Boston College Third World Law Journal

Volume 10 | Issue 2 Article 7

5-1-1990

Getting Around the Voting Rights Act: The Supreme Court Sets the Limits of Racial Voting Discrimination in the South

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GETTING AROUND THE VOTING RIGHTS ACT: THE SUPREME COURT SETS THE LIMITS OF RACIAL VOTING DISCRIMINATION IN THE SOUTH

I. INTRODUCTION

Congress enacted the Voting Rights Act (the "Act")[1] in 1965 in response to the "long and sorry history of resistance to the Fifteenth Amendment[]."[2] Section 5 of the Act, which requires certain jurisdictions to preclear changes to their electoral systems, was intended to "eradicat[e] the continuing effects of past discrimination" in the jurisdictions covered by the Act, and "insure that old devices for disenfranchisement would not simply be replaced by new ones."[3] Racial voting discrimination was not eradicated by the work of the "freedom riders" in the 1960s and early 1970s. Implementation of the Act eliminated the more flagrant methods of voting discrimination, such as literacy tests and poll taxes. Nevertheless, minority disenfranchisement continues in many Southern states through the use of practices such as annexations and redistricting and by the enactment of electoral systems which dilute the minority vote. Despite the victories of the civil rights movement in recent decades, voting discrimination has continued into the 1990s.[4]

The Supreme Court has espoused inconsistent interpretations of Section 5 of the Act. The Court has adopted dual standards of review for cases involving annexations and for cases involving other methods of voter discrimination. This Note will explore the development of these dual standards, and examine whether the stan-

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[1] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1982)).

[2] City of Richmond v. United States, 422 U.S. 358, 379 (1975) (Brennan, J., dissenting).

[3] City of Lockhart v. United States, 460 U.S. 125, 141 (1983) (Marshall, J., dissenting) (quoting S. REP. No. 417, 97th Cong., 2d Sess., at 6, 12, 44 (1982)).

[4] *See, e.g.*, Collins v. City of Norfolk, VA., 883 F.2d 1232 (4th Cir. 1989) (case brought under § 2 of the Act, alleging that the city's at-large electoral system diluted black voting strength and that the system had been maintained for a discriminatory purpose, remanded by the circuit court to the district court in 1989). *See also* Gunn v. Chickasaw County, Mississippi, 705 F. Supp. 315 (N.D. Miss. 1989) (plan precleared under § 5 by the U.S. Attorney General's office in 1983 was held by the district court in 1989 to violate § 2 of the Act); Panel Discussion, *The Voting Rights Act and Judicial Elections: An Update on Current Litigation*, 73 JUDICATURE 74 (1989). The cases described in the above article specifically address discrimination in judicial elections and were brought under § 2 as well as § 5 of the Act. The scope of this Note is limited to a discussion of § 5 of the Act.

dards can be reconciled, both with one another, and with the intent of Congress in passing the Voting Rights Act. Section II provides the historical background of the Act and shows the century-long defiance of the fifteenth amendment of the United States Constitution which led to the passage of the Act. Section III describes the development of the dual standards of review by the Supreme Court: a "fairness" standard for annexation cases, and a "retrogression" standard for other electoral changes. Section IV examines the two standards of review in relation to one another and in light of congressional intent with respect to the Act.

II. The Historical Background of the Voting Rights Act of 1965

A. *The Reconstruction and Its Aftermath*

Resistance to the voting rights of blacks by Southern states has persisted since the end of the Civil War despite the passage of the fifteenth amendment.[5] From the onset of Reconstruction, Southern states both refused to acknowledge and actively obstructed the voting rights of black citizens.[6] The "Black Codes" were passed throughout the South, severely limiting the civil rights of blacks.[7] In Mississippi, for example, the Black Codes provided that blacks could not testify in trials involving white plaintiffs and defendants, could not sit on juries, and could not intermarry with whites, and they also provided strict vagrancy laws as a means of controlling blacks.[8] In response to the Black Codes and other overtly discriminatory actions of Southern states,[9] Congress passed the Civil Rights Act of 1866 and the Reconstruction Acts of 1867 and 1868, which gave all males over twenty-one years of age the right to vote, but excluded former Confederates and Confederate supporters.[10] Al-

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[5] *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

[6] For example, South Carolina's first Reconstruction Constitutional Convention in September, 1865, under a Unionist governor, limited voting and office-holding to free white men. *See* McDonald, *An Aristocracy of Voters: The Disenfranchisement of Blacks in South Carolina*, 37 S.C.L.R. 557, 558 (1986).

[7] *See* McDonald, *supra* note 6, at 558; Hunter, *Racial Gerrymandering and the Voting Rights Act in North Carolina*, 9 CAMPBELL L. REV. 255, 256 (1987).

[8] L. FRIEDMAN, A HISTORY OF AMERICAN LAW 504–05 (1985).

[9] For example, refusing to ratify the fourteenth amendment. *See* Hunter, *supra* note 7, at 256.

[10] McDonald, *supra* note 6, at 559.

though electoral participation of blacks improved,[11] "[t]he majority of whites never acquiesced in the sharing of political power with blacks, and a violent opposition to black enfranchisement developed. The Ku Klux Klan became widely active . . . and political intimidation, including assassination, was commonplace."[12]

In the years following the end of Reconstruction in 1877, Southern Democrats regained control of state legislatures, and enacted new voting laws patterned on the "Mississippi plan."[13] These laws included literacy and comprehension tests, poll taxes, and stringent registration deadlines.[14] These requirements were an effective method of disenfranchising blacks since, as of 1890, approximately two-thirds of adult Southern blacks were illiterate, whereas less than one-quarter of adult Southern whites were illiterate.[15] In addition, legislatures established alternative tests, such as grandfather clauses and property qualifications, in order to prevent illiterate whites from being denied the right to vote.[16] Not surprisingly, the black voting rate sharply declined. In Mississippi, for example, the percentage of blacks eligible to vote dropped from over fifty percent to about five percent.[17] The disenfranchisement of Southern blacks was far from temporary; there was little, if any, improvement in the decades that followed. As of the early 1960s, only 6.7 percent of black Mississippians were registered to vote.[18]

B. *The Voting Rights Act of 1965 and Its Effect*

The Voting Rights Act of 1965 was designed to enforce the fifteenth amendment, so as to give blacks and other minorities access to the electoral process. In Section 2 of the Act, Congress provided for the protection of the voting rights of minorities throughout the country. Using broad language, this Section prohibits the "denial

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[11] At the second Reconstruction Constitutional Convention in South Carolina in 1867, 76 out of 124 delegates were black. McDonald, *supra* note 6, at 559.

