

Constitutional Law: Due Process: Non-Retrogressive Reapportionment Plan Upheld. (*Beer v. United States*)

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Robert S. Berman, *Constitutional Law: Due Process: Non-Retrogressive Reapportionment Plan Upheld. (Beer v. United States)*, 60 Marq. L. Rev. 173 (1976).

Available at: <http://scholarship.law.marquette.edu/mulr/vol60/iss1/10>

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not determine what makes reputation different from other liberty interests, nor did it state how its violation of the presumption of innocence differs from other such violations which have been declared unconstitutional. Moreover, the obvious importance of one's good reputation is simply ignored.⁴⁹

The substantive inadequacy of *Paul* is the harm it does to the concept of section 1983. Section 1983 was enacted to be the procedural mechanism for litigating questions arising out of the fourteenth amendment, and its purpose is to protect a person's rights, privileges, and immunities without the restrictions of other state remedies. The Court has emasculated section 1983 by imposing upon it the limitations of tort law and the necessity of a particular relation to state remedies. Persons with legitimate claims such as Davis's are now left without a remedy or an impartial forum.

GEORGE S. BARANKO

Constitutional Law—Due Process—Non-retrogressive Reapportionment Plan Upheld—In the recent decision of *Beer v. United States*¹ the plaintiffs, six city council members,² on behalf of the City of New Orleans, sought a judgment from the District Court for the District of Columbia declaring that neither the intent nor the effect of a proposed plan for the apportionment of the councilmanic districts, which had been challenged twice by the Attorney General of the United States,³ would abridge the right to vote on account of color or race.⁴ A

49. See W. SHAKESPEARE, *OTHELLO*, Act III, Scene 3, Lines 155-60. Who steals my purse steals trash. . . . But he that filches from me my good name [r]jobs me of that which not enriches him, [a]nd makes me poor indeed.

1. 425 U.S. 130 (1976). Justice Stewart delivered the opinion of the Court in which Chief Justice Burger and Justices Blackmun, Powell and Rehnquist joined; Justice White filed a dissenting opinion; Justice Marshall filed a dissenting opinion, in which Justice Brennan joined. Justice Stevens took no part in the decision.

2. The action was brought by six of the seven incumbent councilmen.

3. The guidelines established by the Attorney General for the preclearance procedure of § 5 of the Voting Rights Act of 1965 are contained in 28 C.F.R. § 51.1 *et seq.* In order to prevent new forms of racial discrimination these guidelines require the submission and subsequent approval by the Attorney General of all changes in a jurisdiction's voting laws.

4. The action for declaratory judgment was brought under § 5 of the Voting Rights

group of black voters intervened⁵ at the district court level. The district court refused to allow the plan to go into effect, holding first that the plaintiffs failed to meet their burden of proving that the plan would not result in the infringement of black voting rights and secondly, that the failure to alter the city charter provision requiring two at-large seats, in itself, had such a discriminatory effect.⁶

The proposed plan was developed by the City of New Orleans pursuant to its city charter⁷ under guidelines established by the city attorney.⁸ The first apportionment and design (Plan

Act of 1965, as amended, 42 U.S.C. § 1973c (1970) [hereinafter cited as § 5] which provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the 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 a 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 provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

5. The intervenors were the plaintiffs in *Jackson v. Council of City of New Orleans*, Civ. No. 73-1862 (E.D. La. June, 24, 1974), five black voters of New Orleans who sought a reconstruction of the councilmanic districts based on constitutional grounds. Proceedings in the case were deferred pending the decision in *Beer*. See FED. R. CIV. P. 24.

6. 374 F. Supp. 363 (D.D.C. 1974).

7. *Id.* at 368 n. 18.

8. *Id.* at 373. There were five main criteria contained in the guidelines: (1) no two incumbents in the same district; (2) the districts were to be compact and geographi-

I) was submitted to the United States Attorney General.⁹ Objection to the plan came not only from the Attorney General, who later disapproved it on the basis that it would have the effect of diluting the black vote, but also from the voters, black and white alike. The black voters felt that the plan would effectively prevent them from electing a black council member, while white voters from the Algiers section of New Orleans, which is disjoined from the city by the Mississippi River, objected to being placed in three different districts.¹⁰

A second plan (Plan II) was drawn up to solve the Algiers problem, but no changes were made to correct the flaws found by the Attorney General.¹¹ Plan II was also rejected by the Attorney General.¹² The plaintiffs then brought this action on behalf of the city.

