Notre Dame Law Review

Volume 51 | Issue 2 Article 9

12-1-1975

Discriminatory Purpose, Changes, and Dilution: Recent Judicial Interpretations of 5 of the Voting Rights Act

Wm. J. Wernz

"DISCRIMINATORY PURPOSE," "CHANGES," AND "DILUTION": RECENT JUDICIAL INTERPRETATIONS OF § 5 OF THE VOTING RIGHTS ACT

I. Introduction

A. *Background*

The Voting Rights Act was first passed in 1965 after the President and Congress were prodded into action by the dramatic suppression of would-be voters in Selma.[1] The Act, widely hailed as perhaps the most effective piece of civil rights legislation, was recently extended and expanded for a second time.[2]

Earlier federal voting rights measures generally proved ineffective, since they involved lengthy and particularized litigations.[3] Southern circumventions were ingenious and voting rights victories were largely pyrrhic.[4] The stringent measures of the Voting Rights Act have, however, proved strikingly effective. Between 1964 and 1972 the number of new black registered voters in the South increased by over one million[5] and the gap between white and black registration rates has been reduced from 44.1 percent in 1965 to 11.2 percent in 1972.[6] The number of black elected officials in the South has increased from well under 100 to about 1,000.[7]

Section 5 of the Voting Rights Act requires political units covered by the Act[8] to obtain advance approval of any "changes" in their voting arrangements from the Attorney General or the District Court for the District of Columbia.[9]

1 U. S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 1 (1975) [hereinafter COMMISSION REPORT]. Ten days after President Johnson's appeal to Congress on March 25, 1965, the march from Selma culminated in Montgomery.

2 Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, 89 Stat. 400 (Aug. 6, 1975).

3 Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U.L. REV. 111, 115 (1972).

4 *Id.* at 114-15.

5 COMMISSION REPORT, *supra* note 1, at 41.

6 *Id.* at 43.

7 *Id.* at 49.

8 42 U.S.C. § 1973 (1970). Section 4 is the trigger mechanism for coverage. Covered jurisdictions are states or other political units that used a voting test or device and had less than 50 percent turnout in the 1964 or 1968 Presidential election. There is a provision for exemption if a jurisdiction can show that it has not used a test or device in a discriminatory manner. Presently covered jurisdictions include Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most of North Carolina, as well as scattered counties elsewhere, including New York's Manhattan, Kings (Brooklyn) and Bronx Counties. COMMISSION REPORT, *supra* note 1, 13-16.

9 42 U.S.C. § 1973c (1970). The text of § 5 reads as follows:

> Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) [§ 4a] of this title based upon determinations made under the first sentence of section 1973b(b) [§ 4b] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) [§ 4a] based upon determinations made under the second sentence of section 1972b(b) [§ 4b] are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such quali-

To gain approval the political unit must show that the proposed change has neither the purpose nor the effect of "denying or abridging the right to vote on account of race or color."[10] While local federal district courts may decide whether a new procedure is a "change" subject to § 5, the Attorney General or the District Court for the District of Columbia must be persuaded that the change will not abridge voting rights for racial reasons.[11] Some critics contend this requirement reduces the South to tutelage, and argue that the provision unconstitutionally abridges states' rights to control their voting procedures[12]; but the Supreme Court, while conceding that the provision is severe and unusual,[13] has found it constitutional.[14]

Section 5 was rarely used in the first six years after the enactment of the Voting Rights Act, but in the last several years it has become the Act's most important provision.[15] Initially, the Justice Department and voters' organizations were concerned with opening the registration rolls to the minority-group voters who had been excluded, but with the virtual accomplishment of that goal,[16] the focus turned to preventing the dilution of the newly established black voting power. The right to vote means little if states are permitted to devise voting procedures which effectively discount or "dilute" black votes. Blacks might vote, but where there is, for example, a white majority and an at-large voting procedure, black votes could be rendered meaningless by racial bloc voting. Similarly, district lines could be redrawn or annexations effected that dilute emerging black political power. Previously, individual constitutional claims were ineffective in combatting these sophisticated evasions of the fifteenth amendment, but § 5 of the Voting Rights Act has emerged as an effective

---

fication, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualifications, prerequisite, standard, practice, or procedure: *Provided,* that such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

10 *Id.* The language here closely parallels that of the fifteenth amendment, which the Act is designed to enforce.

11 Georgia v. United States, 411 U.S. 526 (1973). "[I]t is well established that in declaratory judgment actions under § 5 the plaintiff has the burden of proof." *Id.* at 538. For a study of Attorney General actions under § 5, see Halpin & Engstrom, *Racial Gerrymandering and Southern State Legislative Re-Districting: Attorney General Determinations under the Voting Rights Act,* 22 J. PUB. L. 37 (1973). The District Court for the District of Columbia has only rarely been the forum submitting jurisdictions have first turned to.

12 Rice, *The Voting Rights Act of 1965: Some Dissenting Observations,* 15 KAN. L. REV. 159 (1966).

13 Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969).

14 South Carolina v. Katzenbach, 383 U.S. 301 (1966). The 1970 amendments to the Act were declared constitutional in Oregon v. Mitchell, 400 U.S. 112 (1970).

15 COMMISSION REPORT, *supra* note 1, at 25; Derfner, *Racial Discrimination and the Right to Vote,* 26 VAND. L. REV. 523, 576-81 (1973).

16 See COMMISSION REPORT, *supra* note 1, at 3, for a progress report.

antidote, and judicial interpretations have played a major role in bolstering the effectiveness of § 5.

Allen v. State Board of Elections[17] determined that § 5 covered all election changes, even such minor matters as a new polling time or place.[18] Though the inference could have easily been drawn from *Allen*, it was not until 1971, in *Perkins v. Matthews*,[19] that the Supreme Court defined annexation as a change subject to § 5 scrutiny, and not until 1973, in *Georgia v. United States*,[20] that redistricting was similarly considered controlled by § 5. In holding that Congress meant to reach "the subtle, as well as the obvious state regulations,"[21] *Allen* created a basis for such procedures as multimember districting, at-large voting, numbered posts, full slate ("antisingleshot") rules, and majority vote requirements[22] to be considered suspect under § 5.

The Voting Rights Act does not, of course, preclude traditional suits for voting rights under the fourteenth and fifteenth amendments. Such actions continue, particularly with regard to redistricting. Moreover, these cases can at times be instructive for § 5 analysis since the Voting Rights Act was passed to "enforce the Fifteenth Amendment of the Constitution of the United States, and for other purposes."[23] The purely constitutional voting rights cases of recent years shall be considered, however, only to illuminate the concept in both constitutional and Voting Rights Act traditions.