[12] *Id.* at 560.

[13] Hunter, *supra* note 7, at 259. The "Mississippi plan" was designed to reclaim state governments for white Democrats "through the systematic use of terrorism and violence." McDonald, *supra* note 6, at 562.

[14] *See, e.g.*, Hunter, *supra* note 7, at 259–60; McDonald, *supra* note 6, at 567–71; Note, *Mississippi and the Voting Rights Act: 1965–1982*, 52 Miss. L.J. 803, 831 (1982).

[15] *Katzenbach*, 383 U.S. at 311.

[16] *Id.*

[17] Note, *supra* note 14, at 832.

[18] *Id.* at 803.

or abridgement of the right of any citizen of the United States to vote on account of race or color . . . . "[19]

In light of the century of resistance to the fifteenth amendment in some parts of the country, Congress recognized that the provisions of Section 2 alone could not effectively combat the special problems presented by the history of racial discrimination and low minority voter participation in those parts of the country. Thus, in an "uncommon exercise" of authority,[20] Congress provided additional protection in Section 5 for the voting rights of minorities in "covered jurisdictions," those jurisdictions with a history of systematic exclusion of minorities from the electoral process.[21] Section 5 provides that every jurisdiction covered by Section 4(b) of the Act must submit any changes in their electoral systems to the Attorney General or to the District Court in the District of Columbia for preclearance.[22] A covered jurisdiction may not enforce any such

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[19] Section 2, as amended, reads:

(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 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section 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) of this section 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.

42 U.S.C. § 1973 (1982).

[20] *Katzenbach*, 383 U.S. at 334.

[21] Application of § 5 to a State is designated in § 4(b) of the Act, and applies

in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of such persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

42 U.S.C. § 1973b(b) (1982). "Covered" jurisdictions in 1965 included the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia, twenty-six counties in North Carolina, three counties in Arizona, one county in Hawaii and one county in Idaho. *Katzenbach*, 383 U.S. at 318.

[22] Section 5, as amended, provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the

change submitted to the District Court unless it obtains a declaratory judgment from that court that the change "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."[23] Similarly, if the proposed change is submitted to the Attorney General, a covered jurisdiction is prohibited from enforcing the change unless the Attorney General does not make an objection within sixty days.[24] Under the preclearance provision, the jurisdiction submitting the electoral changes bears the burden of showing that the change has no discriminatory "purpose or effect."[25]

By enacting Section 5, Congress enhanced the power of the Justice Department to fight racial discrimination in voting by giving

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first sentence of section 1973b(b) of this title 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 . . . on November 1, 1968, or . . . on November 1, 1972, 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 qualification, 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, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, 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, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor 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. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. 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.

42 U.S.C. § 1973c (1982).

[23] Beer v. United States, 425 U.S. 130, 133 (1976) (quoting 42 U.S.C. § 1973b as amended (1970)).

[24] *Katzenbach*, 383 U.S. at 320.

[25] Ball, *The Perpetuation of Racial Vote Dilution: An Examination of Some Constraints on the Effective Administration of the 1965 Voting Rights Act, as Amended in 1982*, 28 HOWARD L.J. 433, 438 (1985).

the Attorney General the power to monitor more effectively changes in electoral procedures in those areas of the country with a history of discriminatory voting practices.[26] Prior to the enactment of Section 5, Justice Department litigation, even when supplemented by private causes of action, was an ineffective check against states and municipalities with discriminatory voting procedures. By enacting Section 5, Congress implicitly acknowledged that the previous system was not adequate to battle the systematic exclusion of minorities embedded in the practices of many states, particularly those in the South.[27] As the Supreme Court described the Act in *South Carolina v. Katzenbach*, "[t]he measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication."[28]

Section 5 is a preventative measure. By requiring that electoral changes be precleared by the Attorney General or the District Court for the District of Columbia, it prevents the enactment of new methods of voter discrimination.[29] The preclearance provision of Section 5 allows the Justice Department to monitor electoral changes in the covered jurisdictions and thus facilitates the prevention of new forms of discrimination in those areas with a history of racial voting discrimination.

Since the enactment of the Voting Rights Act, voting discrimination has shifted from overt means of discrimination, such as poll taxes and literacy tests, to new, subtle forms of discrimination which dilute the minority vote.[30] These new types of discrimination have emerged in several forms. Annexations enlarge a city's boundaries, often changing the racial makeup of the electorate.[31] Redistricting redraws the voting districts within a city (or other political subdivi-

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[26] Pursuant to the Civil Rights Act of 1957, the Attorney General was given the power to seek injunction against public and private discrimination in voting rights. The Civil Rights Act of 1960 gave the Attorney General access to voting records. *See Katzenbach*, 383 U.S. at 313.

[27] Perkins v. Matthews, 400 U.S. 379, 396 (1971). *See also* Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 141 (1984).

[28] *Katzenbach*, 383 U.S. at 327–28.

[29] "Since the DOJ began to implement Section 5 . . . 'the most frequent use of Section 5 . . . has been to combat practices which were not identified as discriminatory when the Voting Rights Act was passed in 1965.'" Ball, *supra* note 25, at 439 (quoting D. HUNTER, FEDERAL REVIEW OF VOTING CHANGES 10 (1975)).

[30] *See id.* at 439.

