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Securing a Valid Annexation in Virginia: State and Federal Requirements

SECURING A VALID ANNEXATION IN VIRGINIA: STATE AND FEDERAL REQUIREMENTS

I. INTRODUCTION*

Municipal expansion by the annexation of surrounding territory involves two separate and distinct procedures in Virginia. Due to the Commonwealth's coverage under the Voting Rights Act of 1965, municipalities seeking annexation must obtain federal approval in addition to satisfying the requirements of state law. Compliance with the Act requires an affirmative showing that the expansion is nondiscriminatory in both its purposes and effects with regard to minority voting strength. Failure to meet these federal requirements will invalidate the annexation, irrespective of its compliance with state law. This note will first examine the law of annexation in Virginia, highlighting its uniqueness among the states, followed by an exposition and analysis of the relevant federal mandates.

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II. ANNEXATION IN VIRGINIA

In Virginia, both cities[1] and towns[2] may enlarge their boundaries by annexation.[3] A municipality's power to annex,[4] as with all of its other governmental functions, must be derived either through statutes or by charter.[5] Nearly seventy years ago, in *Hunter v. City of Pittsburgh*,[6] the Supreme Court recognized municipal corporations as being "political subdivisions of the State, created as convenient agencies for exercising such governmental powers of the State as may be entrusted to them."[7] The same theory has been expressed in Virginia, where municipal corporations have been called "creatures,"[8] "mere auxiliaries,"[9] "mere local agenc[ies]"[10] and "subordinate political subdivisions"[11] of the state. By general law,[12] Virginia provides for territorial expansion, and cities and towns must fashion their annexation efforts within that framework.[13]

A. City-County Separation

The organization of local government in Virginia is unique, for nowhere else in this country will one find statewide city-county separation.[14] Under

1. Va. Const. art. VII, § 1; Va. Code Ann. § 1-13.2 (Repl. Vol. 1973).

2. Va. Const. art. VII, § 1; Va. Code Ann. § 1-13.29 (Repl. Vol. 1973).

3. Va. Code Ann. § 15.1-1033 (Repl. Vol. 1973). The Code deals with annexation in general in §§ 15.1-1032 to -1058 (Repl. Vol. 1973). For literature on annexation in Virginia see the following works: C. Bain, Annexation in Virginia (1966) [hereinafter cited as Annexation in Virginia]; C. Bain, "A Body Incorporate" - The Evolution of City-County Separation in Virginia (1967) [hereinafter cited as A Body Incorporate]; 13 Michie's Jurisprudence *Municipal Corporations* §§ 11-16 (1951); Bain, *Terms and Conditions of Annexation Under the 1952 Statute*, 41 Va. L. Rev. 1129 (1955); Martin & Buchholtz, *Annexation - Virginia's Dilemma*, 24 Wash. & Lee L. Rev. 241 (1967); McSweeney, *Local Government Law in Virginia, 1870-1970*, 4 U. Rich. L. Rev. 174 (1969).

4. Va. Const. art. VII, § 2; Va. Code Ann. § 15.1-1032 (Repl. Vol. 1973). *See also* 13 Michie's Jurisprudence *Municipal Corporations* § 2 at 362, 372-73 (1951).

5. Murray v. City of Roanoke, 192 Va. 321, 325-26, 64 S.E.2d 804, 807 (1951).

6. 207 U.S. 161 (1907).

7. *Id.* at 178.

8. Washington, A. & Mt. V. Ry. v. City Council, 98 Va. 344, 350, 36 S.E. 385, 387 (1900), *quoting from* Burckhardt v. City of Atlanta, 103 Ga. 302, 30 S.E. 32, 35 (1898).

9. City of Richmond v. Richmond & D.R.R., 62 Va. (21 Gratt.) 604, 617 (1872).

10. Jordan v. Town of South Boston, 138 Va. 838, 843, 122 S.E. 265, 266 (1924); Whiting v. Town of West Point, 88 Va. 905, 906, 14 S.E. 698, 699 (1892).

11. Camp v. Birchett, 143 Va. 686, 692, 126 S.E. 665, 667 (1925).

12. Va. Const. art. VII, § 2. Prior to 1902 the General Assembly could enlarge municipal boundaries by special act. City of Falls Church v. Board of Supervisors, 193 Va. 112, 68 S.E.2d 96 (1951). An explanation of the change is provided in Annexation in Virginia, *supra* note 3, at 1-12.

13. Va. Code Ann. § 15.1-1032 (Repl. Vol. 1973).

14. A Body Incorporate, *supra* note 3, at ix, 23; Annexation in Virginia, *supra* note 3, at ix; Report of the Commission on City-County Relationships, H. Doc. No. 27, at 48 (1975)

this system, cities maintain complete independence from counties;[15] they are co-equal political subdivisions and within their own boundaries are separate and distinct politically, governmentally and geographically.[16] The doctrine of city-county separateness, which has a most obscure origin,[17] has long been recognized by the Virginia Supreme Court,[18] although the matter has apparently never been directly at issue.[19] Some writers have found at least tacit recognition of independence in past statutes and constitutions.[20] The case of *Supervisors of Washington County v. Saltville Land Co.*[21] provides one of the earliest and clearest recognitions of the independence of Virginia cities. The court flatly stated that "[a] city is entitled . . . to a separate government, and when incorporated is no part of the county for governmental purposes."[22] A 1971 amendment to the Constitution of Virginia inserted the words "independent incorporated community" into the definition of "city."[23]

Unlike cities, towns are governmentally dependent on the county in which they are geographically situated[24] and are subject to the county's various exercises of power.[25] The city is subject only to the authority of the state and generally has all the powers granted to counties plus those additional powers granted by charter.[26] When a town annexes part of the

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[hereinafter cited as STUART COMMISSION for G.R.C. Stuart, chairman]; REPORT OF THE VIRGINIA METROPOLITAN AREAS STUDY COMMISSION, S. DOC. No. 16, at 17 (1967) [hereinafter cited as HAHN COMMISSION for its chairman T. Marshall Hahn, Jr.]; 24 WASH. & LEE L. REV. 241, *supra* note 3; 4 U. RICH. L. REV. 174, *supra* note 3, at 177.

15. A BODY INCORPORATE, *supra* note 3, at 23-27; STUART COMMISSION, *supra* note 14, at 48; 4 U. RICH. L. REV. 174, *supra* note 3, at 175; 24 WASH. & LEE L. REV. 241, *supra* note 3.

16. City of Richmond v. Board of Supervisors, 199 Va. 679, 684, 101 S.E. 2d 641, 644 (1958).

17. Chester W. Bain has devoted an entire book to the evolution of this doctrine - A BODY INCORPORATE, *supra* note 3.

18. *See* City of Richmond v. Board of Supervisors, 199 Va. 679, 101 S.E.2d 641 (1958); County School Bd. v. School Bd., 197 Va. 845, 91 S.E.2d 654 (1956); City of Colonial Heights v. County of Chesterfield, 196 Va. 155, 82 S.E.2d 566 (1954); County of Norfolk v. City of Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947); Supervisors of Washington County v. Saltville Land Co., 99 Va. 640, 39 S.E.704 (1901).

19. A BODY INCORPORATE, *supra* note 3, at 37, 45.

20. *Id.* at 37-45, 51-53. *See also* 24 WASH. & LEE L. REV. 241, *supra* note 3, at 242 & n.9.

21. 99 Va. 640, 39 S.E.704 (1901).

22. *Id.* at 644, 39 S.E. at 705.

23. VA. CONST. art. VII, § 1. *See also* VA. CODE ANN. § 1-13.2 (Repl. Vol. 1973).

24. Nexsen v. Board of Supervisors, 142 Va. 313, 128 S.E. 570 (1925); Campbell v. Bryant, 104 Va. 509, 52 S.E. 638 (1905); Day v. Roberts, 101 Va. 248, 43 S.E. 362 (1903); Supervisors of Washington County v. Saltville Land Co., 99 Va. 640, 39 S.E. 704 (1901). *See, e.g.*, A BODY INCORPORATE, *supra* note 3, at 23. The Constitution of Virginia defines town as a community "within" a county. VA. CONST. art. VII, § 2.

25. *See* Supervisors of Washington County v. Saltville Land Co., 99 Va. 640, 39 S.E. 704 (1901).

26. A BODY INCORPORATE, *supra* note 3, at 26; 4 U. RICH. L. REV. 174, *supra* note 3, at 177.

county, the county still retains control over the territory annexed.[27] On the other hand, when a city annexes part of a county, that area is completely incorporated into the city and is no longer subject to county control.[28] Since a county loses tax revenue when its population and land area are reduced, counties promptly contest most city annexation attempts.[29]

In the context of annexation, the city-county separation can be criticized as naturally resulting in bitterness between local governments[30] and dislocation of governmental activities.[31] However, Virginia's unique system has received more praise than criticism, since separation has reduced overlapping governmental functions,[32] increased the measure of home rule,[33] and simplified tax and governmental structures.[34] City-county separation will undoubtedly continue in Virginia due to the costs and administrative difficulties which would result from the system's termination.[35]

Annexation proceedings may be instituted by two methods in Virginia. First, the council of a city or town may pass an ordinance seeking annexation, and then petition the circuit court of the county in which the territory is sought.[36] Alternatively, fifty-one percent of the voters of an area adjacent to the city or town may petition the local circuit court to be annexed to that municipality.[37] Whether the proceeding is instituted under one

27. *See* 41 VA. L. REV. 1129, *supra* note 3, at 1130.

28. *See* STUART COMMISSION, *supra* note 14, at 49; ANNEXATION IN VIRGINIA, *supra* note 3, at x.

29. *See* ANNEXATION IN VIRGINIA, *supra* note 3, at 219; A BODY INCORPORATE, *supra* note 3, at 101. *See also* STUART COMMISSION, *supra* note 14, at 49; COMMISSION TO STUDY URBAN GROWTH, ADJUSTMENT OF THE BOUNDARIES OF VIRGINIA MUNICIPALITIES AND ADJACENT COUNTIES, H. DOC. NO. 13, at 6 (1951) [hereinafter cited as COMMISSION TO STUDY URBAN GROWTH].

30. *See generally* ANNEXATION IN VIRGINIA, *supra* note 3, at x; STUART COMMISSION, *supra* note 14, at 8, 49; HAHN COMMISSION, *supra* note 14, at 13. Bitterness and opposition have to costly court struggles. The Stuart Commission incorporated into its report a chart showing these costs in recent annexation proceedings. STUART COMMISSION, *supra* note 14, at 77-78.

31. *See generally* STUART COMMISSION, *supra* note 14, at 49; COMMISSION TO STUDY URBAN GROWTH, *supra* note 29, at 6.

32. *See* STUART COMMISSION, *supra* note 14, at 49; HAHN COMMISSION, *supra* note 14, at 17; COMMISSION TO STUDY URBAN GROWTH, *supra* note 29, at 5.

33. *See* A BODY INCORPORATE, *supra* note 3, at 100 (quoting the late Dean Pinchbeck of the University of Richmond).

34. COMMISSION TO STUDY URBAN GROWTH, *supra* note 29, at 5.

35. *See* STUART COMMISSION, *supra* note 14, at 49.

36. VA. CODE ANN. § 15.1-1033 (Repl. Vol. 1973).

37. *Id.* § 15.1-1034. This section also gives the governing bodies of counties and towns the right to petition to be annexed. Because it is the belief of voters that taxes are generally higher in the neighboring cities than are the accompanying benefits, the second method is less frequently employed. *See* County of Norfolk v. City of Portsmouth, 186 Va. 1032, 1038, 45 S.E.2d 136, 138 (1947); ANNEXATION IN VIRGINIA, *supra* note 3, at 60 & appendix.

method or the other, the proponent must meet the same statutory test before the court will award annexation.[38]

B. Code Requirements

One local judge and two remote judges, appointed by the Virginia Supreme Court from outside the circuit, comprise the annexation court.[39] The court, sitting without a jury,[40] determines whether annexation should be granted and imposes the terms and conditions of the award.[41] These terms and conditions are just as important as the grant of the land itself,[42] because a grant to which the court attaches too high a price may be financially unacceptable to the annexing municipality.[43]

The annexation court has the onerous task of determining "the necessity for and expediency of" annexation.[44] It must consider the "best interests" of the city or town, of the area to be annexed, of the entire county and of the remaining portion of the county should annexation be granted.[45] The burden of proof is on the party requesting annexation,[46] and the Supreme Court of Virginia will not disturb the finding of the annexation court unless that finding is clearly erroneous or without credible evidence to support it.[47]

In reviewing annexation cases, the court examines a number of factors to determine whether annexation is necessary and expedient. These include whether there is a community of interest between the city and the area to be annexed,[48] what services will be provided to the new area,[49]

38. Johnston v. County of Fairfax, 211 Va. 378, 177 S.E.2d 606 (1970). The Code requires that the proponent demonstrate the "necessity for and expediency of" annexation. Va. Code Ann. § 15.1-1041 (Repl. Vol. 1973).