B. *The Concepts and Cases*

The courts have only recently begun interpretation of § 5's substantive provisions. The extent of the section's coverage and the types of racial discrimination forbidden by the section are still being judicially determined. Specific attention is appropriate for cases containing interpretations of key § 5 concepts: (1) the proscribed discriminatory "purpose"; (2) "changes," or new voting procedures covered by § 5; and (3) "dilution," the measure of discriminatory effect used in § 5 and related constitutional cases. "Purpose" was initially construed in the recent *City of Richmond v. United States*,[24] while another case

17 393 U.S. 544 (1969).

18 "Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way." *Id.* at 566.

19 400 U.S. 379 (1971).

20 411 U.S. 526, 534-35 (1973). A number of jurisdictions had submitted redistricting plans before the *Georgia* holding.

21 393 U.S. at 565. This echoes Justice Frankfurter's often quoted dictum that "the [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275 (1939). *Georgia*, 411 U.S. at 533, notes that Congress has implicitly ratified *Allen*'s broad interpretation of the coverage of § 5.

22 A full-slate requirement forces a voter in an at-large election to vote for as many candidates as there are places to be filled. If there are fewer black candidates than places, blacks will be forced to vote for some whites. For an explanation of the discriminatory potential of each of these procedures, see COMMISSION REPORT, *supra* note 1, at 204-08.

23 Perhaps the most salient difference is that the burden of proof is shifted by the Voting Rights Act from the aggrieved voter to the submitting jurisdiction. Voting Rights Act suits are also heard on the merits in the District Court for the District of Columbia rather than in local federal courts. The purely constitutional voting rights cases of recent years shall be considered here only as they help illuminate the concept of "dilution," which is prominent in both constitutional and Voting Rights Act traditions. *See* note 4 *supra*.

24 95 S. Ct. 2296 (1975).

recently argued before the Supreme Court, *Beer v. United States*,[25] continues the judicial development of "changes" and "dilution."

Richmond is the Court's fullest treatment of an application of § 5 to the substance of voting changes. While the opinion is instructive on other facets of § 5, its concept of "purpose" is the case's most important feature, especially since this reading is arguably without statutory support, and could attenuate § 5's deterrent effect.

Section 5 was intended to have a "freezing effect"[26] on voting procedures in covered areas, by forbidding unapproved "changes." Courts have, however, construed § 5 as applicable in some circumstances to retained or carry-over procedures as well. To the extent that the concept of "changes" is expanded to include carry-over procedures as well as procedures directly changed, § 5 will become a means of reforming entire voting systems rather than merely prohibiting covered states and subdivisions from worsening the status of the black voter. The courts have taken at least the first steps in this direction.

"Dilution," another important § 5 concept, is still in process of definition. The courts have frequently used the rubric "dilution" in deciding whether there has been abridgment of voting power on racial grounds. Particularly, as the focus of voting rights concern has shifted from denial of the vote to subtler forms of weakening minority voting power, it has become important to define standards for judging discriminatory effect. Constitutional guidance has been offered by the Court,[27] and several attempted specifications of the general constitutional criteria have emerged in recent lower court cases. Prominent among these measures of undiluted vote is the *Beer* requirement that, at least in the context of a history of discrimination, redistricting must give minorities the power to command proportional representation.[28]

II. *Richmond:* Discriminatory Purpose and Effect

A. *The Background*

1. The Case Background

The Supreme Court has considered only three § 5 annexation cases,[29] and *Richmond* is the Court's first opinion on one of the section's substantive concepts: proscribed discriminatory purpose. Earlier annexation cases established the context for *Richmond* and other § 5 cases: *Perkins v. Matthews* held that annexations are covered by § 5[30] and *City of Petersburg v. United States* offered suggestive interpretations of "changes" and "dilution."

The general factual backgrounds of *Richmond* and *Petersburg* are similar. Both Virginia cities sought to annex parts of adjacent counties. In both cases

25 374 F. Supp. 363 (D.D.C. 1974). Argued last term, *Beer* has been set for reargument. 95 S. Ct. 1672 (1975).

26 Georgia v. United States, 411 U.S. 526, 538 (1973).

27 *See* text accompanying notes 86-92 *infra.*

28 *See* text accompanying notes 93-97 *infra.*

29 City of Richmond v. United States, 95 S. Ct. 2296 (1975); City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973). *See* Perkins v. Matthews, 400 U.S. 379 (1971).

30 400 U.S. at 390.

there was a black population majority in the original city, a white majority in the enlarged city and, at the outset, an at-large system of election. Both cities had a history of bloc voting and racial discrimination. The cases differ importantly, however, since in *Petersburg* there was no evidence or finding of a discriminatory purpose in the annexation.[31]

In *Petersburg* the Supreme Court affirmed without comment the lower court's ruling that "this annexation can be approved only on the condition that *modifications calculated to neutralize* to the extent possible any adverse effect upon the political participation of black voters are adopted. . . ."[32] The annexation would be acceptable only if the carry-over, at-large procedure was changed to a ward system of election. To mitigate the dilutive effect of annexation, the court actually required alteration not of a "change," but a carry-over procedure. The *Petersburg* court also determined that showing a lack of discriminatory effect would be "a heavy burden for a community in a state with Virginia's history of past racial discrimination."[33]

Perkins and *Petersburg* set the stage for *Richmond* and other recent § 5 cases, then, by bringing annexations within § 5, by suggesting a broad construction of "changes," and by requiring "modifications calculated to neutralize" dilutive changes. The *Richmond* Court works out of this context and breaks new ground in its interpretation of the discriminatory "purpose" forbidden by § 5. This interpretation, as well as the Court's finding of no discriminatory effect, are worthy of careful critical attention as they shed initial light on what the Court will consider to be forbidden by § 5.