[31] For an example of an annexation, assume a city annexes a suburban town. After the annexation, the suburban town would cease to exist as a separate entity, but would instead be part of the enlarged city.

sion).[32] In addition, electoral systems which dilute the minority vote have emerged.[33]

Among the most common of the discriminatory electoral systems are at-large elections, majority vote requirements and numbered post systems. In at-large voting systems, candidates are elected by entire jurisdictions, rather than by district. These systems can dilute the minority vote where racial bloc voting exists.[34] For example, in a jurisdiction where 45 percent of the voters are black and 55 percent are white, if the white voters vote as a bloc in an at-large election, the black voters foreseeably could never be represented. Similarly, in a majority-rule jurisdiction, a run-off election is required when no candidate has a clear majority. In such a system, a black voting minority may never be able to elect the candidate it, as a bloc, supports.[35]

Finally, in a numbered post system, a candidate must specify by number which office he or she is seeking.[36] Thus, each race becomes "effectively a separate election for a separate office."[37] Since votes are cast for each post, a majority voting as a bloc could elect all of the candidates, rather than electing the number of candidates proportionate to its voting strength. Under this system, the voting strength of a minority could be completely eliminated.

Despite the intentions behind Section 5,[38] the practices which the Act was designed to eliminate have persisted since its

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[32] In contrast to an annexation, redistricting does not involve the enlargement of a city's physical boundaries. Redistricting is the redrawing of electoral district lines within a city's existing boundaries.

[33] Ball, *supra* note 25, at 439.

[34] Racial bloc voting can be defined as "systematic voting among an identifiable racial group." *See* Ball, *supra* note 25, at 435 n.10. The political strength of a minority voting group can be diluted or even completely eliminated by the bloc vote of the majority.

[35] *See* Port Arthur v. United States, 459 U.S. 159, 167 (1982). To illustrate this, assume a municipality has a 45 percent black voting minority and a 55 percent white voting majority. If the black minority votes as a bloc, its candidate will receive only 45 percent of the vote. Thus, in a run-off with the next-highest vote-getter, if the white majority votes as a bloc, the candidate supported by the black minority will never receive over 50 percent of the vote.

[36] For example, in a municipality where there are three city council positions, a candidate must specify which post he or she is seeking, e.g. "Council Seat Number 2." Voters cast ballots for each of the three seats, rather than for a single candidate. Thus, rather than electing the three candidates with the highest number of votes, which would allow a minority of over 33 percent to elect one candidate, the majority can elect the candidates to all of the posts.

[37] Lockhart v. United States, 460 U.S. 125, 127 (1983).

[38] In *Katzenbach*, the Court described the purpose of § 5 as being "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." 383 U.S. at 308.

passage.[39] A 1981 study revealed that in covered jurisdictions, at-large election systems existed in 76 percent of municipalities with black majorities and in 59 percent of municipalities with black minorities.[40] None of these municipalities with at-large systems had any black representatives on the local councils.[41] The remainder of this Note examines how discriminatory voting practices have been perpetuated since the Act was passed.

III. The Development of the Dual Standards by the Supreme Court under Section 5

One year after Congress passed the Voting Rights Act, the Supreme Court gave it a clear, decisive endorsement in the face of a challenge to its constitutionality.[42] In *South Carolina v. Katzenbach*, the state of South Carolina challenged the constitutionality of the Voting Rights Act in general, and also attacked specific provisions of the Act, including Section 5.[43] The Voting Rights Act suspended South Carolina's use of a literacy test to bar black voters.[44] In addition, the state wished to change its electoral laws without Section 5 preclearance.[45] South Carolina challenged the Act on the grounds that it encroached on states' rights and exceeded congressional power.[46] The Supreme Court overruled the arguments of South Carolina and the other states, calling the Act an "'appropriate' measure[]" by Congress under Section 2 of the fifteenth amendment.[47]

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[39] For example, thirteen counties in Mississippi replaced district election with at-large elections without getting preclearance. Note, *supra* note 14, at 843.

[40] Ball, *supra* note 25, at 436 (referring to United States Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals 40 (1981)).

[41] *Id.*

[42] The Court stated: "The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S. at 324.

[43] *Id.* at 323.

[44] *Id.* at 319.

[45] *Id.* at 320.

[46] *Katzenbach*, 383 U.S. at 323. Specifically, the state challenged the constitutionality of §§ 4(a)-(d), 5, 6(b), 7, 9, 13(a) and certain provisions of § 14. *Id.* at 317. South Carolina also argued that § 4(a)-(d) violates equality of the states, due process and separation of powers and constitutes a bill of attainder; that § 5 infringes on Article III by directing the district court to issue advisory opinions; and that §§ 6(b), 9 and 14(b) violate due process. *Id.* at 323.

[47] *Id.* at 308. Virginia, Louisiana, Alabama, Mississippi and Georgia argued as amici curiae in support of South Carolina. *Id.* at 305–06.

In upholding the Act in *Katzenbach*, the Supreme Court enumerated Congress' reasons for passing the Act:

> First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner, and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.[48]

In the years following *South Carolina v. Katzenbach*, the Supreme Court has redefined the scope and intent of Section 5. In preclearance cases involving electoral changes by virtue of an annexation, the Supreme Court's interpretation of Section 5 has evolved into a "fairness" test. In these cases, election plans must be found by the Court to be "fairly designed."[49] In preclearance cases involving redistricting and other electoral changes, however, the Court has adopted a "retrogression" standard. Under this standard, electoral changes which are discriminatory can be precleared so long as the discrimination in the proposed plan is not any worse than under the existing plan.[50]

The Supreme Court's interpretations of Section 5 with respect to electoral changes through annexations and redistricting are inconsistent with each other and have fallen short of the goals heralded in *South Carolina v. Katzenbach*. In *Katzenbach*, the Court stated: "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."[51] By reading the retrogression standard into Section 5, however, the Supreme Court has allowed voting discrimination to be perpetuated. The Court has upheld discriminatory electoral plans, "[a]lthough [a] plan may . . . remain[] discriminatory, [if] it nevertheless [is] not a regressive change."[52] This perpetuation of discriminatory practices clearly does not further the goal of ridding the country of racial discrimination in voting. The "fairness" standard, on the other hand, comes closer to the goals espoused in *Katzenbach*. As this standard has

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[48] *Id.* at 309.

[49] City of Richmond v. United States, 422 U.S. 358, 370 (1975). The "fairness" standard is discussed *infra*, at text accompanying notes 54–103.

[50] *See infra*, text accompanying notes 104–144.

[51] *Katzenbach*, 383 U.S. at 315.

