UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 54 | Number 2 Article 6

1-1-1976

Constitutional Law -- Annexations and the Voting Rights Act

Brian A. Powers

Constitutional Law—Annexations and the Voting Rights Act

The Voting Rights Act of 1965 has been praised as "the most successful piece of civil rights legislation ever enacted by Congress."[1] Designed to regulate the details of certain states' registration of voters and voting procedures, the Voting Rights Act contains a stringent and extraordinary provision, section five, that is intended to prevent future attempts to evade the act.[2] Jurisdictions under the purview of section five[3] must gain approval from federal authorities before instituting any

1. *Hearing on the Enforcement and Administration of the Voting Rights Act of 1965 as Amended Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 8, at 86 (1971) (statement of H. Glickstein, Staff Director, U.S. Comm'n on Civil Rights). For an assessment of the progress achieved by the Voting Rights Act see U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS LATER (1975).

2. Section 5, 42 U.S.C. § 1973c (1970) provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in 42 U.S.C. 1973b(a) based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or 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, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, 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, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

3. The initial Act applied only to states or parts of states that had literacy tests or similar devices and in which the registration or voter turnout for 1964 was less than 50% of the voting age population. States covered by the Act in 1965 were: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia; forty counties of North Carolina and several non-Southern areas. After five years a jurisdiction could terminate its coverage, but in 1970 this period was extended to ten years. The Voting Rights Act Amendment of 1970 broadened coverage to include those states which used a literacy test and which had less than 50% of the registration or turnout for the year 1968. Thus, after 1970 the act also included three populous New York City boroughs: Bronx, Brooklyn and Manhattan. 42 U.S.C. § 1973b(b) (1970). On July 28, 1975, the Congress passed a bill extending

changes in voting laws or procedures.[4] By virtue of section five, the burden of proof is no longer on the voters opposing the new election procedure; it has been shifted to the state or subdivision, which must demonstrate that the alteration is not invidious in purpose or effect.[5]

In *City of Richmond v. United States*[6] the United States Supreme Court was confronted with the issue whether an annexation that brings a heavy influx of whites into a city and alters the racial balance to the detriment of the black community's political influence violates section five. Refusing to invalidate the annexation in question, the Court indicated that section five is not a shield to protect pre-annexation voting strength; instead it is to serve only as a mechanism to ensure that blacks are afforded representation reasonably equivalent to their proportion in the post-annexation community.[7] The Court also made clear that an annexation tainted by the impermissible desire to abridge or deny black voters' access to the political system is not a per se violation of section five so long as "verifiable reasons are *now* demonstrable in support of the annexation."[8]

The case arose as a result of the persistent efforts of Richmond to expand its boundaries to encompass some of the suburban areas encircling it.[9] Negotiations were bitter and protracted. While they dragged on, demographic and voting changes swept the city. Blacks achieved a majority status which, due to the Voting Rights Act of 1965, had a great potential for being translated into political power.[10] Finally, in May

the Voting Rights Act of 1965 for seven more years for those areas having a literacy test and a less than 50% registration or voting turnout for the year 1972. Congress also broadened the scope of the bill to include Spanish-speaking Americans and other "language minorities." Pub. L. No. 94-73, § 203 (Aug. 6, 1975). Thus, Texas, with its heavy concentration of Mexican-Americans and Alaska with its large native population are now covered by section 5, in addition to parts of other states such as California and Colorado. N.Y. Times, July 29, 1975, at 1, col. 4.

4. A voting change that is not precleared can not be enforced. Approval may be secured by obtaining a declaratory judgment from the United States District Court for the District of Columbia that the proposed change is not discriminatory in purpose or effect or by obtaining the assent of the Attorney General of the United States. See 42 U.S.C. § 1973c (1970).

5. *See, e.g.*, Georgia v. United States, 411 U.S. 526 (1973).

6. 95 S. Ct. 2296 (1975). Mr. Justice White wrote the majority opinion. Justices Brennan, Douglas and Marshall dissented in an opinion written by Mr. Justice Brennan. *Id.* at 2308. Mr. Justice Powell took no part in the consideration of this case.

7. *Id.* at 2304.

8. *Id.* at 2305 (emphasis added).

