See *supra* text accompanying note 41 (discussing proportional representation).

109. 403 U.S. at 143 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). See also *Rogers v. Lodge*, 102 S. Ct. at 3275-76; *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Harrison v. Schaefer*, 383 U.S. 269 (1966); *Burnette v. Davis*, 382 U.S. 42 (1965); *Lodge v. Buxton*, 639 F.2d at 1364; *Neveit*, 571 F.2d at 216; *Leadership Roundtable*, 499 F. Supp. at 581-84. See generally *Bickerstaff*, *supra* note 2, at 649-51; Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis*, 76 MICH. L. REV. 694, 695-98 (1978).

in Dallas and Bexar Counties, Texas by limiting their opportunity to participate in the political process and elect legislators of their choice.<sup>110</sup> Plaintiffs made their case by showing, first, that a history of official racial and ethnic discrimination had affected the rights of minorities to register, vote, and participate in the political process. Second, the majority vote requirement in primary elections and the numbered posts contributed significantly to the impermissible vote dilution.<sup>111</sup> Third, minorities were vastly underrepresented in elective positions and candidate slates. Fourth, restrictive voter registration procedures had hindered minorities' efforts to register. Finally, government officials had been unresponsive to the needs of the minorities in these counties.<sup>112</sup>

The next key vote dilution case was *Zimmer v. McKeithen*.<sup>113</sup> In *Zimmer*, the Fifth Circuit held that multimember districts with anti-single-shot provisions unconstitutionally diluted the minority vote in East Carroll Parish, Louisiana. In so holding, the court listed several factors that could be used to demonstrate unconstitutional vote dilution:

where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running for particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester* . . . demonstrates, however, that all these factors need not be proved in order to obtain relief.<sup>114</sup>

During the years immediately following the *Zimmer* decision, courts in voting rights and other constitutional cases have insisted on stronger showings of discriminatory purpose before they will find that the fourteenth or fifteenth amendment has been violated. In *Washington v. Davis*,<sup>115</sup> an employment discrimination case, the Supreme Court held "that the invidious quality of a law [neutral on its face] claimed to be racially discriminatory must ultimately be

110. 412 U.S. at 763-65. The Court in *White v. Regester* did not question the general rule that multimember districts and at-large elections are not per se unconstitutional. *Id.* at 765.

111. 412 U.S. at 766. *Accord City of Rome*, 446 U.S. at 184 n.20, *aff'd*, 472 F. Supp. at 244; *Nevett*, 571 F.2d at 217 & n.10; *Turner*, 490 F.2d at 194; *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds per curiam sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); *Dunston v. Scott*, 336 F. Supp. 206, 211-12 (E.D.N.C. 1972).

112. 412 U.S. at 766-69.

113. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds per curiam sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). See also *Nevett*, 571 F.2d at 217.

114. 485 F.2d at 1305 (footnote omitted). See also *Rogers v. Lodge*, 102 S. Ct. at 3277 n.8; *Washington v. Finlay*, 664 F.2d at 920-22.

115. 426 U.S. 229 (1976).

traced to a racially discriminatory purpose."<sup>116</sup> Numerous Fifth Circuit decisions tried to reconcile the growing emphasis on "purpose" with the voting rights principles declared in *White*, *Whitcomb*, and *Zimmer*. These Fifth Circuit cases generally held that the factors articulated in *Zimmer* were still the key inquiry because they could be used to prove the invidious purpose required under *Washington v. Davis* and its progeny.<sup>117</sup>

In 1980, *City of Mobile v. Bolden*<sup>118</sup> threw the law into a state of confusion. A plurality of the Supreme Court declared that the *Zimmer* factors, taken alone, were "most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case."<sup>119</sup> Thus, a constitutional vote dilution claim requires more than a mere showing that the discriminatory effect was reasonably foreseeable. Instead, a plaintiff must show that "the decision maker . . . 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."<sup>120</sup>

By requiring direct evidence of discriminatory purpose, *Bolden* represented a serious and arguably unrealistic obstacle to constitutional vote dilution litigation. More recently, however, in *Rogers v. Lodge*,<sup>121</sup> a majority of the Supreme Court affirmed a Fifth Circuit finding that the at-large election system in Burke County, Georgia was unconstitutional, based on the evidentiary factors outlined in *Zimmer*. Justice White, writing for the majority, stated that the district court had adequately "demonstrated its understanding of the controlling standard," namely discriminatory intent.<sup>122</sup> Moreover, the district court clearly had been aware that its inquiry into invidious purpose was not limited to the *Zimmer* factors. Under these circumstances, the majority was "not inclined to disagree with the Court of Appeals' conclusion that

116. *Id.* at 240. See also *Personnel Adm. v. Feeney*, 442 U.S. 256 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); Note, *Discriminatory Purpose and Discriminatory Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1376 (1979).

117. See *Nevelt*, 571 F.2d at 228-29; *City of Mobile v. Bolden*, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980); *Blacks United for Lasting Leadership, Inc. v. Shreveport*, 571 F.2d 248 (5th Cir. 1978); *Thomasville Branch of the NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978).

118. 446 U.S. 55 (1980).

119. *Id.* at 73. The Fifth Circuit Court of Appeals recently has analyzed the six separate opinions in *Bolden* in the context of further fourteenth and fifteenth amendment challenges to at-large and multimember district systems. See *Lodge v. Buxton*, 639 F.2d at 1372-75. See also *City of West Helena*, 675 F.2d at 204-05; *Washington v. Finlay*, 664 F.2d at 918-20; *McMillan v. Escambia County*, 638 F.2d 1239, 1242-43 (5th Cir.), *appeal dismissed sub nom. City of Pensacola v. Jenkins*, 453 U.S. 946 (1981); Note, *City of Mobile, Alabama v. Bolden: The Requirement of Discriminatory Intent in Vote Dilution Claims*, 32 BAYLOR L. REV. 639 (1980); Comment, *City of Mobile v. Bolden: A Setback in the Fight Against Discrimination*, 47 BROOKLYN L. REV. 169 (1980); Comment, *The Standard of Proof in At-large Vote Dilution Discrimination Cases After City of Mobile v. Bolden*, 10 FORDHAM URB. L.J. 103 (1981); Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 144 (1980); Note, *Voter Dilution and New Intent Requirements Under the Fifteenth and Fourteenth Amendments*, 18 HOUS. L. REV. 611 (1981); Note, *Voting Rights: Stuck Inside of Mobile With the Voting Blues Again: Vote Dilution Claims Confined*, 10 STETSON L. REV. 363 (1981).

120. 446 U.S. at 72 n.17 (quoting *Feeney*, 442 U.S. at 279).

121. 102 S. Ct. 3272 (1982).

122. 102 S. Ct. at 3278.

the District Court applied the proper legal standard."<sup>123</sup>

Thus, the *Rogers v. Lodge* majority held that the vote dilution factors developed in *White* and *Zimmer* may be sufficient to establish a constitutional violation in fourteenth and fifteenth amendment litigation when those factors demonstrate discriminatory purpose.<sup>124</sup> Even if these factors are constitutionally sufficient only in certain circumstances, *Rogers v. Lodge* confirms that these factors remain highly relevant to constitutional analysis.<sup>125</sup> Thus, they remain highly relevant, under the second prong of *Beer*, to section 5 analysis, even after the statutory shift in the burden of proof.<sup>126</sup>

### B. Objections to At-large Elections and Multimember Districts

Under the Attorney General's treatment of at-large elections under section 5, the two essential elements of an objection have been (1) racially or

123. *Id.*

124. Notwithstanding the combined effect of *Rogers v. Lodge* and *City of Mobile v. Bolden* on the constitutional basis for a vote dilution claim, future vote dilution litigation may be based instead on § 2 of the Voting Rights Act, as amended in 1982. Before these most recent amendments, § 2 of the Act tracked the language of the fifteenth amendment, and at least four justices of the Supreme Court had expressed the view that § 2 and the fifteenth amendment were identical in coverage and effect. *Bolden*, 446 U.S. at 60-61 (plurality opinion). The 1982 amendments, however, replaced prior § 2 with the following new language:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its 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.

Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982). Both the language of new § 2 and its legislative history make clear that in order to establish a violation, plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice. Instead, it is sufficient to show "that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." S. REP. NO. 417, 97th Cong., 2d Sess. 27 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 205. Fact patterns in which § 2 plaintiffs can make this showing with respect to "result" may evolve as virtually indistinguishable from cases in which submitting jurisdictions have been unable to carry their § 5 burden to show lack of unconstitutional purpose.

125. See also *Perkins v. City of West Helena*, 675 F.2d 201, 208 (8th Cir. 1982); *Lodge v. Buxton*, 639 F.2d at 1373.

126. See, e.g., objection letter to Kosciusko, Miss. (Sept. 20, 1976). In that letter the Attorney General explained an objection to at-large elections with numbered posts and a majority vote requirement for city aldermanic elections in the following typical language:

In our analysis we have considered the factors enunciated in *White v. Regester*, 412 U.S. 755 (1973), and the other cases to which it has given rise, including the history of exclusion of minorities from the political process, the degree of responsiveness of the elected representatives to the needs of the minority community, and the history of governmental discrimination in the area. See also *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

*Id.* See also objection letter to Edgefield County, S.C. (Feb. 8, 1979).

ethnically polarized voting and (2) a minority population of sufficient size and geographical concentration to elect at least one candidate of its choice in single-member district elections.<sup>127</sup> The Attorney General has applied this test in numerous instances to object to a change from single-member districts to at-large elections in jurisdictions with a minority population percentage between twenty-five percent and thirty-five percent.<sup>128</sup> Other objections refer vaguely to "significant" or "substantial" minority population without giving a percentage.<sup>129</sup> One important objection offers more specific guidance on how large the minority population must be. Rockdale County, Georgia sought to abolish an appointed advisory board and at the same time to increase the number of county commissioners from one to three. The commissioners would be elected at-large to numbered posts for staggered four-year terms, with a majority vote requirement. The Attorney General objected because evidence showed that the black population was between ten and seventeen percent.<sup>130</sup> Later information showed, however, that the black population was actually less than ten percent. While reaffirming the basic rule that at-large elections with anti-single-shot provisions are generally discriminatory when there is polarized voting and a significant minority, the Attorney General articulated a significant limitation by observing, "[T]he principle loses its vitality when the minority proportion of the population decreases to a point where even alternative systems would not significantly enhance the opportunity of such a minority to elect a candidate of its choice."<sup>131</sup>

Under this reasoning, the number of seats on a governing body determines how much voting strength is needed to elect a candidate in a single-member district and, in turn, whether a minority population is large enough to conclude that at-large elections have a discriminatory effect. As a general rule, this test is useful because there is usually an existing board with an established number of seats. But where a new council is formed, as in Rockdale County, the Attorney General's test concedes practically total discretion to the covered jurisdiction to set the size of the governing body and thereby determine when a minority population becomes "significant": "While it is obvious that the larger the number of single-member districts the greater the chances of the minority electing representation of its choice, suffice it to say that the Attorney General has no authority under Section 5 to require the adoption of any par-

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127. See objection letter to Charleston, S.C. (June 14, 1977) (citing *White, Turner, Zimmer*). See also objection letters to Sumter County, S.C. (Dec. 3, 1976) ("black population . . . is relatively concentrated"); Sumter County, Ga. (July 13, 1973) ("significant concentrations of black citizens"); Lowndes County, Miss., Bd. of Educ. (June 23, 1975) ("residential concentrations"); Calhoun County, S.C., School Dist. (Aug. 7, 1974) ("significant concentrations of black citizens").

128. See, e.g., objection letters to Henry County, Ga. (July 23, 1979) (31.9% black); Charleston County, S.C. (June 14, 1977) (31% black); Horry County, S.C. (Nov. 12, 1976) (25% black); Pike County, Ala. (Aug. 12, 1974) (34% black); Bibb County, Ga., Bd. of Educ. & Orphanage (Aug. 24, 1971) (34% black).

129. See, e.g., objection letters to Conecuh County, Ala. (Apr. 23, 1982); State of Mississippi (July 8, 1977) ("cognizable racial minority"); Sumter County, S.C. (Dec. 3, 1976) ("substantial proportion of the population").

130. Objection letter to Rockdale County, Ga. (July 1, 1977).

131. Letter to Rockdale County, Ga. (Sept. 9, 1977) (discussing July 1, 1977 objection).



ticular form of government."<sup>132</sup> A larger number of seats would reduce the percentage of the vote needed to control one seat, and thus increase the likelihood that minorities could enjoy meaningful participation in the political process in a single-member district system.<sup>133</sup> Thus, had Rockdale County decided to increase the number of commissioners from one to seven, for example, rather than to three, the Attorney General may have concluded that the at-large election procedure had a discriminatory effect.

This analysis of at-large elections applies even when a minority group constitutes a numerical majority, because a population majority still may be unable to control at-large elections. A black numerical "majority" is still a "minority" for section 5 purposes if black voter turnout is chronically low.<sup>134</sup> One objection to at-large elections noted that "the fact that a minority racial or ethnic group may constitute a majority of the population in a county does not automatically remove the possibility of Fifteenth Amendment dilution . . . ." <sup>135</sup> Under the same reasoning, at-large elections may also be objectionable on vote dilution grounds even if minority-supported candidates have had some success.<sup>136</sup> Further, if circumstances are such that purely at-large elections would prompt an objection, the Attorney General probably will object to a hybrid plan that elects some council members by district and others at-large.<sup>137</sup>

Even when the number of seats on the governing body is fixed, it is not always enough to look at polarized voting and the significance of the minority population to determine how minority voters would fare in a single-member district system. Here again, the retrogression test presents difficulty in some

132. *Id.*

133. See objection letter to Tyler, Tex. (Feb. 25, 1976) ("under the enlarged seven-member council the representation which the affected minorities are given a realistic chance of electing is reduced [from 20% with a five-member council] to 14%").

134. *Hale County v. United States*, 496 F. Supp. 1206, 1216 (D.D.C. 1980); objection letter to Hale County, Ala. (Dec. 29, 1976). *Accord Graves v. Barnes*, 343 F. Supp. 704, 730-31 (W.D. Tex. 1972), *aff'd in relevant part sub nom. White v. Register*, 412 U.S. 755, 768-70 (1973).

One objection concerned a change from at-large to single-member district elections where Mexican-Americans constituted approximately 55% of the population. The city council in Beeville, Texas had five members, elected at-large to staggered two-year terms. Candidates favored by Mexican-American voters frequently had been successful. In the context of racially polarized voting, the Attorney General concluded that

the effect of the adoption of a single-member district plan may be to restrict the influence of the Mexican American electorate in Beeville to districts one and two, although under the prior at-large system or under alternative single-member district member plans Mexican Americans could potentially have greater influence.

Objection letter to Beeville, Tex. (Feb. 2, 1979). This language indicates that the objection probably was directed at the particular districting and not to single-member elections as such.

135. Objection letter to Calhoun County, S.C., School Dist. (Aug. 7, 1974). See also *Moore v. Leflore County Bd. of Election Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974); objection letters to Edgefield County, S.C. (Feb. 8, 1979); *State of Mississippi* (July 8, 1977).

136. See objection letter to Charleston County, S.C. (June 14, 1977). See also *United States v. Board of Supervisors*, 571 F.2d 951, 956 (5th Cir. 1978); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 149 & n.21 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977).

137. See, e.g., objection letters to Corpus Christi, Tex., Indep. School Dist. (Apr. 3, 1980); Nacogdoches, Tex., Indep. School Dist. (Apr. 3, 1980); Allendale County, S.C. (Nov. 25, 1977). *But see* objection letter to Houston, Tex. (June 11, 1979).

cases. On the one hand, the presence of these two essential elements may show that at-large elections in the abstract are retrogressive as compared with minority voting *potential* in single-member districts. On the other hand, strict application of the retrogression test suggests that this sort of abstract analysis must give way to an inquiry focusing on the *existing* single-member districts that constitute the status quo in the covered jurisdiction.