[52] *Lockhart*, 460 U.S. at 134.

evolved, courts may now require an improvement in the electoral system as a condition of preclearance.[53]

A. *The "Fairness" Standard For Annexations*

The "fairness" standard, which the Court has applied to annexation cases, has undergone a series of changes over the last two decades, providing broader protection of minority voting rights as it has evolved. Electoral changes caused by annexations were first held to be subject to Section 5 preclearance requirements in a 1971 case, *Perkins v. Matthews*.[54] In *Perkins v. Matthews*, the appellants, voters and candidates in Canton, Mississippi, sought an injunction against enforcement of electoral changes, including an annexation, without Section 5 preclearance.[55] The Supreme Court held that the extension of a city's boundaries through annexation is not exempt from Section 5 preclearance:

> Changing boundary lines by annexations which enlarge the city's number of eligible voters . . . constitutes the change of a 'standard, practice, or procedure with respect to voting.' Clearly, revision of boundary lines has an effect on voting in two ways: (1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation . . . . Moreover, [Section] 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation.[56]

Thus, the Supreme Court implicitly recognized that an annexation was a *per se* change to a jurisdiction's electoral system and therefore is covered by Section 5 of the Act.

In a 1987 case, the Court reaffirmed the holding in *Perkins*, and broadened the scope of Section 5 coverage in annexation cases. In *City of Pleasant Grove v. United States*, the Court held that a city's decision not to annex an area was subject to Section 5 preclearance.[57] In that case, a sparsely populated parcel inhabited solely by whites and a vacant parcel were annexed by an Alabama city, while a neighboring area, populated by blacks, was not. Inhabitants of the

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[53] *See infra* discussion of *Port Arthur v. United States*, text accompanying notes 86–103.

[54] 400 U.S. 379 (1971).

[55] *Id.* at 382.

[56] *Id.* at 388–89.

[57] 479 U.S. 462, 470–72 (1987).

latter area petitioned the city for annexation and were refused.[58] The Attorney General refused to preclear the annexed parcels,[59] and the district court also refused preclearance on the ground that "a community may not annex adjacent white areas while applying a wholly different standard to black areas and failing to annex them based on that discriminatory standard."[60] In affirming the decision of the district court, the Supreme Court stated that although "the annexations did not reduce the proportion of black voters or deny existing black voters representation . . . Section 5 looks not only to the present effects of changes, but to their future effects as well . . . . [A]n impermissible purpose under [Section] 5 may relate to anticipated as well as present circumstances."[61] Thus, the Court expanded the use of Section 5 as a powerful means to eradicate discrimination in cases involving an annexation.

In *City of Petersburg, Virginia v. United States*,[62] a 1972 annexation case which caused present changes to the electoral power of blacks, the city sought to annex an area which would increase the white population from 16,402 to 23,447, while increasing the black population from 19,701 to only 19,947.[63] This would change the black population majority of 55 percent to a minority of 46 percent.[64] The three judge district court explained the connection between the annexation and voting discrimination through minority vote dilution:

> The dilution here has occurred as a result of the annexation in the context of at-large elections and bloc-voting by race, and under these circumstances it abridges the right to vote on account of color by impairing the ability of blacks to elect candidates of their choice and to have their ideas on political matters afforded the recognition to which they are entitled on the merits and by virtue of their individual citizenship and their numerical strength in the community.[65]

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[58] *Id.* at 466.

[59] *Id.*

[60] *Id.* at 467 (quoting the district court opinion, 568 F. Supp. 1455, 1460 (D.D.C. 1983)).

[61] *Id.* at 470–71. The Court reasoned: "One means of thwarting [racial integration] is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength." *Id.* at 472.

[62] 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973).

[63] *Id.* at 1024.

[64] *Id.*

[65] *Id.* at 1029.

In *Petersburg*, the Supreme Court summarily affirmed the district court's conditional approval of the proposed annexation.[66] The approval was conditioned on modifications of the electoral system "calculated to neutralize . . . any adverse effect upon the political participation of black voters . . . i.e., that the [city of Petersburg] shift from an at-large to a ward system of electing its city councilmen."[67] By adopting this "neutralization" standard, the district court was thus able to require that the city make a progressive change in its electoral system as a means to balance the adverse effect the annexation would have on the political strength of black voters.[68]

The Court further refined the standard of Section 5 in annexation cases in a 1975 case, *City of Richmond v. United States*.[69] *Richmond* involved an annexation of a portion of Chesterfield County, Virginia, which would decrease the percentage of blacks living in the city from 52 percent to 42 percent.[70] The annexation was submitted to the Attorney General for preclearance, and was denied.[71] The Attorney General recommended that the at-large election system be replaced with a single-member district system in order to minimize the adverse racial effects that would be caused by the annexation.[72] The city and the Attorney General submitted to the district court as a consent judgment a nine-ward plan in which four wards would have substantial black majorities and one ward would have a split of approximately 59 percent white and 41 percent black.[73] The district court rejected the plan, finding that the city had not shown a legitimate purpose for the annexation.[74] The district court further

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[66] 410 U.S. 962 (1973).

[67] *Petersburg*, 354 F. Supp. at 1031.

[68] The replacement of the at-large system, which can dilute the black vote, with a ward, or district system of voting can be viewed as a progressive change. Rather than electing candidates on a jurisdiction-wide basis, in which a majority voting as a bloc could foreseeably succeed in electing its candidate every time, the jurisdiction is broken down into districts. Since in *Petersburg* the black minority was substantial (46 percent), *id.* at 1024, it was likely that one or more of the districts would have a black voting majority. Thus, the effects of racial bloc voting could be lessened and minority voting groups would be more likely to be afforded representation. *See supra* note 34.

[69] 422 U.S. 358 (1975).

[70] *Id.* at 363.

[71] *Id.* at 363–64.

[72] *Id.* at 364. The Attorney General's proposal here was very similar to the district court's condition on the approval of the annexation in *Petersburg*. *See supra* text accompanying notes 62–68.

[73] *Id.* at 366.