39. Va. Code Ann. § 15.1-1038 (Repl. Vol. 1973).

40. *Id.*

41. *Id.* §§ 15.1-1041(d), -1042.

42. 24 Wash. & Lee L. Rev. 241, *supra* note 3, at 262.

43. For example, in 1965, Richmond declined to accept an annexation award due to the $55 million obligation imposed by the court. City of Richmond v. United States, 422 U.S. 358, 362-63 (1975).

44. Va. Code Ann. § 15.1-1041(b) (Repl. Vol. 1973).

45. *Id.*

46. City of Roanoke v. County of Roanoke, 214 Va. 216, 198 S.E.2d 780 (1973); Johnston v. County of Fairfax, 211 Va. 378, 177 S.E.2d 606 (1970); County of Chesterfield v. Berberich, 199 Va. 500, 100 S.E.2d 781 (1957).

47. City of Roanoke v. County of Roanoke, 214 Va. 216, 198 S.E.2d 780 (1973); City of Alexandria v. County of Fairfax, 212 Va. 437, 184 S.E.2d 758 (1971); Town of Narrows v. Giles County, 184 Va. 628, 35 S.E.2d 808 (1945).

48. Johnston v. County of Fairfax, 211 Va. 378, 177 S.E.2d 606 (1970); City of Portsmouth v. County of Norfolk, 198 Va. 247, 93 S.E.2d 296 (1956); Town of Narrows v. Giles County, 184 Va. 628, 35 S.E.2d 808 (1945).

49. Rockingham County v. Town of Timberville, 201 Va. 303, 110 S.E.2d 390 (1959).

whether the city has the financial ability and stability to pay for the territory,[50] crowding in the city,[51] the ability of the city to develop the territory after annexation,[52] the amount of vacant land within the city,[53] the county residents' present use of the city's services and facilities,[54] the health conditions of the county and city and the opportunity for their improvement,[55] the growth rate of the city,[56] the availability of housing within the city[57] and the city's future needs for development and expansion.[58] The opposition of local residents has never been a sufficient ground for denying annexation.[59] The increase in revenue the city will realize and the amount of revenue the county will lose have not been valid considerations for awarding[60] or denying[61] annexation. No single factor controls whether an annexation is necessary and expedient.[62] By statute, annexation courts are required to "balance the equities" in each case and render the decision accordingly.[63]

50. County of Fairfax v. Town of Fairfax, 201 Va. 362, 111 S.E.2d 428 (1959).
51. City of Roanoke v. County of Roanoke, 204 Va. 157, 129 S.E.2d 711 (1963).
52. City of Roanoke v. County of Roanoke, 214 Va. 216, 198 S.E.2d 780 (1973).
53. *Id.*
54. County of Henrico v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941).
55. Henrico County v. City of Richmond, 106 Va. 282, 55 S.E. 683 (1906).
56. *Id.*
57. City Council v. Alexandria County, 117 Va. 230, 84 S.E. 630 (1915).
58. Henrico County v. City of Richmond, 106 Va. 282, 55 S.E. 683 (1906).
59. County of Norfolk v. City of Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947).
60. City of Alexandria v. County of Fairfax, 212 Va. 437, 184 S.E.2d 758 (1971).
61. Warwick County v. City of Newport News, 120 Va. 177, 90 S.E. 644 (1916).
62. County of Fairfax v. Town of Fairfax, 201 Va. 362, 111 S.E.2d 428 (1959).
63. VA. CODE ANN. § 15.1-1042 (Repl. Vol. 1973). The balancing process seems conducive to resolving the complexities that the issue involves. *See generally* STUART COMMISSION, *supra* note 14, at 33-35; REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL, ANNEXATION AND CONSOLIDATION, H. DOC. NO. 16, at 9 (1964); COMMISSION TO STUDY URBAN GROWTH, *supra* note 29, at 5. For example, the Code requires the court to consider the services that the city will render and the needs of the area proposed to be annexed. VA. CODE ANN. § 15.1-1041(b) (Repl. Vol. 1973). Suppose the city cannot supplement the services already offered by the county, yet needs additional territory to relieve congestion and overcrowding. How do these valid considerations and others mesh? What role do traditional state policies play in the proceeding? For instance, it has been the policy of Virginia to keep rural areas under county government and urban areas under city government. County of Norfolk v. City of Portsmouth, 186 Va. 1032, 455 S.E.2d 136 (1947). How does this policy square with the occasional need of cities for undeveloped territory? Alternatively, how does this policy withstand the large scale urbanization of surrounding counties? Courts respond by "balancing the benefits and injuries to the parties concerned," County of Fairfax v. Town of Fairfax, 201 Va. 362, 366, 111 S.E.2d 428, 432 (1959), and by "act[ing] more as chancellors in equity than courts of law operating under the strict rules of *stare decisis*." ANNEXATION IN VIRGINIA, *supra* note 3, at 215.

C. Stuart Commission

In 1971 the Virginia General Assembly imposed a moratorium on city-initiated annexation[64] and created the Commission on City-County Relationships, popularly known as the Stuart Commission, to study and recommend changes or additions in annexation law.[65] The Stuart Commission submitted its recommendations to the Governor and General Assembly in January of 1975.

The Commission recommended that the two most fundamental characteristics of Virginia annexation, city-county separation[66] and judicial determination,[67] remain unchanged. It was noted that city-county separation should remain since it prevents duplication of effort and overlapping jurisdictions, and because the expense of change would be too great.[68] The Commission favored retention of the judicial process as the mechanism for resolving the annexation questions because it felt that courts can be responsive to the complex issues involved, cognizant of state and regional concerns, and flexible in the face of changing urban problems.[69]

Among the modifications recommended were two amendments designed to insure that, at an annexation trial, a city be permitted to cure purely technical defects rather than be penalized by a mandatory delay prior to a corrective suit.[70] Under the existing statute, a city failing in a suit due to such a defect in the annexation ordinance is barred for five years from instituting another proceeding against the county.[71] The Commission also recommended that in contested annexation cases all three judges be from remote judicial circuits,[72] believing that accusations of bias and conflict of interest create an antagonistic atmosphere that outweighs the value of local expertise and familiarity.[73] Another proposal was a provision that

64. Va. Code Ann. § 15.1-1032.1 (Repl. Vol. 1973), *as amended* (Cum. Supp. 1975).

65. Stuart Commission, *supra* note 14, at 7-8. The Commission was also to examine size requirements for new cities and city status for counties. *Id.* at 7-8.

66. *Id.* at 48-49.

67. *Id.* at 33-35.

68. *Id.* at 49.

69. *Id.* at 33.

70. *Id.* at 37-38; Va. Code Ann. § 15.1-1046, -1055 (Repl. Vol. 1973). The purpose of the waiting period is to relieve the county of the burden of defending a rapid succession of annexation suits. City of Charlottesville v. County of Albemarle, 214 Va. 365, 370, 200 S.E.2d 551, 555 (1973).

71. City of Charlottesville v. County of Albemarle, 214 Va. 365, 200 S.E.2d 551 (1973). The Commission felt that the General Assembly should correct this injustice and thereby eliminate the possibility for five years of smoldering discontent and unnecessary local disharmony. Stuart Commission, *supra* note 14, at 37.

72. Stuart Commission, *supra* note 14, at 40-41.

73. *Id.* at 41.

would allow the court to divide the issues of annexation, hearing the necessity and expediency question separately before receiving evidence on other issues.[74] The Commission also recommended that a list of factors to be considered by the court be incorporated into the annexation statutes.[75]

For more effective and economically viable local government, the Stuart Commission suggested that the population criterion for independent city status be raised from five thousand[76] to twenty-five thousand residents, with a minimum density of two hundred persons per square mile.[77] In addition to improving the financial base of the future Virginia city,[78] this proposal would ease county opposition to town annexations since the town's potential independence would be greatly reduced.

The Stuart Commission further recommended a procedure whereby a county could unilaterally incorporate as a city.[79] The same criteria proposed for independent cities would apply.[80] While this would prevent new cities from rising within the old county boundaries, it is uncertain how city status for a county would affect future annexation attempts by neighboring cities. In *City of Portsmouth v. City of Chesapeake*,[81] the Supreme Court of Virginia held that a city could continue its annexation suit against a territory which, though presently part of a city, was part of a county when the proceedings were instituted.[82] The court stated in dictum that "[t]here is no constitutional prohibition against annexation by a city of a portion of the territory of another city."[83] However, the existing statutes seem to contemplate city and town annexation of county territory, and the

74. *Id.* at 38-39. This would eliminate unnecessary testimony concerning the terms and conditions of boundary change should the proponent fail the "necessary and expedient" test. *Id.*

75. *Id.* at 41-44. It should be remembered, however, that a court's decision already involves a balancing process in which many factors are evaluated. The General Assembly should carefully consider whether this list of statutory factors would saddle the court with unnecessary inquiry into matters which are inapplicable or inconclusive in certain cases. A confidence in the past success of judicial flexibility should override the fear that the court might leave one factor unexamined.

76. VA. CODE ANN. § 15.1-978 (Cum. Supp. 1975).

77. STUART COMMISSION, *supra* note 14, at 50-52. Other study commissions have recommended similar changes: REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL, ANNEXATION AND CONSOLIDATION, H. DOC. NO. 16, at 9 (1964); COMMISSION TO STUDY URBAN GROWTH, *supra* note 29, at 9. Chester W. Bain has also recommended an increase. ANNEXATION IN VIRGINIA, *supra* note 3, at 235-36.

78. STUART COMMISSION, *supra* note 14, at 50-52.

79. *Id.* at 56-62.

80. *Id.* at 50-51, 57.

81. 205 Va. 259, 136 S.E.2d 817 (1964).

82. *Id.*

83. *Id.* at 264, 136 S.E.2d at 822.

consolidation statutes apparently envision a process whereby two entire cities become one, rather than one city feeding on a portion of another.

If city status for counties does not insure protection against neighboring city annexation, there is one Stuart Commission proposal which would conclusively settle the issue. The Commission recommended that certain counties be granted immunity both from involuntary city annexation and also from incorporation of new cities within.[84] To be eligible, a county must have a population of twenty-five thousand persons and an average density of two hundred persons per square mile.[85] Additionally, the court must determine that the county is providing and will continue to provide services comparable to those of nearby cities and that immunity is in the best interests of the Commonwealth.[86] Finally, recognizing that immunity could leave certain cities in severe economic straits, the Commission suggested that the General Assembly could provide needy cities with some sort of financial assistance, including housing and public transportation programs.[87] Cities could also receive more assistance for their law enforcement programs,[88] similar to that presently being received by counties. Such programs would spread the financial burden more equitably throughout the Commonwealth.[89]

Annexation under Virginia law is not an automatic process,[90] and the

84. STUART COMMISSION, *supra* note 14, 29-31.

85. *Id.* at 31.

86. *Id.* The Commission cited the rapid urbanization of some counties, the full range of services that those counties provide, and the bitterness and exorbitant costs attending annexation as reasons for the grant of immunity. *Id.* at 26-29. According to the Commission, immunity against city incorporation will prevent fragmentation in local government and preserve the "territorial integrity of the parent county." *Id.* at 29. The Commission concluded:

> In short, as counties have become vehicles for the delivery of urban services, city arguments in favor of boundary expansion have tended to shift from service provision to the maintenance of the political, economic, and social viability of the city itself. Annexation, instead of serving as a means to distribute city benefits to once rural areas, has become a means of extending to suburban residents their share of the operating costs and social responsibilities of a city upon which they ultimately depend. *Id.* at 28.

87. *Id.* at 68.

88. *Id.* at 71. The Stuart Commission recommended no specific assistance programs, and the cities will probably argue that indeed none will be forthcoming from the General Assembly. Cities might point out that, without the ability to expand their tax base through annexation, they may face either a serious economic decline, an abrogation of their independence, or both.

89. *Id.* at 68.

90. On February 9, 1976, three members of the Stuart Commission offered House Bill No. 855 to the General Assembly. This bill substantially incorporated the recommendations set forth in the Stuart Commission Report. The major provisions of the bill included:

procedure for initiating a valid boundary expansion does not end in the state courts. The complexities reach new levels with the introduction of federal questions pursuant to the fifteenth amendment.