The district court decision in *Wilkes County v. United States*<sup>138</sup> illustrates this dilemma. Wilkes County, Georgia had sought preclearance for a change from single-member districts to at-large elections. The district court held that the change would have a discriminatory purpose or effect. The retrogression test could have required the court to use the existing single-member districts as a benchmark to determine whether blacks in Wilkes County would be better or worse off after the proposed change. But because the existing single-member districts were "severely malapportioned," the district court decided not to use them as the status quo for purposes of the retrogression test.<sup>139</sup> Instead, the court compared the submitted at-large scheme with *hypothetical* fairly drawn single-member districts and found discriminatory effect.<sup>140</sup> In so doing, the district court, as a concession to the difficulty of defining the status quo, avoided strict application of the retrogression test and employed a test similar to the general standards of access to the political process used in constitutional cases.<sup>141</sup> Thus, under *Wilkes County*, a submitting jurisdiction in which the two essential elements are present may fail to prove constitutionality even if there is no retrogression.

Nevertheless, the tendency to restrict the retrogression test in the at-large election context has not been uniform. In *Charlton County Board of Education v. United States*,<sup>142</sup> the district court refused to abandon inquiry into retrogression. In that case, the court considered a change from an appointed to an elected board of education, for which the new elections would be at-large with staggered terms and numbered posts. The Attorney General objected,<sup>143</sup> but

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138. 450 F. Supp. 1171 (D.D.C.), *aff'd*, 439 U.S. 999 (1978).

139. 450 F. Supp. at 1178. The court observed that the proposal would diminish black voting power even as compared with the "severely malapportioned" districts. *Id.* at 1176. Nevertheless, the court's opinion leaves little doubt that it would have used the same analysis even if at-large elections would actually enhance black voting strength over the existing single-member districts.

140. The district court stated, "Since the existing election districts are severely malapportioned, it is appropriate, in measuring the effect of the voting changes, to compare the voting changes with options for properly apportioned single-member district plans." *Id.* at 1178.

141. In evaluating the probable outcome under hypothetical single-member district elections, the Attorney General generally has assumed that district lines will be "fairly drawn." The objection to at-large elections in Terrell County, Georgia contains typical language: "Residential patterns in the county are such that the creation of seven *fairly-drawn* single-member districts satisfying applicable legal requirements could be expected to result in some districts having a black majority in population." Objection letter to Terrell County, Ga. (Dec. 16, 1977) (emphasis added).

The Fifth Circuit Court of Appeals employed a similar analysis in *Moore*, a constitutional vote dilution case, ordering simultaneous abandonment of at-large elections and a redistricting scheme to correct prior malapportionment. 502 F.2d at 625-27. *See also* objection letters to Butler County, Ala. (July 19, 1982); Henry County, Ga. (May 27, 1980 & July 23, 1979).

142. No. 78-0564 (D.D.C. Nov. 1, 1978).

143. Objection letter to Charlton County, Ga. (June 21, 1977).

the district court held that the change was ameliorative under the retrogression test.<sup>144</sup> The court pointed out that blacks had never been appointed under the old system but had enjoyed success in recent elections.<sup>145</sup> The court also found "no substantial evidentiary basis from which racial bloc voting can be inferred."<sup>146</sup> The Attorney General argued in support of his objection that the retrogression test is meaningless if applied to an entirely new system. Invoking general principles of vote dilution, he argued that "the only comparison that can be made is to compare the value of the vote granted to white residents with the value of the vote granted to black residents."<sup>147</sup> The district court expressly rejected this interpretation of the retrogression test, reasoning that elections "clearly enhanced the ability of minorities to participate in the political process" as compared with an appointive method that had totally excluded them.<sup>148</sup>

Although *Charlton County* at first glance appears to treat the retrogression test as decisive in spite of a different result dictated by constitutional vote dilution standards, the case may not be of great general significance. In *Charlton County* blacks had fared very poorly under the existing appointive system. The key fact was the apparent extent of black political successes in elections, even those conducted at-large with staggered terms and numbered posts.<sup>149</sup> When the circumstances indicate vote dilution, however, an objection will still be interposed. In several instances both before and after *Charlton County*, the Attorney General objected to similar appointive-to-elective changes when the new elections would be conducted at-large with anti-single-shot provisions. For example, the Attorney General found that blacks in Horry County, South Carolina, had done poorly in county elections, that there was a pattern of racial bloc voting, and that the majority vote requirement "emerge[d] as a very significant factor in . . . Horry County."<sup>150</sup>

144. No. 78-0564, slip op. at 9 (D.D.C. Nov. 1, 1978).

145. *Id.* at 3, 6.

146. *Id.* at 6.

147. *Id.* at 8.

148. *Id.* at 9.

149. This fact may explain the objection letter to Long County, Georgia (July 16, 1976), in which the Attorney General indicated that a change from an appointive to an at-large elective board of education would be precleared as long as there were no anti-single-shot provisions.

150. Objection letter to Horry County, S.C. (Nov. 12, 1978). See also objection letters to Harris County, Ga., Bd. of Educ. (Aug. 18, 1975); Bibb County, Ga., Bd. of Educ. & Orphanage (Aug. 24, 1971). In one case, however, the Attorney General offered to preclear the creation of a new at-large judgeship if anti-single-shot provisions were eliminated. See objection letter to Baton Rouge, Louisiana (Feb. 7, 1980) (withdrawn Oct. 10, 1980).

The Rockdale County case is another instance of an objection to a method of election, even though under the prior system there had been only one county commissioner. The Attorney General's objection may also have relied on the recent appointment of a black to the county advisory board, which the new county commission would replace. Objection letter to Rockdale County, Ga. (July 1, 1977).

Several objections have concerned shifts from elective to appointive offices and reductions in the frequency of elections. In these situations, the Attorney General has asked whether the change was proposed in a context of increasing minority influence in elections. For example, the Attorney General objected to abolishing the elective office of Superintendent of Education in Clarendon County, South Carolina, because black candidates would run if elections were continued. Objection letter to Clarendon County, S.C. (Nov. 13, 1973). In Tunica County, Mississippi, the Attor-

### C. *Objections to Anti-Single-Shot Provisions*

The close relationship that has developed in constitutional cases between at-large elections<sup>151</sup> and anti-single-shot provisions has continued in the Attorney General's objections under section 5. In accord with *White v. Regester*, an objection to at-large elections is more likely when there are also anti-single-shot provisions, because these provisions will "tend further to highlight the dilutive effect of the at-large proposal."<sup>152</sup>

Not surprisingly, then, the analysis of anti-single-shot provisions under section 5 has resembled the approach to at-large elections.<sup>153</sup> Racially polarized voting and a substantial minority population have been the two key

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ney General objected to changing the office of Superintendent of Education from elective to appointive because the change "was adopted at a time when blacks had just begun to regain the franchise in Mississippi." Objection letter to Tunica County, Miss., Bd. of Educ. (Jan. 24, 1977). Similarly, the Attorney General objected when the State of Alabama proposed to appoint rather than elect certain judges. Blacks had won election to that office in the past, and evidence indicated a significant risk that making the office appointive would reduce opportunities for black political participation. Objection letter to the State of Ala. (Dec. 20, 1972). The Attorney General also objected to a proposal to change the office of City Clerk in Shaw, Mississippi from an elective to an appointed position. Objection letter to Shaw, Miss. (Nov. 21, 1973). See also objection letters to Sumter County, S.C. (Oct. 1, 1976); State of South Carolina (Sept. 8, 1975).

Efforts to postpone elections have prompted similar objections. The Attorney General objected when Hollandale, Mississippi, indefinitely postponed an election for city clerk because "members of the black community in Hollandale were interested in supporting a candidate or candidates for the clerk's post this year." Objection letter to Hollandale, Miss. (July 9, 1973). In the Waller, Texas, Consolidated School District, the Attorney General objected to moving an election to a date in August, when 3000 faculty and students at a predominantly black university in the district would be away on vacation. Objection letter to Waller, Tex., Consol. School Dist. (Mar. 10, 1978).

See objection letters to Chester County, S.C. (Sept. 26, 1979); Fort Worth, Tex., Indep. School Dist. (Jan. 16, 1978); Sumter County, S.C. (Oct. 1, 1976); East Dublin, Ga. (June 19, 1974). See also objection letter to Statesboro, Ga. (Feb. 2, 1981). *But see* letter to Statesboro, Ga. (May 13, 1981) (withdrawing objection).

151. Just as the principles governing at-large elections and multimember districts are substantially identical, the analysis of anti-single-shot provisions is practically the same whether they are implemented in at-large elections or in multimember districts. See objection letters to Orleans Parish, La. (Aug. 15, 1975) (numbered posts and majority vote requirement in multimember districts); Sumter County, Ala., Democratic Executive Comm. (Oct. 29, 1974) (full slate requirement in multimember districts); Evangeline Parish, La., School Bd. & Police Jury (June 25 & July 26, 1974) (numbered posts, majority vote requirement, full slate requirement, and staggered terms in multimember districts).

152. Objection letter to Chambers County, Ala., Bd. of Educ. (Mar. 10, 1976). See also objection letters to Chester County, S.C. (Oct. 28, 1977); Long County, Ga. (July 16, 1976).

153. Substantially the same analysis applies to each of the standard anti-single-shot provisions. At least two jurisdictions simply resubmitted changes after substituting one anti-single-shot device for another device to which the Attorney General already had objected. In both cases, the Attorney General objected again, noting that the substitution made no difference. See objection letters to Thomasville, Ga. (Aug. 27, 1973 & Aug. 24, 1972) ("there is little difference between the racial effect of at-large voting with majority and residency requirements and at-large voting with majority and numbered posts requirements"); Newnan, Ga. (June 10, 1975 & Oct. 13, 1971) (staggered terms and numbered posts have "same effect on potential voting strength of racial minorities").

In one case, however, the Attorney General objected to a change from residency districts to numbered posts because the residency districts had "provided the black community . . . with the potential to influence the selection of candidates likely to be responsive to their interests." Objection letter to Griffin-Spaulding County, Ga., Bd. of Educ. (July 6, 1981). See also letter to Griffin-Spaulding County, Ga., Bd. of Educ. (Sept. 28, 1981) (declining to withdraw the objection). *But see* objection letter to Guilford County, N.C. (Mar. 1, 1982) ("The proposed residency districts would operate essentially as numbered posts").

elements giving rise to an objection. Numerous objections to anti-single-shot provisions have relied on these two elements without further analysis. For example, an objection to a majority vote requirement in Mullins, South Carolina simply stated:

Our analysis reveals that blacks constitute a substantial proportion of the population of the City of Mullins, that the city council is elected at large, and that racial bloc voting may exist. Under these circumstances, recent court decisions, to which we feel obligated to give great weight, indicate that a majority vote requirement could have the potential for abridging minority voting rights.<sup>154</sup>

As with at-large elections, an objection to an anti-single-shot provision requires racially or ethnically polarized voting. The Attorney General withdrew earlier objections to numbered posts in Monahans, Texas and to a majority vote requirement and numbered posts in the Midland, Texas, Independent School District for lack of racially polarized voting.<sup>155</sup> As to Midland, the Attorney General stated, "we do not conclude that racial bloc voting exists in the Midland ISD elections to such an extent as to provide the necessary basis for a continued objection to the implementation of the majority vote and numbered posts requirements."<sup>156</sup>

The definition of "substantial" minority population should be the same for both at-large elections and anti-single-shot provisions because the core interest, election to one seat on a multimember governing body, is the same. Indeed, the Rockdale County objection<sup>157</sup> itself arose in the context of both at-large elections and several anti-single-shot provisions.<sup>158</sup> Consistent with that analysis, the Attorney General objected to numbered posts in the Comal, Texas, Independent School District, which had a Mexican-American population of approximately seventeen percent.<sup>159</sup> As a general rule, a minority population of twenty to twenty-five percent is a "substantial minority population."<sup>160</sup>

At least two objections have been based on the combined population of two distinct minority groups.<sup>161</sup> At the other extreme, anti-single-shot provi-

154. Objection letter to Mullins, S.C. (June 30, 1978) (citing *White, Zimmer, Nevett*). Many other objections articulate this standard in substantially identical language. *See, e.g.*, objection letters to Angleton, Tex., Indep. School Dist. (Mar. 15, 1982) (majority vote requirement and numbered posts); Ector County, Tex., Indep. School Dist. (Mar. 15, 1982 & July 7, 1978) (same); Marion, S.C. (July 5, 1978) (majority vote requirement); Seneca, S.C. (Sept. 13, 1976) (same); Lockney, Tex., Indep. School Dist. (Mar. 30, 1976) (majority vote requirement and numbered posts); East Dublin, Ga. (Mar. 4, 1974) (numbered posts and staggered terms).

155. Letters to Midland, Tex., Indep. School Dist. (Nov. 13, 1978) (withdrawing Aug. 6, 1976 objection); Monahans, Tex. (June 1, 1976) (withdrawing Mar. 11, 1976 objection).

156. Letter to Midland, Tex., Indep. School Dist. (Nov. 13, 1978) (withdrawing objection).

157. *See supra* text accompanying notes 130-33.

158. *See* objection letter to Rockdale County, Ga. (July 1, 1977); letter to Rockdale County, Ga. (Sept. 9, 1977).

159. Objection letter to Comal, Tex., Indep. School Dist. (Apr. 4, 1977).

160. *See, e.g.*, objection letters to Corsicana, Tex., Indep. School Dist. (Apr. 28, 1978) (majority vote requirement and numbered posts; 23% black population); Pageland, S.C. (Mar. 22, 1977) (majority vote requirement; 23% black population).

161. Objection letters to Prairie Lea, Tex., Indep. School Dist. (Apr. 11, 1977) (majority vote

sions have prompted objections even where the minority group constituted a numerical majority.<sup>162</sup> As with at-large elections, the election of some minority candidates has not precluded a finding that anti-single-shot provisions have a discriminatory, vote-dilutive effect.<sup>163</sup>

The analyses of at-large elections and anti-single-shot provisions differ from each other in several respects.<sup>164</sup> First, an objection to anti-single-shot provisions should not require that a minority population be geographically insular. Effective single-shot voting does not presuppose that a minority is concentrated in a particular district. Second, several objections have suggested that government interests may justify anti-single-shot provisions in certain circumstances. For example, an objection to a majority vote requirement in Hollywood, South Carolina stated:

Because of the potential for diluting black voting strength inherent in the use of a majority vote requirement in Hollywood and *because the town has advanced no compelling reason for its use*, we are unable to

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requirement and numbered posts, 20% Mexican-American and 10% black); Luling, Tex. (Mar. 29, 1976) (numbered posts; 25% Mexican-American and 16% black).

162. *E.g.*, objection letters to Madison, Ga. (July 29, 1975) (majority vote requirement and numbered posts); Wadley, Ga. (Oct. 30, 1974) (same); Calhoun County, S.C., School Dist. (Aug. 7, 1974) (at-large elections and staggered terms). The analogous rule for at-large elections is discussed *supra* text accompanying notes 134-35.

163. *See Kirksey*, 554 F.2d at 149 n.21; *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc), *aff'd on other grounds per curiam sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); objection letter to Charleston County, S.C. (June 14, 1977). Similar principles for at-large elections are discussed *supra* at text accompanying note 136.

164. These observations apply to the vast majority of cases that involve the five classic anti-single-shot provisions discussed *supra* text accompanying notes 104-05. In addition, several unique situations involving changes closely related to anti-single-shot provisions deserve mention.

