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# Racial Discrimination and the Right to Vote

*Armand Derfner\**

Lawyers in voting discrimination cases are fond of quoting Justice Frankfurter's dictum that "the [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination."<sup>1</sup> Unfortunately for historical accuracy and for the health of our society, this statement simply has been false for most of the century since the passage of that amendment.

In the past fifteen years, however, a change has begun, and the right to vote without discrimination has gained substance. This Article is an effort to describe today's law of voting discrimination, and how that law developed. Because the present state of this area is so largely a product of its tortured history, it will be necessary to begin with a history of black enfranchisement. This history revolves chiefly about three major, short periods of dramatic change, separated by years of generally downward drift. For each of these periods, this Article will examine the varying response of the federal branches to the unceasing disfranchisement efforts of the states.

The first period, 1867 to 1876, covers the decade of congressional Reconstruction, which opened with formal enfranchisement of blacks and the passage and vigorous enforcement of broad protective legislation. It ended with Supreme Court decisions gutting both the fourteenth and fifteenth amendments on the same day followed soon by a political decision to terminate already dwindling enforcement efforts. For the next few years the states were increasingly left to their own devices and gradually pushed blacks effectively out of politics. Although federal enforcement of voting rights was meager, there was one development during these years—the Supreme Court's recognition of extensive congressional power over federal elections—that was to play a large role in the enfranchisement efforts of the 1960's.

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The author has been involved as counsel for a party or amicus curiae in a number of the cases described in this Article, including the following still-pending cases:

*City of Richmond v. United States*, Civil No. 1718-72 (D.D.C., filed Aug. 25, 1972); *City of Petersburg v. United States*, Civil No. 509-72 (D.D.C., Oct. 24, 1972); *Stevenson v. West*, Civil No. 72-45 (D.S.C., Apr. 7, 1972); *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972); *Harper v. Kleindienst*, Civil No. 1607-72 (D.D.C., Aug. 11, 1972); *Perkins v. Kleindienst*, Civil No. 1309-72 (D.D.C., Nov. 2, 1972).

1. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

The second major period, 1890 to 1908, saw the Southern States abandon their ad hoc barriers to black voting and develop total disfranchisement schemes, complete with literary tests, poll taxes, grandfather clauses, and white primaries. Contemporaneously, the federal government and courts clearly indicated that they would not intervene to halt this regressive trend. This disfranchisement pattern was enormously successful and prevailed for over half a century. In the 1940's, however, there were faint suggestions, amplified in the 1950's, that the federal government again would seek to enforce equal voting rights and that the courts might be less parsimonious in their readings of the fourteenth and fifteenth amendments.

The third major period began in 1957 and has continued to the present. During this period the fight for voting rights became a part of the civil rights revolution, and all levels of the federal government functioned to protect, not prevent, voting equality. Older responses to voting discrimination were adapted or discarded as the situation required, and for the first time, it seemed that full voting equality might some day be realized.

In the modern period, for the first time since the end of Reconstruction, voting discrimination has been energetically challenged. The growth of black political participation and power since 1957 has been great, and with that growth has come a steady shift in the nature of the discriminatory barriers facing black voters. For years, Mr. Justice Frankfurter notwithstanding, the most simple-minded modes of discrimination—generally transparent devices to prevent blacks from even qualifying to vote—were almost totally effective. In the past few years, however, the more facile of these techniques have been routed. Opponents of black political participation therefore have been forced to resort to more sophisticated modes of discrimination, chiefly those involving subtle burdens that deter participation and diluting mechanisms that limit the effectiveness of black votes.

These new modes of discrimination have been met by the development of sophisticated tools capable of dealing effectively with voting discrimination. The new tools go beyond the traditional but cumbersome fifteenth amendment. They include statutes, such as the provisions of the Voting Rights Act of 1965 that suspend literacy tests and require certain states to seek advance clearance from federal authorities before making changes in their voting procedures, and include constitutional provisions, like the equal protection and due process clauses of the fourteenth amendment, that have not previously been used to protect voting rights.

The development of new weapons against discrimination has

brought us to a watershed. If the new weapons are vigorously used and if the federal government and the courts maintain a commitment to equal voting rights, the possibility of ending voting discrimination is real. The second half of this Article is a status report on the progress of the challenge to voting discrimination, a report that summarizes both today's modes of discrimination and the available antidotes.

## I. RECONSTRUCTION AND ENFRANCHISEMENT: 1867-1876

### A. *Constitutional Background*

Before the Civil War, blacks, whether enslaved or free, were totally disfranchised except in six northeastern states.<sup>2</sup> After the War, the First Reconstruction Act of 1867 required the former rebel states to adopt new constitutions guaranteeing universal male suffrage without regard to race as a condition of readmission to the Union.<sup>3</sup> These constitutions remained in effect for a generation, being eventually discarded only when the federal government signaled its loss of interest by repealing most of the Reconstruction laws.

The fourteenth amendment, adopted in 1868, dealt with the franchise rather backhandedly, by providing that a state's representation in Congress was to be reduced proportionately if the state barred any adult males from the vote. The amendment also protected citizens' privileges and immunities, and guaranteed all persons equal protection and due process. However, these clauses, which were to become so important in later years, had little effect on voting at their inception.<sup>4</sup>

Enfranchisement of black citizens was formally guaranteed nationwide when the fifteenth amendment was passed in 1870. This amendment provided that "[t]he right of citizens of the United States to vote

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2. *Oregon v. Mitchell*, 400 U.S. 122, 156 (1970) (Harlan, J.). In a few states, however, blacks had been able to vote in earlier years.

3. Act of March 2, 1867, ch. 153, 14 Stat. 428. Detailed provisions governing the adoption and ratification of these constitutions were added later in 1867 and 1868. Act of March 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14; Act of March 11, 1868, ch. 25, 15 Stat. 41. The subsequent statutes readmitting states to the Union provided that the Reconstruction constitutions should never be amended to disfranchise anyone whose franchise they guaranteed, except for conviction of felony or prospective change in residence requirements. *See, e.g.*, Act of June 25, 1868, ch. 70, 15 Stat. 73.

These statutes were preceded by 2 others enfranchising blacks in the District of Columbia, Act of Jan. 8, 1867, ch. 6, 14 Stat. 375, and in the territories. Act of Jan. 25, 1867, ch. 15, 14 Stat. 379.

4. The debate over the framers' original understanding of the fourteenth amendment, particularly concerning its impact on voting, has been extensive and will not be continued here. The debaters and other sources are listed in 2 opinions in *Oregon v. Mitchell*, 400 U.S. 122, 154-200 (Harlan, J.), 250-78 (Brennan, J.) (1970).

shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The amendment also included, as had the thirteenth and fourteenth amendments, a clause providing that "Congress shall have power to enforce this article by appropriate legislation."<sup>5</sup>

### B. Congressional Enforcement

Promptly after the fifteenth amendment became effective on March 30, 1870,<sup>6</sup> Congress exercised its authority to pass appropriate enforcement legislation by enacting the Enforcement Act in 1870,<sup>7</sup> and, thereafter, expanding it by amendments in 1871.<sup>8</sup> The Enforcement Act contained three major portions.

First, section 1 guaranteed the right to vote in all national *and* state elections to all citizens without regard to race. After all other voting provisions of the Reconstruction statutes had been repealed, this section remained in solitary—and largely unenforceable—splendor, until it was again augmented by enforcement machinery beginning in 1957.<sup>9</sup>

The second major portion of the Enforcement Act, sections 2-6, designated a variety of racially discriminatory acts as federal offenses. Sections 2 and 3 required election officials to give whites and blacks equal opportunities to qualify to vote and nullified any prerequisite whose performance was made impossible by official discrimination. The use of force, bribery, threats, economic pressure, or "other unlawful means" to interfere with or obstruct any citizen's right to be free of racial discrimination in voting was made criminal under sections 4 and 5. Finally, section 6 barred any conspiracy to violate other portions of the Act or to hinder any citizen's free enjoyment of any federal right or privilege. These sections were meant to be drawn narrowly in order to fit the contours of the fifteenth amendment and, in the case of section 6, any other provision of the Constitution that created a right or privilege—specifically, the fourteenth amendment. As will be seen, the Supreme Court soon held that they were too broad, and struck down sections 3, 4 and 5.

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5. A history of the events surrounding the passage of the fifteenth amendment is described in W. GILLETTE, *THE RIGHT TO VOTE* (1965). A different view, attributing more importance to the framers' principles than to the Republicans' need for votes, is given by Cox & Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. SOUTHERN HIST. 303 (1967).

6. 16 Stat. 1131.

7. Act of May 31, 1870, ch. 64, 16 Stat. 140.

8. Act of Feb. 28, 1871, ch. 49, 16 Stat. 433.

9. Section 1 of the Enforcement Act was carried forward as REVISED STATUTES § 2004, and is now codified as 42 U.S.C. § 1971(a)(1) (1970).

The third major portion of the Enforcement Act, covering sections 19-22, was based not on the fifteenth amendment but on the power of Congress over federal elections. This portion represented a sweeping exercise of that power which outlawed a host of voting and registration frauds and other irregularities in federal elections. Sections 19-22 specifically defined a federal election as one in which a federal officer—a representative or delegated to Congress—was to be chosen, regardless of whether state officers were also being selected. Congress' broad power to supervise federal elections was thus extended to the state election process when states conducted dual-purpose elections or used a single registration system for all elections. Moreover, section 22 further extended the reach of federal power by making it a federal crime for any official—state or federal—to violate *state* law in a federal election. In contrast to its efforts to enforce the fifteenth amendment, Congress' efforts here proved successful, for the Supreme Court eventually held explicitly that broad federal legislation could cover elections of state officers conducted jointly with elections for federal officers.<sup>10</sup>

The 1871 amendments to the Enforcement Act moved in another direction by providing for federal officials to supervise federal elections and voting registrations. These election supervisors were to be appointed by a federal judge upon request by two citizens of any city with more than 20,000 persons. The supervisors were directed to see that each precinct's rolls were honest, the elections properly conducted, and its votes tallied correctly. Other sections gave the supervisors broad powers and protections, including the right to assistance from United States Marshals and, in necessary situations, the power to summon a posse to aid with difficult arrests.

### C. *Judicial Construction*

The Enforcement Act elicited a mixed response in the lower courts. While the federal election provisions generally fared well, the provisions barring racial discrimination ran into more frequent judicial opposition.<sup>11</sup> A significant complication was that, as criminal statutes, they had to be strictly construed.

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10. Sections 16-18 of the Enforcement Act were designed to enforce the fourteenth amendment. The fourteenth amendment had been adopted partly to clarify the constitutional basis for the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27, which rested initially on the thirteenth amendment. Sections 16-18 implemented the fourteenth amendment by re-enacting the 1866 Act. Among the provisions of the 1866 Act are those now codified as 42 U.S.C. §§ 1981-82, 1987-92, and 28 U.S.C. § 1443 (1970).

11. The course of enforcement is described in H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* 230-49 (1937); W. DAVIS, *THE FEDERAL ENFORCEMENT ACTS, STUDIES IN SOUTHERN*

In 1875 the Supreme Court finally heard appeals that tested the construction and validity of sections 3, 4 and 6 of the 1870 Act. In *United States v. Cruikshank*,<sup>12</sup> eight men, who were part of a mob that had dispersed and murdered a group of blacks in Louisiana, appealed from convictions under section 6 for conspiring to hinder citizens in the enjoyment of rights or privileges guaranteed by the federal Constitution or laws.<sup>13</sup> In *United States v. Reese*,<sup>14</sup> two election judges appealed from convictions under sections 3 and 4 of the 1870 Act for refusing to receive a black man's vote.<sup>15</sup> The Supreme Court deliberated on both cases for over a year and finally handed down decisions on March 27, 1876. The result was a nearly total nullification of the critical sections of the Enforcement Act.

In *Cruikshank*, the Court held that each of the rights or privileges at whose enjoyment the conspiracy allegedly was aimed was in fact not a federal right or privilege. The Court instead found them to be rights or privileges which were derived from the states and which the federal government had no power to protect. Four counts specifically alleged interference with voter rights, but the Court held that the only voting rights that Congress had authority to protect were the right to vote in a federal election and the right to vote free of racial discrimination. Because neither of these rights was alleged, the indictment was held not to state an offense. Although the Court did not strike down section 6, it construed the section so narrowly as to render it virtually useless.<sup>16</sup>

In *Reese*, the Court could find no fault with the indictments and therefore directly faced the constitutionality of sections 3 and 4. Emphasizing the proposition that strict construction was necessary because these were criminal statutes, the Court noted that "the Fifteenth

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HISTORY AND POLITICS 205-28 (1914); Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. SOUTHERN HIST. 202 (1962).

12. 92 U.S. 542 (1876).

13. The Colfax Massacre, which gave rise to the *Cruikshank* case, is described in H. CUMMINGS & C. MCFARLAND, *supra* note 11, at 241-44.

14. 92 U.S. 214 (1876).

15. The judges' refusal to accept the vote was based on the voter's failure to pay his poll tax. The voter had offered to pay the tax but the collector had refused to accept the tax because of the voter's race. These facts activated §§ 3 and 4 of the Enforcement Act. Act of May 31, 1870, ch. 14, §§ 3 & 4, 16 Stat. 140. Section 3 provided that anyone who had been wrongfully prevented on grounds of race from doing an act necessary to qualify to vote could present an appropriate affidavit to the election judge, who was then required to receive the person's vote or be guilty of a crime. Section 4 provided that any person who by unlawful means prevented a citizen from voting or qualifying to vote "as aforesaid" was guilty of a crime.

16. Section 6, the criminal conspiracy statute governing civil rights violations, has remained in the Code, 18 U.S.C. § 241 (1970). Its scope has broadened in recent years with the expanded definition of federal rights. See *United States v. Guest*, 383 U.S. 745 (1966).

Amendment does not confer suffrage upon anyone," but does create a federal constitutional right that "is within the protecting power of Congress—the right to be free from discrimination in voting."<sup>17</sup> Nonetheless, the Court held that the sections were void because, although the cases involved wrongful acts done on account of race, the wording of the sections (which the Court misread) made possible, in other situations, their application to cases not based on racial discrimination.

Thus the Supreme Court, in its first exposure to the Reconstruction statutes, had on a single day crippled the efforts of Congress to protect the right to vote against both official and private interference. Although the Supreme Court's holdings were seemingly technical and implied that Congress could rectify the statutory defects,<sup>18</sup> the Republicans lost control of Congress in 1875 and did not regain control until near the end of the century, when Reconstruction was long since dead. Meanwhile, the Supreme Court continued its series of restrictive holdings, which within a decade virtually nullified the Reconstruction statutes.<sup>19</sup>

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17. In a powerful dissent, Justice Hunt argued that §§ 3 and 4 of the Enforcement Act were limited to violations on account of race because their language tied them to § 1, which affirmed the right to vote free of racial discrimination, and to § 2, which made it a violation for any official to deny, on grounds of race, equal opportunity to complete the prerequisites for qualifying to vote. "By the words 'as aforesaid,' the provisions respecting race and color of the first and second sections of the statute are incorporated into and made a part of the third and fourth sections." 92 U.S. at 242 (Hunt, J., dissenting).

18. It has been argued persuasively that the *Reese* Court recognized the breadth of congressional power under the fifteenth amendment, and would have upheld and enforced a broad statute, including prohibitions against private abridgement of the right to vote, if it had been limited to racially grounded wrongdoing. Note, *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1448 (1965). Under this view, the Supreme Court remained sympathetic to expansive congressional power under the fifteenth amendment (but not the fourteenth) through the 1880's, and a later Court's holding that the fifteenth amendment does not extend to private conduct was a gross misreading of *Reese*. *James v. Bowman*, 190 U.S. 127 (1903). See notes 19 & 33 *infra*.

19. In addition to *Reese*, which struck down statutory provisions on the ground that they could be construed to reach misconduct not based on race, several other cases struck down civil rights statutes that could be construed to reach private misconduct unaided by state action. *Baldwin v. Franks*, 120 U.S. 678 (1887); *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883). The restrictive interpretation of the Reconstruction statutes and Civil War Amendments already had begun with the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), both of which narrowed the scope of the privileges and immunities clause of the fourteenth amendment.

In *James v. Bowman*, 190 U.S. 127 (1903), the Supreme Court struck down § 5 of the Enforcement Act on the ground that it covered private conduct, which the Court held was not within the power given Congress under § 2 of the fifteenth amendment. That section barred bribery or other interference with the right to vote of any person "to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States." The holding of *James* was possible only because the Supreme Court (a) confused the fourteenth and fifteenth amendment cases, (b) misrepresented the holding and language of *Reese*, and (c) totally



#### D. End of Reconstruction

Throughout Reconstruction, strong federal enforcement of the civil rights laws was essential to protect black voters from official fraud and malfeasance and private violence. Although many blacks held local and statewide office,<sup>20</sup> and many state governments were nominally in the hands of "radical" governors, these were unstable governments which depended upon the presence of federal troops and the widespread disfranchisement of whites.<sup>21</sup> Society, however, remained basically under white control, and the weight of social and economic pressure still operated to place conservative whites in power in most places—as private citizens, if not as officials.

The first three years of the decade saw vigorous enforcement of the new laws. In 1873, the number of criminal prosecutions in the South under the Reconstruction statutes totaled 1,271,<sup>22</sup> and that year's appropriation for administering the election supervisor program under the 1871 Act was 3,200,000 dollars.<sup>23</sup> Thereafter, federal enforcement waned, and effective disfranchisement began in earnest. The reconstruction governments, though headed by "Radical Republicans," came under increasing pressure when whites resumed voting in increased numbers and sought by any means to eliminate black voters. Federal troops became less and less responsive to Republican governors' requests for support and protection, leaving those governments vulnerable to overthrow. When Mississippi's Republican governor, Adelbert Ames, was forced to resign in 1875,<sup>24</sup> only three states remained "unredeemed"—Louisiana, South Carolina, and Florida—the only three states in which federal troops were still stationed.<sup>25</sup>

These three states were to be the focus of the Hayes-Tilden Presidential contest, whose settlement in the Compromise of 1877 is viewed

ignored the alternate holding of *Ex parte Yarbrough*, which sanctioned federal protection of the right to be free of racial discrimination in voting. Note, *supra* note 18, at 1455.