2. The Factual Background

The city of Richmond began annexation suits against two counties in 1962. At that time, black voters were not a significant political force and the purpose of the suits was not racially tainted.[34] One of the annexation actions proved too costly to continue, and the other was pursued only desultorily until 1968. By that time, blacks had emerged as a strong political power and were becoming a population majority in Richmond. With the 1970 city council elections imminent, the city agreed in 1969 to a compromise annexation, which reduced the percentage of the black population from 52 percent to 42 percent. *Perkins* had not yet been decided, and the 1969 compromise was not submitted for preclearance.[35] Elections were held in the enlarged city in 1970—elections which, in the light of the *Perkins* inclusion of annexations within § 5, were illegal—and subsequent elections have been enjoined pending the outcome of this suit. After *Petersburg* allowed an annexation only on condition of changing from an at-large to a ward system, the city amended its election plan accordingly.[36] The Attorney General then accepted the annexation and revised

31 354 F. Supp. at 1024.

32 *Id.* at 1031 (emphasis added). *Petersburg* could not be fairly read to imply that any annexation without discriminatory purpose could be purified of wrongful racial effect by use of a ward system.

33 *Id.* at 1027.

34 Holt v. City of Richmond, 459 F.2d 1093, 1097 (4th Cir. 1972).

35 It was reasonably clear by this time that annexations were subject to § 5 and other cities had submitted them prior to *Perkins*.

36 95 S. Ct. at 2301.

election plan.[37] He and the city then presented the plan to the District Court for the District of Columbia, which sought the assistance of a Special Master. The District Court, accepting the Master's findings that the city had not proven that the changes did not have discriminatory purpose and effect, refused to approve the annexation.[38] During this time, there was also a fifteenth amendment suit, *Holt v. Richmond,*[39] filed and later appealed, which sought to have the annexation dissolved.

B. *Discriminatory Purpose*

On appeal, the Supreme Court accepted the findings of the Master that the compromise annexation

> was infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office *through at-large elections*. . . .[40]

Having added the qualification "through at-large elections," the Court apparently accepted a finding of discriminatory purpose only insofar as the annexation paralleled the *Petersburg* expansion of an at-large system. It did not seem to accept that the entire 1969 annexation was infected with discriminatory purpose. Why the particular device used should dictate the finding of discriminatory *purpose* is unclear. Apparently removal of an at-large method legitimated the city's purpose.

The Court's ambiguous acceptance of the Master's finding of impermissible purpose was followed by a skeptical commentary on his methods[41] and a conclusion that "the controlling factor in this case is whether there are *now* objectively verifiable, legitimate reasons for the annexation."[42] Even if the Court had found a clearly invidious intent in the 1969 compromise, that intent would not, in the Court's view, have amounted to the discriminatory purpose forbidden by § 5, if *presently* nonracial justifications for the annexation exist. The Court did not explain or attempt to justify this shift in temporal focus. Instead, the Court juxtaposed its interpretation of purpose with references to the lack of racial motive in 1962, the Fourth Circuit's holding in *Holt* that plaintiffs had not shown unlawful purpose in 1969, and the apparent inevitability of some annexation by Richmond.[43] The case is presently before the district court on remand for consideration of whether there are now legitimate reasons for annexation.

---

37 *Id.*

38 *Id.* at 2302. The court did not, however, agree with the Master's remedial recommendation of deannexation.

39 334 F. Supp. 228 (E.D. Va. 1971), *rev'd,* 459 F.2d 1093 (4th Cir.), *cert. denied,* 408 U.S. 931 (1972). The present suit was submitted in the form of a consent judgment to the District Court for the District of Columbia, 376 F. Supp. 1344 (D.D.C. 1974).

40 95 S. Ct. at 2305 (emphasis added).

41 *Id.* at 2306-07. The Court specifically suspected that the Master may have relied too much on the testimony of an interested witness. But besides the verbal evidence showing impermissible intent there were objective correlatives: the character of the annexed area sorted badly with the city's need for space, as it was relatively developed and populous; the city planning official was not even consulted about the compromise. *Cf.* 459 F.2d at 1093, 1105-06, 1109 and 376 F. Supp. at 1353.

42 95 S. Ct. at 2306 (emphasis added).

43 *Id.* at 2306-07.

This construction of the Act is subject to several criticisms. As Justice Brennan pointed out in his dissent, such a reading "wholly negates the prophylactic purpose of § 5."[44] The deterrent effect of § 5 is established as important,[45] but the Court's holding seems to allow unjustifiable discriminatory maneuvers on the chance that justifications will be available years later. Under *Richmond,* a city's intent at the time of annexation is irrelevant; instead the Court is willing to entertain a city's nonracial explanation six or seven years after annexation.[46]

The Court's allowance of after-the-fact justification is unacceptable on other grounds. "Purposes" should not be narrowly equated with "reasons." The Court remanded for decision on whether there are in 1975 acceptable reasons or justifications for annexation. But even were there nonracial justifications that could have been adduced in 1969, if the *intent* of the city was to dilute the black vote, then arguably its purpose was infected. Masking of impermissible purpose with facially valid reasons should not be tolerated, especially since Congress has mandated inquiry into purpose as well as effect. Yet the Court's holding here eviscerates the first of those mandates.[47]

Further, the Court's reference to the inevitability of annexation, and the nonracial purposes of the much larger 1962 proposal, is not germane, as was noted by Justice Brennan: "Annexation in the abstract, however, is not at issue here; the critical question is whether the particular line drawn in 1969 had any contemporary justification."[48]

Finally, the Court's reliance on the Fourth Circuit's holding of lack of discriminatory purpose in *Holt* is misplaced. That case was not within the Voting Rights Act and therefore the plaintiff had to shoulder the heavy burden of proving discriminatory purpose. That burden became impossible to carry when the *Holt* court found all evidence of wrongful motive simply irrelevant.[49] In *Richmond,* a § 5 case, the burden shifted to the city, but the Court lightened it by finding irrelevant any illicit purposes at the time of the change. Indeed, *Richmond* inverted the *Petersburg* determination that a city in a state with Virginia's past has a heavy burden to show a lack of discrimination; a Southern city now can prove the absence of discriminatory purpose by discovering nonracial reasons for annexation.

---

44 *Id.* at 2310.

45 *See* COMMISSION REPORT, *supra* note 1, at 30-31; Derfner, *supra* note 15, at 580-81.

46 This apparent crippling of the statute may be somewhat mitigated by the preclearance provision. In *Richmond,* the annexation went into effect without proof of lack of racial purpose, but, at least with regard to annexation, this would presumably not happen again since *Perkins* would now clearly force cities to seek preclearance.