Several objections have blocked discriminatory changes in the candidate nomination process of political parties. In 1979, for example, the State of Mississippi passed an "open primary" law. Act of Mar. 30, 1979, ch. 452, 1979 Miss. Laws 834. Previously, political parties had nominated candidates through a primary election, after which party nominees and independents ran in the general election. Under the proposed system, all opposed candidates, regardless of party affiliation, would run in a "preferential" election. If no candidate received a majority, the two candidates receiving the most votes for each office in the preferential election would then run in a general election. *Id.*, §§ 1-6, at 834-35. The Attorney General objected, first, because the proposal would effectively introduce a majority vote requirement, and second, because it would limit the political influence exercised by blacks through the Democratic Party. His objection noted, "The information provided in your submission and an analysis of recent elections show the important role that blacks have acquired in the Democratic Party in Mississippi. The elimination of the present system of partisan primaries and party nominations will eliminate this political advantage that blacks have obtained." Objection letter to the State of Mississippi (June 11, 1979). *See also* objection letters to the State of Mississippi (Aug. 23, 1976 & June 4, 1975).

A similar situation arose in Texas in 1973. Legislation required any political party that received between 2% and 20% of the vote to nominate its candidates by convention rather than by primary election. Act of June 15, 1973, ch. 542, § 6, 1973 Tex. Gen. Laws 1404, 1409 (codified at TEX. REV. CIV. STAT. ANN. art. 13.45 (Vernon Supp. 1982)). The change would have severely disadvantaged any affected political party, because the state reimbursed political parties for primary elections but not for conventions. It was well-known that the proposal would affect only one party, La Raza Unida, and thus "significantly limit the opportunity for Mexican-Americans to nominate, on an equal basis with others, a candidate of their choice." Objection letter to the State of Texas (Jan. 26, 1976). The Attorney General ruled that the proffered justification, "lessening of the burdens and expense of state-financed primary elections," did not justify the discriminatory effect. *Id.*

*See also* objection letters to the State of Alabama (July 19, 1982, Jan. 16, 1976 & Aug. 1, 1969).

conclude that the burden of proof has been sustained and that the imposition of the majority requirement, in the context of an at-large election system, will not have a racially discriminatory effect in the Town of Hollywood.<sup>165</sup>

This suggestion that other government interests may justify the change is absent from objections to at-large elections. Nevertheless, a strict standard applies whenever a locality seeks to justify an anti-single-shot provision. For example, when the Comal, Texas, Independent School District stated that "the change to running by place was done to simplify the ballot and to avoid confusion on the part of the voters,"<sup>166</sup> the Attorney General responded, "it has not been demonstrated why such a problem could not be eliminated through education efforts and clear instructions on the ballot."<sup>167</sup>

The third and most important difference between the treatment of anti-single-shot provisions and at-large elections is that objection letters in the former instance sometimes discuss whether single-shot voting would be an effective political strategy for minorities in the local political situation. Several objections have taken the following approach: "where there is increasing participation in the political process by the black community as in Darlington, a majority [vote] and residency requirement have the practical effect of eliminating the potential for minority voters to elect candidates of their choice through the use of single-shot voting."<sup>168</sup>

In concluding that single-shot voting would be an effective minority strategy, some objections have merely pointed out that adoption of anti-single-shot provisions was a local reaction to the election of minority-supported candidates through single-shot voting. For example, Williamston, North Carolina proposed staggered terms soon after the first black had been elected to the board of commissioners.<sup>169</sup> In other instances objections have observed that

165. Objection letter to Hollywood, S.C. (June 3, 1977) (emphasis added). Other objections contain substantially similar language. *See, e.g.*, objection letters to West Orange-Cove, Tex., Consol. Indep. School Dist. (Feb. 9, 1981) (majority vote requirement and numbered posts); Alto, Tex., Indep. School Dist. (May 11, 1979) (same); Lancaster, S.C. (Sept. 19, 1978) (majority vote requirement); Marion, S.C. (July 5, 1978) (same); Neches, Tex., Indep. School Dist. (Apr. 7, 1978) (majority vote requirement and numbered posts); Prairie Lea, Tex., Indep. School Dist. (Apr. 11, 1977) (same).

166. Objection letter to Comal, Tex., Indep. School Dist. (Apr. 4, 1977) (quoting letter from Comal Indep. School Dist. to Attorney Gen. (Jan. 31, 1977)).

167. *Id.* Similarly, the Attorney General has stated that a county's goal of guaranteeing county-wide representation could be achieved through single-member districts rather than through the residency districts that the county proposed. Objection letter to Guilford County, N.C. (Mar. 1, 1982). *See also* objection letters to Fort Valley, Ga. (May 13, 1974) (majority vote requirement and numbered posts); East Dublin, Ga. (Mar. 4, 1974) (numbered posts and staggered terms).

168. Objection letter to Darlington, S.C. (Aug. 17, 1973) (majority vote and residency requirements). For virtually identical language, see objection letters to Tomson, Ga. (Sept. 3, 1974) (majority vote requirement, numbered posts, and staggered terms); Perry, Ga. (Aug. 14, 1973) (majority vote requirement). *See also* objection letter to Rock Hill, S.C. (Dec. 12, 1978) (majority vote requirement).

169. Objection letter to Williamston, N.C. (Feb. 4, 1977). The objection did not, however, cite specific evidence of discriminatory purpose. *See also* objection letters to Alapaha, Ga. (Mar. 24, 1980) (majority vote requirement and numbered posts); Laurinburg, N.C. (Dec. 12, 1978) (majority vote requirement and staggered terms); Sumter County, S.C. (Oct. 1, 1976) (residency require-

although few minority candidates had won election in the past, the candidates could now benefit from single-shot voting in light of recent increases in minority political activity.<sup>170</sup>

More detailed objections have examined election results to determine the actual or potential effectiveness of single-shot voting. For example, in Colleton County, South Carolina, the Attorney General found that "had a majority vote been required for election to the board of education in 1972 the black candidate would not have been elected."<sup>171</sup> Staggered terms for the Gretna, Virginia town council prompted an objection under similar reasoning. The Attorney General observed, "Since 1971, eight black candidates have run for city office. None have placed higher than fifth, a position insufficient to achieve election under the plurality system, were staggered terms in effect."<sup>172</sup> In Reidsville, North Carolina "all three of the black persons who were elected successively to the council over the last eleven years initially obtained incumbency by placing fifth, a position that would not have resulted in their election under the proposed change."<sup>173</sup> And in Greenville, North Carolina, "since 1965 only one black candidate has achieved election, and then only by placing sixth when he was first elected with a plurality of the vote."<sup>174</sup>

Minority defeats in runoff elections also have provided strong evidence that single-shot voting would be viable and therefore that anti-single-shot provisions have a discriminatory effect. The district court took this approach in *City of Rome v. United States*, pointing out that the most recent serious black candidate "would have been elected under the pre-1966 plurality-win system, but was defeated by the white candidate in the runoff election under the majority vote regime."<sup>175</sup> In Jonesboro, Georgia the only black town council member originally had won election with a plurality. An objection was issued when he was later defeated after the town adopted a majority vote requirement and numbered posts provision.<sup>176</sup> In Chester County, South Carolina, at-large elections with residency and majority vote requirements prompted an objection because recent black candidates would have won with a plurality but had lost to white candidates in runoffs.<sup>177</sup> Similarly, in the June 1976 Demo-

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ment); Cuthbert, Ga. (Apr. 9, 1973) (numbered posts); Hogansville, Ga. (Aug. 2, 1972) (majority vote requirement and numbered posts).

170. See, e.g., objection letters to Woodville, Tex. (Nov. 12, 1976) (numbered posts); Hereford, Tex., Indep. School Dist. (May 24, 1976) (majority vote requirement and numbered posts).

171. Objection letter to Colleton County, S.C. (Feb. 6, 1978) (staggered terms).

172. Objection letter to Gretna, Va. (Sept. 27, 1979).

173. Objection letter to Reidsville, N.C. (Aug. 3, 1979) (staggered terms).

174. Objection letter to Greenville, N.C. (Apr. 7, 1980) (majority vote requirement). See also objection letters to Griffin-Spaulding, Ga., Bd. of Educ. (July 6, 1981) (numbered posts); Laurinburg, N.C. (Dec. 12, 1978) (majority vote requirement); Clute, Tex. (June 17, 1977) (same); Cameron, S.C. (Nov. 15, 1976) (same); Athens, Ga. (Oct. 23, 1975) (same); Jonesboro, Ga. (Feb. 4, 1972) (majority vote requirement and numbered posts).

175. 472 F. Supp. 221, 244 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980). In his earlier objection letter, the Attorney General had pointed out that "a black candidate for school board received the highest vote among 4 candidates in the primary but lost to a white opponent in the run-off." Objection letter to Rome, Ga. (Oct. 20, 1975).

176. Objection letter to Jonesboro, Ga. (Feb. 4, 1972).

177. Objection letter to Chester County, S.C. (Oct. 28, 1977).



cratic primary in Horry County, South Carolina, "one black candidate was among the eight persons receiving the greatest number of votes and would have been one of that party's nominees but for the majority requirement."<sup>178</sup>

The extent of some objection letters' inquiry into past election results and thus into the viability of single-shot voting under particular local conditions once again raises fundamental questions about the retrogression test. On the one hand, the particularized inquiry into election results in Colleton County (South Carolina), Gretna (Virginia) and similiar cases suggests that the Attorney General would preclear an anti-single-shot provision if the submitting jurisdiction can show that single-shot voting has not been a viable minority election strategy. Indeed, this is the approach that the retrogression test would seem to require; if single-shot voting cannot be effective, then anti-single-shot provisions cannot be retrogressive even if they are vote-dilutive under the analysis in constitutional voting rights cases.

On the other hand, one recent district court case, *City of Lockhart v. United States*,<sup>179</sup> suggests that an analysis of potential retrogression under the specific local circumstances is *not* an essential element of an objection. Thus, once again the district court significantly limited the retrogression test in favor of *Beer's* second prong inviting consideration of constitutional indices of vote dilution. The case arose when Lockhart, Texas sought preclearance for a five-member city commission, to be elected at-large with numbered posts and staggered terms. The existing commission consisted of three members elected at-large to numbered posts. The Attorney General objected,<sup>180</sup> and the city then filed a declaratory judgment action in the district court.

The district court first observed that the prior use of numbered posts by a general-law city such as Lockhart was contrary to Texas law.<sup>181</sup> The court concluded that it would treat the prior numbered-post provision "as if it never had existed" for the purpose of determining whether the submitted change represented a "retrogression" within the meaning of *Beer*.<sup>182</sup> Thus, in a manner reminiscent of *Wilkes County*,<sup>183</sup> the court defined the status quo as a three-member commission elected at-large but without numbered posts or any other anti-single-shot device.

Having defined the status quo in a manner that rendered the retrogression test analytically insignificant by guaranteeing a finding of retrogression, the district court then set forth an alternative holding that casts serious doubt on whether an analysis of retrogression under specific local circumstances can ever save an anti-single-shot provision. Because the commission would be enlarged at the same time that the anti-single-shot provisions would be adopted, the proposed change would not have restricted the existing possibilities for

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178. Objection letter to Horry County, S.C. (Nov. 12, 1976).

179. No. 80-364 (D.D.C. July 30, 1981), *prob. juris. noted*, 102 S. Ct. 1609 (1982).

180. Objection letter to Lockhart, Tex. (Sept. 14, 1979).

181. *City of Lockhart*, slip op. at 2-3, 8-9.

182. *Id.*

183. See *supra* text accompanying notes 138-41.

single-shot voting.<sup>184</sup> Nevertheless, the majority of the three-judge panel refused to preclear the anti-single-shot provisions, even "assuming the validity of the original two numbered-post provisions."<sup>185</sup> The majority observed that single-shot voting would be a viable minority strategy within races for each numbered post,<sup>186</sup> but that "the provision for an additional two numbered posts in conjunction with the provision for staggered terms has a synergistic discriminatory effect."<sup>187</sup> These points, however, were probably irrelevant to the retrogression inquiry, because there would have been no additional elections *at all* without the change and resulting increase in the number of commission seats.<sup>188</sup>

*City of Lockhart* comes very close to holding that implementing a device with a discriminatory track record and significant potential for unconstitutional vote dilution under the local circumstances is objectionable *per se*, even if other, simultaneous changes keep the change from being retrogressive in that particular setting. Indeed, the key sentence in the *City of Lockhart* opinion is simply: "Both the Congress and the Supreme Court have established that the imposition of numbered posts and staggered terms have a discriminatory impact on minority voting rights."<sup>189</sup>

#### V. ANNEXATIONS AND CONSOLIDATIONS

An annexation or consolidation<sup>190</sup> may be discriminatory if it decreases a locality's minority population percentage.<sup>191</sup> Nevertheless, the courts and the Attorney General have recognized that section 5 was not meant to lock jurisdictions permanently in their existing boundaries.<sup>192</sup> Accordingly, an annexation generally will be approved if the locality can make either of two showings.

184. See *City of Lockhart*, slip op. at 12-16 (Robinson, C.J., dissenting).

185. *Id.* at 10. The original commission consisted of a mayor and two commissioners, while the proposed five-member city commission was to include a mayor and four commissioners.

186. *Id.* at 5.

187. *Id.* at 10.

188. *Id.* at 12-16 (Robinson, C.J., dissenting). Cf. objection letter to Rockdale County, Ga. (July 1, 1977), discussed *supra* text accompanying notes 130-32 & 150.

189. *Id.* at 11.

190. The same rules apply to both annexations and consolidations. See *City of Port Arthur v. United States*, 517 F. Supp. 987, 1010 (D.D.C. 1981), *prob. juris. noted*, 102 S. Ct. 1272 (1982); objection letters to Port Arthur, Tex. (Mar. 24, 1978 & Mar. 5, 1980); Victoria, Tex., Indep. School Dist. (Apr. 2, 1976). For convenience, this article refers to both types of boundary expansion as "annexations."

191. See *Perkins v. Matthews*, 400 U.S. 379, 388-90. See also *City of Rome*, 446 U.S. at 187; *City of Richmond v. United States*, 422 U.S. 358, 367-68 (1975). The recognition that boundary adjustments have significant discriminatory potential stems from *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Section 5 covers boundary enlargements to the extent that they affect the conduct of elections. An objection prevents elections in the annexed territory but does not affect the validity of the annexation itself. See *City of Petersburg v. United States*, 354 F. Supp. 1021, 1023 n.2 (D.D.C. 1972) (per curiam), *aff'd*, 410 U.S. 962 (1973).

Annexations under § 5 are given general treatment in Note, *Judicial Review of Municipal Annexations Under Section 5 of the Voting Rights Act*, 12 URB. L. ANN. 311 (1976); Note, *Securing a Valid Annexation in Virginia: State and Federal Requirements*, 10 U. RICH. L. REV. 557 (1976).

192. *City of Richmond*, 422 U.S. at 368-69 (citing *Perkins*, 400 U.S. at 388-89); *City of Port Arthur*, 517 F. Supp. at 1011; *City of Rome*, 472 F. Supp. at 245; *City of Petersburg*, 354 F. Supp. at 1030.

First, it can show that the annexation will not reduce appreciably the minority population percentage. Alternatively, it can show that the expanded city's minority population, even if smaller in percentage, still will enjoy representation that is "reasonably commensurate with its voting strength in the expanded City."<sup>193</sup> The condition that is imposed most often to achieve this result is the single-member district election.<sup>194</sup>

### A. Demographic Effect

The Attorney General's analysis of annexations and consolidations generally has started with demographic information on the new territory. The annexation will be precleared if it does not reduce the minority population percentage in the jurisdiction.<sup>195</sup> If an annexation reduces the minority population percentage, however, the Attorney General has often objected even when the reduction is very small. For example, the Attorney General objected to a reduction of the black population share by 0.9 percent in Statesboro, Georgia,<sup>196</sup> and to a reduction by 1.0 percent in Monroe, Georgia.<sup>197</sup> The Attorney General also objected to an annexation in Houston, Texas that reduced the black population from 26.0 percent to 24.8 percent and the Mexican-American population from 14.0 percent to 13.5 percent.<sup>198</sup> In other cases,

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193. *City of Rome*, 472 F. Supp. at 246. *Accord* *United Jewish Orgs. v. Carey*, 430 U.S. 144, 160 (1977). See objection letters to Indianola, Miss. (June 1, 1981); Mendenhall, Miss. (Jan. 12, 1981); New Bern, N.C. (Sept. 29, 1980) (withdrawn Oct. 5, 1981); letter to Greenville, N.C. (Apr. 7, 1980). See also letter to Lake Providence, La. (May 21, 1982) (withdrawing objection of Dec. 1, 1972). Cf. objection letter to Houston, Tex. (June 11, 1979).