Fortunately, the vitality of *James* as a bar to congressional protection of fifteenth amendment rights against private conduct has apparently ended. See note 257 *infra*.

20. There were 20 blacks who served in the House of Representatives and 2 blacks who were elected to the Senate during Reconstruction. J. FRANKLIN, *FROM SLAVERY TO FREEDOM* 317-23 (3d ed. 1967).

21. Section 5 of the First Reconstruction Act, Act of March 2, 1867, ch. 153, § 5, 14 Stat. 428, provided that "participation in the rebellion" brought disfranchisement. This was construed to include all officeholders and soldiers except conscripts.

22. M. BERGER, *EQUALITY BY STATUTE* 8 (1967).

23. Act of June 10, 1872, ch. 415, 17 Stat. 348.

24. The end of Governor Ames' tenure is described in V. WHARTON, *THE NEGRO IN MISSISSIPPI 1865-1890*, at 181-98 (Harper Torchbook ed. 1965).

25. J. FRANKLIN, *supra* note 20, at 332.

generally as the formal end of Reconstruction.<sup>26</sup> By that Compromise, Hayes was awarded the disputed votes of the three "unredeemed" states, which were sufficient to elect him President. In return, federal troops were removed from those states, and it was tacitly understood that the federal effort to enforce black equality in the South had ended. There were periodic federal prosecutions in the South thereafter, and the Enforcement Act remained on the statute books until 1894, but Reconstruction was over.

#### E. Congressional Power over Federal Elections

Several of the prosecutions during the twilight of Reconstruction, however, were to have enormous significance in the twentieth century—prosecutions for violations of the Enforcement Act in connection with federal elections.

These cases involved Congress' specific power over election of United States Senators and Representatives, given in article 1, section 4 of the Constitution: "The Times, Manner and Places of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of choosing Senators." This provision formed the basis of several sections of the Enforcement Act<sup>27</sup> that broadly regulated the election of Representatives.

After the 1876 *Cruikshank* and *Reese* decisions had narrowed or invalidated portions of the Enforcement Act based on the fifteenth amendment, several prosecutions for violations of the federal election sections of the Act reached the Supreme Court and resulted in far-reaching affirmations of Congress' article 1 power.

The first case, in 1880, was *Ex parte Siebold*,<sup>28</sup> which did not involve race but ballot stuffing. Five men in Maryland were indicted for violating section 22 of the Enforcement Act of 1870, which made it a *federal* crime for an election official to violate *state* law at a federal election, and section 10 of the 1871 amendments to the Enforcement Act, which made it a crime to interfere with a federal election supervisor's efforts to assure an honest election.<sup>29</sup> In upholding these broad

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26. The most complete discussion of the Compromise of 1877 appears in C. WOODWARD, *REUNION & REACTION* (1966).

27. Sections 19-22 of the 1870 Act, ch. 114, 16 Stat. 140, and all but one section of the 1871 Amendments, Act of Feb. 28, 1871, ch. 49, 16 Stat. 433.

28. 100 U.S. 371 (1880).

29. Act of May 31, 1870, ch. 114, § 22, 16 Stat. 145; Act of Feb. 28, 1871, ch. 99, § 10, 16 Stat. 436.

provisions, the Supreme Court viewed the federal power over election of federal officers expansively to mean that if the overlapping of federal and state functions or the concurrence of state and federal elections created conflict, state, not federal law, must yield.

The breadth of federal power over the election of federal officers was confirmed in 1884, in *Ex parte Yarbrough*.<sup>30</sup> In this case, the Supreme Court affirmed the convictions of white conspirators who were charged with having beaten a black man for voting in a federal election—a violation of both section 6 of the Enforcement Act, which prohibits interference with the exercise of a federal right or privilege<sup>31</sup> and section 2 of the Ku Klux Klan Act of 1871, which prohibits interference with the specific federal right to support a candidate for federal office.<sup>32</sup> In upholding the constitutionality of these statutes, the Court emphasized Congress' broad power to deal with the election of federal officers and to protect citizens' right to vote in such elections; and held that thus the power extends clearly to protection against private conduct. Moreover, the Court specifically denied the applicability of fourteenth amendment cases—meaning principally *Cruikshank*, which was not cited by name—which had held private conduct beyond Congress' reach.<sup>33</sup>

30. 110 U.S. 651 (1884).

31. Act of May 31, 1870, ch. 14, § 6, 16 Stat. 140.

32. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13, was passed to enforce the fourteenth amendment and was necessitated by the states' inability to protect civil rights against private interference. The Act had provisions directed at private lawlessness and rebellion, as well as a provision guaranteeing federal rights against deprivations under color of law (now 42 U.S.C. § 1983 (1970)) and by private conspiracy (now 42 U.S.C. § 1985 (1970)). In *Collins v. Hardyman*, 341 U.S. 651, 655 (1950), the Supreme Court avoided what it saw as constitutional objections by limiting § 1985 to conspiracies involving some state action; but the Court later removed this limitation in *Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971).

33. Both counts of the indictment in *Yarbrough* alleged that the conspirators had interfered with the black voter's right to vote in a federal election "on account of his race, color and previous condition of servitude." The last portion of the opinion, 110 U.S. at 664-66, discusses Congress' power to protect fifteenth amendment rights and seems to rely on that power to derive a congressional ability to protect the right to vote in federal elections:

"In the case of *U.S. v. Reese*, so much relied on by counsel, this court said in regard to the Fifteenth Amendment, that 'it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude.' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.

"The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary." *Id.* at 665.

Because *Yarbrough* arose on a writ of habeas corpus, the Court's jurisdiction was limited to determining whether the statutes involved were constitutional, and did not extend to the sufficiency of the indictments. In relation to the validity of the statutes, the discussion of Congress' power to

Because most states used a single system for registering or otherwise qualifying to vote for state and federal officers,<sup>34</sup> and because these officers often were chosen at the same elections, the Supreme Court's interpretation of Congress' power in *Siebold* and *Yarbrough* gave the federal government a potent weapon for protecting voting rights in general. Although the development proved abortive because most of the Enforcement Act was repealed in 1894 and 1909,<sup>35</sup> the seeds were planted for the future. Enough remained of the Enforcement Act to sustain a tortuous line of twentieth-century cases that extended federal law to cover various types of fraud and ballot stuffing in federal elections, and to define federal elections to include *primary* elections for federal officers.<sup>36</sup> The holding that federal elections included primaries led directly to the outlawing of white primaries, and the recognition of general congressional power over federal elections allowed Congress to enact voting legislation in 1957, 1960 and 1964 that would withstand constitutional attacks.

#### F. Post-Reconstruction Decline

Meanwhile, the withdrawal of the federal government from the business of protecting voting rights yielded predictable results. From 1876 to 1890, Democrats solidified their hold in the Southern States, and went far toward eliminating black voters as factors in politics. This process was slowed only somewhat by the restraints of the Reconstruc-

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enforce the fifteenth amendment appears to be dictum—although the federal right protected by R.S. § 5508 in that case could as well be the right of exemption from racial discrimination in voting as the right to vote in a federal election. In any event, whether the discussion of Congress' power to protect fifteenth amendment rights against private action is dictum or alternate holding, it is clear that the *Yarbrough* Court was convinced that such power does exist. See Note, *supra* note 18.

*Yarbrough* was followed by several other cases in which the Supreme Court vigorously protected federal rights—chiefly those implied by the very existence of a national government—in contrast to its grudging treatment of those rights created by the thirteenth, fourteenth, and fifteenth amendments. See, e.g., *Logan v. United States*, 144 U.S. 263 (1892) (involving the lynching of a federal prisoner, in which the Court summarizes a number of its earlier opinions on the power of Congress to enforce various types of federal rights).

34. In 1878, South Carolina adopted a law that provided for different ballot boxes for federal and state elections in order to avoid federal authority over state elections. G. TINDALL, *SOUTH CAROLINA NEGROES, 1877-1900*, at 31 n.67 (LSU Press ed. 1966). However, it remained generally more convenient to continue the custom of overlapping state and federal election processes. See U.S. CONST. amend. XXVI (passed to avoid running separate elections after the Supreme Court upheld an 18-year-old vote law for federal elections but struck it down as applied to state elections in *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

35. Act of February 8, 1894, ch. 25, 28 Stat. 36; Act of March 4, 1909, ch. 321, 35 Stat. 1088.

36. See pages 542-44 *infra*.

tion Act constitutions, which guaranteed adult male suffrage without regard to race. Widespread use of violence, fraud and corruption kept registered black voters away from the polls, except when there were struggles between different white factions, in which case black votes were often wanted and were delivered by bribery or coercion.<sup>37</sup>

Another major tactic, which was equally significant, especially from an historical perspective, has received less notice: the use of methods for diluting black votes very similar to methods used today.<sup>38</sup> The most common were gerrymandering and malapportionment. Mississippi, for example, followed the pattern of drawing countywide legislative districts in white majority areas while in heavily black Adams and Hinds Counties, the cities of Natchez and Jackson, which had large concentrations of whites, were carved out as separate districts. In Virginia, the legislature reapportioned five times in thirteen years after Redemption—in 1871, 1874, 1876, 1878 and 1883. In various states, control over governmental functions was removed from the local governments—many of which were still in the hands of Republican-black alliances—and placed in the hands of the by-then Democratic state governments.

One of the favored techniques was to make the election process itself more difficult. In 1882, South Carolina enacted the "Eight Box Law," under which separate ballot boxes were set up for each elective office. For the vote to count, the voter had to cast his ballot in the proper box; whites were assisted, but blacks were not. In other situations, ad hoc strategies were devised: polling places were located far from black communities, or were suddenly moved without notice; additional black candidates were induced to run for a given office or were simply added to the list of candidates to insure that black voters would split their votes while whites united behind a single candidate.

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37. V. WHARTON, *supra* note 24, at 204-05. For the general history of these years see J. FRANKLIN, *supra* note 20, at 324-38; C. WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913*, 1-106 (1951). For a national perspective see R. LOGAN, *THE BETRAYAL OF THE NEGRO* 23-87 (Collier ed. 1965).

38. Methods used in the 1870's and 1880's to minimize or dilute the votes of blacks are discussed in the following sources: J. FRANKLIN, *supra* note 20, at 332-34; A. KIRWAN, *REVOLT OF THE REDNECKS* 4-5, 36-37 (Harper Torchbook ed. 1965); P. LEWINSON, *RACE, CLASS, & PARTY* 63-68 (Universal Library ed. 1965); W. MABRY, *THE NEGRO IN NORTH CAROLINA POLITICS SINCE RECONSTRUCTION* 16-22 (1940); R. MORTON, *THE NEGRO IN VIRGINIA POLITICS, 1865-1902*, at 91-94 (1919); G. TINDALL, *supra* note 34, at 31, 39, 68-73; C. WOODWARD, *supra* note 37, at 54-57; V. WHARTON, *supra* note 24, at 168, 199-204; C. WYNES, *RACE RELATIONS IN VIRGINIA, 1870-1902*, at 7-14, 39-41 (1961); Graves, *Negro Disfranchisement in Arkansas*, 26 *ARK. HIST. Q.* 199, 208-14 (1967); Mabry, *Negro Suffrage and Fusion Rule in North Carolina*, 12 *N.C. HIST. REV.* 79, 80-81 (1935); Wardlaw, *Negro Suffrage in Georgia 1867-1930*, 33 *BULL. U. GA.*, No. 22, at 34-55 (Phelps-Stokes Studies No. 11, 1932).

Finally, there was growing use of difficult-to-meet qualifications, which would later form the backbone of the total disfranchising schemes. These included literacy tests, poll taxes that had to be paid well in advance—sometimes several years—of the election, and arbitrary residence requirements aimed at highly migratory blacks. Overall, the voting process—for blacks—became a steeplechase.

## II. TOTAL DISFRANCHISEMENT: 1890-1908

By about 1890, the halfway measures of the previous twenty years were no longer satisfactory to whites who sought to eliminate black political effectiveness. While blacks remained on the rolls and were entitled to vote, there was the possibility that they might effectively exercise their franchise, or that the federal government might again seek to enforce their right to vote.<sup>39</sup> Also many blacks actually did vote, and their votes were courted by competing white factions, thus giving blacks an opportunity to gain by, and at the expense of, divisions among whites.<sup>40</sup> Moreover, the various methods developed to keep blacks away from the polls or to control their votes through bribery or coercion had created a general atmosphere of corruption surrounding southern elections, causing many whites to feel that eliminating the possibility of black voting would reduce the fraud, corruption and violence that had been necessary to maintain white control.<sup>41</sup> Finally, total disfranchisement of blacks fit within the general movement to create a system of

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39. In 1890, Senator Lodge introduced a bill for federal supervision of federal elections going well beyond the 1871 amendments to the Enforcement Act, H.R. 11045, 51st Cong., 1st Sess. (1890). The Lodge Bill, which Southerners adroitly nicknamed the "Force Bill," passed the House and may have had some influence in making white Mississippians believe that the Republicans, having gained control of the Presidency and both houses of Congress for the first time since the Grant administration, might undo the Compromise of 1877. A. KIRWAN, *supra* note 38, at 59. This Bill's course through Congress is traced in R. LOGAN, *supra* note 37, at 70-82.

40. P. LEWINSON, *supra* note 38, at 88-91; G. TINDALL, *supra* note 34, at 75, 91; V. WHARTON, *supra* note 24, at 203-06.

41. An historian sympathetic to disfranchisement stated that "there was a general feeling in the North as well as in the South, that if the negro was to be excluded from his privileges in any case, it would be better for all concerned to have it done legally than illegally." W. SMITH, *NEGRO SUFFRAGE IN THE SOUTH, STUDIES IN SOUTHERN HISTORY AND POLITICS* 231, 242 (1914). Judge J.J. Chrisman, a delegate to the 1890 Mississippi Convention, put it more bluntly:

"Sir, it is no secret that there has not been a full vote and a fair count in Mississippi since 1875—that we have been preserving the ascendancy of the white people by revolutionary methods. In plain words, we have been stuffing ballot-boxes, committing perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for election was about to rot down. No one would deliberately choose to perpetuate such methods . . . who was not a moral idiot." Quoted in C. WOODWARD, *supra* note 37, at 57-58.

rigid racial segregation.<sup>42</sup> All these factors were intensified by the crisis over populism.<sup>43</sup>

#### A. State Disfranchising Constitutions

The institutionalization of effective disfranchisement necessitated amendment of the state Reconstruction constitutions.<sup>44</sup> Mississippi initiated this movement by holding a constitutional convention in 1890. Because the fifteenth amendment prevented simple methods of disfranchisement, the convention developed a sophisticated scheme—the so-called “Mississippi Solution”<sup>45</sup>—which was in essence adopted by the other southern states over the next eighteen years.<sup>46</sup>

The Mississippi Solution was described by the Mississippi Supreme Court in the 1896 case of *Ratliff v. Beale*:

Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone. A voter who should move out of his election precinct, though only to an adjoining farm, was declared ineligible until his new residence should have continued for a year. Payment of taxes for two years at or before a date fixed many months anterior to an election is another requirement, and one well calculated to disqualify the careless. Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not.<sup>47</sup>

42. C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

43. V. KEY, *SOUTHERN POLITICS* 7-8, 541 (Vintage ed. 1949). In North Carolina, for example, blacks, Populists and Republicans formed an alliance that actually governed the state from 1894 to 1898. Mabry, *White Supremacy and the North Carolina Suffrage Amendment*, 13 N.C. HIST. REV. 1, 10-12 (1936); Mabry, *supra* note 38, at 81-95.

44. See note 3 *supra*.

45. A. KIRWAN, *supra* note 38, at 65-84; V. WHARTON, *supra* note 24, at 206-15.

46. The relevant dates for other conventions are: South Carolina, 1895; Louisiana, 1898; North Carolina, 1900; Alabama, 1901; Virginia, 1902; Texas, 1902; Georgia, 1908.

The tenor of the conventions was clear, and comments can be found in virtually each one that are the equivalent of future Senator Carter Glass' comment during the Virginia Convention:

“Discrimination! Why that is precisely what we propose; that, exactly, is what this convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every Negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate . . . . It is a fine discrimination, indeed, that we have practiced in the fabrication of this plan.” P. LEWINSON, *supra* note 38, at 86.

47. *Ratliff v. Beale*, 74 Miss. 247, 266-67, 20 So. 865, 868 (1896). This case arose when the

The Mississippi Supreme Court, however, emphasized features of the disfranchising scheme that were nominally nonracial.<sup>48</sup> These features basically were benign compared to two mechanisms—the literacy test and the white primary—which were not mentioned by the court but which became the chief means of maintaining white supremacy.

The literacy provision, which was adopted eventually by every Deep South state except Texas and Florida, required that an applicant for registration demonstrate to the registrar his ability to read and write any section of the state or United States Constitutions.<sup>49</sup> Literacy tests aroused the most bitter opposition from those who feared that the disfranchisement of large numbers of illiterate whites could also result. To meet this fear, most states established a number of alternatives to the literacy test: an “understanding” test, property qualification, a good character requirement, or most transparent of all, a “grandfather clause.”<sup>50</sup> The key to the literacy test, and especially its alternatives,

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Attorney General of Mississippi ruled that the poll tax could be enforced by levy. The Supreme Court of Mississippi held in *Ratliff* that, since the poll tax was intended primarily “as a clog upon the franchise,” and only secondarily as a revenue measure, payment of the tax should not be enforceable, because “it must be so construed as to carry into effect the purpose of the convention. It is evident that, the more the payment of the tax is made compulsory, the greater will be the number by whom it is paid, and therefore the less effectual will be the clause for the purpose it was intended.” *Id.* at 268, 20 So. at 869. *Cf.* *United States v. Dogan*, 314 F.2d 767 (5th Cir. 1963), which involved a sheriff who had refused to accept poll tax payments from blacks.

48. One of the chief elements of the disfranchising solution was the imposition of prerequisites to registering or voting which, while not necessarily difficult in themselves, amounted to an endless series of impediments, any one of which could trip up the unwary voter or, as the Mississippi Supreme Court described blacks, the voter who was “careless” or “without forethought.” In addition to requiring that the voter pay a poll tax long before the election, and making him keep his poll tax receipts for several years to present on election day, the voter had to register 4 months before the election in order to vote:

“The object of this section is to require the electorate to register at least four months before an election at which they may offer to vote. It was also a part of the convention scheme to secure an intelligent, watchful, and patriotic electorate, well knowing that the transient and thoughtless and improvident people would not be so liable to register at such a length of time before the election as would the more intelligent, patriotic and watchful voters. In other words, it was a part of the scheme to acquire white supremacy, and the convention was searching the field of expedients for methods to accomplish that end, which this section was one of the factors in obtaining.