47 The Court, by remanding, implicitly recognized this distinction between "reasons" and "purpose." It stated, 95 S. Ct. at 2307, that a change could have no discriminatory effect, but be still forbidden by § 5's proscriptions against racial purposes. But if the effect were nondiscriminatory, presumably "reasons" would be readily at hand. Of course, the chances of finding a racist purpose after a holding of no racist effect would be slim, as it would imply in effect that the racists were bumblers. See Wallace v. House, 515 F.2d 619 (5th Cir. 1975), for the converse: "the lack of racial motivation is at least some evidence of a lack of discriminatory effect." *Id.* at 633.

48 95 S. Ct. at 2311 n.14. "Contemporary" here refers to 1969.

49 459 F.2d 1093, 1097-98 (4th Cir. 1972). Judge Haynsworth, writing for the Fourth Circuit, evinced the very narrow opinion that motive is relevant only when there is the type of egregious discrimination found in Gomillion v. Lightfoot, 364 U.S. 339 (1960). In *Gomillion,* the City of Tuskegee had attempted to reshape its boundaries in order to exclude all but four of its black citizens. For a comment on Judge Haynsworth's view and a discussion of the recent

C. *Discriminatory Effect*

The Court's consideration of discriminatory effect stands on firmer, if not unassailable, ground:

> We are also convinced that the annexation now before us, in the context of the ward system of election finally proposed by the city . . . does not have the effect prohibited by § 5.[50]

The earlier *Petersburg* case required "modifications calculated to neutralize (dilution) to the extent possible." The *Richmond* Court found that, as in *Petersburg,* conversion from an at-large system to a ward plan meets this requirement. The Master reached an opposite conclusion because a black organization had presented a plan calculated to give black voters a better opportunity to control the swing ward.[51]

The ward plan presented by Richmond did not address racial distribution as a factor.[52] Such "color-blind" action is normally desirable, but where it is necessary to "calculate to neutralize" racial dilution, then a color-conscious remedy ought to be required. Although the shift from an at-large to a ward system was an acceptable calculation in *Petersburg,* it is a wooden reading of that case to infer that such a conversion will always be a sufficient calculation. This is especially so where there is also evidence of racial purpose, as in *Richmond.* The "fairly designed ward plan" required by the Court does "afford [blacks] representation reasonably equivalent to the political strength in the *enlarged community,*"[53] but the alternatives suggested by the lower court in *Holt*[54] and the plan of the black organization seem better "calculated to neutralize" the dilution of black voting power from its strength in the city *before annexation.* The Court, once approving the requirement of such calculations in *Petersburg,* concentrated on the racial proportions in the enlarged city rather than requiring equitable and imaginative measures to preserve the black voting power in the original city.

The overall effect of the various court proceedings in the Richmond dispute is that the apparent purpose of the compromise annexation of 1969, the dilution of black voting power, has been accomplished. While the Voting Rights Act intended that unless there was a showing of nondiscrimination, the 1964 voting procedures would remain unchanged, the Court's decision leaves in effect the illegal election of 1970 and the achievement of racist purpose in 1969.

---

constitutional controversy over inquiry into legislative motive, see Note, *Municipal Boundary Changes and the Fifth Amendment,* 51 N. CAR. L. REV. 573, 578-81 (1973). This controversy can easily be sidestepped in § 5 analysis, as the Congress there requires scrutiny of intent.

50 95 S. Ct. at 2304.

51 The plan approved by the Court had four predominantly black and four predominantly white districts, with blacks comprising 40.9 percent of the other ward; the alternate plan would have given blacks 59 percent of the population in the swing ward, probably about half the registered voters. The District Court for the District of Columbia held that Richmond's racist history and purposes required it to eliminate the dilutive effects of annexations. 376 F. Supp. at 1353.

52 City of Richmond v. United States, 376 F. Supp. 1344, 1357 (D.D.C. 1974).

53 95 S. Ct. at 2304 (emphasis added).

54 334 F. Supp. at 240. The court would have had the old city elect seven councilmen and the annexed area elect the other two.

Richmond is the Supreme Court's first holding on the meaning of the discriminatory purpose proscribed by § 5. It is indulgent to a fault in allowing cities to later justify their suspect motives. The statutory language requiring the submitting jurisdiction to show that its voting change has neither discriminatory purpose nor discriminatory effect[55] is clear. It provides no support for the Court's construction of "purpose" as ex post facto explanation. The Court's reading of discriminatory effect is more tenable, though it inadequately provides the safeguard for existing minority voting power that § 5 seeks as a minimum.

III. Changed and Carry-over Voting Procedures

Section 5 explicitly forbids unapproved changes in voting procedures, but appears to offer no direct avenue for reaching retained, or carry-over, procedures which have discriminatory purpose or effect.[56] Several recent cases suggest, however, a wedge by which retained procedures may also be subject to § 5 examination. If § 5 is construed broadly to cover carry-over provisions as well as novel features, the section could effect a general reformation of voting procedures in covered areas. Carry-over procedures were first brought within § 5 in the *Petersburg* annexation case by viewing a new procedure and a carry-over procedure as a single entity.

A. Petersburg

The city in *Petersburg* submitted for approval an annexation plan that retained an at-large voting system.[57] The District Court for the District of Columbia rejected the plan, as had the Attorney General, but offered approval on condition that the at-large system be transformed into a ward system. The court called the rejected plan "an expansion of an at-large voting system" and found that "the expansion . . . is a change."[58] The Attorney General's office spoke of "readopting the at-large election system," and continued, "in the particular context of Petersburg we are unable to conclude that *the at-large feature* will not have a discriminatory effect on voting rights."[59] Section 5 proscribes *changes* which have a discriminatory effect, but here the effect of a *retained* feature, in the context of change, is subjected to scrutiny.

This analysis indicates that the new feature (the annexation) is not by itself objectionable, and the old feature (at-large voting) is not by itself subject to § 5, but the total effect of the combined features receives § 5 scrutiny, in the context of a shift from a black population majority to white. Considering the old and new together is arguably in the spirit of § 5, because it is clear that in tandem with the annexation, the at-large voting procedure takes on a new

55 *See* note 4 *supra.*
56 *Id.*
57 *See* discussion accompanying notes 31-33 *supra.*
58 354 F. Supp. at 1029.
59 *Id.* at 1023 (emphasis added). Since *Georgia,* this is all that the Attorney General or the District Court for the District of Columbia need conclude, viz., that the political unit has not carried its burden of showing lack of discriminatory effect. For a contrasting conclusion, see *Beer, infra* note 102.

cast and weakens the power of the black vote. If the "freezing effect" of § 5 is to have meaning, a change cannot be scrutinized in isolation without concern for its interaction with retained procedures. The *Richmond* Court displayed a realistic appreciation of the thrust of § 5 when it affirmed the *Petersburg* court's conditioning of approval on a change to a ward system.[60]

B. Georgia

Georgia v. United States [61] suggests a broader use of § 5, in the context of a redistricting change, to effect a reform of carry-over procedures. In *Georgia* the interaction between the novel and retained procedures is not as clear as in *Petersburg*. The redistricting change seems more nearly the *occasion* for examining carry-over practices. If this tendency were extended, periodically required redistricting could bring every voting practice under § 5 scrutiny.