[74] *Id.* at 367. The district court referred the case to a Special Master for recommendations. Based on the findings of the Special Master, the district court stated that the city's "1970 changes in its election practices following upon the annexation were discriminatory in purpose and effect and thus violative of Section 5[] . . . . " *Id.* at 366–67.

found that the proposed nine-ward system did not "minimize[] the dilution of black voting power to the greatest possible extent."[75] The district court thus declined to approve the annexation because it "had the forbidden effect of denying the right to vote of the Negro community in Richmond."[76]

On review, the Supreme Court's opinion in *Richmond* made clear that the bare fact of a reduction in bloc voting strength will not be enough to establish a violation of Section 5. In vacating the decision of the district court, the Supreme Court acknowledged its recognition in *Perkins* that "changes in city boundaries by annexation have sufficient potential for denying or abridging the right to vote . . . ."[77] The Supreme Court specifically limited its holding in *Perkins*, however: "[W]e did not hold in *Perkins* that every annexation effecting a reduction in the percentage of Negroes in the city's population is prohibited by [Section] 5."[78] The Court laid out a two-step test to determine whether an annexation violates Section 5. First, a court must determine that legitimate, verifiable reasons for the annexation are demonstrated by the city.[79] Second, a court must find that an election plan, such as the ward plan in *Richmond*, is "fairly designed" in order to "afford [minorities] representation reasonably equivalent to their political strength in the enlarged community."[80] Thus, in order to uphold the city's annexation in *Richmond*, the Supreme Court fashioned a "fairness" standard by which to determine the permissibility of an annexation. The Court explained:

> To hold otherwise would be either to forbid all such annexations or to require, as the price for approval of the annexation, that the black community be assigned the same proportion of council seats as before, hence perhaps permanently overrepresenting them and underrepresenting other elements in the community, including the nonblack citizens in the annexed area.[81]

The Supreme Court remanded the issue of whether the Richmond annexation was legitimate under the "fairness" test.[82]

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[75] *Id.* at 367.

[76] *Id.*

[77] *Id.* at 368.

[78] *Id.*

[79] *Id.* at 372. Valid reasons for annexation include, e.g., broadening the tax base and expanding potential for growth. *See also Petersburg*, 354 F. Supp. at 1024.

[80] *Richmond*, 422 U.S. at 370.

[81] *Id.* at 371.

[82] *Id.* at 379. In upholding preclearance coverage for *future* effects of an annexation in *Pleasant Grove v. United States*, the Supreme Court drew on *Richmond*, citing its reasoning:

In a dissenting opinion, Justice Brennan argued that the "neutralization" standard embraced by the district court in *City of Petersburg*[83] should be applied in the *Richmond* case.[84] Justice Brennan argued that "the dilutive effect of an annexation of this sort can be cured only by a ward plan 'calculated to neutralize . . . any adverse effect upon the political participation of black voters.'"[85]

The Supreme Court drew on Justice Brennan's *Richmond* dissent in its opinion in *Port Arthur v. United States*, decided in 1982.[86] *Port Arthur* involved the consolidation of two neighboring Texas cities and the annexation of an incorporated area, resulting in the decrease in the percentage of blacks in the population in Port Arthur from 45.21 percent to 40.56 percent.[87] The city also wanted to expand its city council from six council members and a mayor to eight council members and a mayor.[88] All council seats were to be governed by a majority vote rule.[89] The district court found that there were legitimate reasons for the annexation, such as increased tax revenue and the hope of attracting new businesses and creating new jobs.[90] Thus, under the *Richmond* standard, the annexation could not be denied as discriminatory in purpose.[91] The district court refused to approve the plan, however, because it "insufficiently neutralize[d] the adverse impact upon minority voting strength which resulted from the expansion of Port Arthur's borders."[92] The district court suggested as a plan of neutralization the elimination of the majority vote requirement for the two at-large

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> An official action, whether an annexation or otherwise, taken for the purpose of discrimination against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute . . . . An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be.

479 U.S. at 471 n.11 (quoting 422 U.S. at 378–79).

[83] *See supra* text accompanying notes 62–68.

[84] 422 U.S. at 388–89 (Brennan, J., dissenting).

[85] *Id.* at 388–89 (quoting *Petersburg*, 354 F. Supp. at 1031).

[86] 459 U.S. 159 (1982).

[87] *Id.* at 162.

[88] *Id.* at 164. The eight council members and the mayor were to be elected as follows: (i) election of four council members from single-member districts (two with black majorities); (ii) election of two council members from districts made of two of the four original districts (one would have a black majority); (iii) at-large elections of two council members and a mayor from each of the two larger districts. *Id.*

[89] *Id.*

[90] 459 U.S. at 170 n.2 (Powell, J., dissenting).

[91] 459 U.S. at 163.

[92] *Id.* at 164.

seats, and stated that if this condition were met, it would offer its approval.[93]

In upholding the decision of the district court, the Supreme Court distinguished *Port Arthur* from *Richmond* on the facts. The Court stated that *Port Arthur* differed from *Richmond* in that *Richmond* "involved a fairly drawn, single-member district system that adequately reflected the political strength of the black community in the enlarged city."[94] In *Port Arthur*, however, preclearance was denied because "the postexpansion electoral system did not sufficiently dispel the adverse impact of the expansions on the relative political strength of the black community . . . ."[95] The Supreme Court's requirement here that the impact on black political strength be sufficiently dispelled is similar to the neutralization analysis in *Petersburg*. In *Port Arthur*, the Supreme Court seemed to include the neutralization standard in the fairness standard when it distinguished that case from *Richmond*, which was "fairly drawn" because the electoral system "adequately reflected the political strength of the black community . . . ."[96]

The Supreme Court expanded the fairness test in *Port Arthur* to allow the district court greater discretion in deciding annexation cases. Thus, the district courts were given the flexibility to impose conditions when approving annexations. In *Port Arthur*, the Court stated that "eliminating the majority-vote requirement was an understandable adjustment" for the district court to demand.[97] The Supreme Court explained:

> In the context of racial bloc voting prevalent in Port Arthur, the [majority-vote] rule would permanently foreclose a black candidate from being elected to an at-large seat. Removal of the requirement, on the other hand, might *enhance* the chances of blacks to be elected to the two at-large seats affected by the District Court's conditional order but surely would not guarantee that result.[98]

The fairness test gleaned from the *Richmond* opinion effectively grants the district court the power to require progress in electoral

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[93] *Id.*

[94] *Id.* at 166.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 167.