194. See *City of Richmond*, 422 U.S. at 378; *City of Petersburg*, 354 F. Supp. at 1031. See also *infra* text accompanying notes 241-45.

195. See, e.g., letter to College Park, Ga. (May 22, 1978) (withdrawing objection of Dec. 9, 1977).

The Attorney General usually has evaluated any anticipated development in the annexed areas. For example, one objection noted, "houses are under construction at this time on part of the land, . . . these houses are in a fairly expensive price range, and . . . the area is located next to a white residential area in the city." Objection letter to Alabaster, Ala. (Dec. 27, 1977). Similar scrutiny of planned development prompted another recent objection:

Your submission also indicates that the owner of the land desires to build multi-family apartment buildings on the land and intends to seek financial assistance from the Department of Housing and Urban Development under the Section 8 Program. If the HUD grant is obtained, a substantial number of black persons may reside in the new residential units. If the owner does not pursue his plan or if the grant is not obtained, the submission indicates that virtually all of the persons who will reside in the new residential units will be white.

Objection letter to Statesboro, Ga. (Aug. 15, 1980). The Attorney General concluded that "the City has failed to carry its burden of demonstrating that the development will, in fact, be completed as planned." *Id.*

Numerous similar objections have examined anticipated population changes. *E.g.*, objection letters to Mendenhall, Miss. (Jan. 12, 1981); Pleasant Grove, Ala. (Feb. 1, 1980); Statesboro, Ga. (Dec. 10, 1979); Fairfield, Ala. (Apr. 16, 1975). In several objections, however, the Attorney General failed to examine the anticipated use of uninhabited land without explaining why. *E.g.*, objection letters to Rocky Mount, N.C. (Dec. 9, 1977); San Antonio, Tex. (Apr. 2, 1976), Shreveport, La. (Mar. 31, 1976); Bessemer, Ala. (Sept. 12, 1975); letter to Rome, Ga. (Oct. 20, 1975).

196. Objection letter to Statesboro, Ga. (Dec. 10, 1979).

197. Objection letter to Monroe, Ga. (Oct. 13, 1976).

198. Objection letter to Houston, Tex. (June 11, 1979) (withdrawn Sept. 21, 1979).

however, the Attorney General has regarded decreases as *de minimis*.<sup>199</sup>

The characterization of an annexation as either "minute but significant" or "*de minimis*" should not depend merely on the size of the decrease in minority population percentage. The demographic information should be considered, as it has been in several submissions, in light of two factors: (1) the sensitivity of the majority-minority balance as evidenced in recent elections; and (2) the cumulative effect of a series of annexations.

Where the minority group and the white population are approximately equal in size, a minute shift in racial or ethnic balance should prompt an objection more readily.<sup>200</sup> In Newellton, Louisiana, an objection was filed because an additional seventy-two whites made blacks a voting minority.<sup>201</sup> Similarly, the district court noted in *City of Petersburg v. United States*<sup>202</sup> that the annexation effected a "reversal" in the racial composition of the city. It would be too rigid, however, to focus too closely on the population percentage balance itself, because the ultimate inquiry is the effect that an annexation predictably will have on the minority voters' ability to elect the candidate of their choice. Election results may show that a few additional white voters could destroy the fragile victory margins that minority candidates had enjoyed. Viewed in this light, an objection to a Fairfield, Alabama annexation provides a more precise analysis:

Where, as here, voter registration is fairly evenly divided between the races, there is a pattern of racial bloc voting and the election statistics for the most recent municipal elections in 1972 demonstrate relatively narrow margins of victory by white over black candidates, the addition of a few hundred white voters can have a significant diluting impact on black voting strength.<sup>203</sup>

Even with the most sophisticated analysis of election returns, an impermissible result can be achieved through a series of annexations, each of which is *de minimis* if taken individually. Therefore, if an annexation is one of several that decrease the minority population percentage, their cumulative effect should be examined lest the Act be frustrated by piecemeal changes.<sup>204</sup>

Generally, the objection letters reflect a healthy concern for this cumula-

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199. See, e.g., letters to Greenville, N.C. (Apr. 7, 1980); Rocky Mount, N.C. (June 9, 1978) (withdrawing objection of Dec. 9, 1977); objection letters to San Antonio, Tex. (Apr. 2, 1976); Shreveport, La. (Mar. 31, 1976); letter to Rome, Ga. (Oct. 20, 1975) (withdrawing objection of Aug. 1, 1975); objection letter to Bessemer, Ala. (Sept. 12, 1975). The district court made a similar *de minimis* finding in *City of Rome*, 472 F. Supp. at 247.

200. See, e.g., objection letters to Vicksburg, Miss. (Oct. 1, 1976) (black population reduced from 49.7% to 45.1%); San Antonio, Tex. (Apr. 2, 1972) (Mexican-American population reduced from 53.1% to 51.1%).

201. Objection letter to Newellton, La. (June 12, 1973). See also objection letters to Jackson, Miss. (Dec. 3, 1976) (withdrawn July 23, 1981); Lake Providence, La. (Dec. 1, 1972) (withdrawn May 21, 1982).

202. 354 F. Supp. 1021, 1024 (D.D.C. 1972) (per curiam), *aff'd*, 410 U.S. 962 (1973).

203. Objection letter to Fairfield, Ala. (Apr. 16, 1975). In contrast, the Attorney General recently withdrew his objection to a 1972 annexation because in the intervening decade the black population had increased to over 70% and achieved significant electoral successes. Letter to Lake Providence, La. (May 21, 1982).

204. *City of Rome*, 472 F. Supp. at 247.

tive impact. Recently, for example, the district court held that the consolidation of Port Arthur, Texas with two adjacent communities and the subsequent annexation of other areas were to be treated together because they had an "indivisible cumulative impact."<sup>205</sup> Under similar reasoning, the Attorney General objected to a Jackson, Mississippi annexation in 1976 that continued

a trend dating back at least to 1960 of the annexation of areas of primarily white population, which has the effect of counteracting the impact of an otherwise growing black population percentage. . . . But for this series of annexations, the black population in the City of Jackson would be approaching a majority.<sup>206</sup>

An objection concerning Victoria, Texas noted that "the submitted annexations would decrease the combined minority percentage population by at least one percent and that, taken cumulatively with all annexations since 1973, they would decrease the population percentage by over three percent."<sup>207</sup> And in 1975, the Attorney General objected to an annexation that was the seventh since 1964 to add an exclusively white residential area to Grenada, Mississippi.<sup>208</sup>

If the jurisdiction did not timely submit some of the annexations for section 5 preclearance, the cumulative effect of annexations should be even more important for two reasons.<sup>209</sup> First, previous failures to comply with section 5 may be probative of invidious purpose. Second, unless all of the annexations are considered together, the earlier annexations will escape section 5 scrutiny altogether. As the district court explained in *City of Rome*, a jurisdiction could frustrate section 5 review by making "piecemeal changes which are insignificant when taken separately but of considerable moment when added together."<sup>210</sup> The Supreme Court endorsed cumulative review of annexations in

205. *City of Port Arthur*, 517 F. Supp. at 1014.

206. Objection letter to Jackson, Miss. (Dec. 3, 1976). Without casting doubt on the reasoning behind the original objection, the Attorney General withdrew it because of changed local circumstances. Letter to Jackson, Miss. (July 23, 1981).

207. Objection letter to Victoria, Tex. (Sept. 3, 1980). A similar objection letter stated, "Our analysis of the submitted data indicates that the submitted annexations would reduce New Bern's minority population percentage by over one percent and that, taken cumulatively with all annexations since 1970, they would decrease the minority population percentage by more than three percent." Objection letter to New Bern, N.C. (Sept. 29, 1980) (withdrawn Oct. 5, 1981).

208. Objection letter to Grenada, Miss. (Feb. 5, 1975). The Attorney General also objected a series of annexations that added 4,791 whites and 74 blacks to a city in a six-year period. Objection letter to Bessemer, Ala. (Sept. 12, 1975); letter to Bessemer, Ala. (July 7, 1982). See also objection letters to Lucedale, Miss. (July 27, 1982); Indianola, Miss. (June 1, 1981); Charleston, S.C. (Sept. 20, 1974).

209. Preclearance of an earlier annexation does not foreclose an objection to a series of annexations if their cumulative effect has become clear in the interim. The Attorney General precleared the 1967 annexation of a predominately white area to Statesboro, Georgia even though the annexation excluded a contiguous black community that had desired annexation. In 1979, when Statesboro proposed another all-white annexation, the Attorney General objected because it was "part of a series of racially selective annexations" and would constitute an impermissible further dilution of black voting strength. With respect to the 1967 annexation, the objection volunteered that the Attorney General's "conclusion at that time not to object was wrong." The objection noted that the 1979 annexation would reduce the minority population percentage by another 0.9%, "resulting in a cumulative dilution of 11.0% within five to fifteen years." Objection letter to Statesboro, Ga. (Dec. 10, 1979).

210. 472 F. Supp. at 247.

*City of Rome*,<sup>211</sup> and it is also the Attorney General's policy. In 1975, when Alabaster, Alabama submitted eleven annexations that the city had enacted in 1971, 1972, and 1973, the Attorney General responded:

I am not unmindful of the fact that our consideration under Section 5 regarding the individual annexations may have resulted in a judgment different from that announced above, had each annexation been submitted promptly upon its completion. However, once confronted with the simultaneous [tardy] submission of 11 annexations, and faced with the question of whether an impermissible dilution under the law has occurred in Alabaster as the result of annexation, we have no alternative but to examine the population of the annexed territory as of the time of submission and to collectively consider the annexations to determine their effect under judicially enunciated standards.<sup>212</sup>

### B. *Racially Selective Policies*

Absence of a discriminatory purpose may be shown by "objectively verifiable, legitimate reasons for the annexation."<sup>213</sup> In some cases, however, the annexation of a predominantly white area reflects a racially selective policy, and an objection can be expected without extended analysis.<sup>214</sup>

In examining an annexation for a racially selective policy, a fruitful inquiry has been a comparison of the responses to requests for annexation from white and minority areas. The Attorney General objected to an all-white annexation to Lake Providence, Louisiana, because the town council had rejected annexation requests from two predominantly black areas.<sup>215</sup> McClellanville, South Carolina had excluded adjacent black areas from an annexation and had discouraged other black areas from formally requesting annexation.<sup>216</sup> Similarly, several minority communities unsuccessfully had sought annexation to Bessemer, Alabama, while "the great majority of annexations of white areas [had] been achieved apparently with a minimum of, if any, difficulty."<sup>217</sup>

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211. 446 U.S. at 186.

212. Objection letter to Alabaster, Ala. (July 7, 1975). Substantially identical language is in the objection letter to Bessemer, Ala. (Sept. 12, 1975).

213. *City of Richmond*, 422 U.S. at 375.

214. When the Attorney General sustained an objection to an annexation to Bessemer, Alabama, he pointed out that the only changed circumstance, an intervening court decision, had not altered the cumulative dilutive effect of seven recent annexations or "the city's failure to annex certain minority communities outside the city limits whose residents wished to be included in the city. The court's decision does not even arguably affect this basis of our determination." Letter to Bessemer, Ala. (Oct. 2, 1978). See also objection letters to Statesboro, Ga. (Dec. 10, 1979 and Aug. 15, 1980).

215. Objection letter to Lake Providence, La. (Dec. 1, 1972).

216. Objection letter to McClellanville, S.C. (May 6, 1974).

217. Objection letter to Bessemer, Ala. (Sept. 12, 1975). An objection to a 1979 annexation to Pleasant Grove, Alabama noted that "several identifiably black areas have petitioned for annexation to the City of Pleasant Grove, but . . . the city has taken no steps to annex those areas, despite the passage of a considerable length of time." Objection letter to Pleasant Grove, Ala. (Feb. 1, 1980). See also objection letter to McComb City, Miss. (May 30, 1973).

An unusual configuration of an annexation also may evidence a racially selective policy. One objection noted that racially selective annexations had created "an area of concentrated black population immediately contiguous to the City . . . [that] is now surrounded on three sides by the City of Grenada [Mississippi] corporate boundaries."<sup>218</sup> Annexations to the Lumberton School District, North Carolina "were outlined in a convoluted, meandering fashion with the result that blacks and Indians were virtually excluded from the three annexations in question."<sup>219</sup> In a recent annexation to Statesboro, Georgia, "the extended city limits were carefully drawn to fence out" a predominantly black area on the edge of the city that had desired annexation.<sup>220</sup> Similiar reasoning prompted the Attorney General to withdraw an objection to an annexation in McClellanville, South Carolina after the town (1) passed a resolution that it would consider future annexation petitions without regard to race, and (2) agreed to inform the Department of Justice of any annexation petitions from black areas adjacent to the town.<sup>221</sup>

A racially selective policy is probably most evident when a white majority goes beyond mere annexation and actually creates a new governmental unit in a manner that excludes minorities. For example, the unincorporated community traditionally known as Hayneville, Alabama was itself predominantly black and located in a county with a seventy-seven percent black population. Although few blacks in Hayneville had been registered to vote before the passage of the Voting Rights Act of 1965, black political strength grew dramatically in the following two years. In 1967 a predominantly white area within Hayneville reacted to this trend by incorporating separately as a new town; the Attorney General objected.<sup>222</sup>

In Orange Grove, Mississippi, the Attorney General found that "racially invidious considerations played a significant role both in the decision to create a new city and in determining which areas and which people would be included."<sup>223</sup> The discriminatory incorporation would abridge the voting rights of blacks both inside and outside the new city. As the Attorney General observed, "those few blacks who would be within the proposed corporate limits

218. Objection letter to Grenada, Miss. (Feb. 5, 1975).

219. Objection letter to Lumberton, N.C., School Dist. (June 2, 1975). *See also* letter to Lumberton, N.C., School Dist. (Jan. 25, 1982) (declining to withdraw the objection). The objections involving Grenada, Mississippi and the Lumberton School District expressly relied on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

220. Objection letter to Statesboro, Ga. (Dec. 10, 1979).

221. Letter to McClellanville, S.C. (Oct. 21, 1974). The objection to annexations to Jackson, Mississippi indicated that the Attorney General had precleared an earlier 1971 annexation only on the "understanding that the city planned to include two specific black areas as part of then pending annexations." Objection letter to Jackson, Miss. (Dec. 3, 1976) (withdrawn July 23, 1981).

*See also* objection letters to Statesboro, Ga. (Aug. 15, 1980); Pleasant Grove, Ala. (Feb. 1, 1980); Statesboro, Ga. (Dec. 10, 1979). In an objection to annexations to Indianola, Mississippi, the Attorney General offered to withdraw if the city adopted a different method of election or "offset the dilutive effect of the annexation in question by annexing the black residential areas adjacent to the city." Objection letter to Indianola, Miss. (June 1, 1981).

222. Objection letter to Hayneville, Ala. (Dec. 29, 1978). Incorporated Hayneville did not submit the incorporation to the Attorney General for § 5 preclearance until 11 years later, in 1978.