In *Georgia,* the state submitted to the Attorney General two reapportionment plans for the state House of Representatives. Both were rejected, because of the "combination of multi-member districts, numbered posts, and a majority (runoff) requirement."[62] Even though the second plan apparently reduced the number of multimember districts below the 1964 figure and even though "multi-member districts, numbered posts and a majority runoff requirement were features of Georgia election law prior to November 1, 1964," § 5 applies

> if that section of the Act reaches the substance of those changes. Section 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters.[63]

Georgia's reapportionment plan provided an occasion for a more general investigation of the racial effects of its voting procedures. Apparently, even those features which are not new and which do not take on a new cast (as had the at-large system with a different racial majority in *Petersburg)* can be found objectionable under § 5. If this reading is adopted, it would mean that the reapportionment that is mandated periodically by law will, in areas covered by the Voting Rights Act, provide an opportunity for wholesale reformation of voting practices, old and new.[64]

C. Beer

The suggestive reading of § 5 "changes" in *Georgia* was extended in *Beer v.*

60 410 U.S. 962 (1973).
61 411 U.S. 526 (1973).
62 *Id.* at 530 n.22.
63 *Id.* at 531.
64 The Court's holding in Connor v. Johnson, 402 U.S. 690 (1971), legitimatized the escape of Mississippi and later Alabama from § 5 coverage of their redistricting. By simply not formulating acceptable redistricting plans, these states surrendered redistricting authority to the local federal district courts. The Court held that the plans of such courts do not fall under § 5, though they are subject to review in the Supreme Court. The *Connor* Court required amendment of the district court's plan so as to eliminate multimember districts, and also expressed its preference for single-member districts. These determinations were within the Court's supervisory power. For a review of more recent history on these matters, see COMMISSION REPORT, *supra* note 1, at 211-14, 239-41.

United States.[65] In this holding by the District Court for the District of Columbia, every feature of the New Orleans system of electing city councilmen was weighed in considering the acceptability of a redistricting plan. The carry-over of an at-large system of electing two of the seven council members received special attention.

Having twice unsuccessfully sought approval of redistricting plans from the Attorney General, New Orleans sought a declaratory judgment from the district court.[66] In the New Orleans plan there were new district lines and a number of suspect procedures were retained, including a majority vote requirement and an at-large requirement.[67] The Attorney General had objected only to the district lines and had not mentioned the noxious carry-over elements.[68] The court nonetheless considered all of these elements in judging the legitimacy of the district lines and gave special attention to the at-large feature.[69] The city contended that the at-large procedure was not subject to § 5, since it had been used since 1954 and because it was unaffected by the redrawing of ward lines for the other five council seats.[70] The court responded that the redistricting plan was not to be judged in a vacuum, but as part of the whole election machinery: "The plan, to merit judicial approbation, must survive not only the restrictions on black voting which it alone imposes but also those which jointly with extrinsic phenomena it makes possible."[71]

This view echoes those considered above in *Petersburg* and *Georgia*. *Beer*'s understanding of changes, however, goes a step beyond its predecessors, by suggesting a normative dimension of changes. This more expansive view is dictated in part by other dynamics of the *Beer* analysis which have no counterpart in *Petersburg* and *Georgia*. The opinion has a strong constitutional coloration, and constitutional analysis obviously extends beyond § 5 "changes."[72] *Beer*'s concept of "dilution" is constitutionally based and tends to subtly refocus the § 5 view of changes. An adumbration of *Beer*'s analysis of "dilution" reveals a shifting of perspective from the "before" and "after," central to § 5, toward a non-temporal ideal of fair voting arrangements.

When the *Beer* court used "change words," such as "diminish," "weaken," and "reduce," it was often not referring to the differences between current and proposed practices or effects. Instead, it was speaking of the difference between "natural" black voting strength, calculated as percentages of the city's population or registered voters, and the percentage of councilmen which the proposed plan and carry-over procedures would give blacks the power to elect. Thus,

65 374 F. Supp. 363 (1974).
66 374 F. Supp. at 367, 369-70.
67 *Id.* at 368.
68 *Id.* at 370 n.33.
69 *Id.* at 399-400.
70 *Id.* Whether § 5 was properly applicable to the at-large feature was one of the "questions presented" to the Supreme Court when *Beer* was argued on March 25, 1975. The other issue was whether the court used improper criteria and standards in evaluating the effect of the plan. 43 U.S.L.W. 3007 (U.S. July 9, 1975). The case was not decided last term and has been restored to the calendar, 95 S. Ct. 1672 (1975).
71 374 F. Supp. at 400.
72 For example in Wallace v. House, 515 F.2d 619, 624 (5th Cir. 1975), the holding of the lower court of voting discrimination was constitutionally based, but there was no triggering "change," as there must be in § 5.

> in determining whether the plan would *diminish* the black-vote potential endowed by a large black population, we similarly included the at-large seats in the computation.[73]

The at-large mechanism is tested because it tends to diminish or change the potency of the black vote from what it might have been, not in 1964 or pre-redistricting, but "normally." When the court spoke of the black vote as it "now is," it meant the "theoretical optimum designed to give fair representation to both minority and majority groups."[74] "Before" and "after" in the court's usage had more than simple temporal meaning, and so the "changes" coming within § 5 are impliedly deviations from a norm rather than differences from past practice.

Justice Brennan perhaps wrote too narrowly in *Richmond* of "what I take to be the fundamental objective of § 5, namely, the protection of *present* levels of voting effectiveness for the black population."[75] In *Petersburg,* in *Georgia,* and especially in *Beer* the ideal is not limited to the preservative function of § 5; § 5 also becomes a wedge for reaching even pre-1964 practices that give less than fair or proportional representation to blacks.