“It is generally known that interest in elections is not so intense a few months before they occur as in the closing days of the period just preceding the election. Often persons would register and be ready to vote if they were permitted to do so by then registering and paying delinquent taxes. . . .” G. ETHRIDGE, *MISSISSIPPI CONSTITUTIONS* 435 (1928).

49. In Virginia, there was a more insidious variant. Although no formal literacy test was given, the registration application had to be completed without any assistance. This requirement was implemented in many parts of the state by “blank check” registration forms, *i.e.* the black applicant would receive a blank piece of paper on which he was to provide by memory the information specified in the Virginia Constitution. Remnants of this practice did not end until *Wilks v. Woodruff*, C.A. No. 4073 (E.D. Va., Sept. 28, 1964).

50. The various alternatives to the literacy test were designed carefully to permit registration



was that they were never intended to operate honestly.<sup>51</sup> Instead, they were designed to give the registrar an elastic standard to implement the avowed intention of disfranchising blacks but not whites:

The delegates knew that the majority of their white Democratic constituents wanted the Negro voter eliminated in a manner that would meet the requirements of the Constitution of the United States. That same majority was determined that no white voter should be barred. It so happened that no man could devise any test which, fairly and honestly applied, would accomplish that purpose. There was a general understanding that the interpretation of the Constitution offered by an illiterate white man would be acceptable to the registrars; that of a Negro would not.<sup>52</sup>

The other main vehicle for maintaining white supremacy was the white primary. This technique, derived from Reconstruction days when white Conservative Clubs united behind a single candidate, became formalized in the Deep South states at the turn of the century. Because no doubt then existed that political parties were private organizations outside the purview of the fourteenth or fifteenth amendments, party primaries could be completely closed to blacks. The white primary, therefore, coincided with the development of the one-party South,<sup>53</sup> which was complete by the end of the nineteenth century, when whites were driven out of the Republican Party or out of the South. The absence of any Republican opposition thus made victory in the Democratic primary tantamount to election; this, in turn meant that any one who wished to cast an effective vote had to join the all-white Democratic Party. This was the goal of those who had argued that black disfranchisement would safeguard white supremacy by eliminating divisions among whites: "When the whites divide you will have the white men of your State bidding for the Negro vote against each other."<sup>54</sup>

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of illiterate whites. The typical grandfather clause exempted from literacy requirements those who—or whose ancestors—were eligible to vote before 1868 or had fought honorably in a war for the United States or the Confederacy. The efficacy of this scheme is suggested by evidence from Georgia, where it was estimated that, of the 5 means of qualifying—having served in the army, having an ancestor who served, literacy, good character, and owning property—the majority of those blacks who were registered qualified under, of all things, the property clause.

51. "I do not expect [it] to be administered with any degree of friendship by the white man to the suffrage of the black man. I expect the examination with which the black man will be confronted, to be inspired with the same spirit that inspires every man in this convention . . . I would not expect for the white man a rigid examination. The people of Virginia do not stand impartially between the suffrage of the white man and the suffrage of the black man. If they did, the uppermost thoughts in the hearts of every man within the sound of my voice would not be to find a way of disfranchising the black man and enfranchising the white man. We do not come here prompted by an impartial purpose in reference to Negro suffrage." Quoted in P. LEWINSON, *supra* note 38, at 85.

52. V. WHARTON, *supra* note 24, at 215.

53. V. KEY, *supra* note 43, at 315-16, 619-21; G. TINDALL, *supra* note 34, at 83-91.

54. P. LEWINSON, *supra* note 38, at 89.

*B. Congress and Court Unconcerned*

Any state apprehension about overstepping the bounds of the fifteenth amendment or prompting new federal intervention proved needless because Congress complaisantly repealed most of the Reconstruction statutes in 1894, saying: "Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it."<sup>55</sup> Many of the remaining statutes were repealed in 1909.<sup>56</sup>

Reflecting the same lack of concern, the Supreme Court found procedural grounds for rejecting, without ever considering their merits, six cases that challenged the disfranchising schemes of Virginia,<sup>57</sup> Mississippi,<sup>58</sup> South Carolina<sup>59</sup> and Alabama.<sup>60</sup> The Virginia and South Carolina cases were adjudged moot on the ground that the elections in which the plaintiffs had wished to vote already had occurred. The other three cases deserve more extended examination.

In *Williams v. Mississippi*,<sup>61</sup> an 1898 decision, a black defendant had been indicted and convicted by all-white juries. He thereafter moved to set aside the indictment and verdict, arguing that blacks had been intentionally disfranchised in his county and, since only registered voters could serve on juries, had been intentionally excluded from serving on his juries. The disfranchisement, he claimed, had been achieved by the discriminatory exercise of local officials' discretion, as intended by the 1890 state constitution. The Supreme Court rejected his claim. Although it acknowledged the Mississippi Supreme Court's statement in *Ratliff v. Beale* that the 1890 convention "swept the field of expedients, to obstruct the exercise of the suffrage by the negro race," the Supreme Court nonetheless held that the federal constitution allows a state to take advantage of "the alleged characteristics of the negro race."<sup>62</sup> As to the contention that the laws were in fact administered discriminatorily, the Supreme Court held that the allegation was insufficient because it failed to indicate how, when, and by whom the discrimination was

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55. H.R. REP. NO. 18, 53d Cong., 1st Sess. 7 (1893), *quoted in* United States v. Classic, 313 U.S. 299, 335 (1941) (Douglas, J., dissenting). The repealer was the Act of Feb. 8, 1894, ch. 25, 28 Stat. 36.

56. 35 Stat. 1088.

57. *Jones v. Montague*, 194 U.S. 147 (1904); *Selden v. Montague*, 194 U.S. 153 (1904).

58. *Williams v. Mississippi*, 170 U.S. 213 (1898).

59. *Mills v. Green*, 159 U.S. 651 (1895).

60. *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903).

61. 170 U.S. 213 (1898).

62. 170 U.S. at 222.

done. The Court therefore concluded that no constitutional rights were violated because "the constitution of Mississippi and its statutes . . . do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."<sup>63</sup>

In 1903, the disfranchising schemes again were attacked in *Giles v. Harris* and *Giles v. Teasley*, two successive Alabama suits. The Supreme Court promptly disposed of these attacks on procedural grounds in two marvelously fatuous opinions,<sup>64</sup> but nevertheless did admit the basis of its underlying fear in an opinion by Mr. Justice Holmes:

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63. 170 U.S. at 225. *But see* *Rogers v. Alabama*, 192 U.S. 229 (1904).

64. The 2 *Giles* cases rank high on the list of Supreme Court opinions that have shamed the judicial process. Both cases involved Alabama's 1901 constitution, under which easy qualifications were established and designed to fit whites but few blacks for registration before 1903, with stiff literacy and other qualifications to come into play thereafter. *Giles* alleged that he and thousands of other qualified blacks had been denied registration on account of race under the pre-1903 tests, solely in order to subject them to the extremely high tests in effect after 1903.

In *Giles v. Harris*, 189 U.S. 475 (1903), plaintiff requested an injunction requiring officials to place him and other qualified black applicants on the rolls. Mr. Justice Holmes seized upon the allegation that these lists were illegal to hold that the Supreme Court could not order someone to be placed upon such lists because it would be participating in an illegality. Concerning the argument that placing qualified blacks on the lists would cure the discrimination, the Court responded: "If the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent." 189 U.S. at 487. This doctrine was, of course, no newer than *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

In *Giles v. Teasley*, 193 U.S. 146 (1904), the same voter attempted to utilize 2 other remedies in state court: mandamus to require the registration board to register him, and damages for its failure to do so. Both claims were dismissed. *Giles v. Teasley*, 136 Ala. 164, 33 So. 819 (1903) (damages); *Giles v. Teasley*, 136 Ala. 228, 33 So. 820 (1903) (mandamus). In dismissing the cases, the Alabama Supreme Court took the same tack that Mr. Justice Holmes had taken in *Giles v. Harris*—that is, the Alabama court took literally *Giles'* allegation that the new Alabama constitution was invalid as a grand disfranchising scheme. Starting from this point, the Alabama court held that if *Giles'* allegation were correct (which it assumed) there was no valid registration board authorized to register him—which meant there would be no valid board which the court could mandamus, and which also meant that damages could not be awarded for the board's refusal, because the board would be unauthorized to register him anyway.

On appeal the Supreme Court stated that, inasmuch as the Alabama court had accepted *Giles'* claim that the constitution of 1901 was unconstitutional, it could hardly be said that his federal claim had been denied. Accordingly, the Supreme Court dismissed the appeals on the grounds that the decisions below rested upon state grounds "wholly independent" of the federal claim.

As to the damages, the Supreme Court said: "[C]onceding the allegations of the petition to be true, and the registrars to have been appointed and qualified under a constitution which has for its purpose to prevent negroes from voting and to exclude them from registration for that purpose, no damage has been suffered by the plaintiff, because no refusal to register by a board thus constituted in defiance of the Federal Constitution could have the effect to disqualify a legal voter, otherwise entitled to exercise the elective franchise. In such a decision no right, immunity or privilege, the creation of Federal authority, has been set up by the plaintiff in error and denied in such wise as to give this court the right to review the state court decision." 193 U.S. at 164.

[E]quity cannot undertake now, any more than it has in the past, to enforce political rights . . . . In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. . . . The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.<sup>65</sup>

### C. Disfranchisement Becomes a Fixture

For more than a half century, virtually every disfranchising device used by the various states survived, except those whose application was either explicitly or inescapably limited precisely to blacks. The poll tax was upheld in 1937,<sup>66</sup> the literacy test was upheld in 1959,<sup>67</sup> and white primaries not mandated by the state were upheld by a unanimous Court as late as 1935.<sup>68</sup> The only devices that were outlawed were grandfather clauses (in 1915,<sup>69</sup> with an attempted modification invalidated in

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As to the mandamus, its response was: "We do not perceive how this decision involved the adjudication of a right claimed under the Federal Constitution against the appellant. It denies the relief by way of mandamus, admitting the allegations of the petition as to the illegal character of the registration authorized in pursuance of the Alabama Constitution.

"This is a ground adequate to sustain the decision and wholly independent of the rights set up by the plaintiff as secured to him by the constitutional amendments for his protection." 193 U.S. at 165.

In short, said the Supreme Court, "in the present case the state court has not sustained the right of the State to thus abridge the constitutional rights of the plaintiff. It has planted its decision upon a ground independent of the alleged state action seeking to nullify the force and effect of the constitutional amendments protecting the right of suffrage." 193 U.S. at 164. What the Court meant by this statement is not clear, unless it was saying that, for Giles, being told he had the right to vote was a perfectly good substitute for actually voting. In any event, Giles did not get to register or vote, the boards of registrars continued to sit for the purpose of registering white people, and the fifteenth amendment continued to coexist peacefully with Alabama's "simple-minded" scheme (and countless others like it) for another half-century.

65. 189 U.S. at 487-88.

66. *Breedlove v. Suttles*, 302 U.S. 277 (1937).

67. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

68. *Grovey v. Townsend*, 295 U.S. 45 (1935).

69. *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

Among other things, these cases held explicitly that the invalidation of Oklahoma's and Maryland's grandfather clause exemption from the literacy test must also invalidate the literacy test itself, *i.e.* a requirement under which white people were exempted was essentially fictitious and the remedy should be the elimination of that standard. 238 U.S. at 367. The Court also rejected the argument—which had puzzled it in *Giles v. Teasley*, 193 U.S. 146, 166 (1904)—that invalidation of the suffrage provisions would leave no suffrage right (and presumably no board to effectuate that right), by holding that the pre-existing nondiscriminatory provisions would return to being.

1939<sup>70</sup>) and white primaries (in 1927, when ordered by the state,<sup>71</sup> and in 1944, when ordered by the political party itself<sup>72</sup>).

The results of the various disfranchising vehicles were electrifying. By 1900 black registration in Louisiana had already dropped from 130,000 to 5,000; similar drops occurred in other states.<sup>73</sup> Blacks were, with rare exceptions in certain cities, wholly eliminated from the political process. Great numbers of counties with large black majorities had not a single black registered to vote. The social norm of disfranchisement made attempts at black registration rare, and the effectiveness of the devices sanctioned by the Supreme Court made successful attempts virtually unique. Thus for most of the first half of the twentieth century, any questions of black participation in politics and voting simply did not exist.

A few indications of change appeared in the 1940's. In 1944, the Supreme Court finally outlawed the white primary, in *Smith v. Allwright*.<sup>74</sup> The white primary had been the most effective and simplest way of disfranchising blacks, and its demise left complex discretionary registration systems as the major line of defense.<sup>75</sup> In 1949, however, an Alabama district court outlawed that state's new "understand and explain" test on the ground—unsuccessfully advanced in the two *Giles* cases 40 years before—that the test had been designed to give registrars the opportunity to discriminate, an opportunity that they were, in fact, exercising. By affirming the lower court's judgment, the Supreme Court thus implicitly overruled the *Giles* cases.<sup>76</sup>

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Since the grandfather clauses used by other states had been temporary, the *Guinn* and *Myers* decisions effectively ended use of that device, except for the variant involved in *Lane v. Wilson*, 307 U.S. 268 (1939).

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

71. *Nixon v. Herndon*, 273 U.S. 536 (1927); *accord*, *Nixon v. Condon*, 286 U.S. 73 (1932).

72. *Smith v. Allwright*, 321 U.S. 649 (1944).

73. C. WOODWARD, *supra* note 37, at 342-46.

74. 321 U.S. 649 (1944).

75. Several states but most notably South Carolina, made unsuccessful attempts to continue the white primary in another guise. *See, e.g.*, *Brown v. Baskin*, 78 F. Supp. 933 (E.D.S.C. 1948), *aff'd*, 174 F.2d 391 (4th Cir. 1949); *Elmore v. Rice*, 72 F. Supp. 516 (E.D.S.C. 1947), *aff'd*, 165 F.2d 387 (4th Cir.), *cert. denied*, 333 U.S. 875 (1948); V. KEY, *supra* note 43, at 625-43.

Other states tried other means to shore up their defenses. In 1950 South Carolina revived its full-slate law. *See* note 127 *infra*. In 1955 Mississippi replaced its alternative literacy or understanding test with a double literacy and understanding test; and in 1946 Alabama adopted the Boswell amendment. Georgia's new defenses relied heavily on reregistration, purging, and challenges. Bernd & Holland, *Recent Restrictions Upon Negro Suffrage: The Case of Georgia*, 21 J. POLITICS 487 (1959).

76. *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd mem.*, 336 U.S. 933 (1949). At this time and also into the 1950's a number of other suits were brought which challenged discriminatory registration practices. On the whole, the results were disappointing. Even when

Other events in the 1940's laid the groundwork for further far-reaching changes. One was resumption of enforcement activities by the Justice Department, which began with the creation of a Civil Rights Section of the Criminal Division in 1939.<sup>77</sup> The first important case brought by that Section was *United States v. Classic*, in which the Supreme Court expanded congressional power over federal elections.<sup>78</sup> The case involved five men who were charged with stealing votes and altering the count in a congressional primary in Louisiana. Although it had been clear since *Siebold* and *Yarbrough*<sup>79</sup> that the right to vote in a federal election is a federal right, which Congress is authorized to protect, intervening cases made it doubtful that the federal election power included primaries.<sup>80</sup> *Classic* overruled these intervening cases and held that the primary, as "an integral part of the procedure of choice" of a federal representative, was covered by the federal right to vote.

*Classic* led directly to *Smith v. Allwright*,<sup>81</sup> which outlawed the white primary, since *Classic's* recognition of the primary as an integral part of the election process enabled the Court to conclude that excluding

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procedural hurdles were overcome, an injunction was denied or otherwise limited to generalities. See, e.g., *Peay v. Cox*, 190 F.2d 123 (5th Cir.), cert. denied, 342 U.S. 896 (1951); *Mitchell v. Wright*, 154 F.2d 924 (5th Cir.), cert. denied, 329 U.S. 733 (1946), on remand, 69 F. Supp. 698 (M.D. Ala. 1947); *Hall v. Nagel*, 154 F.2d 931 (5th Cir. 1946). But see *Byrd v. Brice*, 104 F. Supp. 442 (W.D. La.), aff'd, 201 F.2d 664 (5th Cir. 1952); *Dean v. Thomas*, 93 F. Supp. 129 (E.D. La. 1950).

The frustration of this period is reflected in *Sellers v. Wilson*, 123 F. Supp. 907 (M.D. Ala. 1954), which described a typical hide-and-seek game played by the registrar of Bullock County, Alabama, and found a fifteenth amendment violation. The court in *Sellers* went on to say: "The supreme law of this republic is that no tests can be required of a Negro applicant as a pre-requisite to registration as a voter that is [sic] not required of a white applicant; therefore, let no Board of Registrars try to devise any scheme or artifice to do otherwise." 123 F. Supp. at 920.

The court, however, found no damages and, because the Board had resigned, held that it could not grant an injunction. The plaintiffs won only the hollow admonition that "the court retains jurisdiction of the case and will grant the injunctive relief prayed for in plaintiffs' petition in the event either or all of these defendants again become members of this Board." *Id.*

For a comparison of the situations in the mid-1940's and in the mid-1950's see Jackson, *Race and Suffrage in the South Since 1940*, 3 NEW SOUTH, Nos. 5 & 6 (Southern Regional Council 1948), Price, *The Negro Voter in the South*, 12 NEW SOUTH, No. 9 (Southern Regional Council 1957).

77. The early years of the Civil Rights Section are described in R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS (1947).

78. 313 U.S. 299 (1941). *Classic* arose under 18 U.S.C. §§ 51 & 52 (now 18 U.S.C. §§ 241 & 242 (1970)), which were derived from §§ 6 & 17 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140.