223. Objection letter to Orange Grove, Miss. (June 2, 1980).

will be transferred from a governmental system, in which there is some promise of effective political participation through fairly drawn single-member districts, to one which does not hold such promise.”<sup>224</sup> The Attorney General objected to another incorporation because of an “irregular . . . boundary line which circumvents an area populated by blacks” who evidently had desired to be included.<sup>225</sup>

The Attorney General also has objected to the discriminatory creation of predominantly white school districts. In Saluda County, South Carolina, whites sought to form a new school district in order to avoid a desegregation order. The district was to be formed through a referendum in which, contrary to South Carolina law, only the residents of the proposed district rather than all county residents would be allowed to vote. The Attorney General objected because the referendum would “limit voting on a school question to a small overwhelmingly white electorate where a county is in the process of desegregating its educational facilities.”<sup>226</sup>

A similar objection blocked the proposed creation of the Westheimer Independent School District in Harris County, Texas. The new district “was first proposed shortly after the 1969 HISD [Houston Independent School District] elections where minority-backed candidates first gained control of the Board and shortly after the HISD had been ordered to undertake substantial school desegregation.”<sup>227</sup> The Attorney General pointed out the discriminatory effect of creating a predominantly white district:

minority residents in the proposed Westheimer District will have no realistic opportunity to achieve the sort of representation in the proposed Westheimer Independent School District that they now enjoy in the Houston Independent School District. Finally, minority parents in the Houston Independent School District whose children, in order to enjoy the benefits of a desegregated education, attend schools located in what would be the Westheimer Independent School District would be disfranchised with respect to all matters relating to the education of their children.<sup>228</sup>

In a more unusual situation, the Attorney General objected to the reorganization of Todd and Shannon Counties in South Dakota. For many years, state law had not permitted the residents of these predominantly Native American counties to vote for county officers in predominantly white Tripp and Fall River Counties, which provided them with government services. In *Little Thunder v. South Dakota*,<sup>229</sup> the Eighth Circuit Court of Appeals held this

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224. *Id.*

225. Objection letter to Pearl, Miss. (Nov. 21, 1973) (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

226. Objection letter to Saluda County, S.C. (Nov. 13, 1972).

227. Objection letter to Westheimer, Tex., Indep. School Dist. (Jan. 13, 1977).

228. *Id.* See also objection letter to Victoria, Tex., Indep. School Dist. (Apr. 2, 1976). The Attorney General has objected twice when school boards tried to decrease minority participation (as a percentage of the electorate) in school board elections. See objection letters to Ouachita Parish, La., School Bd. (March 7, 1977); Robeson County, N.C., Bd. of Educ. (Dec. 29, 1975).

229. 518 F.2d 1253 (8th Cir. 1975).



voting restriction unconstitutional and thus provided the Native Americans with their first access to county government. The white residents of Tripp and Fall River Counties then sought to nullify *Little Thunder* by severing the formal relationship between the white and Native American counties. The Attorney General objected to this scheme because the new Native American counties would be nominally independent but actually dependent on the neighboring white counties since their revenues would be insufficient to carry out normal government functions.<sup>230</sup>

### C. Method of Election

When demographic information indicates the potential for discrimination, but there is no other evidence of a racially selective policy, annexation must be examined "in the context of the local electoral system, with due consideration to the historic patterns of minority electoral participation."<sup>231</sup> More specifically, the test is whether the election system will reflect fairly the strength of the minority community as it exists after the annexation.<sup>232</sup> An objection is appropriate if the method of election and the traditional indicators of vote dilution suggest that a predominantly white annexation would diminish the political access of minorities.

*City of Petersburg* and *City of Richmond v. United States*<sup>233</sup> illustrate this analysis. Petersburg, Virginia had a city council consisting of five members who were elected at-large to four-year terms that expired at staggered two-year intervals. A candidate had to receive a majority of the vote to win, and runoff elections were frequent. After the Attorney General objected to an annexation,<sup>234</sup> the city sought a declaratory judgment. The district court found that a long history of racial segregation and discrimination had resulted in a "dramatic polarization of the races in Petersburg with respect to voting."<sup>235</sup> The city council, which had always had a white majority, had been "generally unresponsive to some of the expressed needs and desires of the black community."<sup>236</sup> Under these circumstances, the district court found that "[t]he annexation . . . to the City of Petersburg dilutes the weight, strength and power of the votes of the black voters in the City. . . . The dilution here has occurred as a result of the annexation in the context of at-large elections and bloc voting by race."<sup>237</sup> The district court concluded that it would approve the annexation only if the city changed from at-large to single-member district elections.<sup>238</sup>

In *City of Richmond*, the annexation in question reduced the city's black

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230. Objection letter to the State of South Dakota (Oct. 22, 1979).

231. Objection letter to Jackson, Miss. (Dec. 3, 1976) (withdrawn July 23, 1981).

232. *City of Richmond*, 422 U.S. at 371.

233. 422 U.S. 358 (1975).

234. Objection letter to Petersburg, Va. (Feb. 22, 1972).

235. 354 F. Supp. at 1025.

236. *Id.* at 1026.

237. *Id.* at 1028-29.

238. *Id.* at 1031.

population from fifty-two to forty-two percent. Relying heavily on the district court's decision in *City of Petersburg*, the Supreme Court found that this reduction, while it might impermissibly dilute the black vote in the context of at-large elections and racial bloc voting, would survive section 5 scrutiny if the city adopted single-member district elections.<sup>239</sup> More recently, in *City of Rome* the Supreme Court upheld the district court's finding that an annexation would have a discriminatory effect because of "three vote-dilutive factors: the at-large electoral system, the residency requirement for officeholders, and the high degree of racial bloc voting."<sup>240</sup>

In accord with these court cases, the Attorney General has considered the dilutive effect of at-large elections and anti-single-shot provisions in determining the conditions for preclearing an annexation. The consistent failure of minority-supported candidates is particularly important.<sup>241</sup> The following language from a New Bern, North Carolina objection letter is typical:

In addition to evidence of a general pattern of racially polarized voting in New Bern municipal elections, we have noted that, with the exception of only one black candidate, no black of the many who have run has ever won election to the New Bern board of aldermen under the at-large, residency requirement, and majority vote runoff features of the city's electoral system.<sup>242</sup>

Most objections have suggested that preclearance is appropriate when the traditional vote dilution factors are present if and only if the jurisdiction institutes single-member district elections.<sup>243</sup> The Attorney General at least twice rejected plans combining at-large and district elections and insisted on single-member district plans.<sup>244</sup> Similarly, the district court in *City of Petersburg*

239. 422 U.S. at 370.

240. 446 U.S. at 187.

241. See, e.g., objection letters to Mendenhall, Miss. (Jan. 12, 1981) ("no black candidate has ever won election"); Victoria, Tex. (Sept. 3, 1980) ("no black or Mexican American has ever won election to the Victoria City Council"); Statesboro, Ga. (Dec. 10, 1979) ("No black has ever been elected to city office, although black candidates have run on several occasions"); Houston, Tex. (June 11, 1979) ("only one black, and no Mexican-American has ever served on the eight-member City Council under the present electoral system"); Jackson, Miss. (Dec. 3, 1976) ("no black has ever been elected to the Council, although several have been candidates") (withdrawn July 23, 1981); Monroe, Ga. (Oct. 13, 1976) ("no black has ever served on the City Council"); Vicksburg, Miss. (Oct. 1, 1976) (black primary candidates had been unsuccessful).

242. Objection letter to New Bern, N.C. (Sept. 29, 1980) (withdrawn Oct. 5, 1981). See also letter to New Bern, N.C. (Sept. 4, 1981); objection letter to Sidon, Miss. (Oct. 28, 1977).

243. For example:

Should the City of Mendenhall adopt an electoral system that would afford black voters an opportunity to elect candidates of their choice, the Attorney General would withdraw this objection. Our analysis has shown that the adoption of a fairly drawn single-member district plan would afford black voters such a fair opportunity.

Objection letter to Mendenhall, Miss. (Jan. 12, 1981).

See also letter to San Antonio, Tex. (Jan. 24, 1977) (withdrawing objection of Apr. 2, 1976 after city adopted single-member district elections); letter to Charleston, S.C. (May 13, 1975) (withdrawing objection of Sept. 20, 1974 after city adopted single-member district elections).

244. Objection letters to Port Arthur, Tex. (July 23, 1980); Savannah, Ga. (June 27, 1978). In another case, however, the Attorney General withdrew an earlier objection because the city adopted a hybrid city council with nine single-member districts and five at-large seats. Letter to Houston, Tex. (Sept. 21, 1979). See also *City of Port Arthur v. United States*, 517 F. Supp. 987

required single-member district elections, rather than simply insisting on elimination of the majority vote requirement and staggered terms.<sup>245</sup>

In several instances, however, the district court and the Attorney General have suggested that the jurisdiction may retain at-large elections after the annexation if it eliminates anti-single-shot provisions. Several annexations to Rome, Georgia prompted an objection to the city's at-large elections and anti-single-shot provisions.<sup>246</sup> The Attorney General offered to reconsider "should the city undertake again to elect . . . by a simple plurality-win system, . . . or from fairly drawn single-member districts."<sup>247</sup> The Attorney General then withdrew the objection after the city had eliminated practically all of the anti-single-shot provisions, because single-shot voting would remain an effective minority electoral strategy even if the city maintained at-large elections. In withdrawing the objection he noted "that the abandonment of the majority vote, numbered post and staggered term procedures for these elections, together with the previous reduction in the number of residency districts for the city commission elections, will give black voters a fair chance to elect candidates of their choice."<sup>248</sup> The district court reached a similar conclusion.<sup>249</sup>

Thus, the Attorney General and the district court have suggested that they may preclear an annexation and allow at-large elections to continue if minority voters can use single-shot voting effectively in that community. Theoretically and under limited circumstances, this may be consistent with the general rule in *City of Richmond* and *City of Petersburg*, which required that elections in the enlarged city "fairly recognize" the political potential of the affected minority. Thus, the viability of single-shot voting under the local circumstances is relevant to whether at-large elections can meet this test without fairly drawn single-member districts.

If *City of Rome* suggests that at-large elections may continue after a dilutive annexation, that suggestion must be confined to the facts in that case. In *City of Rome*, blacks arguably had not suffered the "total exclusion" from the

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(D.D.C. 1981) (denying § 5 preclearance but declining to require single-member districts; city permitted to develop own plan), *prob. juris. noted*, 102 S. Ct. 1272 (1982).

245. 354 F. Supp. at 1031.

246. Letter to Rome, Ga. (Oct. 20, 1975).

247. *Id.*

248. Letter to Rome, Ga. (Aug. 5, 1980). See also letter to Rome, Ga. (Aug. 12, 1976).

249. *City of Rome*, 472 F. Supp. at 246-49. Similarly, an objection to annexations to New Bern, N.C. stated:

Should the City of New Bern adopt an electoral system that would afford black voters an opportunity to elect candidates of their choice, the Attorney General will consider withdrawing this objection. Options which the city may wish to consider include the adoption of a fairly drawn single-member district plan or the removal of the majority vote and residency requirements. Either of these options holds the promise of providing black voters with an opportunity to achieve representation reasonably equivalent to their political strength in the enlarged community and, therefore, could provide a basis for the withdrawal of the objection here interposed.

Objection letter to New Bern, N.C. (Sept. 29, 1980) (emphasis added). See also objection letter to Lucedale, Miss. (July 27, 1982). Cf. the analysis applying to at-large elections, discussed *supra* at text accompanying notes 127-50, especially objection letters to Baton Rouge, La. (Feb. 7, 1980); Long County, Ga. (July 16, 1976).

political process that was evident in *City of Petersburg*.<sup>250</sup> The district court pointed out that there had been no direct legal barrier to black voting for some time. White officials were somewhat responsive to the black community, and white candidates sought black support.<sup>251</sup> In addition, the local circumstances suggested that single-shot voting might afford blacks the degree of representation required by *City of Petersburg* and *City of Richmond*.<sup>252</sup> The district court, however, gave little weight to evidence that few blacks had run for city office, that no black candidates had ever been elected, and that there was racial bloc voting.<sup>253</sup> Despite this evidence of political exclusion, *City of Rome* should not be read to modify the rule that a city must take steps "to neutralize to the extent possible any adverse effect upon the political participation of black voters."<sup>254</sup> Most annexation objections have arisen amid numerous traditional vote dilution indicators of the sort that were present in *City of Petersburg*.<sup>255</sup>

This inquiry into how far a jurisdiction must go in neutralizing the effects of an annexation should recall *City of Lockhart* and the purpose of undertaking a detailed examination of voting patterns in the jurisdiction prior to the section 5 submission. Once again, the conflict is between the retrogression test and *Beer's* more general invitation to consider equal political access as defined in the constitutional vote dilution cases.<sup>256</sup> The retrogression test could be interpreted to require different degrees of postannexation "neutralizing" measures, depending on the level of political access that minority voters enjoyed before the annexation. Under this reasoning, little would need to be done to enhance or preserve the position of minority voters who had little political access before the annexation. In turn, little would need to be done to neutralize the effects of the annexation.

Faced with this issue, the courts and the Attorney General have not extended the retrogression test to annexations and consolidations. This response is evident, first, from *City of Petersburg* and *City of Rome*, each of which turned primarily on constitutional vote dilution indicators.<sup>257</sup> More di-

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250. In *City of Richmond*, the Supreme Court used the phrase "total exclusion" to refer to the discriminatory potential of the annexation in *City of Petersburg*, 422 U.S. at 370.

251. 472 F. Supp. at 224-25.

252. The district court pointed out that the Attorney General had reached essentially the same conclusion. *Id.* at 248-49. The court also stated that because at-large elections had some advantages, a "compelling showing" would be required before a court would order adoption of single-member districts, particularly when at-large elections had been a long-standing tradition. *Id.* This dictum is difficult to reconcile with *City of Petersburg* and *City of Richmond*, both of which indicate that the decision to condition § 5 preclearance on adoption of single-member districts depends entirely on whether the minority can achieve effective political access in at-large elections. See *City of Richmond*, 422 U.S. at 370-71.

253. 472 F. Supp. at 225-27.

254. *City of Petersburg*, 354 F. Supp. at 1031 (emphasis added). The dissent in *City of Richmond* stressed this "to the extent possible" language in endorsing an alternative plan that would have provided for greater black representation. *City of Richmond*, 422 U.S. at 388-89 (Brennan, J., dissenting). See also *City of Richmond*, 376 F. Supp. at 1356-57.

255. See, e.g., sources cited *supra* notes 241-44.

256. The most important of these factors are listed *supra* text accompanying notes 41-50.

257. See *City of Rome*, 446 U.S. at 183-87; *City of Petersburg*, 354 F. Supp. at 1025-31.

rectly, the district court specifically refused to apply the retrogression test to annexations and consolidations in *City of Port Arthur v. United States*.<sup>258</sup> In that case, Port Arthur, Texas sought section 5 preclearance for several annexations and consolidations that were part of a general boundary expansion. The Attorney General objected to the city's section 5 submission,<sup>259</sup> and the city turned to the district court. The city urged the court to apply the retrogression test to measure any effect on minority political power against preexpansion minority representation. The district court responded by rejecting the argument "that the simple analysis used in *Beer v. United States* to test the effect of voting procedure changes can be transferred to complex situations involving consolidations and annexations."<sup>260</sup> The court explained that "procedure changes" must be distinguished from boundary enlargements because the former affect an unchanged population, while citizens added by a boundary expansion "should not suffer for the failure of the old inhabitants to achieve proportional representation."<sup>261</sup>

Although *City of Port Arthur* directly affects only annexations and consolidations, it is part of an emerging pattern. Together with *Apache County, Wilkes County*, and *City of Lockhart*, it limits the use of prior levels of minority political participation as reference points for section 5 analysis. Instead, all four cases rely on constitutional vote dilution factors to establish an ideal hypothetical reference point of equal political access for minorities. Against this reference point, a covered jurisdiction has the burden of proving lack of unconstitutional purpose.

## VI. REDISTRICTING

In *Georgia v. United States*<sup>262</sup> the United States Supreme Court held that section 5 applies to legislative redistricting.<sup>263</sup> Clearly, redistricting has a significant impact on the ability of voters to elect the candidate of their choice, but there is no easy standard for determining when a redistricting plan is discriminatory. As the following discussion indicates, the Attorney General and the district court generally have decided section 5 submissions by looking to the factors that traditionally have governed constitutional reapportionment litigation.<sup>264</sup>

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258. 517 F. Supp. 987 (D.D.C. 1981), *prob. juris. noted*, 102 S. Ct. 1272 (1982).