The district court found that even though the statistical data, considered in a vacuum, did not necessarily establish that the plan was racially discriminatory, the inexorable consequence of the plan would be "a drastic reduction in the voting strength of the black minority."¹³ The court based this conclusion on the blacks' past denial of access to the political system,¹⁴ procedures such as anti-single-shot voting¹⁵ and majority

cally integral; (3) districts were to follow traditional political boundaries; (4) boundaries should also follow natural boundaries as well as streets and canals; (5) the districts were to avoid lines which would divide concentrations of minority voters and thereby reduce their voting strength.

9. Louisiana is covered by the Voting Rights Act of 1965 as of August 7, 1965. 30 Fed. Reg. 9897 (1965).

10. 374 F. Supp. at 373-74. Under Plan I blacks would be a population majority in two districts but would be a voting majority in neither. The white population of Algiers has always been in one district.

11. It is significant that Algiers, which had a population of less than one district (117,000), was able to force a change in the apportionment plan, while the 267,000 blacks of New Orleans were not able to accomplish a similar feat. 374 F. Supp. at 372. See U.S. COMM'N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER*, 287-92 (1975) [hereinafter cited as *TEN YEARS AFTER*]. See generally W. MILLS & H. DAVIS, *SMALL CITY GOVERNMENT: SEVEN CASES IN DECISION-MAKING* (1962).

12. 374 F. Supp. at 376-77.

13. *Id.* at 388.

14. *Id.* at 374-75.

15. *Id.* at 376. Antisingle-shot voting is the requirement that a voter must cast the number of votes equal to the number of positions to be filled. The procedure works against a minority group in a multi-member district because the minority voters cannot concentrate their vote behind a limited number of candidates, while the votes of the majority are divided among a number of candidates.

vote¹⁶ and the demographics of the city.¹⁷ For these reasons the court concluded that the city had failed to meet its burden of proving that the plan did not have the purpose and would not have the effect of denying or abridging the right to vote on account of color.¹⁸ The district court also found that the two at-large seats required by the city charter further diluted black voting strength. According to the district court, the necessity of looking at the entire procedure for the election of the seven member city council outweighed the objection that because the at-large seats had not been changed since 1954 and were not being changed at that time, they were not subject to pre-clearance under section 5.¹⁹

I. BACKGROUND OF VOTING RIGHTS ACT OF 1965

Mounting frustration with the obstacles encountered by blacks in attempting to vote under the Civil Rights Acts of 1957,²⁰ 1960²¹ and 1964²² prompted Congress to pass the Voting Rights Act of 1965.²³ Prior to the 1965 Act, the passage of each new federal law caused some states to enact "new and more sophisticated tactics to disenfranchise,"²⁴ which in turn generated another federal law. The 1965 Act was an attempt by Congress to enforce the fifteenth amendment²⁵ by providing a formula to determine whether a jurisdiction fell within the scope of the Act.²⁶ A jurisdiction which satisfied the formula was then required to have its voting procedure approved either

16. *Id.* A minority candidate could win a position in a contest with two majority candidates if the majority candidates split the votes of the majority. However, majority voting rules would then require a run-off election, thus making it all but impossible for the minority candidate to prevail.

17. *Id.* at 368. The black population is heavily concentrated in a series of neighborhoods extending eastwardly and westwardly through the center of the city. The areas outside the central city are predominantly white. The lines of Plan I, running in a north-south direction would produce a district with a white majority.

18. *Id.* at 388.

19. *Id.* at 399-400.

20. 71 Stat. 634 (codified in scattered sections of 5, 28, and 42 U.S.C.).

21. 74 Stat. 86 (codified in scattered sections of 5, 18, 20 and 42 U.S.C.).

22. 78 Stat. 241 (codified in scattered sections of 5, 18, 26, 29, 42, and 45 U.S.C.).