79. See notes 28-33 *supra* and accompanying text.

80. See *Newberry v. United States*, 256 U.S. 232 (1921), *United States v. Gradwell*, 243 U.S. 476 (1917). See also *United States v. Bathgate*, 246 U.S. 220 (1918).

81. 321 U.S. 649 (1944).

blacks from primaries materially affected their right to vote.<sup>82</sup> The decision in *Classic* had several other significant repercussions. It foreshadowed broad definitions of "voting" by holding that the right to vote included the right to have one's vote counted as it was cast. And its treatment of the relation between article I, section 4, of the Constitution (dealing with regulation of federal elections) and article I, section 2 (dealing with state-imposed qualifications) suggested that Congress' power over federal elections might extend to the alteration of state *voter qualifications* and thus might include the power to ban poll taxes and literacy tests.<sup>83</sup>

Changes were proceeding at other levels. Black pressure against existing conditions increased, especially with the coming of the New Deal and World War II. The composition of the Supreme Court changed. In 1947, the President's Committee on Civil Rights issued a report entitled *To Secure These Rights*. In addition to ending segregated schools and employment discrimination some of its recommendations were: the abolition of the poll tax by statute or constitutional amendment; enactment of new statutes to protect the right to vote, creation of a permanent United States Commission on Civil Rights; and additional authority for the Justice Department in civil rights matters, including the authority to intervene in private litigation and to bring its own civil suits for damages, injunctions, or declaratory judgments.<sup>84</sup> Each of these recommendations for guaranteeing the right to vote eventually was implemented, once *Brown v. Board of Education* provided an effective catalyst for change. Moreover, when the effects of the new emphasis on voting rights were felt, Congress again led the way, by passing legislation, which, in many instances, was patterned after the long-abandoned Reconstruction statutes.

### III. MODERN ENFRANCHISEMENT

A new era began in 1957, when Congress overcame a weak filibuster to pass the first civil rights law since 1875. The prior cases had established a twofold right to vote: a right to vote in federal elections,

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82. *Smith* flatly overruled *Grovey v. Townsend*, 295 U.S. 45 (1935), which had held unanimously that political parties were private clubs free to discriminate so long as there was no state involvement. Although the *Smith* opinion took pains to cloud the issue, it was plain that *Grovey* had been overruled by *Classic*, with the *Smith* case simply announcing the inevitable. In any event, the *Smith* decision elicited a bitter dissent from Justice Roberts, who complained that the new Court's readiness to overrule earlier cases "tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." 321 U.S. at 669.

83. The latter suggestion was intentional, according to Chief Justice Stone, who wrote the *Classic* opinion. A. MASON, HARLAN FISKE STONE 588-89 (1956).

84. PRESIDENT'S COMM. ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* 151-73 (1947).

which Congress could protect against both state and private interference, and a right to be free of racial discrimination in voting, which it was then thought Congress could protect only against state action. The approach used in the Civil Rights Act of 1957, and also in the Civil Rights Acts of 1960 and 1964, was to build upon those powers that the courts had upheld—chiefly the congressional power over federal elections—and to facilitate litigation both by private parties and the Justice Department. The latter goal was, in part, implemented by authorizing the Justice Department to bring civil suits rather than only cumbersome criminal cases. It was soon realized, however, that piecemeal litigation, even by the Justice Department, would not achieve widespread registration. Eventually, the barriers to black voting were broken down not by litigation under these Acts, but by sweeping assertions of congressional power in the Voting Rights Act of 1965. Nevertheless, the Acts of 1957, 1960, and 1964 were seminal sources for the 1965 Act, because they adopted progressively more stringent remedies which were accepted by the courts. This court approval consequently notified Congress that the old Supreme Court cases would no longer impede its power to pass strong enforcing legislation under the fifth section of the fourteenth amendment and the second section of the fifteenth amendment.

#### A. *Civil Rights Act of 1957*<sup>85</sup>

The 1957 Act was essentially a codification of the major recommendations in the 1947 President's Committee report, *To Secure These Rights*. The Act created a Commission on Civil Rights, and upgraded the Civil Rights Section to a division of the Justice Department. As for substance, Congress built upon the statute dealing specifically with the right to vote, section 1 of the Enforcement Act of 1870, which provided that all citizens otherwise qualified to vote in any state or federal election were entitled to vote in any such election without discrimination on account of race.<sup>86</sup> To section 1, which represented an exercise of Congress' fifteenth amendment power, a provision was added, which represented an exercise of its power over federal elections. This new provision prohibited anyone, whether or not acting under color of law, from interfering with any person's right to vote in a federal election.<sup>87</sup> Perhaps most significant was another provision that authorized the United States to sue anyone who had violated or was about to violate any other

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85. Pub. L. No. 83-315, 71 Stat. 634. The background of the 1957 Act is described in J. ANDERSON, EISENHOWER, BROWNELL AND THE CONGRESS (1964).

86. Section 1 is now codified as 42 U.S.C. § 1971(a)(1) (1970).

87. Civil Rights Act of 1957, § 131(c)(b), 42 U.S.C. § 1971(b) (1970).



person's voting rights—either the right to vote in federal elections or the right to be free from racial discrimination in voting.<sup>88</sup>

*B. Civil Rights Act of 1960*<sup>89</sup>

The few suits that were brought under the 1957 Act exposed several weaknesses in the Act. The Civil Rights Act of 1960 was designed to close those and other loopholes and to streamline voting litigation further. The central feature of the 1960 Act was its creation of federal referees, who would be appointed upon a finding that particular acts of discrimination were pursuant to a "pattern or practice" of discrimination and whose duties would continue until a finding that the "pattern or practice" had ceased. The referee was to register any applicant who demonstrated that he was qualified to vote under prevailing state law or standards, and that he had been denied registration by state officials since the finding of a "pattern or practice" of discrimination.<sup>90</sup> The words "qualified under State law" were defined to mean qualified according to the laws, customs or usages of the state, but could not include qualifications more stringent than those previously applied to white applicants by discriminating registrars. This provision had the effect of "freezing" state voter qualifications at the level at which they had been applied to whites regardless of any state laws formally prescribing higher standards for black voters. For example, if literacy tests had been waived for whites, the freeze doctrine now waived them for blacks.<sup>91</sup>

The 1960 Act's provisions indicated that Congress was seeking to write elastic legislation whose coverage and application would encompass new state attempts to evade the specific provisions of the law.

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88. *Id.* § 131(c)(c), 42 U.S.C. § 1971(c) (1970). The 1957 Act also included 2 jurisdictional improvements. First, § 121(c), 28 U.S.C. § 1343(4) (1970), added a new jurisdictional basis for suits under federal civil rights statutes, which was not based on jurisdictional amount or state action. Second, § 131(c)(d), 42 U.S.C. § 1971(d) (1970), allowed plaintiffs to bring voting discrimination cases directly in federal court without exhausting the elaborate administrative remedies that some states had established to shield their registrars. *See* MISS. CODE ANN. §§ 3224-31 (Supp. 1972). *See also* Peay v. Cox, 190 F.2d 123 (5th Cir. 1951).

89. Pub. L. No. 86-449, 74 Stat. 86. The background of the 1960 Act is described in D. BERMAN, *A BILL BECOMES A LAW* (2d ed. 1966).

90. Pub. L. No. 86-449, § 601(a), 74 Stat. 90 (codified at 42 U.S.C. § 1971(e) (1970)). The court itself, upon finding a pattern or practice, could unilaterally examine voters' qualifications. Most courts themselves fulfilled this responsibility, and only one referee was appointed under this provision. D. STRONG, *NEGROES, BALLOTS AND JUDGES* 52-55 (1968).

91. The freeze doctrine, while seemingly extreme, was consistent with equitable remedies developed by the courts in similar discrimination cases. *See* Guinn v. United States, 238 U.S. 347 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See* Note, *The Federal Voting Referee Plan and the Alteration of State Voting Standards*, 72 YALE L.J. 770 (1963). *See* notes 69 *supra* & 166 *infra*.

Moreover, this Act evoked two important concepts framed in *Classic*: first, the freezing of state qualifications came close to altering those qualifications, as *Classic* had suggested might be done; secondly, the 1960 Act included a definition of voting that integrated all the steps of the "procedure of choice" that cumulatively had been developed in earlier cases.<sup>92</sup>

### C. Civil Rights Act of 1964<sup>93</sup>

Four years later and after dozens of frustrating cases under the 1960 Act, Congress finally implemented the *Classic* suggestion and used its power over federal elections to alter state qualifications for voters in federal elections.<sup>94</sup> The major new voting provisions were four sections aimed at the most flagrant methods of manipulating literacy tests. One section required state registrars to apply the freeze doctrine, *i.e.* to register blacks under the same standards as those which traditionally had been applied to whites.<sup>95</sup> A second section required that any literacy, understanding, or interpretation test be given entirely in writing.<sup>96</sup> A third section barred the use of immaterial errors, such as word misspellings, to deny registration.<sup>97</sup> Finally, a fourth section provided that a sixth-grade education was rebuttable evidence of literacy in any voting discrimination suit brought by the Justice Department.<sup>98</sup> The applicability of these provisions was, nevertheless, limited to voting in, or qualifying to vote in, *federal* elections.

Before they were tested, a rush of events overtook the voting provisions of the 1964 Act. Congress despaired of using litigation to secure voting rights and instead, in the Voting Rights Act of 1965, simply

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92. The 1960 Act also required election officials to maintain all records relating to any federal election for 22 months after the election, and to make them available to the Attorney General. Civil Rights Act of 1960, §§ 301-06, 42 U.S.C. §§ 1974-74e (1970). The 1960 Act also provided that a registrar's discriminatory acts should be deemed those of the state, which might be joined as a party defendant in any suit. *Id.* § 601(b), 42 U.S.C. § 1971(c) (1970). This provision solved the problem of what to do when the registrar resigned and left no one against whom an injunction might issue. See *United States v. Alabama*, 171 F. Supp. 720 (M.D. Ala.), *aff'd*, 267 F.2d 808 (5th Cir. 1959), *vacated and remanded*, 362 U.S. 602 (1960).

93. Pub. L. No. 88-352, 78 Stat. 241.

94. Congress' power in this regard was analyzed in Note, note 91 *supra*, which was written in 1963 when a bill that contained the outline of what became the 1964 Act had just been introduced.

95. Civil Rights Act of 1964, § 101(a)(2)(A), 42 U.S.C. § 1971(a)(2)(A) (1970).

96. *Id.* § 101(a)(2)(C), 42 U.S.C. § 1971(a)(2)(C) (1970).

97. *Id.* § 101(a)(2)(B), 42 U.S.C. § 1971(a)(2)(B) (1970).

98. *Id.* § 101(b), 42 U.S.C. § 1971(c) (1970). The 1964 Act also dealt with the problem of the foot-dragging federal judge by authorizing the Attorney General to request a 3-judge court and expedited treatment in any case that requested a finding of a pattern or practice of discrimination.

abolished some state standards and put others in the hands of federal officials. The main provisions of the 1965 Act evinced a new approach to securing voting rights and are, therefore, discussed separately below. The 1965 Act, however, took one final step, in section 15, to broaden the litigation approach of the three previous Acts. Section 15 amended the three Acts by striking the limiting word "federal" from the coverage of each substantive provision, and by eliminating wholly the definition of "federal election" from the Code.<sup>99</sup> Congress' decision to assert its broad powers under the fifteenth amendment rather than to proceed cautiously under its power over federal elections was indicative of its new directions.

#### D. Application of the New Civil Rights Acts

In terms of voters registered and protected, the record of eight years of streamlined litigation as a remedy for disfranchisement reveals a dismal account of enormous effort generated in attempting to overcome pervasive lawlessness by election officials.<sup>100</sup> This lawlessness generally was met by unconcern on the part of federal district judges in the Deep South states, so that it was not until cases began reaching the Fifth Circuit that any significant enfranchisement occurred. In this eight-year period, the United States filed 71 suits under these provisions—including actions against discriminatory registration practices, suits directed at private or official intimidation, and suits simply to obtain registrars' records.<sup>101</sup> Three of these suits were omnibus actions against Alabama, Louisiana and Mississippi, in which the Justice Department attacked broad portions of those states' voter qualifications in the categories of literacy, understanding and citizenship tests.<sup>102</sup> The

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99. Voting Rights Act of 1965, Pub. L. No. 89-110, § 15, 79 Stat. 445. The limitation to federal elections did remain in 42 U.S.C. 1971(b), which prohibited anyone, whether acting under color of law or not, from interfering with the right to vote in federal elections.

100. See B. MARSHALL, *FEDERALISM AND CIVIL RIGHTS* (1964); P. WATTERS & R. CLEGHORN, *CLIMBING JACOB'S LADDER* 211-43 (Harbinger ed. 1967); D. STRONG, note 90 *supra*. A voting case might take as many as 6,000 man-hours to prepare. See *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

101. *Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., ser. 2, at 5 (1965). The history of the litigation is summarized in D. STRONG, note 90 *supra*, and in 2 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1533-41 (3d ed. 1967). The cases are spelled out in detail in *Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2, at 1175-1445 (1965).

102. *United States v. Mississippi*, 229 F. Supp. 925 (S.D. Miss. 1964); *rev'd*, 380 U.S. 128 (1965), *on remand*, 256 F. Supp. 344 (S.D. Miss. 1966); *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965), *on remand*, 265 F. Supp. 703 (E.D. La. 1966), *aff'd*, 386 U.S. 270 (1967); *United States v. Baggett*, Civ. No. 2159-N (M.D. Ala., filed Jan. 15, 1965) (dismissed after passage of the Voting Rights Act, April 5, 1966).

total result of this effort was that the percentages of registered blacks increased as follows: Mississippi, from 4.4 percent in 1954 to 6.4 percent in 1965; Alabama, from 14.2 percent in 1958 to 19.4 percent in 1964; and Louisiana, from 31.7 percent in 1956 to 31.8 percent in 1965.<sup>103</sup> Clearly, it was time for a change.

On the other hand, this litigation led to a judicial climate that definitely had future significance. Although most of the cases that created this climate are principally of historical interest now, they nevertheless involved significant legal questions. One of the most significant, practically and symbolically, was the constitutionality of the new statutes themselves, which was settled in *United States v. Raines*,<sup>104</sup> the first case brought under the 1957 Act. *Raines*, which involved discrimination by the registrar of Terrell County, Georgia, was brought by the United States under 42 U.S.C. § 1971(c) (1970), which authorized such a suit “[w]hensoever any person has engaged or there are reasonable grounds to believe that any person is about to engage in” discriminatory conduct. The district court held section 1971(c) unconstitutional because the words “any person” might be construed to allow suits to enjoin purely private action designed to deprive citizens of the right to vote on account of their race or color.<sup>105</sup> The Supreme Court unanimously reversed the lower court decision and held the statute constitutional. Noting that the *Reese* case had arisen in the context of a criminal case, the Court gave short shrift to the *Reese* overbreadth argument and held that Registrar Raines, whose conduct was clearly official, could not claim that the statute was unconstitutional because of its possible application to someone else: “[T]o the extent *Reese* did depend on an approach inconsistent with what we think the better one and the one established by the weightiest of the subsequent cases, we cannot follow it here.”<sup>106</sup>

Apart from exhibiting a totally new attitude toward the constitutionality of federal civil rights legislation, the cases under the 1957-64 Acts settled other questions. First, the freezing principle, as an equitable remedy, was adopted explicitly and made the norm for most cases.<sup>107</sup> Secondly, the courts finally began to recognize that, when countless whites but virtually no blacks were registered, a presumption was cre-

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103. *Hearings on H.R. 6400*, *supra* note 101, at 4.

104. 362 U.S. 17 (1960).

105. *United States v. Raines*, 172 F. Supp. 552 (M.D. Ga. 1959) (applying *United States v. Reese*, 92 U.S. 214 (1876)).

106. 362 U.S. at 24.

107. *E.g.*, *United States v. Ward*, 349 F.2d 795 (5th Cir. 1965); *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964). The principle was approved explicitly in *Louisiana v. United States*, 380 U.S. 145 (1965).

ated that, in effect, shifted the burden of proof to the state.<sup>108</sup> Finally, the courts became accustomed to doing what Justice Holmes in the *Giles* decision had thought impossible—supervising in detail the operations of local election officials.<sup>109</sup> All these principles and attitudes were instrumental in formulating the pattern of the Voting Rights Act of 1965 and in encouraging courts to give meaningful relief in subsequent cases.

#### E. Voting Rights Act of 1965<sup>110</sup>

The Voting Rights Act of 1965 was a bold assertion of federal power to enforce the fifteenth amendment by stringent measures. It responded to the ability of the Southern States to stay one step ahead of federal law, the futility of the litigation method of securing voting rights, and the emotional national mood created by a series of outrages against blacks and civil rights workers.

The Act is a comprehensive scheme for regulating the details of certain states' election process both as to registration and voting, and contains a special provision, section 5, which is designed to thwart any future attempts to evade the Act. The act's core feature is a coverage formula—commonly known as the "trigger"—by which its stringent provisions would be applied only in states or parts of states that have literacy tests or similar devices and in which either the registration or voter turnout figure for 1964 was less than 50 percent of the voting-age population.<sup>111</sup> In these states or subdivisions, two provisions apply

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108. *United States v. Hines*, 9 RACE REL. L. REP. 1332 (1964); see *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962) ("In the problem of racial discrimination, statistics often tell much, and Courts listen.")

109. See *Alabama v. United States*, 304 F.2d 583, 585 (5th Cir. 1962) (district court held empowered to "engage in a most detailed supervision of the day-to-day operation of voter registration").

110. 42 U.S.C. §§ 1973 *et seq.* (1970).

111. 42 U.S.C. § 1973b(b) (1970). The jurisdictions initially covered by the trigger provision were: Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia; 40 counties in North Carolina; and several non-Southern areas.

Under § 4(a) of the Act, 42 U.S.C. § 1973b(a) (1970), a jurisdiction can terminate its coverage by suing the United States in the federal district court for the District of Columbia and obtaining a declaratory judgment, which certifies that for at least 5 years—since amended to 10 years—it has not used a literacy test or similar device with the purpose or effect of discriminating on account of race. Because most of the covered Southern States continued to use a literacy test until it was suspended on the effective date of the Act, August 6, 1965, a declaratory judgment could be obtained only after the Act had been in effect for the requisite 5-year—now 10-year—period. The common description of the Voting Rights Act as having a life of 5 years is, therefore, a shorthand reference to the period required before a covered jurisdiction can obtain the declaratory judgment terminating its coverage.