[98] *Id.* at 167–68 (emphasis added). Removal of the majority-vote requirement could enhance the chances of blacks being elected because the effects of racial bloc voting could be diminished. *See supra* notes 34–35.

systems when approving annexations. Rather than merely approve or deny an annexation, the district court may condition approval of one electoral change on an improvement of another aspect of the electoral system.[99] Port Arthur's black community comprised a minority of voters before and after the annexation. In the pre-annexation electoral scheme, council members were elected at-large, thus "foreclos[ing] a black candidate from being elected . . . ."[100] By requiring that the city abandon the majority-vote rule as a condition to obtaining preclearance for its annexation plan, the Supreme Court in effect mandated that the post-annexation system must be an improvement on the old scheme, in the interest of fairness.

In a dissenting opinion in *Port Arthur*, Justice Powell, joined by Justices Rehnquist and O'Connor, attacked the majority's grant of discretion to the district courts as "authoriz[ing] a standardless equitable jurisdiction in district courts."[101] Although Justice Powell recognized the power of a district court to disagree with the Attorney General's findings, he stated "it does not follow that the District Court was 'sitting as a court of equity' . . . and had the power to require political enhancement."[102]

In addition, Justice Powell refused to recognize that the holding in *Port Arthur* was consistent with *Richmond* or with the intent of Congress in enacting Section 5: "The theory that political strength should be enhanced, rather than preserved, is new doctrine. It is a view Congress has never embraced . . . ."[103]

B. *The Retrogression Test*

Justice Powell's assertion in the *Port Arthur* dissent is supported by the Supreme Court's interpretation of the Voting Rights Act in non-annexation Section 5 cases.[104] The fairness standard adapted from the *Richmond* case, which allows for the enhancement of a

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[99] For example, in *Port Arthur*, the city had to abandon the majority-vote rule in order to get approval for the annexation. 459 U.S. at 167–68. This can be viewed as progressive because abandoning the majority-vote rule has the potential to reduce the effects of racial bloc voting. *See supra* notes 34–35.

[100] *Port Arthur*, 459 U.S. at 167.

[101] 459 U.S. at 169 (Powell, J., dissenting).

[102] *Id.* at 173.

[103] *Id.* at 172–73. As support for this statement, Justice Powell cited a Senate Committee Report: "Electoral devices, including at-large elections, per se would not be subject to attack under Section 2. They would only be vulnerable if, in the totality of circumstances, they resulted in the denial of equal access to the electoral process . . . . " *Id.* at 173 n.4 (quoting S. REP. No. 417, 97th Cong., 2d Sess., at 16 (1982)).

[104] *See, e.g.*, Beer v. United States, 425 U.S. 130 (1976).

minority's political power as a condition of annexation, has not been applied to other electoral changes which affect political representation. In a line of cases involving redistricting and electoral changes, the Court has held that the congressional intent behind Section 5 was to preserve the status quo of political representation, even where voting discrimination continues to exist. Thus a change in the electoral system which results in discrimination may be precleared, so long as the discrimination is not worse than before the electoral change. The Supreme Court permits voting discrimination in these cases so long as it is not regressive.

In *Beer v. United States*,[105] the city of New Orleans submitted a redistricting plan for preclearance after its 1970 census. Within the city limits, 35 percent of the registered voters were black.[106] Prior to the 1970 plan, the city was divided into five electoral districts, running roughly north to south through the city, with one council member elected from each district and two council members elected at-large. In one of these council districts, roughly half of the voters were black. In the other four districts white voters had a clear majority.[107] The disparity between the percentage of black voters in the city and their underrepresentation in council districts may be attributed to the north-south design of the districts and the east-west progression of the predominantly black neighborhoods.[108] Following rejection by the Attorney General of one plan,[109] the city submitted to the district court a plan similar to the pre-1970 census plan, in which one of the five council districts had a majority of black voters of 52.6 percent. The other four districts had white majorities.[110]

The district court rejected this plan, on the basis that it "would have the effect of abridging the right to vote on account of color."[111] The district court based its decision on two determinatons. First, blacks would not be represented reasonably in proportion to their

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[105] 425 U.S. 130 (1976).

[106] *Id.* at 134.

[107] *Id.* at 135.

[108] *Id.* at 135–36. A district plan that would logically provide more proportional representation would be districts in an east-west direction, like the direction of the black neighborhoods.

[109] There were two plans submitted for approval. The Attorney General objected to the first plan because blacks did not constitute a majority of voters in any of the districts. The plan discussed here is a second plan, which the city began preparing even before the Attorney General objected to the first plan. *See id.* at 135–36.

[110] *Id.*

[111] *Id.* at 136.

share of the city's registered voters.[112] Second, the continued use of two at-large council seats served to minimize the black vote.[113] The district court thus advanced a variation of the fairness standard enunciated in *Richmond*.[114]

Upon review, the Supreme Court patently rejected the holdings of the district court. The Court held that because the at-large seats had been part of the city's electoral system since 1954, they were not subject to review. The Court viewed the two at-large seats as a continuation of an existing practice, not a new practice under the 1970 plan. Since "[t]he language of [Section] 5 clearly provides that it applies only to proposed changes in voting procedures,"[115] the Court found that the at-large seats were not subject to review under Section 5.[116]

In overruling the lower court, the Supreme Court cited the legislative history of the Act:

> Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down . . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'[117]

The *Beer* Court drew on a Senate Report which stated that the intent behind Section 5 was "'to insure that [the gains thus far

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[112] *Id.*

[113] *Id.* at 137–38.

[114] *See id.* The *Richmond* case required that a new electoral plan "afford [minorities] representation reasonably equivalent to their political strength in the enlarged community." *Richmond*, 422 U.S. at 370.

[115] *Beer*, 425 U.S. at 138.

[116] *Id.* at 138–39.

[117] *Id.* at 140 (quoting H.R. REP. No. 196, 94th Cong., 1st Sess., at 57–58 (1975)). The Court also cited *Katzenbach* for this proposition. 425 U.S. at 140. This is misleading, however, because it ignores the main thrust of the *Katzenbach* opinion, which acknowledged that the purpose of the Voting Rights Act was to "rid the country of racial discrimination in voting." *Katzenbach*, 383 U.S. at 315. The *Katzenbach* Court stated that

> Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination . . . . Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.