23. 42 U.S.C. §§ 1971, 1973-1973p (1970).

24. McCarty & Stevenson, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 357 (1967).

25. The only other law enacted under the aegis of the fifteenth amendment was the Enforcement Act of May 31, 1870, ch. 64, 16 Stat. 140, construed in *United States v. Cruikshank*, 92 U.S. 542 (1876), and *United States v. Reese*, 92 U.S. 214 (1876).

26. 42 U.S.C. 1973b (1970).

by the Attorney General or by securing a declaratory judgment from the District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."²⁷ The constitutionality of the Act was promptly affirmed in *South Carolina v. Katzenbach*,²⁸ in which the Supreme Court held the Act to be appropriate in light of the exceptional conditions that prompted its passage.²⁹

Contemporaneously with the nationwide concern for black suffrage which prompted the Voting Rights Act of 1965 and its amendments, the Court entered the "political thicket" of apportionment that Justice Frankfurter had warned against in *Colegrove v. Green*.³⁰ In *Gomillion v. Lightfoot*³¹ the Court held that a district boundary based on invidious discrimination was unconstitutional. Two years later, in *Baker v. Carr*,³² the Court suggested that judicially manageable standards exist for fair representation in the apportionment areas.³³ The standard of "one man, one vote" was later enunciated in a series of cases commencing with *Westberry v. Sanders*³⁴ and *Reynolds v. Sims*,³⁵ both of which struck down apportionment plans which

27. 42 U.S.C. 1973c (1970).

28. 383 U.S. 301 (1966). See Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79; Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1 (1965); Cox, *The Constitutionality of the Voting Rights Act of 1965*, 3 HOUS. L. REV. 1 (1965); Roman, *Section Five of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 24 RUTGERS L. REV. 521 (1970).

29. During the Congressional hearings on the proposed act, 25,000 people marched from Selma to Montgomery, Alabama under the protection of federal marshalls to petition for the right to vote. The effect of this march was evident during the committee deliberations. *Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., at 4 (1965) [hereinafter cited *1965 Hearings*]; cf. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

30. 328 U.S. 549 (1940). In that case, the Supreme Court refused to find a judicially cognizable claim in a challenge brought by three voters to the apportionment of congressional districts in Illinois.

31. 364 U.S. 339 (1960). The Court held that a claim existed under the fifteenth amendment when the municipal boundaries of Tuskegee, Alabama, were redrawn into an irregular twenty-eight sided figure resembling a dragon. This action by the state legislature reduced the black population of Tuskegee from four hundred to five.

32. 369 U.S. 186 (1962). The Supreme Court reversed the ruling of a Tennessee district court and remanded the case for further findings. The district court, relying on *Colegrove v. Green*, denied jurisdiction of a challenge to the failure of the Tennessee legislature to apportion its districts since 1901.

33. *Id.* at 210. For the purposes of this article the terms "reapportionment" and "redistricting" will be included under the term "apportionment."

34. 376 U.S. 1 (1964).

35. 377 U.S. 533 (1964).

created serious inequalities in the populations of congressional and state legislative districts, respectively.³⁶ In the cases following *Reynolds*, all questions of political representation were subordinated to the rule of absolute equality of population in all legislative districts. A strictly numerical approach was sufficient.³⁷

This mathematical rule of equality did not always accomplish the basic aim of fair representation that *Reynolds* had commanded.³⁸ By "not coming to grips with the question of representation,"³⁹ the Supreme Court may have protected the voting rights of black citizens which could never be used effectively. This problem was recognized in *Allen v. Board of Elections*,⁴⁰ when the Court stated that voting rights can be infringed by a dilution of voting power as well as by an absolute prohibition of casting a ballot.⁴¹

The Court's desire to require mathematical equality in section 5 preclearance cases was illustrated in *Georgia v. United States*.⁴² The Court held, based on its previous holding in *Allen*, that the section 5 preclearance procedure must be broadly construed, and that each covered jurisdiction must review all apportionment plans with the Attorney General or seek a declaratory judgment in federal court. As a result of the *Georgia* decision, coupled with the results of the 1970 census which forced many of the political subdivisions covered by the Act to apportion, submissions, to the Attorney General under section 5 increased dramatically.⁴³

36. Some of the districts varied in population by as much as thirty-five percent.

37. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, in REAPPORTIONMENT IN THE 1970's 217 (N. Polsby ed. 1971). See *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

38. 377 U.S. 533, 577 (1964). See also 26 ALA. L. REV. 163 (1973).

39. Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, 1969 SUP. CT. REV. 219, 227.

40. 393 U.S. 544 (1969). Amendments in the Mississippi election laws such as an increase in the number of signatures for an independent candidate to gain a place on the ballot and changing voting for county supervisors to at-large instead of by district were covered by the § 5 preclearance procedure.

41. 393 U.S. at 569, citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

42. 411 U.S. 526 (1973).

43. In the years 1965-1970, a total of 578 changes were submitted under § 5. During the period 1970-1974, 3,898 were reviewed by the Attorney General. SENATE COMM. ON THE JUDICIARY, REPORT ON THE VOTING RIGHTS ACT OF 1965 EXTENSION, S-1279, S. Rep. No. 94-925, 94th Cong., 1st Sess., 16 (1975) [hereinafter cited as 1975 Hearings].

The 1970 legislative apportionment in Louisiana gave rise to several actions alleging racial discrimination.⁴⁴ The Louisiana plan was labelled

the clearest example of racially discriminatory gerrymandering of state legislative districts. In addition to the widespread use of multimember districts in both chambers, the acts contained a great variety of ad hoc gerrymandering devices, including divisions of black population concentrations, circumscribing blacks into a single, overwhelmingly black majority district thereby rendering adjacent districts majority white, and inclusion of remote, noncontiguous areas of white population concentration into otherwise majority black districts.⁴⁵

In *Taylor v. McKeithen*⁴⁶ plaintiffs claimed that the Louisiana districts, although equal in population, served to dilute the strength of the black votes. The court observed that voting rights litigation "was leaving the era of reapportionment and beginning the quest for representative apportionment."⁴⁷ It was this quest for representative apportionment that resulted in the district court's holding of invalidity in *Beer*. The plaintiffs appealed to the Supreme Court. The Court held that the judgment of the district court should be vacated and the case remanded. The Court's decision reinforced the weight of decisional authority holding that apportionment plans need preserve mathematical equality only.⁴⁸

II. THE OPINION

A. Dilution of Voting Power

Both the majority opinion and Justice Marshall's dissent in *Beer* agreed that the question to be resolved was "when does an apportionment plan have the effect of denying or abridging the right to vote on account of race or color."⁴⁹

44. The five actions were consolidated for trial. *Bussie v. Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971), *modified and aff'd mem. sub nom. Bussie v. McKeithen*, 457 F.2d 796 (5th Cir. 1971), *vacated and remanded mem. sub nom. Taylor v. McKeithen*, 407 U.S. 191 (1972), *on remand*, 499 F.2d 893 (1974).

45. Halpin & Engstrom, *Racial Gerrymandering and Southern State Legislative Redistricting*, 22 PUB. L.J. 37, 52-53 (1973). Stanley Halpin, one of the authors, was the attorney for the intervenors in the instant case.

46. 499 F.2d 893 (5th Cir. 1974).

47. *Id.* at 910.

48. The disparity between the most and least populous of the districts was 1,631 people or 1.4 percent. 374 F. Supp. at 386.

49. 425 U.S. at 139, 145.

The opinion of the Court, written by Justice Stewart, treated the question as merely one of statutory interpretation.⁵⁰ The majority relied on both the legislative history of the Act and *South Carolina v. Katzenbach*⁵¹ for the proposition that the Voting Rights Act was intended to "rid the country of racial discrimination in voting."⁵² The majority devised a twofold test for section 5 cases to determine whether an abridgement of suffrage exists. The first step requires determining whether the proposed change would lead to a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."⁵³ Assuming no retrogression, the second step requires determining whether the plan is nevertheless unconstitutionally discriminatory on the basis of race or color under the fourteenth amendment.⁵⁴ Only after these threshold questions are answered can the court make its determination regarding the constitutionality of a proposed apportionment plan.