III. ANNEXATION AND THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The fifteenth amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[91] This language has always been interpreted as self-executing[92] and has been construed to invalidate state voting requirements which discriminate either on their face or in practice.[93] While states have "broad powers to determine the conditions under which the right of suffrage may be exercised,"[94] the provisions of the fifteenth amendment override any contrary exercise of state authority.[95] State power cannot be used as an instrument to circumvent a federally-protected right.[96]

The first successful fifteenth amendment challenge to an annexation came in *Gomillion v. Lightfoot*.[97] The city of Tuskegee, Alabama redrew

(1) independent city status for counties,
(2) immunity from establishment of new cities within counties,
(3) an immunity status for counties that would bar city-initiated annexations, and
(4) an absolute defense for counties which could be used against particular city-initiated annexation attempts, should the full immunity status not be sought.

The requirements for each of these benefits are basically the same. The county must have a population of 25,000 with a minimum density of 200 residents per square mile. The county should be able to show that it provides services comparable to those of cities, and that the "best interests" of the state and area will be served by the action. Independent city status, alone, requires majority approval by the voters of the county.

House Bill No. 855 was carried over to the 1977 Session.

91. U.S. CONST. amend. XV, § 1.

92. South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966).

93. Louisiana v. United States, 380 U.S. 145 (1965); Alabama v. United States, 371 U.S. 37 (1962); Gomillion v. Lightfoot, 364 U.S. 339 (1960); United States v. Thomas, 362 U.S. 58 (1960); Terry v. Adams, 345 U.S. 461 (1953); Schnell v. Davis, 336 U.S. 933 (1949); Smith v. Allwright, 321 U.S. 649 (1944); Lane v. Wilson, 307 U.S. 268 (1939); Myers v. Anderson, 238 U.S. 368 (1915); Guinn v. United States, 238 U.S. 347 (1915); Neal v. Delaware, 103 U.S. 370 (1881).

94. Carrington v. Rash, 380 U.S. 89, 91 (1965).

95. U.S. CONST. art. VI states in part: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

96. Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960), *cited in* South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966).

97. 364 U.S. 339 (1960). Jurisdiction had been denied at the district court level, 167 F. Supp. 405 (M.D. Ala. 1958), and at the circuit court level, 270 F.2d 594 (5th Cir. 1959).

its boundaries from a perfect square to a twenty-eight-sided figure, thereby adding some white voters, while excluding almost all black voters. The disenfranchised blacks sought a declaratory judgment, claiming the statute would deny them the right to vote as protected by the fifteenth amendment. In granting this relief, the Supreme Court noted that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end,"[98] and that "a constitutional power cannot be used by way of condition to attain an unconstitutional result."[99]

As urban black populations have increased, urban white populations have declined.[100] This inverse relationship has produced either black population majorities or significant minorities in many urban centers.[101] Some white political power structures have responded to growing black voter strength by gerrymandering voting districts, instituting malapportionment schemes, or simply failing to reapportion to give black voters full representation.[102] Thus, black voters were denied an opportunity to elect representatives attuned to their needs.[103]

The development of significant black voting strength in the inner-city complicated the annexation problem. While there are many valid reasons for annexation,[104] a simultaneous dilution of black voting strength often

98. 364 U.S. at 347, *citing* United States v. Reading Co., 226 U.S. 324, 357 (1912).

99. Western Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918). For further discussion see Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 S. Ct. Rev. 194.

100. See C. Cooley, An Argument for the Unconstitutionality of De Facto Racial Segregation in Public Education, 7-36, March, 1975 (unpublished thesis in University of Richmond Library) for a discussion of population and demographic trends in metropolitan areas.

101. Estimated 1970 black population percentages: Washington, D.C., 68%; Chicago, 32%; Philadelphia, 32%; Detroit, 47%; Baltimore, 47%; Cleveland, 38%; St. Louis, 46%; New Orleans, 45%; Memphis, 39%; Atlanta, 39%; Newark, 46%; Oakland, 39%; Richmond, 52%; Birmingham, 40%. *Revolution in Civil Rights*, Congressional Quarterly Service, June, 1968, at 117.

102. For further discussion of these practices see Note, *Chavis v. Whitcomb: Apportionment, Gerrymandering, and Black Voting Rights*, 24 Rutgers L. Rev. 521 (1970); Note, *Political Gerrymandering: The Law and Politics of Partisan Districting*, 36 Geo. Wash. L. Rev. 144 (1967).

103. A traditional goal of all minority groups has been to elect a member of their minority to political office, "not only as a means of providing for a person in government who will be reponsive to their needs, but also as a symbol that this minority group has achieved a measure of total citizenship." Note, *Chavis v. Whitcomb: Apportionment, Gerrymandering, and Black Voting Rights*, 24 Rutgers L. Rev. 521, 523 n.12 (1970). *See also* A. Downs, Urban Problems and Prospects (1970); T. Dye, The Politics of Equality (1971); Lubell, The Future of American Politics (1952).

104. Examples would be: increasing the residential and commercial tax base (not valid in Virginia, but acceptable in the federal courts); and gaining additional vacant lands for growth of industry and service facilities (schools, power plants, etc.). See notes 48-63 *supra* and accompanying text.

occurs, and the question is then raised whether the annexation was racially motivated.

The judiciary has been reluctant to review questions of "political" gerrymandering,[105] but has made exceptions for "racial" gerrymandering, which is within the traditional sphere of constitutional litigation.[106] However, the mere dilution of voting strength has been held to be insufficient to invoke constitutional review pursuant to the fourteenth and fifteenth amendments.[107] It has therefore never been clearly held that dilution of minority group voting strength through annexation is violative of the fifteenth amendment.

In *Holt v. City of Richmond*,[108] a suit was brought under the fifteenth amendment by black residents of the city of Richmond, Virginia against the city and its council, claiming racially motivated purposes in bargaining with the adjoining county of Chesterfield to acquire the additional white voters needed to maintain control of the city council. The court found that, although the initial annexation proceedings against the county had not been motivated by an effort to dilute the vote of black citizens,[109] circumstances had changed by the time of the 1969 compromise.[110] The judge determined that the purpose and effect was to thwart political control by blacks. The court interpreted "deprivation of one's vote by reason of race" to include dilution as well. It found ample basis in the testimony presented

105. *See* WMCA, Inc. v. Lomenzo, 382 U.S. 4, 6 (1965) (Harlan, J., concurring); Sincock v. Gately, 262 F. Supp. 739, 829-33 (D. Del. 1967). *See also* Note, *Political Gerrymandering: The Law and Politics of Partisan Districting*, 36 GEO. WASH. L. REV. 144 (1967).

106. "Considerable debate, however, has arisen concerning whether the complaint should be structured in terms of an alleged violation of 14th or 15th amendment rights." Note, *Chavis v. Whitcomb: Apportionment, Gerrymandering, and Black Voting Rights*, 24 RUTGERS L. REV. 521, 525 n.15 (1970). *Compare* Wright v. Rockefeller, 376 U.S. 52 (1964), *with* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

107. Mann v. Davis, 245 F. Supp. 241 (E.D. Va. 1965), *aff'd mem. sub. nom.* Burnette v. Davis, 382 U.S. 42 (1965). Based on population statistics, the city of Richmond, Virginia was entitled to five representatives in the General Assembly and adjacent Henrico County was entitled to three. An eight man, multimember district was formed, thereby reducing the 42% black population of the city to 29% of the multimember district. This decision preceded, of course, Virginia's inclusion under the Voting Rights Act of 1965. But the opinion would be precedent for non-covered areas. The Court affirmed the district court's determination that even the concept of one-man, one-vote "neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color." Mann v. Davis, *supra* at 245.

108. 334 F. Supp. 228 (E.D. Va. 1971), *rev'd*, 459 F.2d 1093 (4th Cir.), *cert. denied*, 408 U.S. 931 (1972).

109. *Id.* at 231.

110. *Id.* at 236.

on which to determine a discriminatory purpose or motive for the compromise annexation.[111] Finally, the councilmanic election of 1970 was found to be "tainted" and new elections were ordered.[112] The court refused to order deannexation but created two new councilmanic districts.[113]

The Fourth Circuit Court of Appeals reversed, holding the "unconstitutional motivation" too remote from the judicial annexation decree to warrant a grant of any relief.[114] According to the court, ostensibly constitutional legislation may not be stricken on grounds of suspect motivation unless the legislative purpose is both obvious and constitutionally impermissible.[115] The court found nothing sinister in official concern that Richmond was becoming a "city of the old, the poor and the Black."[116] Since Richmond initially sought the annexation for totally valid and compelling reasons, and those reasons continued to exist at the time of annexation, there was no violation of the fifteenth amendment.[117]

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111. Mayor Bagley of Richmond negotiated the compromise which allowed the annexation of a 23 square mile area (the initial suit sought 51 square miles) and reduced the 1970 black population percentage from 51.5 percent to 42 percent by the addition of 47,000 voters (95 percent of whom were white). The county of Chesterfield agreed not to appeal the compromise. This had the effect of allowing the annexation to become effective on January 1, 1970 (VA. CODE ANN. § 15.1-1041 (Repl. Vol. 1973)) and in time for the 1970 councilmanic elections. The district court found that during the compromise meetings Mr. Bagley "did not have the detailed information required to effectively evaluate any tentatively agreed upon line except for the size of the area and the fact that there was a sufficient number of white population which could reasonably be expected to dilute the potential Negro vote so as to preclude legislative control by that segment of the population in 1970." *Id.* at 235.

112. *Id.* at 239.

113. These were close to, but not exactly the same as, the old city and the annexed area. *Id.* at 240.

114. 459 F.2d at 1094.

115. *Id.* at 1098. See Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810). For additional discussion of the problems involved in judicial analysis of motivation, see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-18 (1970); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 86-95 (1971).

116. "There is nothing sinister in such concern. It is simply recognition in Richmond of a problem common to most of our cities throughout the United States. As the more affluent residents move to suburbs, central cities encounter a multitude of problems, including a declining tax base with which to support services for which there is an ever increasing demand. Where it is practical, an obvious and traditional answer has been extension of the city's boundaries to encompass developing residential and industrial areas." 459 F.2d at 1096. But if the concern was truly not racial, but rather economic, and the officials equated the terms black and poor, then why was not the concern merely that Richmond would become a city of the old and the poor?

117. *Id.* at 1099-1100. Judge Butzner gave a strong dissenting opinion and would have required deannexation. *Id.* at 1100-08.

IV. FEDERAL LEGISLATION ENACTED PURSUANT TO THE FIFTEENTH AMENDMENT

A. Before 1965

Ratification of the fifteenth amendment in 1870 was followed by immediate enactment of the Enforcement Act of 1870.[118] Under that Act, interference with a citizen's right to vote became a federal crime.[119] A year later, an amendment to the Act established a system of federal supervisors of elections.[120] There was no futher legislation enacted to enforce the fifteenth amendment until the Civil Rights Act of 1957, which authorized the Attorney General to institute suits on behalf of private individuals to secure voting rights.[121] Additional legislation in 1960[122] provided that, if charges of voter discrimination were sustained in a suit instituted by the government, the Attorney General could request the court to determine whether the individuals concerned were deprived of their rights by a "pattern or practice" of discrimination. The Civil Rights Act of 1964[123] granted further relief. Of equal importance concerning voting rights was the 1964 reapportionment decision of *Reynolds v. Sims*,[124] which held that the equal protection clause required seats in both houses of a bicameral state legislature to be apportioned on the basis of population.

B. The Voting Rights Act of 1965

The Voting Rights Act of 1965[125] has become the greatest single hurdle to Virginia municipalities seeking the annexation of surrounding territories. It was passed by Congress upon the authority of section 2 of the fifteenth amendment.[126] Among the general provisions of the Voting Rights Act, section 2 prohibits the imposition or application of any racially discriminatory voting qualification or prerequisite to a voting standard,

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118. Act of May 31, 1870, ch. 114, 16 Stat. 140.

119. Act of May 31, 1870, ch. 114, §§ 4-6, 19, 16 Stat. 141, 144-45.

120. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433.

121. 42 U.S.C. § 1971(c) (1970).

122. 42 U.S.C. § 1975(h) (1970).

123. 42 U.S.C. §§ 1971, 1975a-d, 2000a to h-4 (1970).

124. 377 U.S. 533 (1964).

125. For a complete legislative history of the Act see *Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); 111 Cong. Rec. (daily ed. April 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26; July 6, 7, 8, 9; Aug. 3, 4, 1965). For a discussion of the legislative proceedings see J. Spell, The Voting Rights Act of 1965, August 1, 1966 (unpublished thesis in University of Richmond library).

126. U.S. Const. amend. XV, § 2 states: "The Congress shall have power to enforce this article by appropriate legislation."

practice, or procedure.[127] Section 3 authorizes courts to apply the remedies established in the special provisions of the Act in suits brought by the Attorney General to enforce the fifteenth amendment.[128] Several sections provide civil and criminal penalties for violations of the Act.[129]

The uniqueness of the Voting Rights Act is in its "special provisions," specifically sections 4 and 5.[130] Section 4 provides a nondiscretionary, automatic formula, or "trigger," by which states or their political subdivisions are made subject to the Act's remedies.[131] Virginia was determined by the

127. 42 U.S.C. § 1973 (1970).