259. Objection letter to Port Arthur, Tex. (Mar. 24, 1978).

260. 517 F. Supp. at 1012 n.149.

261. *Id.*

262. 411 U.S. 526 (1973).

263. *Id.* at 531-35 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 141-44 (1971), for the general proposition that redistricting has significant vote-dilutive potential). The Court in subsequent cases has held, however, that § 5 does *not* apply to a redistricting plan that a court formulates and adopts. *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981); *Connor v. Johnson*, 402 U.S. 690, 691 (1971) (per curiam). See also *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978); *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 638 n.6 (1976).

264. For example, in objecting to a reapportionment plan for the Corpus Christi, Tex., Independent School District, the Attorney General announced the following standard:

The court must then look to the matter of whether the redistricting plan, whether adopted by legislative processes or proposed to be adopted and ordered by the court, will con-

### A. Underrepresentation of Minority Districts

Redistricting plans often have prompted objections because they contain a predominantly minority district that is overpopulated, which results in the underrepresentation of minority voters in those districts.<sup>265</sup> For example, a plan for Batesville, Mississippi contained one overpopulated ward with a black majority and two substantially underpopulated wards that were virtually all-white. The plan deviated from districts of equal population by fifty-four percent.<sup>266</sup> A plan for Tate County, Mississippi would have underrepresented blacks and overrepresented whites by 33.8 percent.<sup>267</sup> The 1980 census data for Holly Springs, Mississippi showed that population statistics provided by the city were inaccurate and that black wards were overpopulated by an overall deviation of seventy percent.<sup>268</sup>

Minority underrepresentation frequently has been traced to a suspect redistricting methodology. One redistricting plan simply used a house count multiplied by the average number of persons per house, even though the average white household was smaller than the average black household.<sup>269</sup> Minority underrepresentation also has occurred because plans are based on registered voters rather than on voting age population. Constitutional vote dilution cases have indicated that, while the use of voter registration figures is not per se impermissible, it may violate the equal protection clause if the distribution of registered voters is not representative of the population as a

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tinue in effect an existent denial of access to the minority. Both the Supreme Court and this circuit have firmly held that where a reapportionment plan is formulated in the context of an existent intentional denial of access by minority group members to the political process, and would perpetuate that denial, the plan is constitutionally unacceptable because it is a denial of rights guaranteed under the Fourteenth and Fifteenth Amendments.

Objection letter to Corpus Christi, Tex., Indep. School Dist. (Apr. 16, 1980) (quoting *Kirksey*, 554 F.2d at 143). See generally Bickerstaff, *supra* note 2, at 644-49.

In some cases, the Attorney General has not reached the merits of a redistricting submission because the enabling legislation that authorized local governments to redistrict had not received § 5 preclearance. See objection letters to St. Mary Parish, La. (Jan. 12, 1972); Caddo Parish, La., School Bd. (Oct. 8, 1971); St. Helena Parish, La. (Oct. 8, 1971); Natchitoches Parish, La. (Sept. 20, 1971); East Feliciana Parish, La. (Sept. 20, 1971); Webster Parish, La. (Aug. 6, 1971); Bossier Parish, La. (July 30, 1971); Jefferson Davis Parish, La. (July 23, 1971); St. Charles Parish, La. (July 22, 1971); Assumption Parish, La. (July 9, 1971); Franklin Parish, La. (July 8, 1971). All of these objections were based on the objection to the enabling legislation. See objection letter to the State of Louisiana (June 26, 1969) (objecting to Act No. 445, 1968 La. Acts 1001 (codified as subsequently amended at LA. REV. STAT. ANN. §§ 33:1221, :1224 (West Supp. 1982))). See also *Dyer v. Love*, 307 F. Supp. 974 (N.D. Miss. 1969).

265. Because § 5 concerns discrimination against racial or language minorities rather than "one-person, one-vote" challenges, the Attorney General may preclear a redistricting submission that is unconstitutional under the fourteenth amendment. See, e.g., objection letter to Charleston, S.C. (Feb. 18, 1975).

266. Objection letter to Batesville, Miss. (Sept. 29, 1980).

267. See objection letter to Tate County, Miss. (Dec. 3, 1971).

268. Objection letter to Holly Springs, Miss. (June 9, 1981). Other objections refer to minority underrepresentation without giving specific figures. See, e.g., objection letters to Corpus Christi, Tex., Indep. School Dist. (Apr. 16, 1980); Tripp & Todd Counties, S.D. (Oct. 26, 1978); Canton, Miss. (Apr. 13, 1977). The smallest deviation to prompt a § 5 objection to a redistricting plan has been 13.8%. Objection letter to College Park, Ga. (Dec. 9, 1977).

269. Objection letter to Canton, Miss. (Apr. 13, 1977). A similar error led to an objection in Barbour County, Alabama. Objection letter to Barbour County, Ala. (Nov. 16, 1981).

whole.<sup>270</sup> Generally, minorities have a lower registration rate than whites, so redistricting based on registration alone is likely to result in minority underrepresentation.<sup>271</sup>

### B. *Minimizing the Number of Minority-Controlled Districts*

Redistricting also has prompted objections when it has minimized the number of districts in which minority voters can elect candidates of their choice. In "borderline majority districts," for example, minority voters constitute a slim numerical majority, but whites retain control. This situation occurs in part because minority voters tend to register and vote at a lower rate than whites as a result of past discrimination and lower socio-economic status.<sup>272</sup> Also, a greater proportion of the minority population is likely to be under voting age.<sup>273</sup> Constitutional cases have long recognized that these borderline majority districts may represent improper vote dilution under such circumstances.<sup>274</sup>

Applying these constitutional principles, the district court held in a section 5 declaratory judgment action that a plan with borderline majority districts had a discriminatory effect: "a district should contain a black population of at least 65 percent or a black [voting age population] of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice."<sup>275</sup> Similarly, in *Donnell v. United States*<sup>276</sup> the district court found that a redistricting plan for Warren County, Mississippi had a discriminatory effect because no district had a voting age population greater than fifty-eight percent black.<sup>277</sup> Of course, the result may be different where minority voting approaches the rate for whites, or where there are other special circumstances. In *City of Port Arthur* the district court found that blacks probably could elect the candidate of their choice in a district with a population 61.1 percent black and a voting age population 55 percent black. Black and white voter turnout in Port Arthur were approximately equal, and a Hispanic population of 2.7

270. *Burns v. Richardson*, 384 U.S. 73, 94-95 (1966). *Accord* *Ely v. Klahr*, 403 U.S. 108, 115 n.7 (1971); *Marshall v. Edwards*, 582 F.2d 927, 937 (5th Cir. 1978); *Robinson v. Commissioners Court*, 505 F.2d 674, 680 (5th Cir. 1974). The use of voting age population is preferred. *City of Rome*, 446 U.S. at 186 & n.22; *Beer v. United States*, 425 U.S. 130, 135 (1976); *Marshall v. Edwards*, 582 F.2d 927, 937, (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979). *See also* *United Jewish Orgs.*, 430 U.S. at 160-62; *Kirksey*, 554 F.2d at 149-50; *Moore v. Leflore County Bd. of Election Comm'rs*, 502 F.2d 621, 626 (5th Cir. 1974).

271. *E.g.*, objection letters to Tripp & Todd Counties, S.D. (Oct. 26, 1978); Aransas County, Tex. (April 28, 1978); Uvalde County, Tex. (Oct. 13, 1976); Waller County, Tex. (July 27, 1976); Crockett County, Tex. (July 7, 1976).

272. *See* *Hale County v. United States*, 496 F. Supp. 1206, 1216-17 (D.D.C. 1980). *See also* the discussion of general criteria, *supra* text accompanying notes 41-50, and the discussion of *Burns v. Richardson*, *Ely v. Klahr*, and their progeny, *supra* text accompanying notes 269-71.

273. *Beer*, 425 U.S. at 134 n.4.

274. *See, e.g.*, *Kirksey v. Board of Supervisors*, 554 F.2d 139, 150 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Moore*, 502 F.2d at 624.

275. *Mississippi v. United States*, 490 F. Supp. 569, 575 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980). *See generally* *Bickerstaff*, *supra* note 2, at 668.

276. No. 78-0392 (D.D.C. July 31, 1979), *aff'd*, 444 U.S. 1059 (1980).

277. No. 78-0392, slip op. at 8. *See also* D. HUNTER, *supra* note 17, at 26.

percent further reduced any advantage enjoyed by whites.<sup>278</sup>

The Attorney General's objection letters have reflected the district court's approach to borderline majority districts. In one case, four of the seven council districts in a redistricting plan for Bamberg County, South Carolina had a black population majority, but only two had a black *voting age* population majority.<sup>279</sup> The Attorney General recently objected to a redistricting plan for Barbour County, Alabama that divided the county's forty-four percent black population into three districts. Each of the three districts had a borderline black majority, but two had a white voting age population majority and the third had only slightly over fifty percent black registered voters.<sup>280</sup>

Other redistricting plans have minimized impermissibly the number of minority-controlled districts by fragmenting minority population concentrations. Again, section 5 determinations have relied on the same factors that control constitutional cases. For example, several objections<sup>281</sup> have relied on *Robinson v. Commissioners Court*,<sup>282</sup> which held unconstitutional a plan that would "fragment what could otherwise be a cohesive voting community."<sup>283</sup>

The Attorney General issued a section 5 objection because a plan for Grenada County, Mississippi was "drawn in a manner which unnecessarily fragments two cognizable black neighborhoods in the City of Grenada, thus diluting or minimizing the voting strength of blacks."<sup>284</sup> A plan for Terrell County, Texas would have impermissibly diluted minority voting strength "by unnecessarily dividing the Mexican-American community in Sanderson among three commissioner precincts."<sup>285</sup>

278. 517 F. Supp. at 1016 n.160.

279. Objection letter to Bamberg County, S.C. (July 30, 1976). The Attorney General withdrew this objection on November 1, 1976, because the redistricting plan enjoyed widespread support in the black community and had resulted in black victories in recent elections. See discussion of minority participation and support, *infra* text accompanying notes 313-17.

See also objection letters to Madison Parish, La. (Aug. 16, 1982) (black population reduced from 61.4% to 54%); Petersburg, Va. (Mar. 1, 1982) (black population percentage reduced from 69.6% to 61.5% and from 71.2% to 61.6%); State of Georgia (Senate and House) (Feb. 11, 1982) (numerous borderline black majority districts); State of Texas (Congress) (Jan. 29, 1982) (Mexican-American population divided into one 52.9% and one 80.4% district); State of Texas (Senate and House) (Jan. 25, 1982) (reduction of minority population percentages); State of North Carolina (House) (Jan. 20, 1982) (black population in three-member district reduced from 57.5% to 51.7%); Attala County, Miss. (Sept. 3, 1974); letter to the State of Georgia (Dec. 13, 1973); objection letter to the State of Louisiana (Aug. 20, 1971) (district with black population majority but black voting age population minority).

280. Objection letter to Barbour County, Ala. (July 21, 1981).

281. *E.g.*, objection letters to Harrison County, Tex. (Aug. 8, 1978); Aransas County, Tex. (Apr. 28, 1978); Edwards County, Tex. (Apr. 26, 1978); Crockett County, Tex. (Nov. 9, 1977).

282. 505 F.2d 674 (5th Cir. 1974).

283. *Id.* at 679. See also *Kirksey*, 554 F.2d at 149, 152; *Moore*, 502 F.2d at 622-24; *Mississippi*, 490 F. Supp. at 581-82.

284. Objection letter to Grenada County, Miss. (Aug. 9, 1973). A later redistricting objection in the same community was based on substantially identical reasoning. Objection letter to Grenada, Miss. (Mar. 30, 1976).

285. Objection letter to Terrell County, Tex. (Dec. 27, 1978). See also objection letters to Marion County, S.C. (Aug. 16, 1982); Conecuh County, Ala. (July 26, 1982); State of New York (June 22, 1982); State of Mississippi (Congress) (Mar. 30, 1982); State of Arizona (Mar. 8, 1982); Uvalde County, Tex. (Feb. 18, 1982 & Jan. 22, 1982); State of Georgia (House, Senate, and Congress) (Feb. 11, 1982); State of Texas (House and Senate) (Jan. 25, 1982); Barbour County, Ala.



Even if a plan does not disperse a cognizable majority concentration, it still has prompted an objection if it distributes minority voters among most or all of the districts in the jurisdiction. For example, in a plan for Edwards County, Texas, "the Mexican American population in the county [had] been almost evenly distributed among the four commissioner precincts."<sup>286</sup> Similarly, in a plan for the Texas House of Representatives, "[t]he location of single-member district lines [in Jefferson County] almost evenly divides the county's minority population among the county's three new single-member districts."<sup>287</sup>

A redistricting plan also minimizes the number of minority-controlled districts when it confines minority voters to a few all-minority districts. For example, Crockett County, Texas created an eighty-four percent Mexican-American district and reduced the Mexican-American majority to a borderline fifty-eight percent in another district, where a Mexican-American candidate lost to a white candidate in a runoff.<sup>288</sup> In Many, Louisiana a plan concentrated most of the forty percent black population into one all-black district. "[T]he rest of the black concentration is fragmented to the point where they represent, at best, a 42% minority among their proportions in the remaining four districts."<sup>289</sup>

### C. *Submerging Minorities Into Multimember Districts*

Multimember districts may dilute minority voting strength in contravention of constitutional standards when multimember districts minimize minority political influence.<sup>290</sup> In recognition of the dangers inherent in multimember districts, courts in constitutional cases have expressed a prefer-

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(Nov. 16, 1981); New York, N.Y. (Oct. 27, 1981); State of Virginia (July 17 & July 31, 1981); Barbour County, Ala. (July 27, 1981); Jim Wells County, Tex. (Aug. 12, 1980); Medina County, Tex. (Dec. 11, 1979); Walthall County, Miss. (Nov. 27, 1978); Harrison County, Tex. (Aug. 8, 1978); Aransas County, Tex. (Apr. 28, 1978); Many, La. (Apr. 13, 1976); State of Texas (Jan. 23, 1976); Cochise College Bd., Ariz. (Feb. 3, 1975); Attala County, Miss. (Sept. 3, 1974); Bronx, Kings, and New York Counties, N.Y. (Apr. 1, 1974); Warren County, Miss. (Feb. 13, 1973); Lafayette Parish, La., School Bd. (June 16, 1972); State of Louisiana (Aug. 20, 1971). See also letter to the State of Georgia (Dec. 13, 1973).

286. Objection letter to Edwards County, Tex. (Apr. 26, 1978) (citing *Kirksey & Robinson*).

287. Objection letter to the State of Texas (House) (Jan. 23, 1976). See also objection letters to the State of Virginia (Mar. 12, 1982); Harrison County, Tex. (Aug. 8, 1978) (black population evenly distributed among all districts).

288. Objection letter to Crockett County, Tex. (Nov. 9, 1977) (citing *White, Robinson, Moore*). See the minimum 60% standard in *Mississippi*, discussed *supra* at text accompanying notes 275-80.

289. Objection letter to Many, La. (Apr. 13, 1976). See also *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Nevett v. Sides*, 571 F.2d 209, at 219, (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980); objection letters to Conecuh County, Ala. (July 26, 1982); Dougherty County, Ga. (July 12, 1982); State of New York (June 22, 1982); Monroe, La., School Bd. (May 18, 1982); State of Alabama (May 6, 1982); State of Virginia (Mar. 12, 1982); State of Texas (Congress) (Jan. 29, 1982); Nueces County, Tex. (Mar. 24, 1978); Bronx, Kings, and New York Counties, N.Y. (Apr. 1, 1974).