9. *Id.* at 2300. As early as 1962, the city sought judicial approval of two annexation ordinances, seeking to annex part of Henrico and Chesterfield Counties. In 1965 when it became apparent that an Henrico County annexation settlement would be too costly, the city shifted its efforts to the Chesterfield County negotiations.

10. In Holt v. City of Richmond, 334 F. Supp. 228, 231-32 (E.D. Va. 1971), *rev'd*, 459 F.2d 1093 (6th Cir.), *cert. denied*, 408 U.S. 931 (1972), the court noted, "[T]he

1969, a compromise agreement, which called for annexation of a portion of Chesterfield County, was reached between the county and the city. A Virginia court[11] approved the plan effective January 1, 1970.[12] One immediate result of the annexation was a diminution in the proportion of blacks in the city so that in the post-annexation, at-large elections of 1970, they constituted forty-two percent of the total population of the enlarged city strength, as compared to their fifty-two percent pre-annexation strength.

In response to the Supreme Court's decision in *Perkins v. Matthews*,[13] the city submitted its annexation decision to the United States Attorney General for approval in a belated attempt to conform to the commands of section five. On May 7, 1971, sixteen months after Richmond assumed jurisdiction over the annexed area, the Attorney General interposed an objection to Richmond's continued use of at-large elections. Meanwhile, a class action by black Richmond voters was filed in federal district court in Virginia challenging the annexation on fifteenth amendment grounds. The district court found in favor of plaintiffs and ordered new city council elections.[14] The Fourth Circuit Court of Appeals reversed.[15]

Unable to gain the Attorney General's acceptance of the plan, the city elected to initiate an action in the District Court for the District of Columbia, seeking a declaratory judgment that the annexation was legal.[16] In response to another annexation ruling, *City of Petersburg v. United States*,[17] Richmond also developed and submitted to the Attor-

evidence shows an increase in Negro voting strength ranging from 4,000 qualified voters in 1956 to more than 35,000 at the present time . . . . While in 1968 there were more whites than Negroes registered to vote, about 50% of the registered Negroes voted as against approximately 30% of the white registered voters."

11. The controlling Virginia statutes permit annexations only after obtaining a favorable judgment from a three-judge annexation court. 95 S. Ct. at 2300 n.2.

12. A writ of error was refused by the Supreme Court of Appeals of Virginia. Deerbourne Civic and Recreation Ass'n v. City of Richmond, 210 Va. lii, *cert. denied*, 397 U.S. 1038 (1970).

13. 400 U.S. 379 (1971). *See* text accompanying note 42 *infra*.

14. The court found that "the purpose of the compromise agreement was to deprive the plaintiff's class of a basic constitutional guarantee." *Holt v. City of Richmond*, 334 F. Supp. 228, 237 (E.D. Va. 1971).

15. 459 F.2d 1093 (4th Cir.), *cert. denied*, 408 U.S. 931 (1972). The court relied on Palmer v. Thompson, 403 U.S. 217 (1970), and United States v. O'Brien, 391 U.S. 367 (1967), to conclude that "the unconstitutional motivation [was] too remote from the judicial annexation decree, which firmly rested on non-racial ground, to warrant a grant of any relief." 459 F.2d at 1094. *See* Note, *Constitutional Law—Municipal Boundary Changes and the Fifteenth Amendment*, 51 N.C.L. REV. 573 (1973).

16. *See* note 4 *supra*.

17. 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973). See text accompanying notes 46-47 *supra*.

ney General various plans attempting to "neutralize to the extent possible any adverse effect [of annexation] upon the political participation of black voters."[18] The Attorney General indicated that one of the plans was satisfactory, and it was subsequently submitted to the district court in the form of a consent judgment.[19]

The matter was referred to a special master who concluded that the city had failed to meet its burden of proof that the annexation, even as modified, did not have the purpose or effect of diluting the black vote of that city.[20] The master's findings indicated that the white political leadership was fearful that without an influx of whites into the city, black voters would be able to elect a majority to the City Council in the 1970 elections.[21] The master emphasized that the city had not demonstrated any acceptable counter-balancing economic and administrative benefits to support the annexation[22] and that the city had failed to minimize to the greatest extent possible the diluting effect of its action.[23] The district court, finding these conclusions to be compelled by the record before the master, declined to grant Richmond a declaratory judgment.[24]