Several of the non-Southern jurisdictions have obtained early termination judgments by estab-

everywhere, while two other provisions apply wherever the Attorney General finds they are needed:

(1) In each covered state or subdivision, any "test or device," principally the literacy test, is suspended for five years (now extended to ten years) (section 4(a));<sup>112</sup>

(2) Each covered state or subdivision must gain prior approval from federal authorities before making any changes in voting laws or procedures; with approval being given only if the state or subdivision can show its change is not racially discriminatory in purpose or effect (section 5);<sup>113</sup>

(3) In those counties of covered states or subdivisions where the Attorney General believes local registrars are not adequately complying with the Act, he can designate federal examiners with full power to register any qualified voter (sections 6 and 7);<sup>114</sup>

(4) In the federal examiner counties, when deemed necessary by the Attorney General, he can designate federal observers to attend elections with full power to observe all parts of the election process—reminiscent of the federal supervisors created by the 1871 amendments to the Enforcement Act (section 8).<sup>115</sup>

In *South Carolina v. Katzenbach*,<sup>116</sup> the Supreme Court held the

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lishing that the test they have used is not discriminatory; but a North Carolina county was refused a declaratory judgment on the ground that its maintenance of unequal education facilities for many years made any literacy test inherently discriminatory. *Gaston County v. United States*, 395 U.S. 285 (1969). The theory of the *Gaston County* case makes it unlikely that any other Southern jurisdiction can obtain early termination. See p. 563 *infra*.

The Act was "extended" for 5 years in 1970, *i.e.* the time required before a state is eligible to seek a declaratory judgment was expanded to 10 years. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 314. At the same time, coverage was broadened to include any states or subdivisions which met the trigger formula (use of a test and less than 50% registration or turnout) for the year 1968. The new formula affected several new non-Southern areas, including three counties in New York (constituting the boroughs of Brooklyn, Manhattan and the Bronx). These counties have obtained a declaratory judgment terminating coverage, but that judgment has been appealed by black voters who intervened in the declaratory judgment suit brought by New York against the United States. *New York v. United States*, Civil No. 2419-71 (D.D.C., Apr. 13, 1972), *juris. postponed sub nom.* NAACP v. New York, 409 U.S. 978 (1972). See generally WASHINGTON RESEARCH PROJECT, *THE SHAMEFUL BLIGHT 2* (1972).

112. 42 U.S.C. § 1973b(a) (1970). The term "test or device" is defined in § 4(c), 42 U.S.C. § 1973b(c) (1970): "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 good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

113. 42 U.S.C. § 1973c (1970). This section is discussed in detail at pp. 576-81 *infra*.

114. 42 U.S.C. §§ 1973d-e (1970).

115. 42 U.S.C. § 1973f (1970).

116. 383 U.S. 301 (1966).

Act constitutional. The Court began by stating that section 2 of the fifteenth amendment gives Congress broad power to devise specific remedies for voting discrimination and to apply those remedies to particular locations. The Court then proceeded to uphold the specific remedies ripe for attack by South Carolina, including those described above—except the use of observers, which had not yet occurred. The opinion reflected an extraordinary sensitivity to the problems of racial discrimination in voting, and concluded with the thought that “[h]opefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live.”<sup>117</sup>

The Act was an immediate success. The effect on voters, and registrars, of suspending literacy tests and of installing federal examiners to register voters in problem areas was electric.<sup>118</sup> By 1967, the percentage of blacks registered in the covered states had risen sharply,<sup>119</sup> and has continued to rise to the point where black registration today is not far below white registration in many parts of the South.<sup>120</sup>

#### IV. NEW FORMS OF SUBTLE DISCRIMINATION

The Voting Rights Act successfully destroyed the pattern of formal and near-total disfranchisement that had been built up since 1890, and produced a situation reminiscent of the 1870's and 1880's. The States' responses to black enfranchisement also have paralleled their responses of a century ago, with heavy emphasis on facially neutral techniques.<sup>121</sup> Instead of preventing blacks from registering, the focus of discrimina-

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117. *Id.* at 337.

118. A number of “eleventh-hour” efforts to stop enforcement of the Voting Rights Act were unsuccessful. Several state courts granted injunctions prohibiting registrars or examiners from ignoring state literacy statutes, but these injunctions were quickly blocked by federal courts. *E.g.*, *United States v. Louisiana*, 265 F. Supp. 703 (E.D. La. 1966); *United States v. Mississippi*, 256 F. Supp. 344 (S.D. Miss. 1966); *Reynolds v. Katzenbach*, 248 F. Supp. 593 (S.D. Ala. 1965); *cf.* *McCann v. Paris*, 244 F. Supp. 870 (W.D. La. 1965). The theory behind the suspension of state literacy requirements was described cogently in a concurring opinion by Judge Rives in *Dent v. Duncan*, 360 F.2d 333 (5th Cir. 1966).

119. The percentage of blacks of voting age registered in the 6 states whose literacy tests were suspended statewide—Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia—went from 25.9% in 1965 to 52.4% in 1967. In those 2 years, the applicable figures for Mississippi went from 6.7% to 59.8%. The figures are shown, by county, in U.S. COMM'N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION* 225-56 (1968).

120. Registration figures by race are notoriously unreliable. The Census Bureau, however, estimates that in the South—including Border and some Southwest states—69% of the voting-age whites are registered, compared to 64% of the voting-age blacks. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, *VOTER-PARTICIPATION IN NOVEMBER 1972, CURRENT POPULATION REPORTS*, Series P-20, No. 244 (1972). Other estimates generally show a difference of 15-20% between white and black registration figures in the Deep South.

121. See pp. 536-38 *supra*.

tion shifted to preventing blacks from using their eligibility to gain any significant political power. In short, the shift was from preventing blacks from voting to preventing blacks from winning or deciding elections.

The methods used since 1965 have varied widely, often reflecting ad hoc adaptations to particular situations.<sup>122</sup> Apart from some instances of fraud, intimidation, and economic pressure, the major forms of discrimination have fallen into three categories: vote dilution, barriers to gaining public office, and hindrances to black voters. Some of the specific methods used include the following:

*Dilution:*

(1) Racial gerrymandering, e.g. drawing legislative districts to divide concentrations of black voting strength;<sup>123</sup>

(2) altering the racial composition of a town or county by annexing or deannexing territory or consolidating political units;<sup>124</sup>

(3) requiring a run-off election between the two highest candidates if no candidate wins a majority in the first election;<sup>125</sup>

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122. Much of the development in Southern politics since the passage of the Voting Rights Act is contained in a comprehensive report issued by the Civil Rights Commission in 1968. U.S. COMM'N ON CIVIL RIGHTS, note 119 *supra*. The list of discriminatory mechanisms on the next few pages is adapted largely from the findings there listed. *Id.* at 171-74.

123. See generally *id.* at 26-35; note 217 *infra*; WASHINGTON RESEARCH PROJECT, *supra* note 111, at 93-108. The mechanisms discussed in this section have a dilutive or discriminatory effect primarily where, as in most of the South, racial bloc voting is a factor. Where this pattern of voting is in evidence, large numbers of black voters tend to support the candidate, white or black, whom they perceive as favoring their interests, while white voters tend to an equal or greater degree to support his opponent. As V. O. Key put it, "In all [the southern states], the presence of large numbers of Negroes has been influential in determining the lines of political division and often in diverting the attention of the electorate from nonracial issues." V. KEY, *supra* note 43, at 254. The cumulative effect of discriminatory mechanisms used in combination (including gerrymandering, at-large elections, a majority requirement, a numbered place system, and high filing fees) is graphically described in a study of Houston. C. DAVIDSON, *BIRACIAL POLITICS* 52-82 (1972).

124. See *Mississippi Freedom Democratic Party v. Johnson*, 299 F. Supp. 93 (S.D. Miss. 1969); N. McMILLAN, *THE CITIZEN'S COUNCIL* 220-21 (1971); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 25-26; WASHINGTON RESEARCH PROJECT, *supra* note 111, at 132-35; note 245 *infra*.

125. Where blacks are a minority, they may still win an office in a plurality election if whites split their votes among several candidates; on the other hand, a majority requirement entails a runoff in which white voters can consolidate to defeat the black voters and their favored candidates. For example, Mississippi, which requires a majority only in primaries, repeatedly has sought to adopt such a requirement for general elections because of the fear that a black candidate (e.g., Charles Evers, 1971 candidate for the governorship) might win by a white split. See e.g., *Graves v. Barnes*, 343 F. Supp. 704, 725, 732 (W.D. Tex. 1972); *Evers v. Board of Election Comm'rs*, 327 F. Supp. 640 (S.D. Miss. 1971). See also V. KEY, *supra* note 43, at 416-23; W. TOWE, *BARRIERS TO BLACK POLITICAL PARTICIPATION IN NORTH CAROLINA* 20 (Voter Ed. Project 1972); R. YOUNG, *THE PLACE SYSTEM IN TEXAS POLITICS* 24-27 (U. Texas: Inst. Pub. Affairs 1965). Majority requirements have elicited a higher percentage of objections than almost any other voting change submitted under § 5 of the Voting Rights Act. See note 245 *infra*.



(4) using at-large elections where black voting is concentrated in particular election districts;<sup>126</sup>

(5) making at-large elections even more unfair to minorities by superimposing various rules that prevent a minority from concentrating its votes to take advantage of a split among the majority group:

(a) full-slate laws (also known as anti-single-shot laws), which require a voter to vote for as many candidates as there are offices to be filled;<sup>127</sup>

(b) numbered place laws, which designate each position by a separate number, require each candidate to qualify for a specific num-

126. Perkins v. Matthews, 400 U.S. 379 (1971); Allen v. State Board of Elections, 393 U.S. 544 (1969); Smith v. Paris, 257 F. Supp. 901 (M.D. Ala. 1966). See pages 573-75 *infra*; W. TOWE, *supra* note 125, at 14-17; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 108-26. This technique, one of the most favored, has been noted in much of the political science literature. E. LADD, NEGRO POLITICAL LEADERSHIP IN THE SOUTH 29-30, 102-03, 307 (Atheneum ed. 1969); D. MATTHEWS & J. PROTHRO, NEGROES AND THE NEW SOUTHERN POLITICS 4, 144, 208, 221 (Harcourt Brace ed. 1966); J. WILSON, NEGRO POLITICS 24-28, 31 (1960); Jewell, *Local Systems of Representation: Political Consequences and Judicial Choices*, 36 GEO. WASH. L. REV. 790, 802-03 (1968).

The past decade has been a virtual epidemic of at-large election laws in the deep South, especially in Mississippi and Louisiana. One of the laws was an amendment to MISS. CODE ANN. § 3374-76 requiring all cities to elect their councilmen at large. Laws of 1962, ch. 537 (May 29, 1962). The new law was passed in 1962 after its sponsor said "the measure would prevent one ward from getting enough Negro voters to elect an alderman," and that the law was "needed to maintain our Southern way of life." The Jackson-Clarion-Ledger, Feb. 1, 1962, at 1; *id.*, Mar. 2, 1962, at 1.

Creating larger districts will also increase the cost of campaigning, Graves v. Barnes, 343 F. Supp. 704, 720-21 (W.D. Texas), *prob. juris. noted*, 409 U.S. 840 (1972), and may increase the number of petition signatures required. Bush v. Sebesta, \_\_\_\_ F. Supp. \_\_\_\_ (M.D. Fla. 1972), *appeal pending*, No. 72-455 (1972).

127. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 35-39. If there are, for example, 7 offices to be filled, a full-slate law means that a voter who is interested in only 2 candidates not only will cast 2 of his votes for those candidates but must cast 5 votes *against* them (*i.e.* for their opponents) if he wishes his vote to count. Preventing black voters from "single-shotting" thus deprives them of the one way in which they gain some political influence. W. TOWE, *supra* note 126, at 17-20; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 35-39; WASHINGTON RESEARCH PROJECT, *supra* note 111, at 127-31.

Furthermore, the requirement that a voter cast a vote for a candidate against his wishes is repugnant to the first amendment, and its effect is insidious: "But you've got to select ten. And in selecting that ten, you might get a grand rascal in there that you don't want, but you've got to hold your nose and take him, because you are forced. And that way no voter in South Carolina has the right that he should have in the elective process, when he's forced to vote for somebody he may not want in order to support somebody he does want." Testimony of Modjeska Simkins, Vol. 1, p. 23, introduced into evidence in Stevenson v. West, C.A. No. 74-75 (D.S.C., April 7, 1972).

The full-slate law is less justifiable than virtually any other voting restriction ever devised. It was struck down in North Carolina and South Carolina in 1972. See cases cited notes 229-30 *infra*. On the other hand, it has been previously upheld in Gordon v. Meeks, 394 F.2d 3 (5th Cir. 1968); Amedee v. Fowler, 257 F. Supp. 659 (E.D. La. 1967); Alsop v. Mayhall, 208 F. Supp. 713 (S.D. Ala. 1962).

bered place, and allow each voter to vote for only one candidate in each place;<sup>128</sup>

(c) staggered terms, which achieve the same end as numbered places, except that the offices are separated chronologically; and<sup>129</sup>

(6) splitting the vote for a strong black candidate by nominating additional blacks as "straw" candidates for the same office.<sup>130</sup>

*Barriers to gaining public office:*

- (1) Abolishing offices or making them appointive;<sup>131</sup>
- (2) extending the term of white incumbents;<sup>132</sup>
- (3) limiting the responsibilities of offices likely to be won by blacks;<sup>133</sup>
- (4) imposing stiff formal requirements for qualifying to run in pri-

128. "It is clear that the numbered seat law may have the effect of curtailing minority voting power. In a true at-large election, if the majority spreads its vote around and the minority single shot votes, the minority strength is concentrated, thus increasing their chance of electing. However, if the minority candidate is forced to run against a specific candidate or candidates for a specific seat, the majority can readily identify for whom they must vote in order to defeat the minority candidate." *Dunston v. Scott*, 336 F. Supp. 206, 213 n.9 (E.D.N.C. 1972). See also *Graves v. Barnes*, 343 F. Supp. 704, 725, 732 n.20 (W.D. Tex. 1972); *W. TOWE*, *supra* note 125, at 27-28; *WASHINGTON RESEARCH PROJECT*, *supra* note 111, at 127-31; *R. YOUNG*, *supra* note 125, at 20-23; *Edsall, State Legislatures & Legislative Representation*, 30 J. POLITICAL 277, 286-87, 289 (1968). The Justice Department has objected to a higher percentage of numbered place systems than any other change submitted under § 5 of the Voting Rights Act. See notes 245-46 *infra*.

129. Any method—such as staggered terms or residence requirements—under which not all candidates run against each other will have the same effect as the numbered place system because it diminishes or eliminates the single-shot possibility. *WASHINGTON RESEARCH PROJECT*, *supra* note 111, at 130.

130. See, e.g., *Henderson v. ASCS*, 317 F. Supp. 430 (M.D. Ala. 1970).

131. *Bunton v. Patterson*, 393 U.S. 544 (1969); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 40-41. Curiously, when a large number of offices are to be filled by a single appointing official, it may be more discriminatory to shift to elections, especially at-large elections. For example, while a suit which challenged the failure of the Governor of Mississippi to appoint any blacks to the 410 count election commission posts was pending, a new law was passed making those offices elective, in at-large countywide elections. *Allen v. Johnson*, 413 F.2d 1218, 1219 (5th Cir. 1969). Few blacks have been elected to these posts, whereas retention of the appointive system might have resulted in a court order requiring a substantial number of black appointments. For example, in *Evers v. Williams*, C.A. No. 4288 (S.D. Miss., June 10, 1969), which was settled during the pendency of a Fifth Circuit appeal, the Governor agreed to appoint blacks, as vacancies opened, to every county draft board in rough proportion to the percentage of blacks residing in the county.

132. See *Sellers v. Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 41-42.

133. In Claiborne County, Mississippi, county officials have blocked attempts by a newly elected black tax collector to reassess property. A variant is to shift fee-producing responsibilities to a white official. For example, in Leake County, Mississippi, where 2 Justices of the Peace shared jurisdiction over the same area and traditionally shared cases as well, a newly elected black Justice was left with little or nothing to do, and no fees to earn, when law officers making arrests brought all defendants before the white Justice.

mary or general elections, *e.g.*, high filing fees, numerous nominating petitions, or complex oaths;<sup>134</sup>

(5) withholding pertinent information about qualifying requirements or other aspects of the election process;<sup>135</sup>

(6) withholding certification, on technical grounds, of black candidates' nominating petitions;<sup>136</sup>

(7) excluding or interfering with black candidates' poll watchers; and<sup>137</sup>

(8) imposing barriers to the assumption of office by successful black candidates.<sup>138</sup>

134. See *Harper v. West*, C.A. No. 72-1256 (D.S.C., Oct. 6, 1972); *United Citizens Party v. South Carolina Election Comm'n*, 319 F. Supp. 784 (D.S.C. 1970); *Whitley v. Johnson*, 296 F. Supp. 754 (S.D. Miss. 1967), *rev'd sub nom.* *Allen v. Board of Elections*, 393 U.S. 544 (1968); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 43-47; WASHINGTON RESEARCH PROJECT, *supra* note 111, at 72-73.

135. *United States v. Democratic Executive Comm.*, C.A. No. 6047-70 (S.D. Ala., Dec. 22, 1970); *Bynum v. Burns*, 379 F.2d 229 (8th Cir. 1967); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 48-55.

136. *Hadnott v. Amos*, 394 U.S. 358 (1969); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 55-58.

One of the best examples of obstruction through minor technicalities was a 1966 Mississippi law, which involved the procedure for qualifying as a candidate for school trustee in certain types of small school districts, most of which are heavily black. These elections take place not at regular polling precincts but at a meeting held at a local school. Before 1966 few blacks had attended these meetings and no black had been elected school trustee in any of these districts within living memory.