128. 42 U.S.C. § 1973a (1970). The special provisions are discussed in detail in notes 130, 131, and 138 *infra*.

129. 42 U.S.C. § 1973i-1 (1970).

130. The special provisions include sections 4 through 9. Sections 6 through 9 provide for the assignment of federal examiners to "list" eligible persons for registration by state officials in the covered jurisdictions and observers to report on the conduct of elections in some of the jurisdictions designated by the Attorney General for federal examiners. 42 U.S.C. §§ 1973d-g (1970).

131. 42 U.S.C. § 1973b (1970). Section 4 is reprinted with the most recent (1975) amendments italicized:

> § 1973b (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which such determinations have been made under *the first two sentences of* subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the *seventeen* years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of *seventeen* years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.
>
> An action pursuant to this subsection 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. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with 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 4(f)(2).*
>
> If the Attorney General determines that he has no reason to believe that any such test or device has been used during the *seventeen* years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

Attorney General to be a "covered jurisdiction" in 1965.[132]

Section 4(a) of the Voting Rights Act provides that a covered jurisdiction may exempt itself from special coverage if it can persuade the United States District Court for the District of Columbia that any test or device which it maintained in the past did not have the "purpose or effect" of discriminating on the basis of race.[133] Virginia filed an exemption suit which was denied in 1974 by the district court.[134] The court, following the

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§ 1973b (b) The provisions of subsection (a) of this section shall apply in any State or in any political subsivision 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 the 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. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of such persons voted in the presidential election of November 1968. *On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.*

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

§ 1973b (c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess such moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

§ 1973b (d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with 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 4(f)(2)* if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

132. 30 Fed. Reg. 9897 (1965).

133. 42 U.S.C.A. § 1973b (a) (1976).

134. Virginia v. United States, 386 F. Supp. 1319 (D.D.C. 1974), *aff'd*, 420 U.S. 901 (1975).

Supreme Court decision of *Gaston County v. United States*,[135] found that past de jure segregation which produced inferior black schools made the literacy test a much greater burden on Virginia's blacks than on its whites.[136]

Section 5 of the 1965 Act freezes the electoral laws and procedures of covered jurisdictions as of November 1, 1964, and prohibits enforcement of any changes until certification by the Attorney General or the District Court for the District of Columbia that the changes are not discriminatory in purpose or effect.[137] Specifically, the section requires that covered jurisdictions submit in advance any changes in voting qualification, prerequisite to voting, or standard, practice or procedure with respect to voting: (1) to the Attorney General who will object within sixty days or allow the changes to become effective; or (2) to the United States District Court for the District of Columbia.[138] The intent of section 5 preclearance was to

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135. 395 U.S. 285 (1969).

136. Virginia v. United States, 386 F. Supp. 1319, 1323 (D.D.C. 1974). Virginia's schools were segregated by law pursuant to VA. CONST. art. IX, § 140 (1902) and VA. CODE ANN. § 22-221 (1950) (repealed by Acts 1971, Ex. Sess., c. 102). The decision notes with approval the comments of Attorney General Katzenbach that "years of violation of the 14th amendment right of equal protection through equal education . . . [should not] . . . become the excuse for continuing violation of the fifteenth amendment, right to vote." *Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 22 (1965), *as cited in* Virginia v. United States, 386 F. Supp. 1319, 1323 (D.D.C. 1974) and Gaston County v. United States, 395 U.S. 285, 289 (1969).

Putting weight on affidavits of fearful blacks, the district court found "the difference between black and white registration rates, and the historical common sense in forming expectations of how illiterate black people who grew up in a period of segregation and bigotry will behave, negate the claim that Virginia's provision of a segregated, inferior education did not affect its voting rolls." Virginia v. United States, 386 F. Supp. 1319, 1325 (D.D.C. 1974).

137. 42 U.S.C.A. § 1973c (1976). This process is often referred to as "preclearance." For a discussion of section 5 remedies see Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U.L. REV. 111 (1972).

138. The entirety of section 5 is set out below. The most recent (1975) amendments are italicized.

> § 1973c Whenever a State or political subdivision with respect to which the prohibitions set forth in 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 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 second 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, 1968, *or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualifica-*

prevent the substitution of new discriminatory laws and procedures for old ones.[139] The burden is on the jurisdiction to submit any change for approval and to prove that the proposed change is neither discriminatory in effect nor in purpose. Both private parties and the Justice Department may sue to enjoin implementation of any change which has not been submitted.[140]

Sections 4 and 5 were upheld as constitutional in *South Carolina v. Katzenbach*,[141] where the Court rejected South Carolina's argument that the Act be voided as an invasion of the "reserved powers of the states."[142] Regulations implementing section 5 were not promulgated until 1971. Since *Perkins v. Matthews*,[143] annexations have been included in the list

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tion or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect 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 to voting, or 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 4(f) (2),* 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 re-examine 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.

139. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 25 (1975).

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

141. South Carolina v. Katzenbach, 383 U.S. 301 (1966). For more detailed discussions of the Act's constitutionality see Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1 (1965); 41 ST. JOHN'S L. REV. 270 (1966); Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1051 (1965).

142. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

143. 400 U.S. 379 (1971).

of actions constituting changes affecting voting.[144] The regulations also give a detailed and extensive statement as to what must be included in any submission of a proposed change.[145] To date fifteen Virginia cities, other than Richmond and Petersburg, have submitted proposed annexations to the Justice Department under section 5 requirements.[146]

V. ANNEXATIONS AND THE MANDATES OF SECTION 5

A. The Procedural Mandate of Section 5: Questions of Coverage

In 1969 the Supreme Court consolidated four cases[147] involving the application of the Voting Rights Act in *Allen v. State Board of Elections*,[148] and expounded on the requirements of section 5 by deciding four principal issues. First, individual citizens have standing in section 5 cases.[149] Second, federal district courts other than for the District of Columbia have jurisdic-

144. 28 C.F.R. § 51.4 (Supp. 1975) states: "Section 5 requires that, prior to enforcement of any change affecting voting, the State or political subdivision which has enacted or seeks to administer the change affecting voting must obtain either a judicial or an executive determination that denial or abridgment of the right to vote on account of race or color is not the purpose and will not be the effect of the change.

. . .

(c) Legislation and administrative actions constituting changes affecting voting covered by section 5 include . . .

. . .

(3) Any change in the constituency of an official or the boundaries of a voting unit (*e.g.*, through redistricting, annexation, or reapportionment). . .".

145. 28 C.F.R. § 51.10 (Supp. 1975).

146. In alphabetical order: Alexandria, Feb. 23, 1973; Blacksburg (Montgomery County), March 29, 1972; Blackstone (Nottoway County), Jan. 23, 1974; Bristol, Jan. 18, 1974; Crewe (Nottoway County), Sept. 21, 1972; Danville (three annexations), April 2, 1973; Farmville, Aug. 18, 1971; Hopewell, Sept. 27, 1971; Kenbridge (Lunenburg County) (three annexations), April 12, 1972; Lovettsville (Loudoun County), May 21, 1973; Lynchburg, March 11, 1975; Victoria (Lunenburg County) (annexation and charter), Dec. 23, 1971; Wakefield (Sussex County), March 22, 1974; Winchester, June 17, 1971; Wytheville (Wythe County), Feb. 2, 1972. Furnished by Sidney Bixler, Civil Rights Division, U.S. Department of Justice.

147. Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967) (changed counties from ward plan to at-large elections of 5 supervisors); Bunton v. Patterson, 281 F. Supp. 918 (S.D. Miss. 1967) (county superintendent of education made appointive office in 11 counties where previously optional to elect or appoint); Allen v. State Bd. of Elections, 268 F. Supp. 218 (E.D. Va. 1967); Whitley v. Johnson, 260 F. Supp. 630 (S.D. Miss. 1966) (changed requirements for independent candidates running in general elections). Mississippi district court judges held that none of these amendments to the Mississippi Code were within the purview of section 5.

148. 393 U.S. 544 (1969).

149. "The guarantee of section 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to section 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557.

tion to hear section 5 questions.[150] Third, the Court required the use of a three-judge panel to hear "coverage" questions in the federal district courts.[151] The fourth and perhaps most important question presented was whether particular state actions challenged therein were subject to section 5.[152] The Court determined that Congress intended to reach "any state enactment which altered the election law of a covered State in even a minor way."[153] The Court then cited *Reynolds v. Sims*[154] as holding that the right to vote can be affected by a dilution of voting power as well as by ar absolute prohibition on casting a ballot.[155]

Although the decision in *Allen* did not directly address the issue of whether annexations were included in the submission requirements under section 5, it was arguable that annexations alter state election laws in more than a "minor way" and would be changed procedure with respect to voting as covered by the Act. Two years after *Allen*, the Court formally ruled that changing boundary lines by annexation which increases a city's number of eligible voters constitutes a change of "standard, practice, or procedure with respect to voting" as envisaged by section 5.[156]

In *Perkins v. Matthews*,[157] the appellants were black voters and candidates for mayor or alderman in the 1969 city elections of Canton, Mississippi. They had sought to enjoin the election in the local federal district court[158] due to the city's effort to enforce, without securing prior federal

150. After noting that an action for declaratory judgment brought by the State pursuant to section 5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination, the Court held:

> A declaratory judgment action brought by a *private litigant* does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. The difference in the magnitude of these two issues suggests that Congress did not intend that both can be decided only by the District of Columbia District Court. Indeed, the specific grant of jurisdiction to the district courts in § 12(f) indicates Congress intended to treat 'coverage' questions differently from 'substantive discrimination' questions. *Id.* at 558-59.

151. "In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge." *Id.* at 562.

152. *Id.* at 563.

153. *Id.* at 566.

154. 377 U.S. 533 (1964).

155. *Id.* at 555; Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969).

156. Perkins v. Matthews, 400 U.S. 379, 388-89 (1971).

157. 400 U.S. 379 (1971).

158. *Allen* had held that private litigants could bring suit for declaratory and injunctive relief in local three-judge district courts concerning coverage questions under section 5. 393 U.S. at 554-63. *See* notes 149-51 *supra*.

approval, three voting changes[159] allegedly within the scope of section 5. One of these changes concerned a combination of two annexations which had expanded the city's boundaries in 1966 and 1968 and which were claimed to have diluted the effectiveness of the black vote. A three-judge district court, after examining the challenged changes to determine whether they had a "discriminatory purpose or effect," dissolved a temporary injunction issued earlier by a single district judge who had relied on *Allen* and dismissed the complaint.[160] On direct appeal the Supreme Court held[161] that all three changes came within the scope of section 5 and therefore should have been submitted to either the District Court for the District of Columbia or the Attorney General for approval prior to implementation in the 1969 city elections. In reaching its holding with regard to the annexations, the Court relied primarily upon *Fairley v. Patterson*,[162] one of the cases consolidated for appeal in *Allen*. There the Warren Court had held that section 5 applied to a change from district to at-large election of county supervisors on the ground that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[163] Declaring that "[i]n terms of dilution of voting power, there is no difference between a change from district to at-large election and an annexation that changes both the boundaries and ward lines of a city to include more voters,"[164] the *Perkins* Court went on to state two ways in which a revision of boundary lines has an effect on 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, § 5 was designed to cover changes

159. As filed, the complaint originally attacked enforcement with respect to voting of (1) changes in locations of polling places and (2) changes in the municipal boundaries of the city by annexations in 1966 and 1968. By leave of the court, the complainants were permitted to add a third count attacking an alleged change from a ward system to an at-large system of conducting councilmanic elections. Perkins v. Matthews, 301 F. Supp. 565, 566 (S.D. Miss. 1969).

160. Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1969).

161. The Court first held that "[t]he three judge court [had] misconceived the permissible scope of its inquiry into Appellants' allegations." 400 U.S. at 383.

162. 393 U.S. 544 (1969). Besides this judicial precedent, the *Perkins* Court also found support for bringing annexations under section 5 in the findings of a study by the United States Civil Rights Commission that "gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters" since 1965 and in testimony by Justice Department officials representing the Attorney General during congressional hearings in 1969 on the Voting Rights Act Amendments of 1970. 400 U.S. at 389-94.

163. Fairley v. Patterson, 393 U.S. 544, 569 (1969).

164. Perkins v. Matthews, 400 U.S. 379, 390 (1971).

> 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.[165]

Although the Court had addressed the coverage issue exclusively, its emphasis on *potential* for illegality implied that, while all annexations will by definition be dilutive, some may be held to be racially discriminatory while others may not. It remained for the District Court for the District of Columbia, in actions for declaratory judgment brought by cities under section 5, and the Attorney General, in passing upon submissions for administrative preclearance, to determine whether a given annexation was discriminatory in purpose or effect in addition to being dilutive per se.