Once the *Beer* majority thus determined a standard by which an apportionment plan must be scrutinized, it further concluded that mere examination of the statistical data was a sufficient basis for such a determination. Since Plan II resulted in a black voting majority in one of the two districts with black population majority,⁵⁵ and since, taking straight racial voting as an undisputed fact, a black could therefore be elected to the council, a feat never accomplished under the old apportionment of the city, the Court upheld the plan: "It is not possible to enhance the political position of racial minorities, as was done here, and still suffer a dilution or abridgment of the right to vote."⁵⁶

50. 425 U.S. at 139.

51. 383 U.S. 301 (1966).

52. 425 U.S. at 140, *citing* *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1965).

53. 425 U.S. at 141.

54. *Id.* n.12; *cf.* 1975 *Hearings, supra* note 43 at 19, where the Senate Judiciary Committee termed a separate determination of "population inequality" and preclearance under § 5 a correct application. *Gaillard v. Young*, C.A. No. 74-1265 (D. S.C. June 11, 1975).

55. Districts B & E had black population majorities of 64.1 percent and 50.6 percent, respectively. There was a 52.6 percent black voting majority in district B. The dramatic effect of Plan II was demonstrated by the increase in district B's black voting majority from 50.2 percent in 1961 to 52.6 percent in Plan II, while district E's black resident population changed from a minority of 49.4 percent to a majority of 50.6 percent. 425 U.S. at 150 n. 7.

56. *Id.* at 141.

However, the majority's analysis of "dilution" is questionable. For the proposition that section 5 was aimed at circumventing the dilution of voting power, the majority cited *Perkins v. Matthews*.⁵⁷ However, the concept of dilution was not a novel one for the Court. In *Reynolds*, the Court itself announced that the "right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as wholly prohibiting the free exercise of the franchise."⁵⁸ Yet the Court actually avoided considering any evidence of dilution⁵⁹ in the instant case. In portraying the political situation in New Orleans, the district court noted that "[t]he large numerical strength of the black community and its much weaker proportional voting power"⁶⁰ was a major problem. Under proposed Plan II, the situation would not improve, and the strength of the black vote would be much lower than its 34.5 percent potential. In response to this allegation, the Supreme Court cited *Whitcomb v. Chavis*,⁶¹ which held there was no "federal right to be represented in legislative bodies in proportion to [a minority's] number in the general population."⁶² However, *Whitcomb* is easily distinguished, since the *Whitcomb* Court based that rule on a finding that "no past denial of access to the political process"⁶³ occurred. However, in *Beer* both the district court and the Supreme Court dissents catalogue the facts creating a denial of access to the political process.⁶⁴ Justice White suggested that the lawmakers were "quite aware of whether the districts that they created [would] be white or black."⁶⁵ The dissents underscored the naivete of the Court's view of discriminatory voting practices. By failing to take into account more than the statistics, the Court failed to recognize

57. 400 U.S. 379 (1971). The change from a ward to an at-large system for election of aldermen was found to be covered by § 5. See generally Derfner, *Discrimination and Voting*, 26 VAND. L. REV. 523 (1973).

58. 377 U.S. at 556. See also Banzhaf, *Multi-member Electoral Districts — Do They Violate the "One Man-One Vote" Principle*, 75 YALE L.J. 1309 (1966); Dixon & McKay, *Election Districts: Substantial Population Equality and Exceeded Expectations*, 1 HUM. RIGHTS 74 (1970-2); 26 ALA. L. REV. 163 (1973); 4 MEMP. ST. U. L. REV. 565 (1974); 7 ST. MARY'S L.J. 447 (1975).

59. 425 U.S. at 144, 161.

60. 374 F. Supp. at 368.

61. 403 U.S. 124 (1971).

62. 425 U.S. at 136 n. 8.

63. 403 U.S. 124, 155-56 (1971).