On appeal,[25] the Supreme Court held that cities under the jurisdiction of section five can alter their racial composition by annexing predominantly white suburbs so long as blacks enjoy a proportionate share of power in the enlarged city.[26] The Court accepted the district court's finding that the annexation, as it was carried out in 1969, was infected by the impermissible purpose of denying the voting rights of black citizens.[27] Nevertheless, the Court was persuaded that section five could be satisfied by the adoption of a fair ward plan, provided that verifiable reasons could now be presented in favor of the annexation.[28]

---

18. *Id.* at 1031.

19. The nine-ward plan finally submitted by the city was composed of four wards which were heavily black, four wards which were predominantly white, and a "swing" ward which had a black population of 40.9 percent. 95 S. Ct. at 2304.

20. City of Richmond v. United States, 376 F. Supp. 1344, 1346 (D.D.C. 1974).

21. *Id.* at 1349.

22. *Id.* at 1353.

23. *Id.* at 1356-57.

24. *Id.* at 1346.

25. *See* note 2 *supra.*

26. 95 S. Ct. at 2304.

27. *Id.* at 2305.

28. *Id.* The Court remanded on this issue for the purpose of bringing up to date and reassessing the evidence. Justice White stated, "We are not satisfied that the Special Master and the District Court gave adequate consideration to the evidence in this case in deciding whether there are now justifiable reasons for the annexation which took place January 1, 1970." *Id.* at 2306.

Rejecting the district court's demand for a ward plan that would protect pre-annexation black voting strength, the Court pointed out that this requirement would necessarily entail an abridgment of other citizens' voting rights in the enlarged city.[29] The majority was concerned that an overly strict interpretation of section five would effectively preclude cities from entering into otherwise legitimate and perhaps desperately needed annexations.[30] The Court was unwilling to believe that Congress intended such a result.[31]

In order to put the Court's holding in appropriate perspective, it is necessary to examine briefly the evolution of section five's interpretation prior to *Richmond.* The Supreme Court in *South Carolina v. Katzenbach*[32] upheld the constitutionality of section five. It noted that the suspension of new voting regulations might have been "an uncommon exercise of congressional power" but concluded that "exceptional conditions can justify legislative measures not otherwise appropriate."[33] Enforcement of section five, however, was more difficult than the Court's facile resolution of the constitutional issues indicated it would be. Jurisdictions under the purview of section five were uncertain of its scope and wary of unnecessary compliance.[34] The Attorney General questioned its workability and failed to adequately promote its enforcement.[35] It was obvious that without further direction from the Supreme Court section five would become largely dormant.

Allen v. State Board of Elections[36] provided the necessary impetus and paved the way for the full impact of section five to be felt. In that case Chief Justice Warren declared that Congress intended section five to be given the broadest possible scope and that consequently the Act encompassed "any state enactment which altered the election law of a

29. *Id.* at 2304.
30. *Id.*
31. *Id.*
32. 383 U.S. 301 (1966).
33. *Id.* at 334.
34. During the first three years only South Carolina made any pretense of compliance with section five; it submitted 118 voting changes to the Attorney General while all the other states and subdivisions combined submitted only two changes. See H.R. REP. No. 94-196, 94th Cong., 1st Sess. 9 (1975).
35. See *Hearings on the Extension of the Voting Rights Act Before a Subcomm. of the House Comm. on the Judiciary,* 94th Cong., 1st Sess., at 169 (1975) [hereinafter cited as *Hearings on Extension*].
36. 393 U.S. 544 (1969). *Allen* involved four instances where states passed new laws or issued new regulations affecting voting or registration. These changes included at-large requirements; switches from elective to appointive office; a statute making it more difficult for independent candidates to run for office by increasing the number of required signatures, shortening the times, and adding other inconvenient requirements; and a state regulation governing assistance to illiterate voters. All four cases were found

covered state in even a minor way."[37] This broad interpretation of the Act was reinforced when Congress extended the Act in 1970 and resisted vigorous attempts by some of the affected states to repeal the preclearance provisions of section five.[38] Accepting this clear mandate, the Justice Department promulgated regulations for the enforcement of section five and initiated energetic efforts to ensure compliance.[39]