B. Questions of Substantive Discrimination: Purpose Inquiry and Effect Inquiry Under Section 5

To date, the District Court for the District of Columbia has had only two opportunities to pass upon the merits of annexations submitted by municipalities for declaratory judgment under section 5.[166] In an appeal from the more recent of these two cases,[167] the Supreme Court for the first time rendered a decision concerning the purposes and effects of an annexation submitted for judicial review. While both cases involved Virginia annexations, their significance will be felt throughout all jurisdictions covered[168] under the Voting Rights Act.[169]

1. *The Facts Presented*

In *City of Petersburg v. United States*,[170] the district court denied Peters-

165. *Id.* at 388.

166. City of Richmond v. United States, 376 F. Supp. 1344 (D.D.C. 1974), *vacated and remanded*, 422 U.S. 358 (1975); City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd mem.*, 410 U.S. 962 (1973). Federal review of municipal annexations under section 5 has been conducted almost exclusively by the Attorney General. From 1965 to 1974, a total of 1025 annexations were submitted to and reviewed by the Department of Justice. Only 11 of these annexations had been submitted prior to the Supreme Court's decision in *Perkins* in 1971. 7 U.S. Code Cong. & Ad. News 1458, 1467 (Aug. 25, 1975).

167. City of Richmond v. United States, 422 U.S. 358 (1975).

168. *See* note 131 *supra* and accompanying text.

169. The Attorney General is obligated to follow the decisions of the District Court for the District of Columbia as well as those of the Supreme Court in passing upon submissions for preclearance. 28 C.F.R. § 51.19 (1975). In view of the volume of annexations submitted to the Attorney General, it is clear that any decisions by these courts are likely to have lasting impressions. *See* notes 143-46 & 166 *supra* and accompanying text.

170. 354 F. Supp. 1021 (D.D.C. 1972), *aff'd mem.*, 410 U.S. 962 (1973).

burg declaratory relief concerning an annexation in 1971 of approximately 14 square miles of neighboring Prince George and Dinwiddie Counties.[171] Before the annexation, Petersburg covered an eight-square-mile area inhabited in 1970 by a population of 36,103. Annexation brought 7,323 new residents into the city. Racial proportions of overall population were almost completely inverted as a result of the annexation. Overnight, Petersburg changed from a predominantly black city (55% black, 45% white) to a predominantly white city (54% white, 46% black). Whereas blacks had held an estimated 51% majority among registered voters in the city in 1970, almost all of the residents in the annexed area were white, causing an estimated 4,800 additional white voters to be included in the city in 1972.[172]

Declaratory relief also was denied in *City of Richmond v. United States*[173] in which Richmond had sought approval of an annexation in 1969 of approximately 23 square miles of adjacent Chesterfield County.[174] The

171. Petersburg City Council had adopted Ordinance No. 6064 on October 18, 1966 in order to initiate formal annexation proceedings in the Circuit Court for Prince George County. The city's petition for annexation was filed shortly thereafter and a three-judge annexation court was convened. The annexation court divided 2-1 in approving annexation. The majority and dissenting opinions were rendered from the bench on October 23 and November 11, 1970, respectively, with the final decree being entered on March 29, 1971. Writs of error were denied the counties by the Virginia Supreme Court on November 23, 1971, and the annexation became effective under state law on January 1, 1972. Files of the Department of Justice, Civil Rights Division, 550 11th Street N.W., Washington, D.C. 20530. The city filed its action for declaratory judgment in the district court on March 17, 1972 after the Attorney General had interposed an objection (dated February 22, 1972) to enforcement of the annexation with respect to voting in response to the city's formal submission for preclearance (dated December 21, 1971). City of Petersburg v. United States, 354 F. Supp. 1021, 1022-23 (D.D.C. 1972).

172. City of Petersburg v. United States, 354 F. Supp. 1021, 1024 (D.D.C. 1972).

173. 376 F. Supp. 1344 (D.D.C. 1974), *vacated and remanded*, 422 U.S. 358 (1975).

174. For a discussion of an earlier challenge to the Richmond annexation on fifteenth amendment grounds in *Holt I* see notes 108-17 *supra* and accompanying text.

While litigating *Holt I*, the city was also occupied with seeking preclearance from the Justice Department. One week after the Supreme Court had decided *Perkins*, City Attorney Conard B. Mattox, Jr. inquired of the Attorney General whether that decision would be treated as operating retroactively concerning the Richmond annexation. The annexation had become final under state law when the Supreme Court had denied certiorari to annexed-area citizens in Deerbourne Civic and Recreation Ass'n v. City of Richmond, 210 Va. li, *cert. denied*, 397 U.S. 1038 (1970). Following the Justice Department's response that *Perkins* would have such effect, Mattox made the city's first official submission for preclearance on March 8, 1971. Acting Assistant Attorney General David L. Norman interposed an objection on May 7, 1971 on the grounds that "[i]n the circumstances of Richmond, where representatives are elected at large, substantially increasing the number of eligible white voters inevitably tends to dilute the voting strength of black voters." Relying on Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969) (invalidating multimember districting provisions of statewide legisla-

annexation resulted in an increase from the 1970 population of 202,359 within the boundaries of the old city to a post-annexation population of 249,621. As in Petersburg, the annexed area was inhabited predominantly by whites, only 1,557 (approximately 3%) of the 47,262 inhabitants of the annexed area being black. Blacks comprised a 42% population minority in the post-annexation community whereas the 1970 Census revealed that they would have had a 52% majority in the old city.[175]

The *Richmond* litigation was unique in that the city had held at-large councilmanic elections within the enlarged community on June 10, 1970, without having secured prior federal approval under section 5.[176] Due to the retroactive effect given by the Supreme Court to its decision in *Perkins*,[177] these elections were prima facie illegal under the Act.[178] This factor, and the submission of a compromise ward election plan by both parties before trial,[179] made *Richmond* considerably more complex[180] than *Petersburg*.

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tive reapportionment), Norman advised that "[y]ou may, of course, wish to consider means of accomplishing annexation which would avoid producing an impermissible adverse racial impact on voting, including such techniques as single-member districts." Following the Supreme Court's reversal of the lower court in Whitcomb v. Chavis, 403 U.S. 124 (1971), on June 7, 1971, Mattox requested reconsideration (letter dated August 2, 1971) of the city's initial submission. A legal memorandum signed by Lewis F. Powell, Jr., then a practicing attorney in Richmond, was attached. On September 30, 1971, Norman reiterated the Justice Department's objection, stating with reference to the Supreme Court's reversal of the *Chavis* decision, ". . . we do not believe that opinion is dispositive of issues raised by the Richmond annexation."

Mattox submitted a final request for reconsideration on July 5, 1972, in light of the Fourth Circuit's decision in *Holt I*, and the Supreme Court's denial of certiorari on June 26, 1972. Holt v. City of Richmond, 459 F.2d 1095 (4th Cir.), *cert. denied*, 408 U.S. 931 (1972). On August 25, 1972, shortly before the sixty-day period had elapsed on this third request for preclearance, the city instituted this action in the district court. Curtis Holt, Sr. and the Crusade for Voters, a Richmond black civic association, were granted leave to intervene as parties defendant. City of Richmond v. United States, 376 F. Supp. 1344, 1349 n.23 (D.D.C. 1974); Joint Appendix, vol. I at 20-34, 168-69, City of Richmond v. United States, 422 U.S. 358 (1975) [hereinafter cited as Joint Appendix].

175. City of Richmond v. United States, 376 F. Supp. 1344, 1350-51 (D.D.C. 1974).

176. *Id.* at 1351.

177. 400 U.S. 379, 395 (1971). Justice Brennan's majority opinion in *Perkins* stated that the reasoning behind the prospective effect given to *Allen* in 1969 could not be applied in *Perkins* two years later. *Compare id. with* Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969).

178. 376 F. Supp. at 1358; 42 U.S.C. § 1973c (1970) (section 5). The city has consistently argued that its failure to submit the annexation for federal approval until *Perkins* had been decided, having held the 1970 councilmanic elections during the interim, was reasonable, particularly in light of the subsequent nonunanimous decision by the Supreme Court in *Perkins*. Appellant's Reply Memorandum at 8, City of Richmond v. United States, 422 U.S. 358 (1975). See the dissenting opinions of Justices Harlan and Black in *Perkins*.

179. Following the district court's decision in *Petersburg* on October 24, 1972, the city entered into negotiations with the Attorney General for the purpose of arriving at a compro-

2. *Purpose Inquiry*

In *Petersburg*, the district court concluded that "the annexation as carried out was fairly intended to accomplish a legitimate governmental purpose. The city limits were expanded into those areas which were most reasonably available and which were the most desirable for accomplishing the legitimate purposes of annexation."[181] The court also found that annexation had been necessary to allow the city to achieve healthy economic growth and that the annexed territory shared a community of interests with the city. The contours of the annexation had been designed without racial animus and the record demonstrated that annexation had generally received biracial support.[182]

Richmond presented an entirely different setting for purpose inquiry under section 5. The district court held that while the city had been motivated at the beginning of the Chesterfield annexation suit by legitimate goals of urban expansion,[183] by 1969 the city had become motivated by a discriminatory purpose to forestall a black political "takeover" in the 1970 councilmanic elections by annexing as many white residents in Chesterfield as possible.[184] Having made these findings, the court

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mise ward plan as an alternative to the traditional at-large election system. By April 25, 1973, the parties had reached agreement on a nine-ward, single-member district plan which was believed to have satisfactorily remedied the discriminatory effect of the 1969 annexation. On May 1, 1973, Richmond city council adopted the proposed plan which was then submitted to the district court in the form of a motion to consider consent judgment on May 17, 1973. Joint Appendix, vol. I at 150-54. The intervenors entered objections to the plan before the court on May 30, 1973. *Id.* at 6.

180. Appointment of a Master and stipulation by all of the parties to the record in *Holt I*, however, assisted the district court in its fact-finding chores. 376 F. Supp. at 1346, 1349.

181. City of Petersburg v. United States, 354 F. Supp. 1021, 1024 (D.D.C. 1972).

182. *Id.*

183. City of Richmond v. United States, 376 F. Supp. 1344, 1351 (D.D.C. 1974).

184. *Id.* at 1349-50, *citing* Master's Finding of Facts, Nos. 4, 5, 6, 7 & 9.

The court rejected the city's estoppel argument that the Fourth Circuit's reversal in *Holt I* precluded a holding in the instant action brought under section 5 that Richmond had failed to carry its burden of proof in purpose inquiry. *Id.* at 1352 n.43. Emphasizing the difference between the private fifteenth amendment suit involved in *Holt I* and an action for declaratory judgment brought by a jurisdiction covered under section 5, the court noted that the Fourth Circuit itself had realized that no such effect should attach to its decision. *Id.*, *citing* Holt v. City of Richmond, 459 F.2d 1093, 1100 (4th Cir. 1972).

The city devoted a substantial portion of its brief on appeal in an attempt to persuade the Supreme Court that the question of purpose had been finally settled by the Fourth Circuit in *Holt I*. Brief for the Appellant at 22-32, City of Richmond v. United States, 422 U.S. 358 (1975) [hereinafter cited as Brief for the Appellant]. In their brief, the United States and the Attorney General opposed the city's estoppel argument on three grounds. The first two paralleled the district court's reasoning that "causes of action arising under the Fifteenth Amendment and the Voting Rights Act [are] separate and distinct . . ." and that the

"address[ed] . . . the importance of Richmond's failure to prove, as Petersburg did, that its annexation did not have a discriminatory purpose."[185] After disapproving the diametrically-opposed views of both the master[186] and the city[187] on this issue, the court formulated its own dual standard for determining whether the city had purged itself of discriminatory taint by adopting the proposed ward election plan. In order to obtain declaratory relief, the city would have to demonstrate "by substantial evidence (1) that the ward plan not only reduced, but also effectively eliminated, the dilution of black voting power caused by the annexation, and (2) that the city has some objectively verifiable, legitimate purpose for annexation."[188]

In applying the "objectively verifiable, legitimate purpose" test established for purpose inquiry in *Richmond*, the district court gave controlling weight to testimony offered at trial by opponents of the annexation[189] in-

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resulting difference in the incidence of proof should preclude application of the doctrine of collateral estoppel. Brief for the Federal Parties at 16 n.4, City of Richmond v. United States, 422 U.S. 358 (1975) [hereinafter cited as Brief for the Federal Parties], *citing* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972). In rejecting the city's estoppel argument, however, the Supreme Court relied solely upon the fact that the federal parties had not participated in the *Holt I* litigation, which had been their third ground for objection. City of Richmond v. United States, 422 U.S. 358, 373 n.6 (1975); Brief for the Federal Parties at 16-17 n.4, *citing* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971). *See generally* Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974).