Id. at 335. It thus appears that the *Katzenbach* Court viewed the Act as a progressive tool toward combatting voting discrimination, rather that an instrument to merely prevent retrogression.

achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques.'"[118] The Court read this narrowly, holding that "the purpose of [Section] 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."[119]

With that pronouncement, the Supreme Court held that the Voting Rights Act, which ten years before was hailed as the instrument to "rid the country of racial discrimination in voting,"[120] had always been intended to preserve the status quo. With this new perspective, the Court concluded that an "ameliorative" plan such as the one at issue in *Beer* could not violate Section 5 "unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."[121] In a footnote, the Court gave examples of constitutional violations in other cases[122] and, without analysis, stated that such constitutional violations did not exist in *Beer*.[123]

The retrogression standard developed in *Beer* was further extended in *Lockhart v. United States*, decided in 1983.[124] *Lockhart* involved proposed changes to the city's governing system and electoral scheme. Under the previous system, the Texas city was governed by a mayor and two council members, all serving two-year terms, elected in even numbered years in an at-large numbered post system.[125] A new city charter, adopted in 1973, added two additional council members, elected in odd-numbered years in an at-large, numbered post election.[126]

In a 1977 lawsuit by four Mexican-Americans challenging the constitutionality of Lockhart's 1973 charter, it was discovered that the city had never obtained preclearance under Section 5 of the Voting Rights Act.[127] The plaintiffs brought a second suit to enjoin

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[118] *Id.* at 141 (quoting S. REP. No. 295, 94th Cong., 1st Sess., at 19 (1975)).

[119] *Id.* at 141.

[120] *Katzenbach*, 383 U.S. at 315.

[121] *Beer*, 425 U.S. at 141.

[122] For example, "racially motivated gerrymandering" in Gomillion v. Lightfoot, 364 U.S. 339 (1960), and "one man, one vote" issues in Regester v. Sims, 377 U.S. 533 (1964). *Beer* at 142–43 n.14. The Court did not point out that both *Gomillion* and *Sims* were pre-Voting Rights Act cases.

[123] *Beer*, 425 U.S. at 142–43 n.14.

[124] 460 U.S. 125 (1983).

[125] *Id.* at 127.

[126] *Id.* at 127–28.

[127] *Id.* at 129. The city's failure to submit electoral changes clearly flies in the face of

the city from employing the new electoral system pending Section 5 preclearance.[128] The city then sought preclearance.[129]

The Attorney General refused to preclear the plan because of its provisions regarding the at-large elections, numbered post system and staggered terms.[130] The city then filed suit for a declaratory judgment in the District Court for the District of Columbia.[131] The district court held that the entire plan was subject to its review.[132] In light of the history of racial bloc voting in the city of Lockhart, the district court held that the numbered posts and staggered terms had a discriminatory impact.[133]

On review, the Supreme Court vacated the district court's finding that Lockhart's electoral system had the effect of denying or abridging the right to vote.[134] Instead, the Supreme Court stated that the retrogression standard pronounced in *Beer* was applicable to *Lockhart*.[135] In applying the retrogression standard, the Court held that the discriminatory effect of the new plan should be compared to the plan actually in effect on November 1, 1972.[136] The Court therefore decided that a violation of Section 5 could only be established by demonstrating that the voting rights of the Mexican-Americans in Lockhart were more abridged under the new plan than before. The Court found no greater abridgement, stating:

> Although the new plan may have remained discriminatory, it nevertheless was not a regressive change . . . . It is recognized

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Congress' intent with respect to enforcement of the Voting Rights Act. The Supreme Court stated in *Perkins*:

> On the basis of the legislative history, there is little question that Congress sought to achieve this goal by relying upon the voluntary submission by affected States and subdivisions of all changes in such laws before enforcing them. Failure of the affected governments to comply with the statutory requirement would nullify the entire scheme since the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act . . . .

Perkins, 400 U.S. at 396.

[128] *Lockhart*, 460 U.S. at 129.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 130. Prior to the 1973 charter change, Lockhart was a "general law" city, meaning that it had only those powers specifically permitted by the State of Texas. *Id.* at 127. The State did not specifically permit the use of numbered posts. Thus, the district court did not recognize the city's pre-1973 use of numbered posts, and treated the numbered post system as an electoral change, subject to § 5 preclearance. *Id.* at 130.

[133] *Id.* at 130.

[134] *Id.* at 136.

[135] *Id.* at 133.

[136] *Id.* at 132.

> that a numbered-post system, in some circumstances, may have the effect of discriminating against minorities in a city where racial bloc voting predominates. Use of numbered posts may frustrate the use of 'single-shot voting,' a technique that permits concentrating support behind a single candidate. Lockhart has used numbered posts, however, consistently since 1917. Effective single-shot voting may be impossible now, but it was equally impossible under the old system . . . .
>
> The use of staggered terms also may have a discriminatory effect under some circumstances, since it, too, might reduce the opportunity for single-shot voting or tend to highlight individual races. But the introduction of staggered terms has not diminished the voting strength of Lockhart's minorities . . . . Minorities are in the same position every year that they used to be in every other year. Although there may have been no improvement in their voting strength, there has been no retrogression either.[137]

Thus, the Court announced that under Section 5 of the Act, covered jurisdictions will be permitted to continue to discriminate against minority voters, so long as the discrimination does not get worse.

In a scathing dissent, Justice Marshall attacked the majority opinion as being "flatly inconsistent with the language and purpose" of Section 5.[138] Justice Marshall maintained that the intent of Congress in enacting Section 5 was to "prohibit the covered jurisdictions from adopting voting procedures which perpetuate past discrimination."[139] Justice Marshall cited the *South Carolina v. Katzenbach* decision, which "recognized [that Section] 5 was designed to suspend 'all new voting regulations pending review by federal authorities to determine whether their use would *perpetuate* voting discrimination.'"[140]

Marshall's dissent also pointed out that the "ameliorative" change in the plan in *Beer* was no longer an issue in the retrogression test.[141] Under the Court's interpretation of Section 5 in *Lockhart*, a change in the electoral scheme within a covered jurisdiction need not make any progress over the discrimination of the past.[142] Procedural changes need only maintain the status quo.

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[137] *Id.* at 134–35.

[138] 460 U.S. at 137 (Marshall, J., dissenting).