290. See *White v. Regester*, 412 U.S. 755, 766-69 (1972); *Whitcomb v. Chavis*, 402 U.S. 124, 143-44 (1971); *Kirksey*, 554 F.2d at 152; *Turner v. McKeithen*, 490 F.2d 191, 197 (5th Cir. 1973); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds per curiam sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976). See also the discussion of multimember districts and at-large elections *supra* at text accompanying notes 106-26.

ence for single-member districts.<sup>291</sup>

In similar fashion, the Attorney General has objected to redistricting plans that submerge minority voters in multimember districts. For example, a plan for the Louisiana Legislature combined several majority black and majority white districts into double-member districts. While each district had a borderline black population majority, whites retained effective control.<sup>292</sup> A similar objection to the redistricting of Ascension Parish, Louisiana noted, "[E]ach of the three areas of black population in the Parish north of the Mississippi River, that is, the prior Ward 5, Ward 6 and census enumeration district number 12 have each been aligned with larger areas of white population creating three multi-member districts which have controlling white majorities."<sup>293</sup> A proposed plan for Pointe Coupee Parish, Louisiana merged two wards with a "substantial black majority and a number of black elected officials" with two other wards, thus creating two majority-white, double-member districts.<sup>294</sup>

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291. The judiciary should formulate multimember district plans only under special circumstances. *McDaniel v. Sanchez*, 452 U.S. at 139; *Bolden*, 446 U.S. at 66; *Connor v. Finch*, 431 U.S. at 415; *East Carroll Parish School Bd. v. Marshall*, 424 U.S. at 638-39; *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); *Mahan v. Howell*, 410 U.S. 315, 333 (1973); *Connor v. Johnson*, 402 U.S. 690, 692 (1971); *Wallace v. House*, 538 F.2d 1138, 1142 (5th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Moore*, 502 F.2d at 627. The Fifth Circuit found such special circumstances present in *Corder v. Kirksey*, 639 F.2d 1191, 1195-96 (5th Cir. 1981) (state policy favoring five-member boards of education justified electing one member at large where there were only four logical single-member districts).

292. See objection letter to the State of Louisiana (Senate and House) (Aug. 20, 1971). See the discussion of borderline majority districts, *supra* text accompanying notes 272-80.

293. Objection letter to Ascension Parish, La. (July 23, 1971). See also objection letter to Ascension Parish, La., School Bd. (Apr. 20, 1972) (virtually identical grounds).

294. Objection letter to Pointe Coupee Parish, La. (Aug. 9, 1971). In an objection letter to the State of Virginia, the Attorney General objected to a multimember district in the City of Norfolk because two single-member districts would have had substantial black majorities. Objection letter to the State of Virginia (Mar. 12, 1982). Moreover, the stated rationale for separate treatment of Norfolk (the presence of a large population that did not vote locally) was novel and was not applied uniformly throughout the state. In an objection letter to the State of North Carolina, the Attorney General objected to minority vote dilution through the use of multimember districts in six counties. Objection letter to the State of North Carolina (Senate and Congress) (Dec. 7, 1981).

See also objection letter to Conecuh County, Ala. (Sept. 14, 1981) ("submerged into larger multi-member districts sizeable black concentrations so as to dilute the minority voting strength that those voters would have enjoyed under a continued single-member district plan"); Rapides Parish, La. (Dec. 24, 1975); Evangeline Parish, La., School Bd. (June 25 & July 26, 1974) ("submerging still sizable concentrations of black voters into majority-white, multi-member districts"); Jefferson Davis Parish, La. (June 4, 1974) ("cognizable Negro minority is located within proposed District Two in such a manner and in sufficient number that their vote is minimized when cast and counted with the larger number of votes cast by the racial majority in the multi-member district"); Twiggs County, Ga. (Aug. 7, 1972); East Feliciana Parish, La., School Bd. (Apr. 22, 1972) ("significant black concentrations have been joined with heavily white areas"); State of South Carolina (Mar. 6, 1972 & Feb. 14, 1974); State of Georgia (Mar. 3, 1972).

The Attorney General also has objected to a North Carolina law that provided that no county could be divided in the formation of a state legislative district. Act of May 31, 1967, ch. 640, § 1, 1967 N.C. Sess. Laws 704, 705 (ratified as N.C. CONST. art. II, § 5(3)). The objection noted that the provision had led to the use of large multimember districts, which in the context of racial bloc voting "necessarily submerges cognizable minority population concentrations into larger white electorates." Objection letter to the State of North Carolina (Nov. 30, 1981) (citing *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

Adherence to the 1967 law and the resulting "submergence of minority voting strength" were important factors in the Attorney General's objection to the redistricting of the North Carolina

As with at-large elections, objections to multimember redistricting have been more likely if the jurisdiction also has anti-single-shot provisions to exacerbate vote dilution.<sup>295</sup> An objection to a multimember district plan for the Lafayette Parish, Louisiana, School Board noted:

The dilutive effect of the multi-member district device on the black population concentrations in Lafayette Parish is magnified by the election of the representatives in each district on a staggered basis—essentially a post system—and the requirement for a majority of votes to elect in a primary election.<sup>296</sup>

In objecting to South Carolina's State House reapportionment, the Attorney General noted "the submergence of significant concentrations of Negro voters into large majority-white multi-member districts and the magnification of this dilution of Negro voting strength by the numbered post and majority vote requirement."<sup>297</sup>

#### D. Availability of Alternative Plans

Objections also have been more likely if alternatives were available that could have avoided the objectionable features of the submitted plan. For example, the Attorney General objected to a redistricting plan for the Cochise College Board, Arizona that fragmented the Spanish-surnamed population because "other logical, rational and compact alternative districting could achieve population equality without such a result."<sup>298</sup>

At a minimum, the availability of alternative redistricting plans that would provide minority voters with a greater opportunity to elect candidates of their choice is relevant to whether the submitted plan has the effect of diluting minority voting strength. The rejection of alternatives also may evidence an invidious purpose.<sup>299</sup> The inference of improper purpose is strongest where districts have unusual configurations, particularly if their shapes disre-

Legislature following the 1980 Census. See objection letter to the State of North Carolina (House) (Jan. 20, 1982); State of North Carolina (Senate and Congress) (Dec. 7, 1981).

295. See *supra* text accompanying notes 151-89 (discussing anti-single-shot provisions in the context of at-large and multimember elections).

296. Objection letter to Lafayette Parish, La., School Bd. (June 16, 1972).

297. Objection letter to the State of South Carolina (Feb. 14, 1974) (citing *White, Zimmer*). See also objection letters to Newton County, Ga. (Jan. 29, 1976); Orleans Parish, La. (Aug. 15, 1975); Evangeline Parish, La., School Bd. (June 25 & July 26, 1974); Twiggs County, Ga. (Aug. 7, 1972); State of South Carolina (Mar. 6, 1972); State of Georgia (Mar. 3, 1972).

298. Objection letter to Cochise College Bd., Ariz. (Feb. 3, 1975). See also objection letters to the State of Alabama (Aug. 2, 1982); Conecuh County, Ala. (July 26, 1982); State of New York (June 22, 1982); State of Louisiana (June 1, 1982); Monroe, La., City School Bd. (May 18, 1982); State of Alabama (May 6, 1982); State of Mississippi (Congress) (Mar. 30, 1982); State of Virginia (Mar. 12, 1982); State of Arizona (Mar. 8, 1982); Uvalde County, Tex. (Feb. 18, 1982 & Jan. 22, 1982); State of Texas (Congress) (Jan. 29, 1982); State of Texas (House and Senate) (Jan. 25, 1982); State of South Carolina (House) (Nov. 18, 1981); Barbour County, Ala. (Nov. 16, 1981 & July 21, 1981); New York, N.Y., (Oct. 27, 1981); Henry County, Ga. (May 27, 1980); Medina County, Tex. (Apr. 14, 1978); Nueces County, Tex. (Mar. 24, 1978); Many, La. (Apr. 13, 1976); Macon Ga. (June 13, 1975); Bronx, Kings, and New York Counties, N.Y. (Apr. 1, 1974); letter to the State of Georgia (Dec. 18, 1973).

299. See *Wilkes County v. United States*, 450 F. Supp. 1171, 1178 (D.D.C.), *aff'd*, 439 U.S. 999 (1978) (citing *City of Richmond*, 422 U.S. at 378; *Nevelt*, 571 F.2d at 221-25). See also *Donnell*,

gard traditional boundaries that could have been accommodated easily.<sup>300</sup> For example, the Attorney General objected to borderline-black-majority districts in Tate County, Mississippi that included noncontiguous areas.<sup>301</sup> The redistricting plan for the Cochise College Board, Arizona contained a district that the Attorney General described as follows: "although geographically located primarily in the north and center of the county, [it] now extends the entire length of the county in siphoning off what appears to be a significant concentration of Spanish Surname persons located in the county's southern extremity."<sup>302</sup>

A reapportionment plan for the Louisiana House and Senate contained a district made up of "two non-contiguous parts separated by the Mississippi River with one situated over a mile downstream from the other."<sup>303</sup> The district had a slim white majority, when "a logical subdivision of the northern segment would have resulted in at least one predominantly Negro district."<sup>304</sup> Another district in the same plan was "an extraordinarily shaped 19-sided figure that narrows at one point to the width of an intersection, contains portions of three present districts, and suggests a design to consolidate in one district as many black residents as possible."<sup>305</sup> The objection also noted that the "district is also over-populated . . . by more than 5.5 percent."<sup>306</sup> Similarly, in East Feliciana Parish, Louisiana, a small all-white portion of one proposed district was located some distance from the rest of the district and was virtually surrounded by another district which was approximately seventy per-

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slip op. at 10; objection letters to Nacogdoches, Tex., Indep. School Dist. (Apr. 3, 1980); La Porte, Tex. (Dec. 27, 1979).

The practice of expressly referring to invidious purpose may stem from *Bolden*, which required direct evidence of discriminatory purpose in constitutional vote dilution cases. See objection letters to the State of North Carolina (Senate and Congress) (Dec. 7, 1981); Conecuh County, Ala. (Sept. 14, 1981); Barbour County, Ala. (July 21, 1981); Batesville, Miss. (Sept. 29, 1980); Jim Wells County, Tex. (Aug. 12, 1980); Selma, Ala. (Apr. 28, 1980) (issued six days after *Bolden* was decided). See also preclearance letter to Richmond, Va. (Aug. 31, 1981). For a fuller discussion of express references to invidious purpose after *Bolden*, see *infra* note 334 and accompanying text.

300. A redistricting plan that adheres to traditional district boundaries or otherwise attempts to satisfy legitimate governmental goals may still be attacked if it offends more fundamental criteria. *Kirksey*, 554 F.2d at 151; *Robinson*, 505 F.2d at 680; letter to Batesville, Miss. (Jan. 30, 1981); objection letter to Attala County, Miss. (Sept. 3, 1974); objection letter to New Orleans, La. (July 9, 1973). See also *Avery v. Midland County*, 390 U.S. 474, 484 (1968); objection letter to the State of North Carolina (Nov. 30, 1981) (discussed *supra* note 294).

One objection letter states that preserving incumbents' seats may be an impermissible redistricting guideline if most incumbents are white. See objection letter to the State of Mississippi (July 31, 1978). In overruling the Attorney General's objection, however, the district court stated that incumbency may be considered "where the evidence shows incumbency concerns were not permitted to encroach upon configurations designed to recognize and protect black voting strength." *Mississippi*, 490 F. Supp. at 583 (citing *White v. Weiser*, 412 U.S. 783, 797 (1973); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)).

301. Objection letter to Tate County, Miss. (Nov. 28, 1972). See the discussion of borderline majority districts, *supra* text accompanying notes 272-80.

302. Objection letter to Cochise College Bd., Ariz. (Feb. 3, 1975).

303. Objection letter to the State of Louisiana (Aug. 20, 1971).

304. *Id.*

305. *Id.*

306. *Id.*

cent black.<sup>307</sup>

The availability of alternatives will not prompt an objection merely because the result would be minority representation more closely proportional to the minority population percentage. Consistently with the rule that proportional representation is not constitutionally required,<sup>308</sup> these objections rely primarily on other factors that indicate vote dilution. While the objections observe that available alternatives would yield greater proportionality,<sup>309</sup> objections of this type arise only when minorities' voting strength has been so minimized that their exclusion from political representation may be characterized as vote dilution.<sup>310</sup> Similarly, recent objections to redistricting based on

307. Objection letter to East Feliciana Parish, La. (Dec. 28, 1971). *See also* objection letters to Uvalde County, Tex. (Feb. 18, 1982) ("strange hourglass configuration"); Barbour County, Ala. (Nov. 16, 1981) ("boundaries . . . are drawn in a convoluted and distorted fashion that 'carves out' of the district virtually all-black areas while drawing into the district elsewhere two all-white areas"); New York, N.Y. (Oct. 27, 1981) ("unusually shaped" district six miles long and, for half of its length, only three blocks wide); State of Virginia (House) (July 31, 1981) (combined parts of three counties that were connected only by a two-mile stretch of river, without regard to compactness); Uvalde County, Tex. (Oct. 13, 1976) ("elongated hour-glass shape of precinct"); Frio County, Tex. (Apr. 16, 1976) ("elongated shape" of precinct); Macon, Ga. (June 13, 1975) (two wards "oddly shaped in an elongated manner"); St. James Parish, La. (Nov. 2, 1971) (unusual boundary line divides black population in half); State of Virginia (Senate) (May 7, 1971) (dividing line between districts "appears contorted and does not conform to natural boundaries").

308. *See* the discussion of proportional representation, *supra* note 41 and accompanying text.

309. *See, e.g.*, objection letters to Uvalde County, Tex. (Feb. 18, 1982) (fragmentation of Mexican-American community); Jim Wells County, Tex. (Aug. 12, 1980) (dispersal of minority population); Terrell County, Tex. (Dec. 27, 1978) (dispersal of Mexican-American population); Edwards County, Tex. (Apr. 26, 1978) (dispersal of Mexican-American population); College Park, Ga. (Dec. 9, 1977) (underrepresentation of minority district and overloading black-majority districts); Tyler, Tex. (Feb. 25, 1976); State of Texas (Jan. 23, 1976) (dispersal of minority populations in Jefferson and Tarrant Counties).

310. *See, e.g.*, objection letters to Uvalde County, Tex. (Feb. 18, 1982) (55.5% Mexican-American population but "clear chance of electing a candidate of their choice . . . in only one precinct"); State of North Carolina (House) (Jan. 20, 1982) (no black representative from Greensboro in spite of a one-third black population); Batesville, Miss. (Sept. 29, 1980) (24.8% black population but no 60% black districts); Selma, Ala. (Apr. 28, 1980) (black population of borderline majority district even further reduced); Medina County, Tex. (Apr. 14, 1978) (47% Mexican-American population but no Mexican-American on County Commission); Macon, Ga. (June 13, 1975) (blacks constitute "substantial minority" but "have little chance of electing a candidate of their choice"); State of Georgia (Mar. 3, 1972) (districts have 57.2% black population but no 60% black districts); State of Louisiana (Aug. 20, 1971) (Orleans Parish is 45% black, has 11 districts, but only one black voting age population majority district, suggesting "a design to consolidate in one district as many black residents as possible"). *See also* objection letter to Medina County, Tex. (Dec. 11, 1979).

Research reveals only one redistricting "borderline majority" objection in which minority voters had more than minimal representation. The Attorney General objected to a plan for Bamberg County, S.C. because the effect of the plan, "against the background of racial bloc voting that appears to exist in this county, is that while blacks comprise at least half of the voting age population and more than half of the County's total population, they will have the opportunity to elect candidates of their choice in only two out of seven councilmanic districts." Objection letter to Bamberg County, S.C. (July 30, 1976). Control of only two out of seven council seats may have constituted sufficient disproportionality to prompt an objection without necessarily endorsing proportional representation. In any event, the objection was withdrawn because of "widespread support for the plan in the black community and the black victories in recent elections." Letter to Bamberg County, S.C. (Nov. 1, 1976) (withdrawing objection of July 30, 1976).