Section 5 centers on procedures different from those in effect in 1964[76] and requires that such different procedures be shown to be free of discriminatory purpose and effect. Insofar as the purposes and effects of these changes cannot be isolated from carry-over procedures it is only judicial realism to give § 5 scrutiny to the related procedures. Thus *Petersburg* tied a carry-over procedure to a change because the old feature would otherwise have new and dilutive effects. *Georgia* held that § 5 is concerned with the effect of changed practices in the context of the whole voting system, including carry-over procedures. *Beer,* however, is animated by constitutional considerations and adds a strong normative and nontemporal dimension to the concept of changes. This addition is incongruous in light of the strong temporal cast of § 5, and can only be reconciled if it is permissible to apply constitutional categories to § 5. This question is confronted more directly in the discussion of "dilution" and *Beer*'s methods.[77]

IV. "Dilution" and *Beer v. United States*

As concern has shifted from preventing denial of the vote to prohibiting its dilution on racial grounds,[78] it has become necessary to determine what constitutes dilution. Correlatively, as Justice Frankfurter pointed out: "One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth."[79] Determining the value of an undiluted vote is crucial in screening changed voting procedures for the discriminatory effect proscribed by § 5. Although the meaning and standards

73 374 F. Supp. at 399 (emphasis added).
74 *Id.* at 388, *quoting* Dobson v. Mayor & City Council, 330 F. Supp. 1290, 1299 (D. Md. 1971).
75 95 S. Ct. at 2312 (emphasis in original).
76 *See* note 4 *supra.*
77 *See* note 98 *infra.*
78 Derfner, *supra* note 15, at 524.
79 Baker v. Carr, 369 U.S. 186, 300 (1962).

for dilution are not settled, broadly it means, in a racial context, that species of discriminatory effect by which minority votes have less than full weight. The recent § 5 Court case, *Beer v. United States*,[80] and other constitutional cases have proposed measures for this full weight in the context of redistricting.

While § 5 offers unique coverage of "changes" in voting practices, the concept of "dilution" has a constitutional history that is longer and broader than its usage in § 5 cases. Section 5 cases have not construed the meaning of "dilution" rigorously or with constitutional resonance.[81] Although *Beer* is formally a § 5 case, its analysis is often indistinguishable from that of purely constitutional redistricting cases. This constitutional tradition must be discussed to understand *Beer* and compare its proposed standard for the undiluted vote of "power to command racial proportionality"[82] with the available alternatives.

A. *The Constitutional Background*

Twenty-five years ago the Court first recognized the right to an undiluted vote:

> The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted.[83]

Justice Warren echoed these thoughts in the "one man, one vote" decision, *Reynolds v. Sims*,[84] a fourteenth amendment, equal protection case: "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." The Court's decisions in *Allen* and *Perkins* transformed § 5 into the most important section of the Voting Rights Act. In holding that the Act reached every type of election change, both opinions accepted that "Congress intended to adopt the concept of voting articulated in *Reynolds v. Sims* and protect Negroes against a dilution of their voting power."[85] The Court thereby recognized the effect on § 5 of a constitutional tradition regarding dilution. That tradition has continued to develop and bear on § 5, especially in two important redistricting cases, *Whitcomb v. Chavis*[86] and *White v. Regester*.[87]

80 374 F. Supp. 363 (D.D.C. 1974).

81 "Dilution" has been used in § 5 cases in at least three senses: (1) as a merely statistical event, Holt v. Richmond, 334 F. Supp. 228, 232 (E.D. Va. 1971); (2) normatively, as a species of abridgment, 374 F. Supp. at 387; and (3) in an intermediate sense, as something to be offset, 354 F. Supp. at 1031. These different meanings account for the sharp difference of interpretation of *Perkins* in *Richmond* between Justice Brennan and the majority. 95 S. Ct. at 2302-03, 2311.

82 "In determining the impact of a redistricting plan upon the voting capability of a racial minority, the relevant comparison is between the results which the minority is constitutionally free to command and the results which the plan leaves the minority able to achieve. A substantial difference between the two is unconstitutionally enervating." 374 F. Supp. at 388.

83 South v. Peters, 339 U.S. 276, 279 (1950).

84 377 U.S. 533, 555 (1964).

85 393 U.S. at 588 (Justice Harlan's disapproving but accurate reading).

86 403 U.S. 124 (1971).

87 412 U.S. 755 (1973).

Whitcomb v. Chavis was a watershed for establishing standards for finding racially discriminatory effect in redistricting cases. In *Whitcomb,* black plaintiffs contended that the Marion County, Indiana, system of electing state legislators operated to dilute the black vote.[88] The county's legislators were all chosen in multimember districts and blacks were rarely elected. The Court "insisted that the challenger carry the burden of proving that multimember districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements," and recalled that it had "not yet sustained such an attack.[89] *Whitcomb* compels a plaintiff to go beyond a showing that the district lines and voting procedures produced a dearth of minority representatives, and requires that he show that the political process itself was not equally open to minorities or that those elected were in fact not representing their constituents' interests.[90]

For several years no plaintiff could carry this onerous burden of showing less than "equal access to the political process" or "reverse legislative outcome." Finally, in *White v. Regester* this "equality of access" test was applied in the totality of the circumstances to show that multimember districting was discriminatory. The circumstances in *White* included a history of racial discrimination and bloc voting, a paucity of elected minority representatives, and suspect election procedures.[91] The Court found that multimember districts, while not per se unconstitutional, were being used "invidiously to cancel out or minimize the voting strength of racial groups."[92]

B. Beer v. United States

Though *Beer* was a § 5 case, its finding of dilution is heavily colored by this application of the *Whitcomb* test in *White. Beer* attempted to meld the approach of a § 5 case with the tradition of constitutional redistricting cases. *Beer* transcended its constitutional predecessors, *Whitcomb* and *White,* factually, as it dealt not only with the validity of multimember districts but also with the particular lines drawn for single-member districts.

Beer's standard for dilution is simple and firm. When redistricting results in racially nonproportional districts—blacks having less than the power to command a proportion of representatives equal to the ratio of the black population—this constitutes the dilution and abridgment forbidden by § 5 and the fifteenth amendment.

> Dilution—a species of abridgment—of the right to vote is necessarily gauged by the difference between the value—the weight—which the vote should have and the value which in the particular circumstances it really has.[93]

88 403 U.S. at 128-29.
89 *Id.* at 144.
90 *Id.* at 149-50, 155.
91 412 U.S. at 766-67. All of these circumstances are also present in *Beer* and presumably would obtain in many § 5 actions.
92 *Id.* at 765.
93 374 F. Supp. at 387.