[139] *Id.* at 138. Justice Marshall's criticism of the majority opinion in *Lockhart* is valid. The retrogression standard, which allows the perpetuation of voting discrimination, is antithetical to Congress' intent, as stated in *Katzenbach*. *See supra* note 51 and accompanying text.

[140] *Id.* at 140 (quoting *Katzenbach*, 383 U.S. at 316) (emphasis in original).

[141] *Id.* at 143.

[142] *See supra* note 137 and accompanying text.

The retrogression standard has been evaluated as "smack[ing] of a logic that two wrongs make a right: It allows abridgement of a fundamental right simply because the abridgement created by the new law is no worse than the abridgement which previously existed."[143] Further, the retrogression test contravenes the purpose of the Voting Rights Act pronounced in *Katzenbach*, to eliminate racial voting discrimination.[144] A standard which permits the perpetuation of discrimination clearly cannot work to further this goal.

IV. An Examination of the Dual Standards

Can the retrogression test developed in *Beer* and *Lockhart* and the "fairness" test developed in *Richmond* and *Port Arthur* be reconciled? The retrogression standard, used in reapportionment and electoral system changes, measures only the deterioration of minority voting rights. The "fairness" standard gives courts the power to "neutralize" adverse effects of an electoral change caused by an annexation, by conditioning approval of an annexation upon a progressive change in the electoral system.

Under the retrogression standard, as long as minority voters were not represented proportionately under an old electoral system, proportional representation does not have to be part of a proposed change.[145] The test for annexations, on the other hand, requires changes to be "fair," the adverse impact on minority voting strength to be "sufficiently neutralized,"[146] and a minority to be reasonably represented in proportion to its political strength.[147]

One author has observed that in "deciding annexation cases, the Court has implicitly abandoned the retrogression test."[148] This observation is an oversimplification, however. In deciding annexation cases, the Supreme Court has recognized that the dilution of minority votes because of an annexation is, in and of itself, a retrogression.[149] An annexation must be shown to have a legitimate purpose. In addition, the Supreme Court has mandated that a

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[143] Note, *supra* note 27, at 161.

[144] *See supra* note 51 and accompanying text.

[145] *See supra* note 137 and accompanying text; *Beer*, 425 U.S. at 141.

[146] *See generally, Port Arthur*, 459 U.S. 159; *Petersburg*, 354 F. Supp. 1021.

[147] *Richmond*, 422 U.S. at 370.

[148] Note, *supra* note 27, at 148.

[149] "[Section] 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation." *Perkins*, 400 U.S. at 388–89.

municipality neutralize the retrogression in minority voting strength which cannot be avoided if the annexation is to take place. The Court therefore has not abandoned the retrogression standard in deciding annexation cases, but has mandated a remedy for an unavoidable retrogression.

In annexation cases, however, the Court may go beyond effecting a remedy, when it applies the "fairness" standard. The Court is not compelled to compare the level of proportional representation prior to the annexation when it determines if a new plan is "fairly drawn," as in cases of redistricting,[150] but instead compares a minority's representation after the annexation to its "political strength in the enlarged community."[151] In this way, the standard of review under Section 5 in annexation cases is more progressive than in retrogression cases.

In order to be consistent with the goals of Section 5, the Court should embrace the "fairness" standard of *Richmond* and *Port Arthur* in the retrogression test.[152] The district court in *Beer* implicitly attempted this when it concluded that the city's plan "would have the effect of abridging the right to vote" because blacks were not represented reasonably in proportion to their political numbers.[153] It is true that Section 5 of the Voting Rights Act was designed to guard against retrogression of the voting rights of minorities, but to stop there would be to unnecessarily limit the Act. The retrogression standard does not attempt to protect the constitutional "right of citizens of the United States to vote [from being] denied or abridged . . . on account of race . . . ."[154] Rather, the retrogression standard permits the perpetuation of racial discrimination in voting. By adopting the retrogression standard, the Supreme Court has interpreted Section 5 in such a way so as to permit discrimination to be left intact, so long as it has existed for a long time. This has circumvented the purpose of the Act, to "rid the country of racial discrimination in voting."[155]

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[150] *See Lockhart*, 460 U.S. at 132–33.

[151] *Richmond*, 422 U.S. at 370; *Katzenbach*, 383 U.S. at 315.

[152] When the Voting Rights Act was amended in 1982, Congress emphasized that § 5 is "'designed to insure that old devices for disenfranchisement would not simply be replaced by new ones,'" and to prohibit the enactment of new "'complex and subtle . . . schemes [that] perpetuate the results of past voting discrimination . . . .'" *Lockhart*, 460 U.S. at 141 (Marshall, J., dissenting) (quoting from S. REP. No. 417, 97th Cong., 2d Sess., at 6, 12, 44 (1982)).

[153] *Beer*, 425 U.S. at 136.

[154] U.S. CONST. amend. XV, § 1.

[155] *Katzenbach*, 383 U.S. at 315.

Section 5 was intended as an instrument of progress, and has effected progress for minority voting rights.[156] The Act's progress could be furthered, however, if the Supreme Court applied the Act more consistently with Congress' intent. The Court could better serve the goals of the Voting Rights Act as enunciated in *South Carolina v. Katzenbach*,[157] by abrogating the retrogression standard in favor of the fairness standard, already recognized in annexation cases.

V. Conclusion

A century of resistance to the fifteenth amendment made necessary the enactment of the Voting Rights Act of 1965. Twenty-five years later, racial discrimination in voting persists. Since its passage, the Supreme Court has adopted dual standards under Section 5 of the Act. The "fairness" standard in annexation cases allows courts to require jurisdictions to improve their electoral systems. Conversely, the "retrogression" standard allows courts to perpetuate discrimination. The latter standard is antithetical to the purpose of Section 5. In order to be consistent with the goals of Congress in passing the Act, the Supreme Court should apply the fairness standard to all Section 5 preclearance cases.

Amy Snyder Weed

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[156] For example, the percentage of black Mississippians registered to vote increased from 6.7 percent in the early 1960's to 72.2 percent in 1980. Note, *supra* note 14, at 803.

[157] Namely, to "rid the country of racial discrimination in voting." *Katzenbach*, 383 U.S. at 315.