After blacks began to register in large numbers in 1965, the legislature suddenly responded by amending the procedure for qualifying as a candidate for school trustee. Where formerly one could simply go to the meeting and seek this office, the new amendment, MISS. CODE ANN. § 6328-09 (Cum. Supp. 1972), provided that a prospective candidate must present a petition with 25 signatures, plus a description of his qualifications *in an affidavit*, and an additional affidavit, which the candidate apparently has to obtain from the registrar, in which it is certified that his petition contains the requisite number of registered voters' signatures. Furthermore, the petition has to be presented 10 days before the election, but notice of the election is not given until 7 days before the election. None of these requirements was especially onerous but the combination of trivialities invited oversight or error, and according to the statute, any misstep was fatal to one's candidacy. The new amendment finally was adopted and went into effect, without publicity, 48 hours before the qualifying deadline for the 1966 elections. Several predominantly white districts, however, were exempted from the amendment's coverage for the 1966 elections.

Several voters and candidates sued, alleging that this statute violated the fifteenth amendment and the due process clause of the fourteenth amendment. A Mississippi district court, in *Boyd v. Johnson*, C.A. No. 668 (N.D. Miss., March 2, 1966), thereafter enjoined enforcement of the new qualifying requirements for the 1966 elections.

137. See *Gray v. Main*, 309 F. Supp. 207 (M.D. Ala. 1968); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 85-98; WASHINGTON RESEARCH PROJECT, *supra* note 111, at 77-81, 89-90.

138. See *Bond v. Floyd*, 385 U.S. 116 (1966). Twenty-three blacks who won county offices in Mississippi in 1967 found it almost impossible to get bonds, which were necessary for them to take office, even though, as Charles Evers said, "A lot of poor whites don't even own a chicken, and they get bonded." U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 58-59 & n.173.

*Hindrances to black voters:*

- (1) Withholding information about registration, voting procedures or party activities from black voters;<sup>139</sup>
- (2) giving inadequate or erroneous information to black voters, or failing to provide assistance to illiterate voters;<sup>140</sup>
- (3) omitting the names of registered voters from the lists;<sup>141</sup>
- (4) maintaining racially segregated voting lists or facilities;<sup>142</sup>
- (5) conducting reregistration or purging the rolls;<sup>143</sup>
- (6) allowing improper challenges of black voters;<sup>144</sup>

139. *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 60-64, 74-76.

In 1968, an insurgent group of Democrats unseated the Regular Democratic delegation to the Democratic National Convention by presenting a case that relied heavily on the Regulars' use of secret meetings, caucuses, and procedures.

140. *See* pages 563-65 *infra*; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 70-74; WASHINGTON RESEARCH PROJECT, *supra* note 111, at 82-86.

141. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 64-67; WASHINGTON RESEARCH PROJECT, *supra* note 111, at 81-82.

In Louisiana, which uses party registration, black voters who appear to vote at the Democratic Primary frequently find that they have been effectively disfranchised by being listed in the Republican books—a designation which they are told takes 6 months to change.

142. *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 82-84.

143. The difficulty blacks have faced in registering to vote has left its mark. In many places blacks still are likely to register less easily than whites because of a variety of factors including the difficulty of traveling to the registrar's office or of getting there during business hours, or simply because of a hesitation to go through the registration process again. In these circumstances, any procedure which removes voters and puts the burden on them to restore themselves to the rolls is likely to have a more adverse effect on blacks than on whites. Many procedures seem to be designed to take advantage of this factor. A reregistration wipes the books totally clean and requires every voter to sign up again. South Carolina conducts a reregistration every tenth year. In 1971, just before Mississippi's state and county elections, Mississippi counties engaged in wholesale reregistrations on the flimsy pretext that the registration was necessitated by redistricting. *See* Letter from Armand Derfner to Assistant Attorney General David L. Norman, July 2, 1971, *reprinted in Hearings on Enforcement of the Voting Rights Act Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 322-24 (1971). The Justice Department was criticized strongly for failing to use its power under § 5 of the Voting Rights Act to stop the reregistrations. *See* H.R. REP. NO. 71-742, 92d Cong., 1st Sess. (1971); WASHINGTON RESEARCH PROJECT, *supra* note 111, at 24-29.

A purge is a selective removal of names from the rolls for some cause. *See Toney v. White*, 348 F. Supp. 188 (W.D. La. 1972). One specific problem, more often faced outside the South, is the periodic purge in which individuals who have failed to vote during a designated period are removed from the rolls. This practice, though undoubtedly overbroad, has been upheld by one federal court in a case in which there was no proof of a racially disparate effect. *See Williams v. Osser*, 350 F. Supp. 646 (E.D. Pa. 1972). *But see Michigan State UAW Community Action Program Council v. Austin*, 387 Mich. 506, 198 N.W.2d 385 (1972).

144. In most states, any voter can challenge another voter, and activate an administrative procedure which imposes a burden on the challenged voter to defend his status. Wholesale challenges have been a favorite tactic in Louisiana, but courts have not been deterred by the claim that the challenges are private acts not subject to regulation. *See Reddix v. Lucky*, 252 F.2d 930 (5th

(7) disqualifying black voters on technical grounds;<sup>145</sup>

(8) requiring separate registration for different types of elections;<sup>146</sup>

(9) failing to provide the same opportunities for absentee ballots to blacks as to whites;<sup>147</sup>

(10) moving polling places or establishing them in inconvenient or intimidating locations;<sup>148</sup>

(11) setting elections at inconvenient times;<sup>149</sup>

(12) failing to provide adequate voting facilities in areas of greatly increased black registration;<sup>150</sup> and

(13) causing or taking advantage of election day irregularities.<sup>151</sup>

Cir. 1958); *United States v. McElveen*, 180 F. Supp. 10 (E.D. La.), *aff'd sub nom. United States v. Thomas*, 362 U.S. 58 (1960); *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965). See generally N. McMILLAN, *supra* note 124, at 222-27; M. PRICE, *THE NEGRO AND THE BALLOT IN THE SOUTH* 34-46 (Southern Regional Council, 1959). For a discussion of extensive use of challenges in Georgia see Bernd & Holland, *supra* note 75, at 487-94; V. KEY, *supra* note 43, at 570.

145. See *United States v. Executive Comm. of the Democratic Party*, 254 F. Supp. 537 (S.D. Ala. 1966); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 76-79.

146. Separate registration for state and federal elections was struck down in *Haskins v. Davis*, 253 F. Supp. 642 (E.D. Va. 1966). Separate registration for county and city elections existed until last year in North Carolina, see W. TOWE, *supra* note 125, at 49, and still exists in Mississippi and much of Florida. In Mississippi, moreover, county registration is a prerequisite for city registration. MISS. CODE ANN. §§ 21-11-1 to -3 (1972).

147. *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 79-80.

148. See, e.g., *Perkins v. Matthews*, 400 U.S. 379 (1971); *Davis v. Graham*, C.A. No. 16,891 (N.D. Ga., Oct. 2, 1972). In *Perkins*, the new polling place in the most heavily black ward was the former city jail, which was tiny and dilapidated, and in which many blacks had been beaten until the very year of the elections involved. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 80-82.

149. Holding elections at inconvenient times occurs most frequently when a large group of blacks or other disfavored voters, such as migrant workers or students, will be gone at a particular time. See, e.g., *Weaver v. Muckleroy*, Civil No. 5524 (E.D. Tex., July 14, 1972).

150. Use of cramped, inappropriate sites for polling places in black precincts is common. Often it is done without the appearance of discriminating simply by failing to move to larger quarters when the rolls in a given black ward have swelled with new registrants. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 119, at 80-84.

151. Efforts to manipulate the vote on election day are common, but one variant deserves mention for its ingenuity. In Tallulah, Louisiana, in 1969, a special election was held for the office of town marshal after the original election had been set aside in *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969). The day before the special election, the white officials assigned to large black precincts suddenly resigned without explanation, leaving inexperienced black alternates in charge of those precincts. It was apparent that the white officials hoped the inexperience of their alternates would lead to errors that might cause the precincts' votes to be thrown out—thus doing by indirection what they could no longer do directly.

As it happened, the black candidate won in a close election, a black alternate official in one precinct made an error in certifying his ballots, and there was talk that the defeated white candidate might challenge the election results. The error was too minor to support a substantial challenge, however, and the talk never came to anything.

The difficulties in combatting these techniques are immense. Because many are not embodied in state law but are of local origin, a single lawsuit may have little effect on a web of discriminatory practices. Other techniques are embodied, not in written laws or rules, but in unwritten practices or ad hoc modifications of written authority. In these cases, because the evidence generally will not be uniform, it may be difficult to prove that a given practice even exists or that it has been applied differently to whites and blacks. Further, many of the practices, like failing to assist illiterate voters, are not obviously restricted in their effect to blacks, but are devices to take advantage of "the alleged characteristics of the negro race." It may be difficult merely to prove that such practices are racially distinctive, let alone to prove that they are invidiously discriminatory. Finally, all these difficulties are compounded because many of the most discriminatory aspects of our election process and laws originated as "good government" reforms.<sup>152</sup> Ex-

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Tallulah is something of a testing laboratory for ingenious techniques. See *Toney v. White*, 348 F. Supp. 188 (W.D. La. 1972); *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968). See also Comment, *Voting Rights: A Case Study of Madison Parish, Louisiana*, 38 U. CHI. L. REV. 726 (1971).

On the other hand, even the most ingenious techniques have ancestors in the 19th century. Thus, the Tallulah resignation ploy resembled a scheme used in the 1892 Alabama gubernatorial election, when Democratic inspectors in charge of 6 heavily populist precincts deliberately made defective returns so as to give the election board an excuse for rejecting them. See Bagwell, *The 'Magical Process': The Sayre Election Law of 1893*, 25 ALA. REV. 81, 87 (1972).

152. C. DAVIDSON, *supra* note 123, at 55; T. DYE, *THE POLITICS OF EQUALITY* 160-61 (1971); Dixon, *Rebuilding the Urban Political System: Some Heresies Concerning Citizen Participation, Community Action, Metroes, and One Man-One Vote*, 58 GEO. L.J. 955, 966 (1970); Sloan, *Good Government and the Politics of Race*, 17 SOC. PROB. 161, 164, 174 (1969); Sloan & French, *Black Rule in the Urban South?*, 9 SOCIETY 29, 34 (1971-72).

Even the Australian ballot "reform" was first introduced in many places in the 1890's with the intended effect of discriminating against illiterate blacks. Bagwell, *supra* note 151, at 93-96. In Arkansas they sang a song about it, to the tune of the Confederate Anthem, "Bonnie Blue Flag:"

The Australian ballot works like a charm,  
It makes them think and scratch,  
And when a negro gets a ballot  
He has certainly got his match.

(Chorus)

Hurrah! Hurrah! for Arkansas Hurrah!  
And when we elect Old Grover  
We will make them kick and paw.

They go into the booth alone  
Their ticket to prepare.  
And as soon as five minutes are out  
They have got to git from there.

(Chorus)

They then next to the Judge applies  
With a little tale of woe,

amples of these measures include at-large elections, purges and reregistrations, and, of course, redistricting. The reformist appearance of these techniques often renders them immune to attack even when, as in racially gerrymandered redistricting, the claim of reform is simply a false cover for perverting the election process.

#### V. SOURCES OF LEGAL PROTECTION AGAINST THE NEW DISCRIMINATION

Unlike attempts of earlier days, recent attacks on these new, elusive modes of discrimination have been moderately successful because the courts have been attentive and because the attacks skillfully have marshalled a range of sources of legal protection.

Formerly, the fifteenth amendment and several federal criminal statutes remaining from Reconstruction were the primary sources of protection; in the past decade, however, the criminal statutes have gone virtually unused, and the fifteenth amendment has also been relatively inactive except as a source of congressional power, largely because of the difficulty in proving that a given "denial or abridgement" of the right to vote is on account of race. Instead, the principal sources of contemporary legal protection against discrimination have been recently adopted statutes or newly applied constitutional provisions including: the equal protection clause and due process clause of the fourteenth amendment; the twenty-fourth amendment, which bans poll taxes in federal elections; section 4 of the Voting Rights Act, which suspends literacy tests; section 5 of the Voting Rights Act, which requires pre-clearance of voting changes in covered states; and several provisions of the recent Civil Rights and Voting Rights Acts designed to meet specific forms of discrimination. Finally, effective use of these sources of protection has been enhanced by the development of a number of judicial remedies suitable for particular cases.

The development of the various sources of legal protection against voting discrimination, and the expansion of their coverage to fill gaps between them, has increasingly tended to federalize the right to vote.<sup>153</sup> The components of a potentially comprehensive defense against voting discrimination are available, and the question is how creatively they will

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And of course his ticket is well prepared,  
Which someone is bound to know.  
(Chorus)

Graves, *supra* note 38, at 212-13.

153. R. CLAUDE, *THE SUPREME COURT AND THE ELECTORAL PROCESS* 251-82 (1970); Sentell, *Federalizing Through the Franchise: The Supreme Court and Local Government*, 6 GA. L. REV. 34 (1971).

be used. This section of this Article will touch briefly on these antidiscrimination provisions and describe how they have been used to help "nullif[y] sophisticated as well as simple-minded modes of discrimination."

#### A. *The Fifteenth Amendment*

Apart from the power it gives Congress the fifteenth amendment always has been of limited direct utility because its application depends upon both proof of discrimination and proof that the discrimination is along racial lines. Early applications of this amendment were limited to cases in which the racial distinction was more or less explicit and in which it could be said that a particular measure had both the purpose and effect of discriminating on account of race. Under these standards, which were never quite articulated, the Supreme Court has applied the fifteenth amendment to strike down discriminatory measures in only eight cases in a century.<sup>154</sup>

In recent years, however, the requirements of proof appear to be less stringent, and the amendment now seems available to strike down measures or practices that draw disadvantageous distinctions between blacks and whites. This development may be traceable to a noted Supreme Court case decided under the fifteenth amendment, *Gomillion v. Lightfoot*.<sup>155</sup> *Gomillion*, whose result is more obvious than its reasoning, held that it was unconstitutional for Tuskegee, Alabama, to redraw its boundaries to exclude all but four or five black voters while retaining every single white within the city. The opinion's language makes it unclear whether the Court's principal ground for holding the city's boundary change unconstitutional was its purpose or its effect, but recent Supreme Court cases have opted to explain *Gomillion* as a case involving racially discriminatory effect.<sup>156</sup>

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154. *Gomillion v. Lightfoot*, 364 U.S. 339 (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); *Louisiana v. United States*, 380 U.S. 145 (1965).

155. 364 U.S. 339 (1960).

156. *E.g.*, *Palmer v. Thompson*, 403 U.S. 217, 225 (1971); *United States v. O'Brien*, 391 U.S. 367, 384-85 (1968). *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1210, 1221-22, 1250-54, 1268-69 (1970). *Gomillion* is also difficult because it sounds like a fourteenth amendment case although it purports to rest on the fifteenth. It may be that the choice of the fifteenth amendment was dictated, for some Justices at least, by the fear that a fourteenth amendment holding might lead to overruling *Colegrove v. Green*, 328 U.S. 549 (1946), which had held malapportionment nonjusticiable. Since *Colegrove* was a fourteenth amendment case, resting *Gomillion* on the fifteenth amendment enabled Justice Frankfurter to write that *Gomillion* was an entirely different case because the racial claim lifted it out of the political arena that the Court had refused to enter in *Colegrove*.



Under the modern interpretation of the equal protection clause, virtually any showing of denial or abridgment of the right to vote on account of race—a violation of the fifteenth amendment—also constitutes a denial of the equal protection of the laws.<sup>157</sup> Because a fourteenth amendment violation can be shown without proving that a distinction is along racial lines, litigants tend to use the fourteenth amendment rationale when there is a choice.

The fifteenth amendment is used commonly, however, in cases involving ad hoc administrative practices.<sup>158</sup> Here, the fifteenth amendment usually is applied in conjunction with one of the implementing statutes that bar racial voting discrimination committed under “any constitution, law, custom, usage, or regulation,” or by means of any “voting qualification or prerequisite to voting, or standard, practice, or procedure . . . .”<sup>159</sup> In the past few years, federal courts, relying on one

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In a recent case, the Fourth Circuit reversed a district court holding that Richmond's annexation of a large number of white suburbanites violated the fifteenth amendment because it was intended to eliminate a black majority and thus prevent blacks from winning control of the city council. *Holt v. City of Richmond*, 334 F. Supp. 228 (E.D. Va. 1971), *rev'd*, 459 F.2d 1093 (4th Cir.), *cert. denied*, 408 U.S. 931 (1972). *Holt* is a troublesome case, but it stands for much less than it suggests on first reading. The district court had found that the annexation was valid and necessary, but that the city officials' rush to conclude it before the 1970 elections resulted from discriminatory motives. The district court upheld the annexation, but ordered the 1970 elections set aside and reheld under a scheme that minimized the impact of the additional voters. The Fourth Circuit held simply that the proof and findings did not show the purpose of the annexation was discriminatory because any discriminatory motives were “remote” from the annexation proceeding, which was being conducted in the Virginia state courts. That proceeding had gone on for many years without any discriminatory purpose, according to the Fourth Circuit, and the fact that some city officials at some point perceived it as having advantages in terms of their own prejudices could not taint the longstanding state court proceeding or poison an otherwise valid and compelling annexation, that was neither affected nor effected by their prejudices.

There was no discussion of the effect of the annexation, except the broad fact that the annexation eliminated a black majority and that political lines in the city were drawn generally along racial lines. The case thus stands for the obverse of *Gomillion*, *i.e.* that if the effect of an act includes substantial neutral or beneficial features, evidence that some people were pleased to perceive a discriminatory effect will not transform the act into one whose purpose or whose inescapable effect is discriminatory.

The Fourth Circuit's view of the case may not square with the record, but it does not conflict with the district court's actual findings. The annexation is presently being challenged under § 5 of the Voting Rights Act. *See* note 247 *infra*.

157. *Hadnott v. Amos*, 394 U.S. 358 (1969); *see* pages 569-75 *infra*.

158. When the discrimination is not rooted in a statute or regulation, courts may be deterred from applying the equal protection clause by the puzzling suggestion in *Snowden v. Hughes*, 321 U.S. 1, 7 (1944), that an administrative error which misinterprets or distorts valid state law is not a denial of the “equal protection of the laws” unless there is some design or intention to discriminate, or unless a suspect classification results. *See* discussion at note 200 *infra*.

The fifteenth amendment's prohibition against racial discrimination in voting invites no such fanciful distinction between statutory and administrative discriminations.