Beer answered the implicit questions of what value the vote should have, and for whom. Its weight, given a history of bloc voting, is the power a racial group has to control the election in a district, and its proper measure can be determined by taking the percentage of the population (or perhaps of the registered voters)[94] which the minority comprises and comparing it with the percentage of council seats that could be controlled. This "power to command proportionality" test is at least arguably not the same as the test of proportional representation rejected in *Whitcomb* and *White*.[95] That rejected test concentrates on proportions in fact elected as an improper index of the undiluted vote, while the *Beer* proposal emphasizes the power to command rather than the result actually commanded. When, however, the totality of the circumstances includes, as it did in *Beer*, a history of discrimination, the distinction between potential and result tends to evaporate:

> the practice of bloc voting along racial lines which so frequently pervades elections in New Orleans would expectably bring the black and white voting potentials fairly close to reality.[96]

In any case, *Beer* clearly applied the "power to command" test literally as the primary basis for deciding the permissibility of a redistricting plan:

> Based upon voter registration, black voting strength is 34.5% of total voting strength in New Orleans. With seven members to be nominated or elected at councilmanic elections, the power of the black vote is theoretically equivalent to 2.42 seats on the Council. . . . It cannot be doubted that the *reduction* in the strength of the black vote from its natural potential of 2.42 seats to an actual equivalent of a dubious one seat is a dilution in every sense of the word.[97]

Beer impliedly holds that § 5 requires affected areas to redistrict in a color-conscious way so as to ensure voting power to black voters in proportion to their numbers.

The "power to command proportionality" test developed in *Beer* appears as a *constitutional* conclusion which has no obvious limitation to § 5 cases. The expansiveness of this conclusion promises breadth of application, but arguably compromises *Beer*'s § 5 basis.[98] Whatever the propriety of *Beer*'s constitutional

94 *Id.* at 388-93, 393-99. The court applies both, using headings of "present" (registered voters) and "natural" (population) black voting strength. The different standards here produce the same result.

95 "Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination *absent* evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice." 403 U.S. at 149 (emphasis added). The rejection of the proportionality test is qualified by what other evidence can be adduced; so evidence of lack of proportionality, while never conclusive by itself would be relevant in some circumstances. 412 U.S. at 765-66.

96 374 F. Supp. at 389.

97 *Id.* at 388-89 (emphasis added).

98 The court recognized that it has authority to hear only § 5, *id.* at 400, but for guidance as to what constitutes the abridgment forbidden by § 5, it looks to the "theory and practice prevalent in legislative [constitutional] reapportionment cases, wherein essentially the same problem has arisen," *id.* at 383. In this constitutional tradition the court finds an "instructive methodology" and the standard general test for "equality of access," *id.* at 384. This test

methods, they aid comparison of *Beer*'s "power to command proportionality" test with tests developed in recent constitutional redistricting cases.

C. *Alternate Standards for the Undiluted Vote*

The *Beer* court has not been alone in attempting to apply and specify the *Whitcomb-White* test for racial dilution in redistricting. Alternate standards for an undiluted vote have appeared in the recent constitutional voting rights cases, *United Jewish Organizations v. Wilson*[99] and *Wallace v. House*.[100]

United Jewish Organizations began as a submission of redistricting plans to the Attorney General under the Voting Rights Act, but the suit developed into a traditional constitutional action under the fourteenth and fifteenth amendments. White voters claimed that their rights had been abridged when, in order to secure the Attorney General's approval under § 5, the New York Legislature replanned several districts to *increase* already existing nonwhite population majorities. The court rejected the claim of the white voters, finding that the new lines were justifiable as "correctives."[101] This court-allowed remedy of increasing nonwhite control beyond majority to a "safe" level indicates that a liberal standard for "proper" minority voting strength is appropriate.

However, the *United Jewish Organizations* "safety" level standard is perhaps too idiosyncratic in nature for purposes of comparison with other measures of the undiluted vote. The standard was allowed by the court rather than required, and the court sought to ensure its constitutional acceptability by calling it a *remedy*. These limiting characteristics can be discounted to a degree because the "safe" districting did in a sense result from § 5 by the Attorney General's refusal to approve other plans, and there seems to be nothing intrinsically remedial in the standard's use.[102] Whatever its limits, the *United Jewish Organizations* safety test is significant as an outpost beyond *Beer*'s proportionality standard.

Beer's proportionality test for determining undiluted votes was explicitly re-

---

is to be applied in the totality of the circumstances as *Beer* brings the constitutional tradition of *Whitcomb* and *White* into a § 5 context. If this procedure is appropriate, it might be asked how a § 5 case differs from a traditional constitutional action. *Beer* is a § 5 redistricting case and it would be unwise to pretend either that § 5 is unrelated to the fifteenth amendment or that there is no constitutional redistricing tradition. The *Beer* court, however, too greatly subjected the § 5 character to the constitutional dimension. Awkwardness results. The court, for example, recognized, *id.* at 392-93, that by § 5 the burden of proof belongs to the city, not to aggrieved voters, but made little of this significant fact. The court did assign to the city the burden that would have been borne by aggrieved voters in a constitutional action, but this simple inversion takes no account of such special § 5 traits as proscription of discriminatory purpose. The court's less than deft handling of the burden is evident in its concluding, *id.* at 393, affirmatively that the plan's effect is discriminatory, when it need have concluded only that the city failed to show lack of dilutive effect. Finally, since constitutional analysis needs no triggering "change," the temporal focus so important to § 5 is slighted. There is, then, an imperfect fit when the District Court for the District of Columbia treats a § 5 case as if it were a constitutional suit. Section 5 will perhaps be less ponderous and more effective if a style is developed which both recognizes the section's constitutional relatives and takes account of the singularities of the statute.

99 510 F.2d 512 (2d Cir. 1975).

100 515 F.2d 619 (5th Cir. 1975). The plaintiff is a black man named George Wallace, Sr.