No problem of collateral estoppel could arise concerning purpose or effect from a suit brought by a private litigant in the local district court for nonsubmission of a covered change in voting since the court's jurisdiction would enable it to reach only the question of coverage. But what if the Attorney General *is* joined in a private fifteenth amendment suit in the local district court which ultimately fails? Whether such a result would entitle the covered jurisdiction to declaratory relief in a subsequent suit brought pursuant to section 5 was left unanswered when the Supreme Court found nonparticipation controlling in *Richmond*.

185. 376 F. Supp. at 1353.

186. The Master had recommended deannexation on the grounds that once the city was proven to have had an illegal purpose in annexing territory as a means of diluting black voting strength, it "could never prove that it no longer had such a discriminatory purpose in retaining the annexed area after adoption of a single-member district ward plan." *Id.*

187. The court's understanding of the city's argument was that evidence of "some effort to remove the discriminatory effect of an annexation by adoption of a ward plan [would be] sufficient to prove that it does not retain the annexed voters for a discriminatory purpose." *Id.*

188. *Id.* The second aspect of this dual standard was concerned with legitimate purposes for *retaining* the annexed area. *See* 376 F. Supp. at 1353-54 & n.52.

189. *See* 376 F. Supp. at 1353-54. The Master had heard testimony at trial from the County Administrator of Chesterfield County that only 6.25% of the total land in the annexed area (not of the vacant land, as stated in the district court's opinion) was capable of industrial development while, on the other hand, deannexation would save the city money by resulting in short-term annual savings of an estimated $8.5 million in net operating losses and long-

stead of to evidentiary references to the record and decisions in *Holt I* upon which the city had relied.[190] With this view of the evidence, the district court concluded that the city had failed to establish any counterbalancing economic or administrative benefits of the annexation.[191] If indeed the court was requiring proof establishing benign purposes for *retaining* the particular 1969 compromise annexation,[192] the city's reliance upon the dated record from *Holt I* would not have been responsive. Whether the city had been fully apprised of the nature of its burden on this issue at trial is unclear from a reading of the court's opinion.

On appeal, the Supreme Court was asked to pass upon the propriety of requiring proof of legitimate reasons for retaining[193] the annexed area by a showing of "counterbalancing economic or administrative benefits"[194] in order to save an annexation infected with a discriminatory purpose. Looking to *Petersburg* for support, the city argued[195] that these aspects of the annexation should not have been before the district court for review.[196] Justice White, speaking for a 5-3 majority,[197] disagreed, holding that the court below had properly interposed this extra burden[198] of proof in purpose

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term savings of $21.3 million of additional capital outlay, as required by the annexation court decree. Joint Appendix, vol. II at 510-34.

190. *See* 376 F. Supp. at 1354. Noting that the city had offered no testimony at trial relevant to this issue, the district court made only two references to the record and the lower court's decision in *Holt I* in its brief discussion of the city's position after trial on this issue.

191. *Id.* at 1353, *citing* Master's Conclusions of Laws, No. 17.

192. *See id.* at 1354 n.52.

193. *See* note 188 *supra*.

194. 376 F. Supp. at 1353.

195. Both the federal parties and the intervenors agreed that the district court had been correct in requiring proof of current legitimate reasons for retaining the annexed area in order for the city to establish that its invidious purpose had been purged. *See* Brief for the Federal Parties at 32; Brief for the Appellee Holt at 24, City of Richmond v. United States, 422 U.S. 358 (1975) [hereinafter cited as Brief for the Appellee Holt]; Brief for the Appellee Crusade for Voters at 10, City of Richmond v. United States, 422 U.S. 358 (1975). However, the intervenors favored deannexation since they argued that the city could not meet this burden of proof. For the Attorney General's argument to the contrary see note 203 *infra*.

196. Brief for the Appellant at 51-53. The *Petersburg* court had held that "this annexation, insofar as it is a mere boundary change and not an expansion of an at-large system, is not the kind of discriminatory change which Congress sought to prevent." City of Petersburg v. United States, 354 F. Supp. 1021, 1031 (D.D.C. 1972). *Petersburg* cannot be cited for this proposition with confidence, however, where, as in *Richmond*, a city acts with a racial purpose. The city's argument erroneously posited that if adverse effect upon black voting strength had been cured within the meaning of section 5, any invidious purpose borne by the annexation's original proponents should be disregarded.

197. Justice Powell did not participate. *See* note 174 *supra*. Justice Brennan wrote a dissenting opinion in which Justices Douglas and Marshall joined.

198. See section IV. C. *infra* for a discussion contra the city's view that the district court had imposed an "extra burden" upon the city, but instead had given it a second chance to

inquiry as a condition to declaratory relief. Accepting the findings of the district court that the annexation as conceived in 1969 displayed an impermissible purpose,[199] the Court ratified this second aspect of the district court's dual standard for determining whether racial purpose had been purged by holding "that if verifiable reasons are now demonstrable in support of the annexation, and the ward plan proposed is fairly designed, the city need do no more to satisfy the requirements of § 5."[200] However, the Supreme Court was not satisfied that the master and the court below had made sufficiently informed and considered conclusions from all of the evidence that may have related to this issue.[201] Since "the controlling factor in this case [was] whether there [were then] objectively verifiable, legitimate reasons for the annexation . . ."[202] and since the United States had recommended further findings concerning "nondiscriminatory purposes that might justify retention of the annexed area,"[203] the Court decided to remand the case for further evidentiary proceedings on this issue.[204]

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obtain a declaratory judgment by showing that its original racial purpose had been purged.

199. 422 U.S. at 373 & n.6. *See* note 184 *supra*.

200. 422 U.S. at 374. Although "now" may be susceptible of several interpretations in this context, it is quite clear that the Court was speaking in terms of legitimate evidence, currently demonstrable, for the city to *retain* the area which it annexed in 1969. In explaining the necessity for remand, the Court stated that it had "sufficient doubt that the record is complete and up to date with respect to whether there are now justifiable reasons for the city to *retain* the annexed area that we believe further proceedings with respect to this question are desirable." *Id.* at 378 (emphasis added).

201. *Id.* at 377-78. *See* notes 189-92 *supra* and accompanying text. The majority pointed to the lack of discussion of evidence tending to support the city and the Master's apparent sole reliance upon the testimony of an interested witness in the County Administrator of Chesterfield County as factors necessitating a remand. In light of the city's objection to the imposition of this burden of proof in the lower court after trial, the Court was also concerned that the record here was incomplete. *Id.* at 378.

202. *Id.* at 375.

203. *Id.* at 373 n.6, citing Brief for the Federal Parties at 34-35. The Attorney General made quite clear, however, that in his judgment the city could in fact meet this test upon remand:

> The City has objectively verifiable, legitimate reasons for retaining the annexed area. Although the timing of the conclusion of the annexation agreement apparently was motivated by impermissible racial considerations, the annexation itself was principally motivated by legitimate goals of urban expansion, in particular by a need to broaden the City's tax base in view of the high public welfare expenditures required by the growing low-income population within the preannexation boundaries. The costs of administering the newly annexed area will be significantly less than the revenues that area will produce. Furthermore, the annexation has enabled the City to maintain racially integrated schools. Brief for the Federal Parties at 13-14.

204. The dissent complained that the majority had manipulated the standard of review under FED. R. CIV. P. 52(a) by failing to accept the district court's findings on this issue without actually declaring them to have been "clearly erroneous." 422 U.S. at 384-85.

3. *Effect Inquiry*

From the outset, the district court in *Petersburg* was aware that, while any annexation would by definition be dilutive, a given annexation may still satisfy effect scrutiny under section 5 if it is shown not to have resulted in a *discriminatory* dilution of black voting strength (*i.e.*, that it did not realize its potential for racial discrimination).[205] In order to detect whether the Petersburg annexation had worked such an effect, the court studied the factual context in which it had occurred as the means of measuring its probable impact on black voting strength. The court held that, within the context of past de jure discrimination,[206] past racial bloc-voting,[207] a predominantly white annexed area,[208] and expansion of an at-large system of electing councilmen,[209] the annexation had in fact resulted in a discriminatory dilution of black voting strength and therefore could not be approved as submitted.[210]

The court was not willing to hold, however, that Petersburg's annexation could not be squared with section 5 under *any* circumstances. Agreeing with the Assistant Attorney General in his letter of objection,[211] the court held that, since it was not the annexation per se but the annexation in the context of at-large elections and bloc-voting which had diluted black voting strength,[212] the proscribed effect could be avoided if the city adopted a system of single-member wards[213] "calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters

205. See concluding remarks in section IV. A. *supra*. The *Petersburg* court framed this issue quite clearly when it stated, "[t]he simple transformation of a potential black voting majority into a clear minority has no effect on relative racial voting strengths *unless votes are cast along racial lines*." City of Petersburg v. United States, 354 F. Supp. 1021, 1025 (D.D.C. 1972) (emphasis added). The court was referring to racial bloc-voting, one of the most important factors giving rise to the discriminatory dilution in that annexation.

206. 354 F. Supp. at 1025.

207. *Id.* at 1025-27 & n.10.

208. *Id.* at 1024.

209. *Id.* at 1025, 1027 & 1029.

210. *Id.* at 1028-29.

211. *Id.* at 1022-23 n.2. The Department of Justice had consistently emphasized the factual context within which the annexation had occurred as the determinative factor. *See also id.* at 1031.

212. *Id.* at 1029.

213. Of course, the city was powerless to modify other aspects of the context of the annexation such as past statewide de jure discrimination and, even more importantly, its vestige as a social problem in the form of racial bloc-voting. Although the annexed area was inhabited predominantly by white residents, the court had found that the city had no viable alternative in determining in which direction to expand. Thus, only with respect to the at-large system of councilmanic elections did the city have the ability to modify the factual context of its annexation.

. . . ."[214] In so holding, the district court rejected the argument of intervenors that its sole jurisdiction under section 5 was limited to issuing a declaratory judgment either for or against the city and that the court had improperly resorted to its general equitable jurisdiction in considering the context in which the annexation had occurred and any means by which it could be "modified" so as to merit judicial approval.[215] Refusing to acknowledge resort to its "broad equity power," the court dismissed this argument by responding that since its declaratory judgment against the city was the product of the discriminatory expansion of an at-large voting system, its jurisdiction under section 5 to render such a holding would necessarily also extend to deciding what the city might do to amend its annexation so as to gain a favorable judgment.[216]

In *Richmond,* the district court perceived a need for a more rigorous burden of proof in effect inquiry where purpose inquiry had disclosed a mindful intent to discriminate against blacks by annexing suburban territory with the objective of diluting black voting strength. Distinguishing *Petersburg,*[217] the court required the city to establish that the proposed ward plan would have "not only reduced, but also effectively eliminated, the dilution[218] of black voting power caused by the annexation. . . ."[219] This was a test that Richmond could never meet. In order to give blacks the same voting strength under a ward system in the enlarged community

214. 354 F. Supp. at 1031. The court's inclusion of the words "to the extent possible" may be directly attributable to its preoccupation with the argument by intervenors that switching to a ward system in councilmanic elections could have no ameliorative effect upon the dilution of black votes in the at-large election of six "constitutional" officers. *See id.* at 1029-31; VA. CONST. art. VII, § 4. *See also* VA. CODE ANN. § 15.1-40.1 (Repl. Vol. 1973). However, both the district court and the Supreme Court in *Richmond* subsequently applied this language as a quantitative requisite with which to judge the acceptability of the city's proposed nine-ward, single-member district plan.

215. 354 F. Supp. at 1029.

216. *Id.*

> It has been suggested by distinguished scholars that there may be a difference between suit for a declaration about the legal consequences of past conduct and a suit in which a declaration is sought about the legal consequences of future conduct. The latter situation, it is said, is 'doubly contingent,' since the future conduct may not take place and if it does the other party may not challenge it. . . . The courts have not used the language of single or double contingency and they have issued declaratory judgments about the legal consequences of future conduct. C.A. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS 447-48 (2d ed. 1970).

217. City of Richmond v. United States, 376 F. Supp. 1344, 1353 & n.46 (D.D.C. 1974).

218. Although the court did not dwell upon them, the same four factors that had been held to render the annexation in *Petersburg* discriminatory in effect were found to be present in *Richmond* also. *See* 376 F. Supp. at 1349, 1351-52. *See also* notes 206-09 *supra* and accompanying text.

219. 376 F. Supp. at 1353.

that they would presently have under an at-large system absent annexation, the city would have had to stretch the fourteenth amendment reapportionment cases beyond acceptable population variance tolerances.[220] After reviewing the city's plan,[221] the district court arrived at the inevitable conclusion that Richmond had in fact failed to meet the "effectively eliminate" standard.