In another important section five decision, *Georgia v. United States*,[40] the Court confirmed that "the very effect of section five was to shift the burden of proof with respect to racial discrimination in voting."[41] A three-judge district court for the District of Columbia emphasized in *City of Petersburg v. United States* that this burden is a heavy one for a community with a long history of block racial voting, in a state with a history of past racial discrimination.[42]

In *Perkins v. Matthews*[43] the Court for the first time held that changing boundary lines by annexation fell squarely within the scope of

---

to have the potential for diluting black voting power, and therefore before these changes could have legal effect, they would have to be approved under the section five preclearance procedures. *Id.* at 571.

37. *Id.* at 566.

38. *Hearings on Extension, supra* note 34, at 169. In Georgia v. United States, 411 U.S. 526, 533 (1973), the Court noted, "Had Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5 . . . . We can only conclude, then, that *Allen* correctly interpreted the congressional design."

39. The Attorney General has interposed objections, at the state and local level, to at-large requirements, polling place changes, majority vote requirements, staggered terms, increased candidate filing fees, redistricting, switches from elective and appointive offices, multimember districts and annexations. "Although 4,476 voting changes have been submitted under § 5 since 1965, between 1965 and 1969 the number of changes submitted was only 323 or 7% of all the department has received. About 93% of all changes have been submitted since 1970. The year 1971 was the peak year for changes reviewed (1118) and objections entered (50), a natural occurrence in light of upcoming elections and redistrictings following the 1970 census. The past three years, however, have continued to require the Department to review a high number of changes (between 850 and 1,000 a year.)" *Hearings on Extension, supra* note 34, at 25 (testimony of Stanley Pottinger, Ass't Att'y Gen., Civil Rights Div., Dep't of Justice).

40. 411 U.S. 526 (1973). In this case which involves the 1972 reapportionment plan for the Georgia House of Representatives, the state of Georgia challenged the Attorney General's regulations which placed the burden of proof on the States under section five. The Court held that reapportionment is within the ambit of section five and that the states have the burden of proof under section five. *Id.* at 535, 538.

41. *Id.* at 538. See 28 C.F.R. 51.19 (1974) which states, "If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the sixty-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

42. 354 F. Supp. at 1027.

43. 400 U.S. 379 (1971).

section five. The Court noted that annexations have a potential to abridge or deny the vote, since

> (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 voters to whom the franchise was limited before the annexations and "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[44]

The *standard* of proof demanded of a municipality before its annexation would be approved was not made clear by the statute or by the *Perkins* decision. The District Court for the District of Columbia struggled to formulate a workable test to determine when an annexation can be approved and when it should be declared discriminatory under section five.[45] Although *Perkins* left no doubt that annexations have the potential for denying or abridging the vote, no decision has held that annexations per se are violative of the act. In *City of Petersburg v. United States* a three-judge District of Columbia court concluded that the city's annexation in the context of at-large elections would serve to dilute the black vote.[46] The court advised that in such circumstances approval would be denied until "modifications calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters are adopted, i.e., that the plaintiff shift from an at-large to a ward system of electing its city councilmen."[47]

The three-judge District of Columbia court in the *Richmond* case purported to subscribe to the *Petersburg* test, but in the process extended it considerably. Interpreting section five as a mandate to preserve and protect the *present* potential for black voting strength, they viewed as discriminatory any annexation that diminished that strength.[48]

The Supreme Court in *Richmond* settled the confusion which the two District of Columbia district court decisions may have generated. Over sharp objections from the dissent, the majority stated that focusing upon present minority strength is not the proper approach in the case of

44. *Id.* at 388, *quoting* Reynolds v. Sims, 377 U.S. 533, 555 (1963).

45. Under section five, a District of Columbia three-judge court has the responsibility to determine whether a standard, practice, or procedure has the purpose or the effect of denying or abridging the right to vote on account of race or color. Since the composition of these three-judge courts is not static, the district court opinions may vary until the Supreme Court addresses the issue in question. 42 U.S.C. § 1973c (1970).

46. 354 F. Supp. at 1028-29.