101 Of course greater latitude has been allowed by courts when measures are remedial.

102 The dissent makes this point vigorously, 510 F.2d at 529. The court speaks of correcting an invidious discrimination, *id.* at 525, but as the rejected district lines were never implemented for lack of approval from the Attorney General, it is not clear exactly what is corrected or how.

jected in a recent Fifth Circuit redistricting case, *Wallace v. House*.[103] There the court adopted only a "fundamental fairness" specification of the *Whitcomb* test. In *Wallace*, a small Louisiana town had an at-large system of electing city councilmen which had been found unconstitutional by a lower court.[104] In the town there was a black population majority, but a slim white voting majority which regularly returned all-white councils. Under a district court order the town developed alternate arrangements and adopted one which created two black wards, two white wards, and left one council seat to be filled by at-large voting.[105] The Circuit court found that this plan did not unconstitutionally dilute the black vote and held that the district court should have deferred to legislative preference for this plan rather than adopt the alternate, single-member plan.[106]

The pertinence of *Wallace* is its standard for the undiluted vote. Like all cases in this constitutional lineage, *Wallace* used the "equality of access" barometer of dilution developed in *Whitcomb* and *White* and applied through the "totality of the circumstances."[107] But while *Beer* was willing to specify that this general test in a Southern context meant the power to command proportional representation, *Wallace* shied from such an interpretation:

> Multi-member districts thus pose a problem of degree of fair representation —"fair" not in the sense either of "considerable" or of "proportionate," but rather in a general sense of equity . . . *the dilution doctrine [is] an intensely practical, factually-oriented rule against fundamental unfairness.*[108]

The *Wallace* court spoke more particularly at one point, recognizing that blacks will now control two of five seats in the council,

> a share only slightly lower than the proportion of black voters in the entire electorate; such representation will give blacks that *access* to the political process which was denied to them under the all-at-large plans. . . .[109]

While this approximates the language of *Beer* as a test of equality of access, the *Wallace* holding actually develops a more general test: "The Constitution, however, demands not racial representation by ratio but racial equity in the political process."[110]

This trio of cases with their suggestions of proper standards for measuring the undiluted black vote are in some ways different and not easily compared.

---

103 515 F.2d at 629.
104 *Id.* at 622.
105 *Id.* at 625.
106 *Id.* at 638. The legislative body whose plan receives deference from the circuit court is the same one that had perpetuated and defended the obviously and later admitted racist prior arrangements. Although the court found and excoriates the racism and unrepresentativeness of earlier city councils, and referred to the Supreme Court as having "meant that to give a black voter a choice of voting for one of three white candidates who know nothing and care less about his or her interests is to render the vote nugatory . . . ," *id.* at 629, it concludes its application of the "intensely practical" dilution doctrine by saying, "We are not prepared to presume . . . that no white person in Ferriday can fairly represent a black person." *Id.* at 638.
107 *Id.* at 628-29.
108 *Id.* at 629 (emphasis added).
109 *Id.* at 634 (emphasis added).
110 *Id.* at 638.

United Jewish Organizations spoke of what may be *allowed* as a measure of proper minority voting strength, while the others speak of *requirements. Beer* alone was a § 5 case, although the related constitutional considerations weighed heavily in the opinion. In spite of these differing contexts, three distinct standards for measuring the undiluted black vote emerge. *Wallace* was an unimaginative application or specification of the *Whitcomb-White* tradition, and offers only a test of fundamental fairness. *Beer,* on the other hand, held that where there is a history of discrimination, anything less than a power to command proportional representation of racial lines is constitutionally impermissible. Finally, *United Jewish Organizations* allowed redistricting that increases black voting power by creating "safe" districts as a remedy.

The Supreme Court's rejection in *Whitcomb* and *White* of proportional results makes it unlikely that *Beer*'s "power to command proportionality" test would be acceptable as a general rule or that *United Jewish Organizations* would be adopted except as a remedy. The Court's giving weight to a discriminatory history in *White* suggests, however, that the *Beer* test has a better chance of winning acceptability in a Southern context. If dilution is to be an "intensely practical doctrine" as the *Wallace* court maintained, specification of the *Whitcomb-White* equality of access test is needed, especially where a continuing history of discrimination can be masked by outward forms of equality. A newly found "fundamental fairness" will not suffice. *Beer* does not suffer from a similar lack of specificity. As a constitutional requirement, even in a Southern context, *Beer*'s "power to command" test may verge too closely to the proportional results test already rejected by the Court. As a § 5 standard, with the submitting jurisdiction bearing the burden of showing that its district lines and voting procedures do not dilute the vote, the *Beer* test ought to be more readily accepted.

V. Conclusion

Judicial interpretations of § 5 of the Voting Rights Act have been notably scanty. The section was of minor importance for several years and, even after *Allen,* the decisions concerned § 5's coverage as opposed to its merits. The Attorney General's rulings and guidelines have had a significant deterrent effect,[111] but the section's future is, in important part, in judicial hands. The recent *Richmond* decision, particularly as an interpretation of "purpose" in § 5, does not augur well for the section's continued effectiveness. If "purpose" is to mean belatedly discovered justification, straightforward and sympathetic exegesis of § 5 is not to be expected.

There are, in the embryonic tradition of § 5 cases, other pivotal concepts whose meanings are still unfolding. Court interpretations of these terms will greatly affect the continued effectiveness of § 5. The Act forbids covered areas to enact discriminatory "changes" in their election laws. Some courts have looked on such "changes" as so closely tied with carry-over procedures that all have come under scrutiny. If this view is developed, periodically required redistricting, as

111 Derfner, *supra* note 15, at 577-80.

well as other "changes," will provide opportunity for doing away with discriminatory procedures, no matter how lengthy their history.

An important criterion for judging discriminatory effect has been "dilution," but the meaning of this concept is no more settled than is the meaning of "changes." The Court has offered constitutional guidance on testing redistricting for discriminatory effect, but it has not yet offered a specific description of the racially undiluted vote. Until such a firm standard is erected, § 5 examinations of voting changes for the dilution which is a species of the proscribed discriminatory effect will be unsettled. *Beer* proposes, at least within the context of a discriminatory history that is also the common § 5 setting, a test which is specific and demanding but, at least as a constitutional standard, perhaps too closely resembles the proportional results criterion already rejected by the Court.

"Reconstruction enfranchisement reached its high point precisely 100 years ago, yet its gains were obliterated quickly. While we are not likely to return to an era of total disenfranchisement, we will not make lasting gains unless efforts to eliminate vote dilution persevere."[112] Section 5 is crucial to such efforts, but the recent *Richmond* decision offers little judicial support. The upcoming *Beer* opinion should indicate whether the Court will continue such restriction or give full effect to § 5.

Wm. J. Wernz

112 *Id.* at 583.

Pages 353-354 are Intentionally Blank.