159. 42 U.S.C. §§ 1971(a)(1), 1973 (1970).

or both of these statutes or on the fifteenth amendment itself, have required relocation of polling places that were inconvenient for black voters,<sup>160</sup> restored black voters stricken in a racially selective purge and simultaneously struck fictitious names enrolled in predominantly white precincts,<sup>161</sup> invalidated a primary election because an official volunteered information concerning qualification only to whites—with the result that black candidates made disqualifying errors,<sup>162</sup> and invalidated a general election because officials gave opportunities to cast absentee ballots only to white voters.<sup>163</sup>

### B. Suspension of Literacy Tests

The provisions of the 1965 Voting Rights Act suspending literacy tests for five years in certain states<sup>164</sup> have led to numerous cases that generally have guaranteed the rights of voters who need assistance. Many of these decisions have rested upon the illiterate voter's rights under the equal protection clause.

Under section 4(a) of the 1965 Act, a state or subdivision in which literacy tests have been suspended may reinstate its tests and otherwise terminate the Act's special coverage provisions before termination of the statutory five-year—now ten-year—period upon a showing that the test it had used before 1965 was not racially discriminatory in purpose or effect. In 1967, Gaston County, North Carolina, sought to terminate coverage by proving that the test it used from 1962 until its suspension in 1965 was not discriminatory. Although it was undisputed that the test had been fairly applied, the Supreme Court rejected this claim by holding that Gaston County's past systematic deprivation of equal *educational* opportunities left its blacks unequally prepared to meet literacy requirements; thus, even a fair test would have a discriminatory effect.<sup>165</sup> As one commentator has noted, this was the "fruition of the freezing principle."<sup>166</sup>

Once the Act enfranchised illiterates in certain states, problems arose with voting procedures. At least two states, Louisiana and Missis-

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160. *Davis v. Graham*, Civil No. 16,891 (N.D. Ga., Oct. 2, 1972).

161. *Hatcher v. Krupa*, Civil No. 4806 (N.D. Ind., Nov. 6, 1971).

162. *United States v. Democratic Executive Comm.*, Civil No. 6047-70 (S.D. Ala., Dec. 22, 1970).

163. *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968).

164. See note 111 *supra*.

165. *Gaston County v. United States*, 395 U.S. 285, 296-97 (1969), *aff'g* 288 F. Supp. 678 (D.D.C. 1968).

166. Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379.

issippi, recently had repealed longstanding statutes providing for assistance to illiterate voters, presumably those qualified under the understanding test or other alternatives designed in the 1890's for illiterate white voters. In both states, the repeals were undone by federal court orders which required election officials to give, upon the request of any voter, any "reasonable assistance as may be necessary to permit such voter to cast his ballot in accordance with the voter's own decision."<sup>167</sup> As Judge Wisdom said in explaining this order in *United States v. Louisiana*:

This stultifying provision [barring assistance to illiterates] conflicts with the Voting Rights Act of 1965. The Act provides for the suspension of literacy tests in states which have used such tests as a discriminatory device to prevent Negroes from registering to vote. Like any other law, this provision implicitly carries with it all means necessary and proper to carry out effectively the purposes of the law. As Louisiana recognized for 150 years, if an illiterate is entitled to vote, he is entitled to assistance at the polls that will make his vote meaningful. We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever.<sup>168</sup>

This view was implicit in striking down other discrimination against illiterates, including a Georgia provision limiting private citizens—allowed by statute to provide voter assistance—to assisting no more than one voter each,<sup>169</sup> and a Greene County, Alabama, rule barring illiterates, but not literates, from carrying marked sample ballots into the voting booth.<sup>170</sup> On the other hand, courts refused to order Virginia to allow illiterates to paste premarked gummed stickers on their ballots,<sup>171</sup> and refused to hold that Sunflower, Mississippi, had

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167. *United States v. Mississippi*, 256 F. Supp. 344, 349 (S.D. Miss. 1966); see *United States v. Louisiana*, 265 F. Supp. 703, 709 (E.D. La. 1966), *aff'd mem.*, 386 U.S. 270 (1967).

168. 265 F. Supp. at 708.

169. *Morris v. Fortson*, 261 F. Supp. 538 (N.D. Ga. 1966). The Georgia statute had allowed a person to assist 10 voters before a recent amendment lowered the limit to one voter. The court ordered the 10-voter limit reinstated.

170. *Gilmore v. Greene County Democratic Party Executive Comm.*, 435 F.2d 487 (5th Cir. 1970).

171. After its literacy test was suspended, Virginia adopted new balloting regulations providing, that election officials, who were already empowered to assist disabled voters, could also assist illiterate voters. A district court held that the voter's constitutional rights had not been violated by the failure to permit the use of stickers as an alternative to receiving aid from an official. *Allen v. State Bd. of Elections*, 268 F. Supp. 218 (E.D. Va. 1967). After the Supreme Court determined that the new procedure was covered by § 5 of the Voting Rights Act, *id.*, 393 U.S. 544 (1969), a statute incorporating the new procedure was enacted and was cleared by the Attorney General under the Voting Rights Act. Letter from Assistant Attorney General Jerris Leonard to Virginia Attorney General Robert Y. Button, \_\_\_\_\_, 1969. The question of an alternative to assistance from an official is no small issue. The chilling effect on a black illiterate voter of being assisted by a white election official can be significant. The black voter faces the prospect of revealing his vote to an unfamiliar or hostile white person without having any assurance that his vote will be cast as

provided inadequate assistance simply because the assisting officials were all white.<sup>172</sup>

The rationale of *United States v. Louisiana* has been extended to states that do not have formal literacy tests. Texas, for example, had no formal literacy test but prohibited any assistance from being given to illiterates. In ordering Texas to assist illiterate voters,<sup>173</sup> a district court found that withholding aid to illiterates denied them equal protection since blind and disabled voters were entitled to aid under Texas law. Finally, section 4(e) of the Voting Rights Act, which enfranchised Puerto Ricans literate only in Spanish,<sup>174</sup> was the basis for a Chicago decision in which election officials were ordered to provide ballots and instructional materials in Spanish when necessary.<sup>175</sup>

The Voting Rights Act was amended in 1970. In addition to extending the suspension of tests in covered areas to ten years or at least until 1975, the amendments then included a provision that suspended all literacy tests in *other* states until 1975 without triggering any special coverage provisions.<sup>176</sup> In *Oregon v. Mitchell*, Congress' power to sus-

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he directs. Faced with this prospect, many illiterate voters have forfeited their votes by staying home or by spoiling their ballots in vain attempts to cast them without assistance.

172. *Hamer v. Ely*, 410 F.2d 152 (5th Cir.), *cert. denied*, 396 U.S. 942 (1969).

173. *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970), *remanded*, 450 F.2d 790 (5th Cir. 1971), injunction granted, Civ. No. SA 70-CA-169 (W.D. Tex., Dec. 6, 1971).

174. Section 4(e), 42 U.S.C. § 1973b(e) (1970), suspends English literacy requirements for anyone who has completed the sixth grade in a public school or an accredited private school within the United States, Puerto Rico, or any territory, in which the predominant classroom language is a language other than English. This provision was upheld as appropriate legislation under the fourteenth amendment by *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

The recognition in *Morgan* of a degree of congressional power to define the content of the equal protection clause has caused some alarm because it seems to lend constitutional support to legislation *restricting* constitutional rights as they have been defined by the federal courts. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542, 1560-73 (1972). See also Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 95-102. A note to the *Morgan* opinion seeks to avoid this possibility by saying simply that Congress can only enforce, not dilute, the guarantees of the fourteenth amendment, 384 U.S. at 651 n.10, yet the commentators are correct in saying that this simple statement raises more questions than it answers.

At the same time it decided *Morgan*, the Supreme Court refused to rule on a claim that the fourteenth amendment per se requires a state's literacy requirement to be satisfied by Spanish literacy. *Cardona v. Power*, 384 U.S. 672 (1966). The California Supreme Court subsequently upheld that claim and struck down that state's English literacy requirement as applied to people literate in Spanish. *Castro v. State*, 3 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

175. *Puerto Rican Organization for Political Action v. Kusper*, 350 F. Supp. 606 (N.D. Ill. 1972).

176. 42 U.S.C. § 1973aa (1970). The 1970 amendment also provided that 18-year olds should vote, 42 U.S.C. 1973bb-1 (1970), and adopted new rules for voting for the President and Vice President, including the right to register and vote absentee and a ban on state residency requirements (for those elections) of more than 30 days. 42 U.S.C. § 1973aa-1 (1970).

pend tests nationwide was unanimously upheld.<sup>177</sup> Every Justice agreed that Congress could use a broad remedy for a widespread problem, even though literacy tests in some areas might not, in fact, be discriminatory.

While affirming Congress' power under the fifteenth amendment to bar literacy tests, the Court nevertheless has reaffirmed its earlier holding that literacy tests per se do not violate the fourteenth or fifteenth amendment.<sup>178</sup> Thus, although the suspension of literacy tests generally has been acclaimed throughout the nation and few could desire their return, the problem is not permanently solved. Because literacy tests are not barred by any self-enforcing provision of the Constitution, unless the nineteen literacy test states repeal their tests, Congress must renew the statutory suspension, enact a permanent prohibition by 1975, or see the tests return.

### C. *Anti-Poll Tax Provisions*

Although Congress has dealt more circumspectly with the poll tax, that requirement is now wholly eliminated, probably because of its inherent irrationality. Its elimination has led also to the invalidation of related tests that discriminate against black and poor candidates. Despite the increasing recognition of the evils of the poll tax in the past third of a century it took 25 years of concerted effort before the federal government took the first limited step, the passage of the 24th amendment guaranteeing the unqualified right to vote in federal elections without payment of a poll tax or any other tax.<sup>179</sup>

After the enactment of the twenty-fourth amendment, several of the five remaining states with poll taxes<sup>180</sup> adopted new laws designed to keep the offensive features of the tax in effect by imposing substitute requirements. In Virginia, for example, one could pay the poll tax and be eligible to vote in state and federal elections. However, if he wished to exercise his twenty-fourth amendment right to avoid the poll tax, he had to obtain a special certificate, which allowed him to vote in federal, but not state, elections. In striking down this statute, the Supreme Court in *Harman v. Forssenius*<sup>181</sup> noted that, although a money payment was

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177. 400 U.S. 112 (1970).

178. Several of the opinions in *Oregon v. Mitchell* approvingly cited *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). See, e.g., 400 U.S. at 144 (Douglas, J.); *id.* at 232 (Brennan, J.); *id.* at 283 (Stewart, J.).

179. Congressional pressure began after the Supreme Court upheld the poll tax in *Breedlove v. Suttles*, 302 U.S. 277 (1937). A direct fifteenth amendment attack on the poll tax was rejected in *Butler v. Thompson*, 97 F. Supp. 17 (E.D. Va.), *aff'd*, 341 U.S. 937 (1951).

180. The 5 states with poll taxes in 1964 were Alabama, Mississippi, Texas, Virginia, and Vermont.

181. 380 U.S. 528 (1965).

not required, the voter choosing to obtain his federal election certificate still faced two of the most objectionable features of the poll tax: the certificate had to be obtained annually and at least six months before the election.<sup>182</sup> The Supreme Court held that this requirement was a material imposition upon a voter in exercising his twenty-fourth amendment rights and that it therefore abridged those rights regardless of whether the new requirement was harder or easier than the poll tax it replaced.<sup>183</sup>

In the Voting Rights Act of 1965, Congress moved against the poll tax as a prerequisite to voting in nonfederal elections, but stopped short of outlawing or suspending it. Instead, in section 10, Congress stated that the poll tax discriminated against the poor and, in some places, blacks, and that it did not "bear a reasonable relationship to any legitimate State interest in the conduct of elections . . ." Accordingly, the Attorney General was directed to sue to invalidate the poll tax as a precondition to voting.<sup>184</sup>

The Attorney General thereafter filed suits in Virginia, Mississippi, Texas, and Alabama—the only four states maintaining these taxes. At the same time, a private lawsuit that attacked the Virginia poll tax was proceeding to the Supreme Court. The poll tax was struck down in three of the cases during the months of February and March, 1966, by district courts in *United States v. Texas*<sup>185</sup> and *United States v. Alabama*,<sup>186</sup> and by the Supreme Court in *Harper v. Virginia State Board of Elections*.<sup>187</sup> Although these three decisions ironically relied on different constitutional provisions, the tax's irrelevance to the voting process was at the core of each opinion. In the Texas case, the district court held that the imposition of an unnecessary tax on the right to vote violated due process. In the Alabama decision, a majority of the court held that the tax retained its original purpose of disfranchising blacks and therefore vio-

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182. The disfranchising effect of the poll tax resulted as much from the early payment deadline and the need to keep the receipt as it did from the cost. It was "like buying a ticket to a show nine months ahead of time, and before you know who is playing or really what the thing is all about. It is easy to forget to do." Stoney, *Suffrage in the South, Part I, the Poll Tax*, 29 SURVEY GRAPHIC 4, 8-9 (1940), quoted in A. KIRWAN, *supra* note 38, at 75.

183. *Harman v. Forssenius*, 380 U.S. 528 (1965). Mississippi's evasion was struck down in *Gray v. Johnson*, 234 F. Supp. 743 (S.D. Miss. 1964).

184. 42 U.S.C. § 1973h(a) (1970). The statute also provided that while the Attorney General's suits were pending a voter could not be barred if he tendered payment of the current year's poll tax within 45 days of the election in which he sought to vote. *Id.* § 1973h(d).

185. 252 F. Supp. 234 (W.D. Tex. 1966).

186. 252 F. Supp. 95 (M.D. Ala. 1966).

187. 383 U.S. 663 (1966). The Court also overruled *Breedlove v. Suttles*, 302 U.S. 277 (1937).

lated the fifteenth amendment. In *Harper*, the Supreme Court held that: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor," in violation of the equal protection clause.<sup>188</sup>

Since the elimination of the poll tax, the principles employed in these cases have been used effectively against other forms of taxing the right to vote, such as imposing property qualifications upon the right to vote<sup>189</sup> or the right to hold office.<sup>190</sup> Moreover, in 1972, the Supreme Court cited *Harper* extensively in holding that the equal protection clause bars the imposition of high filing fees for candidates.<sup>191</sup>

#### D. Other Civil Rights Statutes

In the civil rights acts passed since 1957, Congress set forth substantive regulations governing the right to vote, several of which may apply without a finding that a previous practice was done on account of race.

One of the most significant is section 11(a) of the Voting Rights Act,<sup>192</sup> which provides that: "No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote." Decisions under this section have invalidated a general election in which voters were not informed that pulling the straight party lever would not register a vote for the leading black candidate;<sup>193</sup> required the counting of votes that had been rejected for technical failure to comply with state law;<sup>194</sup> and invalidated a primary election in which certain voters, most but not all of whom were black, had been removed from the rolls by improper challenges immediately before the election.<sup>195</sup>

Two other important sections do not require acts based upon race.

188. *Id.* at 668. Judgments were entered the following week in *United States v. Mississippi*, 11 RACE REL. L. REP. 837 (S.D. Miss. 1966), and *United States v. Virginia*, 11 RACE REL. L. REP. 853 (E.D. Va. 1966).

189. *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

190. *Turner v. Fouche*, 396 U.S. 346 (1970); *Stapleton v. Clerk for the City of Inkster*, 311 F. Supp. 1187 (E.D. Mich. 1970).

191. *Bullock v. Carter*, 405 U.S. 134 (1972).

192. 42 U.S.C. § 1973i(a) (1970). *But see Powell v. Power*, 436 F.2d 84 (2d Cir. 1970) (suggesting that a § 11(a) case must at least have a racial overtone).

193. *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969).

194. *United States v. Executive Comm. of the Democratic Party*, 254 F. Supp. 537 (S.D. Ala. 1966).

195. *Toney v. White*, 348 F. Supp. 188 (W.D. La. 1972).

The first requires officials to apply one set of standards in determining the qualifications of all voters—essentially codifying the equal protection clause.<sup>196</sup> The second prohibits officials from denying anyone the right to vote because of immaterial errors in applications or other prerequisites.<sup>197</sup>

### E. *The Fourteenth Amendment: Equal Protection Clause*

The equal protection clause of the fourteenth amendment has long been available to strike down explicitly racial voting discrimination. It was so used in the first two white primary cases.<sup>198</sup> In this context, however, the fourteenth amendment adds little to the protections afforded black voters by the fifteenth amendment.<sup>199</sup> It was not until the early 1960's—when the equal protection clause began to be used to invalidate voting discriminations not explicitly based on race—that the clause took on added value for blacks as well as other voters. Two concepts, which concerned the application of the equal protection clause and which developed during this recent period, have added to its importance: (1) that diluting votes is akin to disfranchisement; and (2) that all restrictions on the right to vote should be subjected to strict scrutiny.

Before the 1960's, the equal protection clause lay dormant as a source of voter protection,<sup>200</sup> but in 1962 the Supreme Court in *Baker*

196. 42 U.S.C. § 1971(a)(2)(A) (1970).

197. *Id.* § 1971(a)(2)(B). Both sections together have been used to restore a black candidate's name to the ballot after he was disqualified because his nominating petitions contained an error similar to one made by a white candidate who was not disqualified. *United States v. Board of Election Comm'rs*, Civil No. WC7153-K (N.D. Miss., Oct. 27, 1971).

198. *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927); see *Nixon v. Condon*, 286 U.S. 73 (1932).

199. See, e.g., *Anderson v. Martin*, 375 U.S. 399 (1964); *McDonald v. Key*, 224 F.2d 608 (10th Cir.), *cert. denied*, 350 U.S. 895 (1955).

200. Several decisions have suggested that the equal protection clause could not be used to protect voting rights. See, e.g., *Colegrove v. Green*, 328 U.S. 549 (1946); *Snowden v. Hughes*, 321 U.S. 1 (1944).

These cases gave the impression that the fourteenth amendment did not cover "political" rights, as Justice Harlan was later to suggest repeatedly, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 163 (1970). That impression was wholly at odds with the prior cases, especially with regard to the equal protection clause. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Before 1962 the Supreme Court had only twice used the equal protection clause to strike down restrictions on voting—in the 2 *Nixon* cases involving state-decreed white primaries—but the first *Nixon* case had squarely addressed and rejected the argument that political rights were not within the equal protection clause:

"The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. . . .