The district court also disapproved the annexation as modified by the proposed ward plan under the "calculated to neutralize to the extent possible" standard established in *Petersburg*. The court endorsed the findings of the master that the city had not considered racial living patterns in drafting its ward plan in an effort to affirmatively reduce to the extent

220. *See generally* Chapman v. Meier, 420 U.S. 1 (1975); White v. Regester, 412 U.S. 755 (1973); Gaffney v. Commings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Abate v. Mundt, 403 U.S. 182 (1971); Reynolds v. Sims, 377 U.S. 533 (1964).

In Avery v. Midland County, 390 U.S. 474 (1968), the Supreme Court had held that the "one man-one vote" principle of *Reynolds v. Sims* and its progeny applied to local governments. Since there were simply not enough blacks of voting age in the new community to give them a majority in enough wards to be able to control city council, the city could have "effectively eliminated" dilution of black voting strength only by creating excessive variances in population between over-populated white wards and under-populated black wards, in violation of the fourteenth amendment.

221. 376 F. Supp. at 1355-56. The nine-ward, single-member district plan submitted to the court for approval by the city and the Attorney General displayed the following demographic characteristics, based on 1970 Census statistics.

Predominantly White Wards

Ward	Total Population	Non-Black Population	%	Black Population	%
A	27,085	26,556	98.0	529	2.0
B	26,442	22,190	83.9	4,252	16.1
D	28,864	28,525	98.8	339	1.2
I	27,907	26,506	95.0	1,401	5.0

Predominantly Black Wards

Ward	Total Population	Non-Black Population	%	Black Population	%
C	27,117	7,149	26.4	19,968	73.6
E	26,803	9,476	35.4	17,327	64.6
F	28,990	3,227	11.1	25,763	88.9
G	27,124	3,832	14.1	23,292	85.9

A ninth ward, Ward H, was the so-called "swing" ward. It had a total population of 29,099 (17,204 non-black, 11,895 black) and was 59.1% non-black and 40.9% black. The median population among all nine wards was 27,715. Maximum over-representation was 4.6% (Ward B) while maximum under-representation was 5% (Ward H). Plaintiff's Exhibit 18—Demographic Characteristics, accompanying Exhibit 15, Joint Appendix, vol. I at 162.

possible the discriminatory dilution of the black vote.[222] The court found further evidence of the city's failure to meet the *Petersburg* standard in comparing the city's plan with an alternative plan drafted by the intervenor Crusade for Voters. Since the Crusade plan[223] had a "swing" ward with a 59% black population majority rather than the 41% black minority displayed by the city's plan, the court inferred that "the city could have done more to compensate for the dilution of black voting power caused by the annexation."[224]

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222. Both in *Petersburg* and in *Richmond* the district court subordinated the principle of racial color-blindness when faced with the problem of how the discriminatory effects of annexation could be cured. *See* notes 248-52 *infra* and accompanying text. In *Richmond*, the district court noted the city's consideration of such pertinent factors as minimal variance from population equality, compactness, physical boundaries, and likeness of area, but went on to hold that "[w]hile Richmond could have legitimately taken these factors into account, they should have been accommodated to the goal of minimizing dilution of the black vote." 376 F. Supp. at 1357.

223. *See id.* The nine-ward, single-member district plan proposed by the intervenor Crusade for Voters displayed the following demographic characteristics, based on 1970 Census statistics, subject to "two minor errors" which had not been corrected by the time of the trial.

Predominantly White Wards

Ward	Total Population	Non-Black Population	%	Black Population	%
A	27,714	25,257	91.13	2.457	8.87
B	28,190	27,928	99.07	262	.93
D	27,730	27,105	97.75	625	2.25
I	27,606	26,301	95.27	1,305	4.73

Predominantly Black Wards

Ward	Total Population	Non-Black Population	%	Black Population	%
C	27,979	10,100	36.10	17,879	63.90
E	27,712	7,538	27.20	20,174	72.80
F	27,460	4,956	18.05	22,504	81.95
G	27,226	3,820	14.03	23,406	85.97

Ward H once again was the "swing" ward. It had a total population of 27,861 (11,417 non-black, 16,444 black) and was 40.98% non-black and 59.02% black. Crusade for Voters Exhibit 21 - Plan R (Map V), Joint Appendix, vol. I at 165.

These population figures would indicate that the median population among all nine wards was 27,720. Maximum over-representation would then be 1.8% (Ward G) while maximum under-representation would be 1.7% (Ward B). Based upon these calculations, it may be submitted that the Crusade's plan (maximum deviation = 3.48%) was also an improvement over the city's plan (maximum deviation = 9.58%) in another regard — it more nearly achieved the ideal of mathematical equality as an apportionment device.

224. 376 F. Supp. at 1357.

On appeal, the Supreme Court was presented with two different standards as devised by the district court in *Petersburg* and *Richmond* which it could have applied in determining whether discriminatory dilution of black voting strength had been cured within the meaning of section 5. Justice White began his opinion by disapproving the district court's interpretation of *Perkins* with regard to the effect of annexations on minority voting power[225] by noting that "[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 § 5."[226] The Court rejected the extraordinary "effectively eliminate" standard for annexations displaying both discriminatory purpose and effect because it believed that Congress could not have intended the extremes of either forbidding all such annexations or, as a condition to declaratory relief, overrepresentation of blacks to the detriment of other elements in the enlarged community.[227]

Refusing to adopt the "effectively eliminate" standard,[228] the Court was

225. The district court had asserted that *Perkins* left implicit the obvious:

> If the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city's old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of black citizens as a class is diluted and thus abridged. 376 F. Supp. at 1348.

226. City of Richmond v. United States, 422 U.S. 358, 368 (1975).

227. *Id.* at 371. *See* note 220 *supra* and accompanying text. Although the Court did not cite any of its decisions in the reapportionment cases, it is clear that it had refused to sacrifice the fourteenth amendment to the district court's "effectively eliminate" standard.

228. The Court also declined approval of the district court's argument that failure to satisfy the "effectively eliminate" standard was further evidence of invidious purpose on the part of the city. The district court had condemned the city's motive for adopting the compromise ward plan at a time when "the present black population majority within Richmond's old boundaries [would] translate in a few years into a voting-age majority." 376 F. Supp. at 1355. In fact, statistical evidence supports a view contrary from that taken by the district court. At trial the Attorney General offered uncontroverted census statistics from the boundaries of the old city for 1950, 1960 and 1970, proving that the black percentage of the voting-age population had consistently lagged behind that of the total population by 1.9%, 4.2% and 7.2%, respectively. For example, the 1970 Census indicates that, within the old city, the black percentage (44.8%) of the voting-age population lagged behind the black percentage (52%) of the total population by 7.2%. Brief for the Appellant at 44. While this phenomenon may be attributed to a number of factors (*e.g.*, black migration, higher birth rates and shorter life expectancies), Richmond appears to be no exception to a generally observable trend in this respect throughout cities in the United States. Interview with Sidney R. Bixler, Civil Rights Division, Department of Justice, in Washington, D.C., October 26, 1975. Although other factors such as white flight could be expected to contribute to the emergence of an eventual black voting-age majority within the pre-annexation community, this evidence tended to prove that the "translation" process would be considerably less rapid than the court indicated. As was stated by the federal parties in their brief:

> No demographic projections were introduced to show when, if ever, a 52 percent black population majority might be transformed into a black voting-age majority; certainly

prepared to endorse the "calculated to neutralize to the extent possible" standard established in *Petersburg*. However, the question arises whether the Court altered that standard while professing to restate it in *Richmond*. The Court held that "[a]s long as the ward system fairly reflects the strength of the Negro community as it exists after the annexation, we cannot hold, without more specific legislative directions, that such an annexation is nevertheless barred by § 5."[229] Since the city's proposed ward plan "[did] not undervalue the black strength in the community after annexation,"[230] it was viewed as having sufficiently compensated for the discriminatory effect of the annexation which had resulted within the context of the at-large system. The dissent noted, however, that "[t]he reliance upon postannexation fairness of representation is inconsistent with . . . the fundamental objective of § 5, namely the protection of *present* levels of voting effectiveness for the black population."[231]

It is clear that there is more than a semantic difference between the *Petersburg* standard which requires mitigation of discriminatory dilution of minority voting strength *to the extent possible* and the Supreme Court's standard for effect inquiry.[232] While *Petersburg* focused upon achieving maximum reversal of dilution of black voting strength as it existed in the old city, the Supreme Court in *Richmond* apparently looked beyond the discriminatory dilution merely to ascertain whether blacks would be fairly represented in the post-annexation, predominantly white community. That the city should have been required to do more, particularly upon these facts, than simply provide for adequate representation of blacks in the enlarged community is a normative function of Congress' purpose in enacting section 5.[233] That the city could have done more to mitigate the dilutive effect of the 1969 annexation is evident in view of the Crusade's

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it is not inconceivable that net out-migrations of young blacks, or net in-migrations of older whites, could result in an indefinitely prolonged period during which whites retained majority voting power. Brief for the Federal Parties at 25.

229. 422 U.S. at 371.

230. *Id.* at 372.

231. *Id.* at 388 (Brennan, J., dissenting) (emphasis in original).

232. See the dissenting opinion of Mr. Justice Brennan where he refers to the test applied by the majority as "the narrowed *Petersburg* 'effect' test." 422 U.S. at 389 n.18 (Brennan, J., dissenting).

233. Having become suspicious of any change in election practices or procedures in certain portions of the nation from experience, Congress enacted section 5 as a prophylactic method of enforcing the Voting Rights Act. *See generally* Allen v. State Bd. of Elections, 393 U.S. 544, 556, 565-66 (1969); South Carolina v. Katzenbach, 383 U.S. 301, 308-15, 328, 335 (1966); Beer v. United States, 374 F. Supp. 363, 377-81 (D.D.C. 1974). Covered jurisdictions should not be able to circumvent the Act by accomplishing "post-dilution" fairness of representation of their black minorities.

alternative ward plan which would have given blacks a better opportunity to elect a majority of city council representatives responsive to their interests.[234]

C. Significance of the Supreme Court's Recent Decision

An understanding of the Supreme Court's decision and an assessment of its significance for the future depends upon an understanding of the unique factual situation presented the Court in *Richmond*. As the dissent noted,[235] the *Richmond* litigation evidenced a quirk in timing in that the annexation became effective just over a year before *Perkins v. Matthews* was decided.[236] With neither a submission to the Attorney General nor a challenge in the local district court,[237] the annexation went forward in 1970 without preimplementation scrutiny. Thus, in 1975, the Supreme Court was faced with an annexation proven to have been tainted with an illegal purpose which had already been implemented as well as enforced with respect to voting.[238] The issue confronting the Court was whether this annexation, and the election that followed it, should be allowed to stand.

The most difficult question facing the Supreme Court in *Richmond* was whether to adopt a literal interpretation of the statute[239] or to create an isolated "municipal hardship" exception regarding section 5 in purpose

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234. *See* notes 222-24 *supra* and accompanying text.

The district court had appreciated the significance of winning the fifth seat on city council where a majority of five would control a city split almost in half by racial bloc-voting. It stated:

> We must look beyond percentages, whether they be of total populations or of voting-age populations, to determine the effect of the boundary expansion on the voting power of blacks and their access to the political process.
>
> [A]lthough population is the proper measure of equality in apportionment, in *Whitcomb v. Chavis* . . . and *White v. Regester* . . . the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength. City of Richmond v. United States, 376 F. Supp. 1344, 1355 n.56 (D.D.C. 1974), *quoting* Zimmer v. McKeithen, 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc).

235. City of Richmond v. United States, 422 U.S. 358, 384 n.12 (1975) (Brennan, J., dissenting).

236. The annexation became effective on January 1, 1970. *Id.* at 363. *Perkins* was not decided until January 14, 1971. 400 U.S. 379 (1971).

237. Curtis Holt, Sr. filed a private section 5 suit in the local district court on December 9, 1971, seeking to overturn the annexation for lack of prior federal approval. Holt v. City of Richmond, C.A. No. 695-71-R (E.D. Va. 1971), *stay granted*, 406 U.S. 903 (1972) (commonly referred to as *Holt II*). This challenge came almost two years after implementation of the annexation and fifteen months after the illegal councilmanic election of 1970.

238. *See* notes 176-78 *supra* and accompanying text.