47. *Id.* at 1031.

48. 376 F. Supp. at 1348. Justice Brennan, in his dissenting opinion, insisted that this was the correct application of *Perkins*. 95 S. Ct. at 2311.

annexation.[49] It rejected this approach on the grounds that it would effectively preclude annexations from occurring or would invidiously dilute the voting strength of other racial groups in the community.[50] The majority focused instead on preserving and protecting voting rights in the enlarged boundaries after annexation.[51]

The Court's approach was based on pragmatic considerations. It proceeded from the presumption that annexations are a legitimate governmental option for cities faced with such problems as a declining tax base and a rising demand for services. Accordingly, the Court devised a test that does nothing to inhibit this option. A city seeking to enlarge its boundaries need only ensure that the electoral system used after annexation be one calculated to give the black community a voting strength most nearly proportionate to its numbers in the new city.[52] *Richmond* in effect allows dilution when accomplished through annexation,[53] but it rationalized this result by declaring, "[A] different city council and an enlarged city are involved after the annexation."[54]

In delineating the principles that should govern the application of section five, insofar as it forbids voting changes having a discriminatory *effect* on the voting rights of blacks, *Richmond* appears to be a significant departure from *Perkins*. In *Perkins* the Court reasoned that annexation has the potential to abridge the vote of black *citizens* since "it dilutes the weight of the votes of the voters to whom the franchise was limited *before* the annexation."[55] In *Richmond* the court no longer was concerned with the voting patterns before annexation, apparently believing that a fair ward plan after the annexation was all that was necessary to ensure effective minority representation.[56]

This reliance on a ward system is not an entirely satisfactory remedy for a minority group fast approaching majority status in a community. The ward plan can be objected to on at least three grounds. First, while four representatives on a city council of nine is a solid base from which to voice dissent, it is not tantamount to wielding effective power. "[B]lacks would have a greater opportunity to elect five councilmen responsive to their concerns and interests in an at-large system

49. 95 S. Ct. at 2304.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. 400 U.S. at 388 (emphasis added).
56. 95 S. Ct. at 2304.

within Richmond's old boundaries than in a ward system operating within the expanded boundaries."[57] Secondly, if demographic trends of the last decade continue, blacks can shortly anticipate attaining majority status despite the recent addition of whites by the annexation. Majority status alone, however, will not bring with it the advantages that would result from the combination of that status with an at-large voting system. Thus, annexation will not only deprive blacks of the probability of immediate power, it will also ensure that the white community will be guaranteed maximum representation if the blacks attain majority status at a later date. A third objection is that, whereas an at-large electoral system tends to reward those candidates who appeal to the broadest spectrum of the community, a ward system typically serves to reward those candidates who reflect the interests of their district. Thus, an unintended consequence of a court-imposed ward system may be an intensification of racial bloc voting, which can very well result in heightened racial tension.[58]

The second prong of any section five inquiry is whether the proposed voting change has been adopted for the *purpose* of denying or abridging the voting rights of blacks.[59] In *Richmond,* the Court was presented for the first time with a district court finding that the *purpose* of a voting change was violative of section five. Unable to completely ignore the clear mandate of the Voting Rights Act concerning invidious purpose, the Court stated, "An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute."[60]

The Court, however, was not convinced that a strict enforcement of the "purpose" clause would be satisfactory. Concerned that the impermissible intent of a few might become a vehicle for denying a boundary change needed for the health of the entire municipality, the Court adopted a "verifiable justification" standard by which purpose becomes determinative only if no countervailing economic and administrative benefits can be demonstrated to be a product of the annexation.[61] Impermissible motivation serves simply to trigger a demand for a legitimate reason for the action.

57. 376 F. Supp. at 1355-56.

58. *Cf.* LaPonce, *The Protection of Minorities by the Electoral System,* 10 W. POL. Q. 318, 330-31 (1957).

59. *See* note 2 *supra.*

60. 95 S. Ct. at 2307.

61. *Id.* at 2308.