The Attorney General in one instance may have given the appearance of requiring proportional representation when he responded to the submission of several possible redistricting proposals for Charleston, South Carolina. The city, with a 44% black population, had submitted four plans in order of preference. The two most preferred plans provided for 12 council members

the 1980 Census have examined whether a plan recognized the increases in minority population since the 1970 Census. In a case involving the Texas Legislature, the Attorney General objected to "a plan in which minorities enjoy no significant gains even though their percentage of the population has increased and the demography of the state presents opportunities in several areas for recognizing the increased potential of the minority community."<sup>311</sup> The objection letter was careful to emphasize, however, that minority political strength need not be maximized, provided that it is also not fragmented or diluted.<sup>312</sup>

### *E. Minority Participation in the Redistricting Process*

Objections are also more likely when a plan excludes minorities from participation in the redistricting process. In 1981, the Attorney General objected to a plan for Barbour County, Alabama because "leaders of the black community were not consulted concerning the placement of the new district lines, and the County has provided no evidence of any systematic effort to involve blacks in its deliberations."<sup>313</sup> An objection to a redistricting plan for Frio County, Texas noted the "absence of any Mexican-American representation on the 8-member reapportionment committee responsible for the plan."<sup>314</sup> Similarly, repeated objections to plans for Jim Wells County, Texas were based partly on

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elected in 3 two-member districts and at-large elections for the remaining 6 council members. It was expected that these plans would result in 2 or 4 black council members. A third plan provided for 15 council members, 12 from single-member districts and 3 elected at-large with residency requirements. It was expected that blacks would elect 5 council members. The Attorney General objected to plans 1 through 3 and precleared plan 4, which provided for 12 council members elected from single-member districts. Five of the 12 districts had substantial black majorities, "thus assuring to blacks the opportunity to elect 5 of the 12 members or 41.6% of the council." Letter to Charleston, S.C. (Feb. 18, 1975). While the Charleston objection suggests in part that proportionality of representation was a key factor, its outcome is probably more attributable to the vote-dilutive devices, specifically multimember districts and at-large elections, in the rejected plans.

The Charleston determination was probably the highwater mark for the Attorney General's formal involvement in choosing among redistricting plans. Another objection letter has stated that "the only function of the Attorney General is to object or approve submitted legislation and we are not authorized nor would it be appropriate for us to recommend alternative approaches." Objection letter to the State of Louisiana, (Aug. 20, 1971).

311. Objection letter to the State of Texas (House) (Jan. 25, 1982). See also objection letters to Glynn County, Ga. (July 12, 1982); Dougherty County, Ga. (July 12, 1982); State of New York (June 22, 1982); State of Texas (Senate) (Jan. 25, 1982).

312. Objection letter to the State of Texas (House) (Jan. 25, 1982). In a similar vein, the Attorney General's objection to North Carolina's senate and congressional redistricting following the 1980 Census noted that the black population percentage in the second congressional district, "the only district where black voters could have the potential of electing a candidate of their choice," had dropped in both the 1971 and 1981 reapportionments. Objection letter to the State of North Carolina (Dec. 7, 1981).

The Attorney General's recent objection to the redistricting of the Georgia congressional seats confirms that census-to-census changes in a particular community's demography are relevant to an inquiry into possible vote dilution. The objection suggests that division of a growing, cohesive black community in Fulton and Dekalb Counties into two separate congressional districts was unconstitutionally vote-dilutive. Objection letter to the State of Georgia (Feb. 11, 1982). See also objection letter to Monroe, La., City School Bd. (May 18, 1982).

313. Objection letter to Barbour County, Ala. (July 21, 1981).

314. Objection letter to Frio County, Tex. (Apr. 16, 1976) (citing *White, Robinson*).

the "conspicuous lack of input from interested members of the minority community."<sup>315</sup>

Conversely, objections have been less likely when minorities participated in the formulation of a redistricting plan. In Bamberg County, South Carolina, the Attorney General withdrew an objection based on disproportionate underrepresentation<sup>316</sup> and racial bloc voting because of "widespread support for the plan in the black community and the black victories in recent elections."<sup>317</sup>

#### F. *Beer Revisited*

This article has attempted to illustrate how the factors that traditionally have governed constitutional vote dilution claims<sup>318</sup> also have dominated the analysis of vote dilution under section 5 for each of the major types of changes submitted for preclearance. The article also has tried to show how the Attorney General and the district court have given the retrogression test limited application in several important cases affecting registration, polling places, at-large elections, anti-single-shot provisions, and annexations.

In addition, the district court has twice construed the retrogression test narrowly in the redistricting context. In *Mississippi v. United States*<sup>319</sup> the State of Mississippi sought preclearance for its statewide reapportionment plan reflecting the results of the 1970 census. In applying *Beer*, the district court limited the retrogression test in two significant ways. First, the court did not use the retrogression test to compare the submission to the existing Mississippi plan, or to existing district lines as applied to current population. Instead, the court compared the submission to a 1979 court-ordered plan that had arisen from a parallel constitutional challenge to reapportionment but had never been implemented.<sup>320</sup> Similarly, in its review of Mississippi's 1981 congressional reapportionment based on the 1980 census, the district court held that an interim plan adopted for the 1982 elections by the United States District Court for the Northern District of Mississippi would serve as the benchmark for the retrogression test. Citing its earlier decision regarding the 1970 census reapportionment in Mississippi, the court stated that "a section 5 declaratory judgment should be denied when the electoral plan under review is retrogressive in comparison to a court-ordered plan that will be implemented

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315. Objection letter to Jim Wells County, Tex. (Feb. 1, 1980). *See also* objection letters to the State of Virginia (Mar. 12, 1982) ("communities were divided without significant consultation with local minority group members"); Jim Wells County, Tex. (Aug. 12, 1980) ("no significant input from the affected minority group"); Walthall County, Miss. (Nov. 27, 1978) ("blacks did not participate in or were not consulted concerning the redistricting plan"); Harrison County, Tex. (Aug. 8, 1978) ("blacks were not consulted concerning the creation of this plan"); Aransas County, Tex. (Apr. 28, 1978) ("minorities were not consulted with respect to the creation or adoption of the new plan").

316. *See* the discussion of the Bamberg County objection *supra* note 310.

317. Letter to Bamberg County, S.C. (Nov. 1, 1976) (withdrawing objection of July 30, 1976).

318. The most important of these factors are listed *supra* text accompanying notes 41-50.

319. 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

320. 490 F. Supp. at 580, 582. *See also* Connor v. Finch, 431 U.S. 407 (1977).

absent approval of the statutory plan."<sup>321</sup> In this respect, both Mississippi cases are closely related to *Wilkes County*, in which the district court also used a hypothetical redistricting as the point of reference under section 5.<sup>322</sup>

The Attorney General recently adopted this flexible approach to the "status quo" and the retrogression test in two objections to redistricting plans for Barbour County, Alabama,<sup>323</sup> where, citing *Wilkes County*, he stated, "Since the prior plan is unconstitutionally malapportioned, our standard of comparison under *Beer v. United States* is 'options for properly apportioned single-member district plans.'<sup>324</sup> Under the Mississippi cases and *Wilkes County*, any substantial deviation from acceptable norms would trigger use of hypothetically drawn districts rather than the actual status quo. For example, a recent objection to a redistricting plan for the New York City Council stated that "because the existing councilmanic districts are severely malapportioned in light of the dramatic population shifts which have occurred in the last decade, we have studied possible alternative reapportionment plans faithful to nonracial criteria."<sup>325</sup> These objections and declaratory judgment actions demonstrate that even in redistricting cases the district court and the Attorney General have restricted the retrogression test and have relied consistently on traditional vote dilution indicators, continuing the trend of *Apache County*, *Wilkes County*, *City of Lockhart*, and *City of Port Arthur*.

More fundamentally, however, the redistricting cases and objection letters suggest that the consistent limits on the retrogression test are justified. In the redistricting cases, more so than in other contexts, we are reminded that the retrogression test alone will not result in preclearance unless the submitting jurisdiction, consistent with the second prong of *Beer*, also meets its burden of proof on the constitutionality of the proposed plan.<sup>326</sup> Recent objections to several redistricting plans indicate that constitutional factors are increasingly recognized as determinative. In objecting to the reapportionments of the South Carolina State House of Representatives, the North Carolina State Senate, and the New York City Council, the Attorney General made it plain that each jurisdiction had to demonstrate "at a minimum" that the proposed plan would not be retrogressive.<sup>327</sup> Each of these objections followed *Mississippi v. United States*<sup>328</sup> in holding that the jurisdiction must also show that the plan

321. *Mississippi v. Smith*, No. 82-0956, slip op. at 7-8 (D.D.C. June 28, 1982) (order denying motion for partial summary judgment).

322. See the discussion of *Wilkes County*, *supra* text accompanying notes 138-41. See also the discussion of the definition of status quo in *City of Lockhart*, *supra* text accompanying notes 180-83.

323. Objection letters to Barbour County, Ala. (Nov. 16, 1981 & July 21, 1981).

324. Objection letter to Barbour County, Ala. (July 21, 1981) (citing *Wilkes County*, 450 F. Supp. at 1178) (citations omitted). See also objection letters to Conecuh County, Ala. (July 26, 1982); Henry County, Ga. (May 27, 1980).

325. Objection letter to Bronx, Kings, and New York Counties, N.Y. (Oct. 27, 1981).

326. See *Beer*, 425 U.S. at 141.

327. Objection letters to the State of North Carolina (Dec. 7, 1981); State of South Carolina (Nov. 18, 1981); Bronx, Kings, and New York Counties, N.Y. (Oct. 27, 1981) (emphasis added). See also objection letter to Williamsburg County, S.C. (Aug. 20, 1982).

328. 490 F. Supp. at 581.



"fairly reflects" minority voting power. More explicitly, the Attorney General objected to the 1982 reapportionment of Georgia's congressional districts relying on constitutional vote dilution factors, even after he first found that "the plan must be considered one which 'enhances the position of minorities in respect to their effective exercise of the election franchise.'"<sup>329</sup> Each of these objections stated constitutionality as the relevant standard and then proceeded to deny preclearance by citing factors that typically determine the outcome in constitutional racial or ethnic reapportionment litigation, such as fragmentation of minority communities, multimember districts, and the like.

The most recent manifestation of this trend is the district court's opinion in *Busbee v. Smith*,<sup>330</sup> which was a declaratory judgment action filed by the State of Georgia following the Attorney General's objection to the 1982 Georgia reapportionment. Citing the requirement in *Mississippi v. United States* that a reapportionment plan must "fairly reflect" the strength of minority voting power,<sup>331</sup> the court brushed aside as insufficient the argument that the proposed plan would not be retrogressive. The court then relied explicitly on the constitutionality prong of *Beer* to deny preclearance. In so doing, the court relied on a number of familiar factors: (1) fragmentation of the large and contiguous black population in metropolitan Atlanta; (2) past discrimination; (3) absence of a legitimate, nonracial reason for the plan; and (4) overt expressions of racial animus.<sup>332</sup>

While this trend toward explicit reliance on the constitutionality prong has become more noticeable in these recent redistricting objections, earlier objections also avoided the retrogression test altogether by relying on the unconstitutionality of the proposal. For example, a 1978 objection to a redistricting plan for Nueces County, Texas found that the plan was not retrogressive but that the county had not met its burden of showing constitutionality.<sup>333</sup> Changes in the language of objection letters following the Supreme Court's *Bolden* decision also suggest reliance on the constitutionality prong of *Beer*. As soon as *Bolden* was decided, the Attorney General's objections began to refer specifically to the discriminatory purpose that, according to *Bolden*, was necessary to a finding of unconstitutionality.<sup>334</sup>

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329. Objection letter to the State of Georgia (Feb. 11, 1982). Of course, the district court and the Attorney General have continued to rely on the retrogression test when it indicates that an objection is appropriate wholly apart from constitutional factors. See, e.g., *Hale County*, 496 F. Supp. at 1216-17; objection letter to Monroe, La., City School Bd. (May 18, 1982); objection letter to the State of Alabama (May 6, 1982).

330. No. 82-0665 (D.D.C. July 22, 1982).

331. No. 82-0665, slip op. at 56.

332. *Id.* at 52-56. At first glance, the court's opinion appears to equate the constitutionality test in *Beer* with the "purpose" standard set forth in the Act and leaves ambiguous which of the two standards is analytically significant. As the opinion is constructed, however, the court could only have taken the view that a covered change would have to satisfy the constitutionality test in *Beer* even absent a "purpose" test in § 5.

333. Objection letter to Nueces County, Tex. (Mar. 24, 1978).

334. See objection letter to Selma, Ala. (Apr. 28, 1980) (issued six days after *Bolden*). See also objection letters to Conecuh County, Ala. (Sept. 14, 1981); Barbour County, Ala. (July 21, 1981); Batesville, Miss. (Sept. 29, 1980); Jim Wells County, Tex. (Aug. 12, 1980). Each of these letters

In sum, although patterns specific to particular types of changes have evolved, the indicators of vote dilution taken from constitutional cases, together with the statutory shift in the burden of proof to the submitting jurisdiction, have emerged as the critical factors in decisions under section 5. As compared with these factors, the retrogression prong of the *Beer* analysis has had relatively little impact on the development of the substantive law of section 5.<sup>335</sup>

## VII. CONCLUSION

By discussing the four basic types of section 5 submissions, this article has sought, initially, to place the over eight hundred objections interposed by the Attorney General into an orderly framework for present and future analysis. Beyond this, the article has sought to demonstrate that section 5 jurisprudence has been characterized by a struggle with *Beer v. United States*. In dealing with *Beer*, the key question has been the extent to which the retrogression test has proved to be the determinative inquiry. The answer provided by the district court and the Attorney General generally has been that the retrogression test in *Beer* is only part of the analysis. First, the "status quo" has emerged as a flexible concept that has yielded to vote dilution indicators from constitutional cases when the status quo either has been difficult to ascertain or itself arguably vote-dilutive. Second, and more importantly, even when the status quo has not presented analytic problems, the district court and the Attorney General appear to have accepted the invitation in the second prong of *Beer*—to consider constitutional factors drawn from fourteenth and fifteenth amendment vote dilution cases.

Thus, while acting consistently with *Beer*, the courts and the Attorney General appear to have discovered that *Beer* provides the starting point for analysis, but little more. As a result, the pattern of decisions under section 5 reveals heavy reliance on the indicators of vote dilution that have developed in constitutional litigation based on the fourteenth and fifteenth amendments. This development has occurred in a manner that reflects adherence to the dictates of *Beer* taken as a whole. Because the burden of proving constitutionality in section 5 cases is on the jurisdiction, the district court and the Attorney General can consider constitutional vote dilution indicators and block a submitted change without necessarily deciding that the same change would be held unconstitutional in fourteenth or fifteenth amendment litigation. At the

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cites *Wilkes County*, 450 F. Supp. at 1178, for the inference of discriminatory purpose. See also preclearance letter to Richmond, Va. (Aug. 31, 1981).

335. Compare the pre-*Beer* objections in objection letters to St. James Parish, Louisiana (Nov. 2, 1971) [and] Clarke County, Ga., Bd. of Educ. (Aug. 6, 1971) with objection letters to Jim Wells County, Tex. (Feb. 1, 1980); [and] objection letter to Uvalde County, Tex. (Oct. 13, 1976); [and] objection letter to Waller County, Tex. (July 27, 1976); [and] objection letter to Crockett County, Tex. (July 7, 1976) [and] letter to Crockett County, Tex. (Nov. 9, 1977); [and] objection letter to Frio County, Tex. (Apr. 16, 1976). The Attorney General's withdrawal of his objection to at-large elections with a majority vote requirement and numbered posts in Fulton County, Georgia is a rare case of an objection withdrawn in explicit reliance on *Beer*. Letter to Fulton County, Ga. (July 2, 1976) (withdrawing objection of May 22, 1974).

same time, in drawing on these factors, the substantive law under section 5 generally has reflected a fundamental faithfulness to the basic underpinning of both section 5 and the constitutional law of vote dilution—equality of access to the political process.