64. See notes 14 and 59 *supra*.

65. 425 U.S. at 144.

that "sophisticated as well as simple-minded modes of discrimination should be nullified."⁶⁶ The majority made no determination of whether the intent of the draftsmen of the New Orleans plan were "racially neutral"⁶⁷ or whether they made only minimal efforts to avoid overt discrimination.

The *Beer* majority, while ruling on the matter of dilution of voting power, refused to consider the question of proportional or compensatory apportionment. This requires a political subdivision to take affirmative action to remedy past voting inequality in future apportionments. In *Taylor v. McKeithen*⁶⁸ the Court of Appeals for the Fifth Circuit talked of "a strong case being made for the use of purposeful judicial racial gerrymandering to afford blacks fair representation in the legislature."⁶⁹ The permissibility of compensatory apportionment has aroused much debate.⁷⁰ It was the hope of the Fifth Circuit that the Supreme Court would deal directly with that issue in *Beer*.⁷¹ However, the Court declined.

B. Burden of Proof

In his dissent, Justice Marshall borrowed freely from equal protection concepts contained in cases arising under the fourteenth amendment.⁷² While this approach is not totally justified by either the legislative history of the fifteenth amendment⁷³ or the Voting Rights Act,⁷⁴ some case law⁷⁵ supports this position. Justice Marshall indicated that the proper test for

66. *Lane v. Wilson*, 307 U.S. 268 (1939).

67. *DeFunis v. Odegaard*, 416 U.S. 312, 334 (1974) (Douglas, J., dissenting) (emphasis deleted).

68. 499 F.2d 893 (5th Cir. 1974).

69. *Id.* at 911.

70. See REAPPORTIONMENT IN THE 1970's (N. Polsby, ed. 1971); Wildgen, *Measuring Malapportionment in Louisiana*, 16 LOYOLA L. REV. 383 (1969); 5 IND. LEGAL F. 167 (1971); 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 472 (1970); 25 STAN. L. REV. 84 (1972).

71. 499 F.2d at 910-11.

72. See Gunther, *The Supreme Court, 1971 Term — Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); See also *Thompson v. Shapiro*, 394 U.S. 618 (1969).

73. During the debates on the fifteenth amendment Senator Howard of Michigan, who introduced the fourteenth amendment in the Senate, stated, "This is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth [article]." CONG. GLOBE, 40th Cong. 3rd Sess. S.p. 1003 (1869).

74. "The basis of the fourteenth amendment is not only unnecessary but also makes the defense of the constitutionality [of the Act] more difficult." Remarks of Nicholas deB. Katzenbach, Attorney General of the United States. 1965 *Hearings*, *supra* note 29, at 66.

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

scrutinizing an apportionment plan under section 5 must be based on constitutional standards taken from both section 5 and equal protection cases. The test Marshall proposed was, in reality, the strict scrutiny-equal protection test.⁷⁶ According to Marshall, the first object of the Court's analysis should be the effect of the plan itself. Then,

if the proposed redistricting plan under-represents minority group members, the burden is on the covered jurisdiction to show that "the political process leading to nomination and election were . . . equally open to participation by the group in question. . . ." If the jurisdiction cannot make such a showing, then the proposed plan must be rejected, unless compelling reasons for its adoption can be demonstrated.⁷⁷

Marshall's approach is here consistent with the concept of the shifted burden of proof first adopted for section 5 cases in *South Carolina v. Katzenbach*.⁷⁸ One of the major purposes of section 5 was to shift the burden of proof "from the discriminatee to the discriminator."⁷⁹ The burden on the state was established in *South Carolina* to be a substantial one.⁸⁰ Thus, in *Georgia v. United States*,⁸¹ the Court sustained the action of the Attorney General invalidating an apportionment plan on the basis that he "could not conclude" that it did not have a discriminatory racial effect on voting.

In *Beer*, the Supreme Court's decision did not directly address the question of who carries the burden of proof.⁸² However, in a final footnote, the Court stated that the plan was not unconstitutional and "[t]he United States made no claim that Plan II suffers from any such disability."⁸³ If the inference to be drawn from these statements is that the federal government has the burden of proof of discrimination, then the Court has destroyed the heart of the Act. Justice Marshall attempted to clarify the Court's position as stated in the footnote. He

76. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

77. 425 U.S. at 157-58 (footnotes omitted).