Minority citizens who attempt to challenge voting changes on fifteenth amendment grounds, as in *Holt*, often find the burden of proof placed on them to be an insurmountable obstacle.[62] As one commentator has noted, "[T]he Supreme Court has applied the fifteenth amendment to strike down discriminatory measures in only eight cases in a century."[63] In recognition of the futility of the litigation method of securing voting rights, the Voting Rights Act shifted the burden of proof. The legislative intent was clearly to make this burden of proof[64] a formidable hurdle for those areas under the jurisdiction of section five. However, after *Richmond*, states and municipalities are unlikely to experience undue difficulty in sustaining the burden of proving that the purpose of the annexation was not illegal under section five.[65]

A municipality now has the option of proving that impermissible purposes were not originally present or presenting compelling current economic and administrative justifications for the annexation. Given the difficulty of ascertaining improper motivations[66] and the multitude of verifiable, legitimate purposes which may plausibly accompany an annexation, it is now highly unlikely that municipalities will fail to meet the burden of proof on this issue.

The Voting Rights Act has often been praised for its deterrent effect in preventing invidious election changes and in inhibiting those maneuvers that were typically used in the past to deny or abridge the voting rights of blacks.[67] Justice Brennan, in the dissenting opinion, wrote that "[t]o hold that an annexation agreement reached under such circumstances can be validated by objective economic justifications offered many years after the fact, in my view, wholly negates the prophylactic purpose of §5."[68] Government officials in the areas affected by the Act may be less hesitant in circumventing the letter of the law in the belief

62. *See* text accompanying notes 14-15 *supra.*

63. Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 561 (1973).

64. *See* note 2 *supra.*

65. Congressman McCulloch, ranking minority member of the House Judiciary Committee, stated, "The burden of proof under section 5 is rightfully placed upon the jurisdiction to show that the new voting law or procedure is not discriminatory. As in tort law, when circumstances give rise to an inference that there has been misconduct, the party that has access to the facts is called upon to rebut the inference and show that its conduct was proper." 115 CONG. REC. 38,486 (1969). *Accord*, 116 CONG. REC. 6154 (1970) (Statement of Senator Fong).

66. *E.g.*, Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367 (1968). For an excellent discussion of this problem *see* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

67. *E.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966).

68. 95 S. Ct. at 2310 (dissenting opinion).

that an *ex post facto* justification will suffice if judicial action is initiated under section five.[69]

The Court's pragmatic approach to annexations is not without merit. The attainment of power by blacks in a city that is no longer economically viable is an empty victory. However, in its eagerness to afford relief to beleaguered cities, the Court seriously undercut the power of section five. The burden of proof concerning the question of discriminatory purpose has become meaningless. By ignoring pre-annexation minority political influence, the Court has invited that influence to be diluted. Politicians in the states and subdivisions covered by section five can no longer successfully prevent blacks from voting. However, annexations may become one method of preventing blacks from winning or deciding elections. The promise of full voting rights is an elusive one if it is subject to manipulations of this kind. In the wake of the violence at Selma, Alabama, President Johnson urged Congress to enact voting rights legislation. The President stated, "No law we now have on the books . . . can ensure the right to vote when local officials are determined to deny it."[70] The *Richmond* decision serves notice to local officials determined to prevent blacks from wielding real power that there is now no law that prevents annexations from being used to dilute the political influence of blacks.

BRIAN A. POWERS

Constitutional Law—The Establishment Clause: Drawing the Line on Aid to Religious Schools

Since its first ruling on an establishment clause[1] challenge to state aid to religious schools,[2] the United States Supreme Court has sought to

69. Annexations are often viewed as a safety valve for our larger cities. This decision will also affect much smaller cities eager to add white voters for their tax dollars and their votes. *Perkins* involved the expansion efforts of Canton, Mississippi, a town with a 1970 census of 10,703; *Petersburg* involved Petersburg, Virginia, a city with a 1970 population of 36,103.

70. *See Hearings on Extension, supra* note 34, at 5.

1. The establishment clause provides: "Congress shall make no law respecting an establishment of religion, ..." U.S. CONST. amend. I.

2. Everson v. Board of Educ., 330 U.S. 1 (1947). The establishment clause was presumed applicable to the states via the fourteenth amendment in *Everson, supra* at 15, and has subsequently been expressly applied to the states. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968); McCollum v. Board of Educ., 333 U.S. 203 (1948).