239. *See* note 138 *supra*.

inquiry.[240] By establishing the present as the interpretive date for purpose inquiry upon remand, the Court avoided the inelastic, retroactive approach which the language of the statute would appear to require. Having failed to carry its burden of proof in the first instance, the Court was willing to allow the city a second chance. Perhaps the Court was disposed to accommodate the city since the discriminatory effect of its annexation was held to have been "cured."[241] However, whether there now exist currently demonstrable, legitimate reasons for retaining the annexed area is not necessarily determinative of whether the original invidious purpose has "disappeared."[242] In any event, such "post hoc rationalization"[243] of an annexation originally infected with an impermissible purpose is not likely to be allowed in the future. With the coverage question now well settled by *Perkins*, covered jurisdictions that fail to submit an annexation for federal approval prior to implementation should not receive the generous treatment afforded Richmond. In addition, tainted annexations that are submitted for preimplementation scrutiny should not give rise to the prudential considerations against deannexation[244] and overturning elections[245] which may have persuaded the *Richmond* Court to give the city a second chance in purpose inquiry. In this respect, the significance of the Supreme Court's decision may be limited.[246]

In contrast, *Richmond* cannot similarly be limited in its effect inquiry. The timing of the annexation and the delay between implementation and submission that presumably gave rise to "post hoc rationalization" in purpose inquiry only tangentially affected the Court's inquiry into whether the discriminatory effect had been cured by the city's ward election system. Thus, it becomes even more significant that the Court tampered with

240. *Cf.* 422 U.S. at 388 (Brennan, J., dissenting).

241. *See* text accompanying notes 228-29 *supra*.

242. The fact that in *Richmond* there may be current objective justifications for annexation provides little proof that the original racial purpose has disappeared. Once an annexation has been found to have a racial purpose, a court should assume that this purpose continues, at least in the absence of a significant change in the racial effect of the annexation or in the identities of its proponents. Especially under a statutory scheme that mandates suspicion of all changes in electoral practice, a showing of economic and administrative advantage should not suffice to dissipate an inference of continuing racial motivation. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 218 (1975) (footnotes omitted).

243. 422 U.S. at 383 (Brennan, J., dissenting).

244. The Court was not persuaded by intervenor Holt's argument that deannexation would be an appropriate remedy in the case at bar. *See* Brief for the Appellee Holt at 37-41.

245. *See generally* Toney v. White, 488 F.2d 310 (5th Cir. 1973); Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967); Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966); James v. Humphreys County Bd. of Election Comm'rs, 384 F. Supp. 114 (N.D. Miss. 1974).

246. *Accord, The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 219 (1975).

the *Petersburg* standard by holding that the adverse effect would be cured if the ward system fairly reflected black voting strength in the new community.[247] Although the majority cited *Petersburg* with approval,[248] it was apparently unwilling to require the limited benign discrimination[249] which

247. *See* notes 232-34 *supra* and accompanying text.

248. 422 U.S. at 370.

249. The Court did not squarely discuss the issue of "benign districting" in *Richmond*, but may have been impressed with the practical difficulties of such a scheme, such as what measure of political power should be assigned to the black community and for what length of time the boundaries should last. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 216 (1975). The issue raises serious questions of constitutionality as well. Taylor v. McKeithen, 407 U.S. 191, 193-94 (1972) (per curiam) (benign districting in legislative reapportionment raises "an important federal question"). Color-conscious remedies for past de jure discrimination, of course, have been permitted in school desegregation cases. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. New Kent County School Bd., 391 U.S. 430 (1968). *See generally* Leedes & O'Fallon, *School Desegregation in Richmond: A Case History*, 10 U. RICH. L. REV. 1 (1975) (history of the *Bradley* litigation). They have also found acceptance as a method of combatting the effects of past private discrimination in employment. *See, e.g.*, Associated Gen. Cont'rs v. Altshuler, 490 F.2d 9 (1st Cir. 1973); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971). *See generally* Werne, *A Guide to the Law of Fair Employment*, 10 U. RICH. L. REV. 209, 256-65 (1976) (affirmative action programs under Title VII). But preferential treatment of minorities through benign districting may be dissimilar from other instances of benign discrimination since the highly-valued right to vote is at stake. See Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

The courts have repeatedly adhered to the principle of racial color-blindness when reviewing legislative districting. Howard v. Adams County Bd. of Supv'rs, 453 F.2d 455 (5th Cir. 1972); Ferrell v. Oklahoma, 339 F. Supp. 73, 83 (W.D. Okla.), *aff'd*, 406 U.S. 939 (1972); Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *rev'd on other grounds*, 386 U.S. 120 (1967); Mann v. Davis, 245 F. Supp. 241, 245 (E.D. Va.), *aff'd per curiam sub nom.* Burnette v. Davis, 382 U.S. 42 (1965). *See also* Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting); United Jewish Orgs., Inc. v. Wilson, 510 F.2d 512, 525-34 (2d Cir. 1974) (Frankel, J., dissenting). *But see contra*, United Jewish Orgs., Inc. v. Wilson, 510 F.2d 512 (2d Cir. 1974), *cert. granted sub nom.* United Jewish Orgs., Inc. v. Carey, 96 S. Ct. 354 (1975). Another factor that may have prompted the Supreme Court to require only post-annexation fairness in *Richmond* was that there was no long-term history of malapportionment which benign districting could have been intended to remedy. In both *Petersburg* and *Richmond* the dilution was a recent development, arriving concurrently with annexation. But *quaere* whether the presumption of illegality under section 5 when applied to any covered change in election practices or procedures should not be sufficient to override the absence of past malapportionment?

For an understanding of benign districting as part of the larger problem of benign discrimination, see generally Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Flaherty & Sheard, *DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas*, 12 DUQUESNE L. REV. 745 (1974); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Note, *Compensatory Racial Reapportionment*, 25 STAN. L. REV. 84 (1972); Comment, *Compensatory Racial Reapportionment But No Right to Community Unity*, 9 SUFF. U.L. REV. 1496 (1975); R. Bourne, De Facto Segregation: The Erosion of Intentionality and the Limits of Judicial Power 59-69, May 1975 (unpublished master's thesis in Harvard Law School Library).

inheres in the *Petersburg* standard when actually confronted with an expansion which displayed racial purpose in *Richmond*. The Court should have been more willing to permit a city submitting such an annexation to consider race in drawing ward lines as a condition to declaratory relief. Since awareness of race under *Petersburg* is warranted only in order to *neutralize*[250] dilution, the city would not have been required to overcompensate by conferring substantially disporportionate representation upon the black minority in the enlarged electorate.[251] By substituting its "post-annexation fairness" standard for the *Petersburg* test without explanation, the Court may have decided to postpone a decision concerning benign discrimination in apportionment until the issue was more directly litigated in the future.[252]

Finally, it is significant to note that the Supreme Court tacitly approved deannexation as an appropriate remedy if on remand the city failed to carry its burden of establishing legitimate reasons for retaining the annexed area. Although an earlier decision[253] by another three-judge panel had limited its jurisdiction solely to rendering a declaratory judgment, both the district court[254] and, apparently, the Supreme Court[255] in *Richmond* were convinced that complete relief could be granted.[256] In that

250. Neutralizing dilution to the extent possible does not include going beyond the dilution in order to ensure black majority representation in a ward system that overrepresents a black minority in the new community. The district court in *Richmond* recognized this by distinguishing *Petersburg* when it formulated the "effectively eliminate" test in effect inquiry. City of Richmond v. United States, 376 F. Supp. 1344, 1353 n.46 (D.D.C. 1974).

251. The Supreme Court would condone such overrepresentation "only in the most extraordinary circumstances" as a last alternative to deannexation. *See* 422 U.S. 358, 373-75 (1975) (dictum). Such circumstances may be held to exist in the future where an annexation greatly depresses black voting strength beyond the point of "cure" under either *Petersburg* or *Richmond*. In *Richmond*, black voting strength was diluted by a ten point drop in percentage of total population. *See* note 175 *supra* and accompanying text.

252. The Supreme Court has recently granted certiorari in a case that directly involves section 5 and benign districting. United Jewish Orgs., Inc. v. Wilson, 510 F.2d 512 (2d Cir. 1974), *cert. granted sub nom.* United Jewish Orgs., Inc. v. Carey, 96 S. Ct. 354 (1975).

253. Beer v. United States, 374 F. Supp. 357 (D.D.C.), *juris. noted*, 419 U.S. 822 (1974), *restored to calendar for reargument*, 421 U.S. 945 (1975) (No. 73-1869) (*Beer I*) (denial of petition to set timetable for elections).

254. 376 F. Supp. at 1360. Judge Jones dissented from this portion of the decision. *Id.* at 1360-61.

255. 422 U.S. at 375.

256. The district court had spawned two theories supporting its claim of jurisdiction to order deannexation. The court placed prime emphasis on " 'the broad equitable jurisdiction that inheres in courts to give effect to the policy of the legislature which they oversee." City of Richmond v. United States, 376 F. Supp. 1344, 1359 (D.D.C. 1974), *quoting* Porter v. Warner Holding Co., 328 U.S. 395, 403 (1946). The court also made reference to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1970). 376 F. Supp. at 1359 n.75. Section

the multitude of factors to be considered in resolving this difficult question of remedy would ordinarily be more conveniently litigated before the local district court, it may be argued that Congress never intended to go beyond the plain meaning of section 5 in conferring jurisdiction upon another court for the single purpose of deciding whether covered changes in voting procedures and practices were discriminatory in purpose or effect. It would appear, however, that this important question of statutory construction has been resolved to the contrary without discussion by the Supreme Court.[257]

VI. PERSPECTIVES FOR THE FUTURE

The law of annexation is presently at a turning point in Virginia. Several measures were introduced during the recently-completed session of the Virginia General Assembly which embodied different views of the Stuart Commission's report.[258] If the Commission's major recommendations are adopted, city-county separation and resolution of annexation disputes by the courts will remain intact.[259] The concept of selective county immunity from involuntary annexation[260] by neighboring cities is certain to provoke much debate.

While the mechanics of annexation in Virginia may change in the future, it is unlikely that such annexations will escape scrutiny under section 5 of

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2202 of that Act would appear to lend support to the court's claim of power to grant complete relief, including deannexation, in declaratory judgment actions brought by covered jurisdictions under section 5. "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202 (1970). It has been noted, however, that:

> The Declaratory Judgment Act is not a grant of jurisdiction to the federal courts. It merely makes available an additional remedy in cases of which they have jurisdiction by virtue of diversity and the requisite amount in controversy, or because of a federal question. C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS 449 (2d ed. 1970).

Whether Congress intended to incorporate section 2202 in its grant of jurisdiction to this single district court to hear declaratory judgment actions brought by states and localities covered by the Voting Rights Act is a problem of statutory construction.

257. It is possible that the Supreme Court will choose to clarify this issue when it renders its forthcoming decision in the appeal from Beer v. United States, 374 F. Supp. 363 (D.D.C.), *juris. noted*, 419 U.S. 822 (1974), *restored to calendar for reargument*, 421 U.S. 945 (1975) (No. 73-1869) (*Beer II*). The district court followed its earlier decision in *Beer I* when it arrived at the merits of the case in *Beer II*. *See* 374 F. Supp. at 385 ("Our task is to determine whether [the city's burden under section 5] has been discharged, and that is the only function we have with respect to the controversy at hand.")

258. *See* note 90 *supra*.

259. *See* notes 66-69 *supra* and accompanying text.

260. *See* notes 84-89 *supra* and accompanying text.

the Voting Rights Act before at least 1985. The Commonwealth's recent failure to gain exemption from the Act's coverage[261] would appear to postpone its removal from the list of covered jurisdictions at least until expiration of the 1975 amendments to the Act.[262] Thus, officials in Virginia cities seeking annexation must continue to obtain prior federal approval by demonstrating that the boundary change is nondiscriminatory in both purpose and effect. Cities submitting requests for annexation accompanied by at-large election systems may be required to change to single-member district wards. Annexations which significantly reduce minority voting strength may not be permitted at all, particularly if expansion in another direction is a viable alternative.

Virginia cities may find the Attorney General of the United States more willing to grant administrative preclearance in a close case if the annexation is at least partially motivated by the effort to achieve integration of the local schools.[263] Given the Supreme Court's unwillingness to approve inter-district busing in the area of school desegregation,[264] officials may successfully argue the existence of a compelling interest in expansion in order to provide integrated public education within the community.

261. Virginia v. United States, 386 F. Supp. 1319 (D.D.C. 1974), *aff'd*, 420 U.S. 901 (1975).

262. *See* notes 131-38 *supra* and accompanying text.

263. The district court found that no such purpose had motivated the original proponents of the annexation in *Richmond*. City of Richmond v. United States, 376 F. Supp. 1344, 1354 n.50 (D.D.C. 1974). On appeal, the Attorney General emphasized the legitimate benefit of the annexation as a factor contributing to the integration of the Richmond public schools. Brief for the Federal Parties at 33-34, *citing* Bradley v. School Bd., 462 F.2d 1058, 1064 & n.6 (4th Cir. 1972), *aff'd per curiam by an equally divided court sub nom.*, School Bd. of City of Richmond v. Board of Educ., 412 U.S. 92 (1973).

264. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974).