78. 383 U.S. 301 (1966).

79. 425 U.S. at 147-48.

80. See *City of Richmond v. United States*, 422 U.S. 358, 380-81 (1975) (Brennan, J., dissenting).

81. 411 U.S. 526 (1973).

82. The district court decision and the two dissenting opinions mentioned the burden question, but it was not mentioned in the opinion of the majority.

83. 425 U.S. at 142 n. 14.

suggested that the majority's position was that the United States had the burden of pleading, while the state had the burden of proof.⁸⁴ However, this amplification is not conclusive, and as a result, *Beer* has cast doubt on the traditional view of who carries the burden of proof in section 5 cases.

C. *At-Large Positions*

The *Beer* decision left another important question unanswered. In *Georgia v. United States* the Court reserved the question of "whether a district in a proposed legislative reapportionment that is identical to a district in the previously existing apportionment may be subject to review under § 5."⁸⁵ In *Beer* both the majority and the dissent addressed the status of the at-large seats. The intervening black voters contended that the at-large seats should also be subject to the preclearance review.⁸⁶ On reargument, the United States conceded that the seats were not subject to review under section 5.⁸⁷ With that concession, the majority then considered the city council as having only five members instead of seven members. Simple mathematics shows the significance which such a change in the number of total seats under review would have on the determination of racial discrimination in the apportionment plan jurisdiction.⁸⁸ While Justice Marshall agreed that the two seats were not before the Court for approval, he stated that Plan II should not be assessed "without regard to the seven-member council it [was] designed to fill."⁸⁹ Marshall further pointed out the danger inherent in the Court's tactic:

The Court's approach of focusing only on the five districts would allow covered municipalities to conceal discriminatory changes by making them a step at a time, and sending one two- or three-district alteration after another to the Attorney General for approval. If nothing beyond the districts actually before him could be considered, discriminatory effects could

84. *Id.* at 153 n. 12.

85. 411 U.S. at 535 n. 7.

86. It is significant that the determination of *Beer* by the district court was cited with approval by the Senate Judiciary Committee when it was deliberating the extension to the original Act. "Section 5 require[d] the submission of the entire seven member plan. . . ." 1975 *Hearings, supra* note 43, at 19.

87. 425 U.S. at 138.

88. *Id.* at 157 n. 18 & 158 n. 19.

89. *Id.* at 158.

be camouflaged and the prophylactic purposes of the Act readily evaded.⁹⁰

Thus, by refusing to review the status of the at-large positions, the *Beer* majority adopted a procedure permitting the avoidance of the purpose of the Act.

III. CONCLUSION

The reasoning of the Court in *Beer* will affect voting rights litigation in several ways: First, courts will continue to accept the "retrogression" test. This test would permit the absurd situation of a black population majority in New Orleans by the 1980 census, but an apportionment plan which gives only one council seat to a district with a black voting majority. According to the Court's reasoning, since no retrogression occurred, the plan would be constitutional.

The second effect of *Beer* is to cast uncertainty on the question of who carries the burden of proof in section 5 cases. But most importantly, *Beer* encourages a minimalistic approach to the problem of voting discrimination. In testifying during hearings on the original Voting Rights Act, former Attorney General Katzenbach stated: "The lesson is plain. [The Civil Rights Acts of 1957, 1960 and 1964] have had only minimal effect. They have been too slow."⁹¹ Only further litigation will determine whether the Court's decision in *Beer v. United States* has "slowed" the Voting Rights Act of 1965 in general, and section 5 specifically, to the point of ineffectiveness.

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Constitutional Law — Tenth Amendment — Fair Labor Standards Act — Minimum Wage Requirement Held Inapplicable to State Employees — Since the United States Supreme Court's abrupt reversal of direction in 1941 in *United States v. Darby*¹ the power of Congress to regulate private persons and corporations under the commerce clause² has been

90. *Id.* at 159 (footnote omitted).

91. 1965 *Hearings*, *supra* note 29, at 4.

1. 312 U.S. 100 (1941).

2. U.S. CONST. art. I, § 8, cl. 3.