" . . . We find it unnecessary to consider the Fifteenth Amendment, because it seems to us



v. *Carr* applied the equal protection clause to the dilution of votes resulting from malapportionment.<sup>201</sup> After several more dilution cases,<sup>202</sup> in 1965 the Court for the first time applied the equal protection clause to a voter qualification not explicitly drawn on racial lines. That case, *Carrington v. Rash*,<sup>203</sup> struck down a Texas constitutional provision prohibiting servicemen from acquiring voting residence in the state.

In holding the Texas provision to be a denial of equal protection, the Supreme Court in *Carrington* noted that the right to vote which "this Court has been so zealous to protect" is "close to the core of our constitutional system."<sup>204</sup> In subsequent cases, the Supreme Court analogized voting to free speech<sup>205</sup> and emphasized that the right to vote is "a fundamental political right, because preservative of all rights."<sup>206</sup> Accordingly, the Court insisted that restrictions on voting require "close scrutiny," that they may not be overbroad, and that any justifying state interest must be not only rational, but also compelling.<sup>207</sup> No matter how the test for compliance with the equal protection clause is phrased, it produces the same result: a presumption favoring the right to cast effective ballots, a pro tanto shift of the burden of justifying the restriction to the state, and a skeptical view of any justifications advanced by the state. This shift in attitude pervades all the voting decisions, not simply those involving bars or inconveniences to voters or candidates.

hard to imagine a more direct and obvious infringement of the Fourteenth." *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927).

Moreover, the applicability of the equal protection clause to voting rights was recognized in numerous other cases in which the claim of denial of equal protection was rejected on the merits. *E.g.*, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959); *Pope v. Williams*, 193 U.S. 621, 634 (1904), *overruled*, *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Williams v. Mississippi*, 170 U.S. 213, 219 (1898).

201. 369 U.S. 186 (1962).

202. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

203. 380 U.S. 89 (1965).

204. *Id.* at 96.

205. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968); *Hadnott v. Amos*, 394 U.S. 358, 364 (1969); *Toporek v. South Carolina Election Comm'n*, Civ. No. 72-1225 (D.S.C. Jan. 23, 1973).

206. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

207. "[I]t is certainly clear now that a more exacting test is required for any statute which 'places a condition on the exercise of the right to vote.' *Bullock v. Carter*, [405 U.S. 134, 143 (1972)]. This development in the law culminated in *Kramer v. Union Free School District*, [395 U.S. 621 (1969)]. There we canvassed in detail the reasons for strict review of statutes distributing the franchise, [*id.* at 626-630], noting inter alia that such statutes 'constitute the foundation of our representative society.' We concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.' [*Id.*, at 627]; *Cipriano v. City of Houma*, [395 U.S. 701, 704 (1969)], *Phoenix v. Kolodziejewski*, [399 U.S. 204, 205, 209 (1970)]. *Cf.* *Harper v. Virginia State Board of Elections*, [383 U.S. 663, 670 (1966)]." *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972).

The most common use of the compelling interest test has been in cases involving eligibility to vote or restrictions that effectively deny the vote to different categories of people.<sup>208</sup> This test also has been used explicitly in cases involving the rights of candidates and political parties,<sup>209</sup> as well as implicitly in other cases that have concerned significant restrictions on the right to cast an effective ballot. The latter cases are typified by the failure to give aid or giving inadequate aid to illiterates,<sup>210</sup> requiring registration too far in advance of an election,<sup>211</sup> singling out categories of people for more stringent application of residence requirements or purging standards,<sup>212</sup> disqualifying voters for criminal convictions,<sup>213</sup> and favoring certain candidates or parties in arranging the order of candidates on the ballot.<sup>214</sup>

In the most recent cases the discriminatory nature of the practices that have been struck down has been quite subtle, either because there is no official distinction drawn—as with the early registration deadline, where the voter has the power to avoid the harmful effect simply by registering—or, when there is a distinction, because it is not evident that anyone is disadvantaged thereby. Differences like these, which impose

208. It has been used, for example, in cases in which the following groups of people were disfranchised: servicemen, *Carrington v. Rash*, 380 U.S. 89 (1965); nonproperty owners, *Cipriano v. City of Houma*, 395 U.S. 701 (1969); nonparents, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); poor people, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); residents of a federal enclave, *Evans v. Cornman*, 398 U.S. 419 (1970); new residents, *Dunn v. Blumstein*, 405 U.S. 330 (1972); and most recently unconvicted jail inmates, *Goosby v. Osser*, 409 U.S. 512 (1973).

209. *Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968).

210. *E.g.*, *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970).

211. *E.g.*, *Ferguson v. Williams*, 343 F. Supp. 654 (N.D. Miss. 1972) (“[T]he state may not, consistent with the Equal Protection Clause, justify a longer registration period [than is clearly essential to hold orderly elections] by the use of part-time, ill-paid election officials, assisted only by limited staff, or by adhering to slow-moving election machinery adequate in other times.”); *Beare v. Smith*, 321 F.2d 1100 (S.D. Tex. 1971). *See also* *Bishop v. Lomenzo*, 350 F. Supp. 576, 587 (E.D.N.Y. 1972) (“The remedy lies in providing more clerks rather than in registering fewer voters.”).

212. *E.g.*, *Newburger v. Peterson*, 334 F. Supp. 559 (D.N.H. 1972); *Whatley v. Clark*, C.A. No. 5474 (E.D. Tex. Oct. 2, 1972).

213. *E.g.*, *Dillenburg v. Kramer*, 469 F.2d 1222 (9th Cir. 1972) (ordering 3-judge court convened to test statute disqualifying unpardoned felons); *Stephens v. Yeomans*, 327 F. Supp. 1182 (D.N.J. 1970). *But see* *Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968); *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.), *aff'd*, 396 U.S. 12 (1969). Disqualification for felony, like the poll tax, is an ancient tradition, but it has often been used to discriminate against blacks, as several Southern states did in the post-Reconstruction period by adding crimes like petit larceny to the list of disqualifying crimes. *See* *Ratliff v. Beale*, 74 Miss. 247, 266-67, 20 So. 865, 867 (1896).

214. *Compare* *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969); *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972); *Mann v. Powell*, 333 F. Supp. 1261, (N.D. Ill. 1960), *with* *Bohus v. Board of Election Comm'n*, 447 F.2d 821 (7th Cir. 1971). *See also* *Mexican-American Political Ass'n v. Brown*, No. SAC, 7951 (Cal. Sup. Ct., Jan. 26, 1973) (Tobriner, J., dissenting).

on state election officials an obligation to eliminate the possibility of discrimination, represent a new use of the equal protection clause, and have not gone unchallenged.<sup>215</sup> These cases are also closely related to other recent cases that deal with vote dilution, and the overlapping of the two concepts may be of the utmost importance to black voters.

The early dilution cases generally involved equalizing district populations without regard to race.<sup>216</sup> For blacks, cases of this sort ordinarily have brought little benefit. In the past few years, however, there has been increasing recognition that black votes can be diluted in very sophisticated ways, and courts have indicated that claims of discrimination arising from seemingly neutral election systems that draw no distinctions on their face are cognizable at least if race is involved. Because racial gerrymandering, even if cognizable, is extraordinarily difficult to prove, there has been little progress in challenging districting plans using single-member districts.<sup>217</sup> On the other hand, although the proof is

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215. See, e.g., *Gordon v. Lance*, 403 U.S. 1 (1971); *Rosario v. Rockefeller*, 93 S.Ct. 1245 (Mar. 21, 1973); *Marston v. Lewis*, 93 S.Ct. 1211 (Mar. 21, 1973).

A number of studies have shown how illusory the appearance of neutrality can be. R. KIMBALL, *THE DISCONNECTED* (1972); Kelley, Ayres & Bowen, *Registration and Voting: Putting First Things First*, 67 AMER. POL. SCI. REV. 359, 375 (1967) ("[o]ur study indicates, not only that electorates are much more the product of political forces than many have appreciated, but also that, to a considerable extent, they can be *political artifacts*. Within limits, they can be constructed to a size and composition deemed desirable by those in power.").

216. E.g., *Hadley v. Junior College District*, 397 U.S. 50 (1970) (special-purpose bodies, e.g., school districts); *Avery v. Midland County*, 390 U.S. 474 (1968) (local governmental bodies); *Reynolds v. Sims*, 377 U.S. 533 (1964) (state legislative elections); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (congressional elections); *Gray v. Sanders*, 372 U.S. 368 (1963) (gubernatorial election). The one-man-one-vote rule has been held inapplicable in some situations. E.g., *Salyer Land Co. v. Tulare Lake Basin Water Conservation Dist.*, 93 S. Ct. 1224 (1973) (certain special-purpose bodies, e.g., water districts); *Wells v. Edwards*, 93 S. Ct. 904 (mem.) (1973) (elected judges); *Sailors v. Board of Educ.*, 387 U.S. 105 (1967) (quasi-appointive body performing primarily administrative duties). See generally R. DIXON, *DEMOCRATIC REPRESENTATION* (1968).

The only major case that was different was *Moore v. Ogilvie*, 394 U.S. 814 (1969). In *Moore*, the Supreme Court struck down an Illinois statute requiring petitions from 50 of the state's 102 counties to nominate an independent candidate. The Court held that the statute discriminated against residents of large counties. Unlike the ordinary reapportionment case, in which residents of different size districts compete with each other through their legislators, the favored citizens in *Moore* did not gain at the direct expense of the disfavored citizens.

217. The difficulties of proving a racial gerrymander are shown by *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Howard v. Adams County Bd. of Supervisors*, 453 F.2d 455 (5th Cir. 1972); *Graves v. Barnes*, 343 F. Supp. 704, 734-35 (W.D. Tex. 1972). On the other hand, a start has been made at fashioning techniques for proving a gerrymander. *Cousins v. City Council*, 466 F.2d 830 (7th Cir. 1972), cert. denied, 409 U.S. 893 (1972); *Klahr v. Williams*, 339 F. Supp. 992 (D. Ariz. 1972); *Moore v. Leflore County Bd. of Supervisors*, C.A. No. GC7184-K (N.D. Miss., Dec. 20, 1972). See also the provocative opinion in *Taylor v. McKeithen*, 407 U.S. 191 (1972).

Black voters have fared better in redistricting cases in those states covered by the Voting Rights Act. In these states, the requirement that voting changes be approved by the Attorney General has led this official to develop standards, which have resulted in invalidating all or part of

almost as difficult, there has been some progress in attacking multi-member districts, as well as those procedures—such as full-state laws and numbered place systems—that aggravate a multi-member district plan.<sup>218</sup>

The discriminatory potential of multi-member districts has been recognized since 1966, when the Supreme Court said:

Where the [equal population] requirements of *Reynolds v. Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.<sup>219</sup>

Earlier, a district court had invalidated an Alabama reapportionment scheme on the ground that the combination of white majority and black majority counties showed a clear purpose to discriminate against black voters by submerging them in white majority, at-large districts.<sup>220</sup> Apart from this case and several others that struck down patently racist attempts by Deep South counties to shift from district elections to at-large elections,<sup>221</sup> the dismantling of at-large elections on the grounds of diluting black votes remained a theoretical proposition.

In 1969, an Indiana district court held that at-large elections in Marion County diluted black votes in the city of Indianapolis.<sup>222</sup> In 1971, however, this judgment was reversed by the Supreme Court in *Whitcomb v. Chavis*, in which the Court found that the failure of Marion County's blacks to achieve greater electoral success appeared to be

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about 50 redistricting plans for state legislatures and local governmental units, such as cities, counties, and school boards. See S. Halpin & R. Engstrom, *Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determinations Under the Voting Rights Act* (paper presented to Southern Political Science Association, November 2-4, 1972); note 245 *infra*.

Black participation in redistricting cases can produce substantial gains even when the issue is not drawn in terms of racial gerrymanders. Redistricting cases are typically multisided lawsuits in which the pull and tug among parties has a significant effect on the end result, and black voters can often gain significantly in this process. For example, in *David v. Cahill*, 342 F. Supp. 463 (D.N.J. 1972), the congressional districting plan adopted by the district court was the one most favorable to black interests, *i.e.* it combined all of Newark (previously split among three districts) and all of East Orange for a district which is already 52% black. This result was achieved on the basis of proof (presented largely by the black plaintiffs) that the governmental structure of New Jersey makes the appropriate subunit of government the city, not the county.

218. For a general discussion of recent developments in connection with multimember districts see A. Derfner, *Multi-Member Districts and Black Voters*, 2 BLACK L.J. 120 (1972).

219. *Burns v. Richardson*, 384 U.S. 73, 88 (1966). The thought was first expressed the previous year in *Fortson v. Dorsey*, 379 U.S. 433 (1965).

220. *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965).

221. *E.g.*, *Smith v. Paris*, 257 F. Supp. 901 (M.D. Ala. 1966), *modified*, 386 F.2d 979 (5th Cir. 1967).

222. *Chavis v. Whitcomb*, 305 F. Supp. 1364, *order entered*, 307 F. Supp. 1362 (S.D. Ind. 1969).

a function of losing elections politically rather than of any racial exclusion or submergence.<sup>223</sup>

Although the *Whitcomb* decision clearly indicated that attacks on multimember districts would face strong uphill fights, within seven months, district courts in Louisiana,<sup>224</sup> Alabama,<sup>225</sup> and Texas<sup>226</sup> ordered the dismantling of multimember districts on the ground that they discriminated against blacks. These opinions distinguished *Whitcomb* by emphasizing the history of discrimination in their respective states and the consequent necessity to avoid drawing districts that would perpetuate the discrimination. Although the reasoning of the three opinions is somewhat different, all concluded that at-large elections discriminate against blacks whenever there is a history of racial discrimination and evidence that the history still affects present voting patterns. This conclusion probably was best stated in *Graves v. Barnes*, the Texas district court opinion in which a multimember district also was found to discriminate against Mexican-Americans: "All these factors confirm the fact that race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities."<sup>227</sup>

The district court in *Graves v. Barnes* also noted that the use of the numbered place system and majority requirement were additional factors rendering the at-large Texas districts even more discriminatory.<sup>228</sup> In other recent cases, a South Carolina court has invalidated a full-slate law;<sup>229</sup> and a North Carolina court has struck down both a full-slate law and a numbered place system.<sup>230</sup> These two decisions illustrate the versatility of the equal protection clause in this area, because both courts were influenced by evidence of racial overtones in the particular mechanisms, but based their decisions on a general application of the equal protection clause. The potential of using the equal protection clause to attack mechanisms that dilute votes, especially black votes, is

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223. 403 U.S. 124 (1971).

224. *Bussie v. Governor of Louisiana*, 333 F. Supp. 452 (E.D. La.), *modified*, 457 F.2d 796 (5th Cir. 1971), *vacated on other grounds sub nom. Taylor v. McKeithen*, 407 U.S. 191 (1972).

225. *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972).

226. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex.), *stay denied*, 405 U.S. 1201, *prob. juris. noted sub nom. Bullock v. Register*, 409 U.S. 840 (1972).

227. 343 F. Supp. at 732.

228. *Id.* at 725.

229. *Stevenson v. West*, Civil No. 72-45 (D.S.C., April 7, 1972). Eight years before, the same court had upheld a full-slate law. *Boineau v. Thornton*, 235 F. Supp. 175 (E.D.S.C.), *aff'd*, 379 U.S. 15 (1964).

230. *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972).

beginning to be realized; but there are conflicting currents, and we cannot yet know which way the Constitution will be taken.

*F. The Fourteenth Amendment: Due Process Clause*

A few recent cases have applied the due process clause to voting problems, and this trend may grow substantially. Statements in various opinions to the effect that voting is a fundamental right and is related to the first amendment freedom of association suggest, as held in *United States v. Texas*, that "the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause."<sup>231</sup> In the *Texas* case, the due process clause was held to invalidate the Texas poll tax.

In other recent cases, the due process clause has served to void unpublished and overly restrictive procedures for challenging the validity of nominating petition signatures,<sup>232</sup> and to invalidate procedures that effectively allowed the major parties to set the deadlines for filing minor party candidates' nominations.<sup>233</sup> In several other cases, unfair political party procedures apparently were held to violate due process.<sup>234</sup> Moreover, a number of decisions appear to use due process analysis, although their holdings purport to rest on other grounds—generally the equal protection clause. The equal protection

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231. 252 F. Supp. 234, 250 (W.D. Tex. 1966). It does not appear that any case other than *Johnson v. Hood*, 430 F.2d 610 (5th Cir. 1970), has held the due process clause inapplicable to the right to vote. *Johnson*, however, relies on *Snowden v. Hughes*, 321 U.S. 1 (1944), and *Snowden* dealt not with the right to vote but with the right to be a candidate for state office. The other cases cited by *Johnson* are no more helpful.

In any event, it is probable that time has erased the *Snowden* principle that the right to run for office is not an aspect of liberty or property. See 321 U.S. at 15 (Frankfurter, J., concurring). The expanding concept of liberty in cases like *Dixon v. Alabama Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), makes it difficult to imagine that "liberty" does not include a right that is "fundamental, because preservative of all rights," *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (Douglas, J., concurring). Presumably, federal courts' reluctance to intervene in state elections will leave the states considerable discretion in establishing the process that is due, but this has nothing to do with whether the constitutional clause applies. See *Board of Regents v. Roth*, 408 U.S. 564, 571-75 (1972). For general statements concerning state discretion and due process see *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Compare the suggestion in *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970), that a violation of the due process clause in an election is contingent upon the absence of an adequate state remedy.

232. *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970).

233. *United Citizens Party v. South Carolina State Election Comm'n*, 319 F. Supp. 784 (D.S.C. 1970).

234. *Miller v. Bartunek*, 349 F. Supp. 251 (N.D. Ohio 1972); *Foley v. Democratic Executive Comm.*, Civil No. 72-935 (E.D. Pa., Aug. 2, 1972). *Miller* does not state which provision of the fourteenth amendment forms the basis for its holding. *Foley* does not rest directly on due process, but on party rules that it enforces under state law by pendent jurisdiction—yielding virtually the equivalent of a due process holding.

clause, however, seems inappropriate in many cases, especially when it is difficult to define a favored class and a disadvantaged class, or to ascertain any nexus between two classes.<sup>235</sup> On the other hand, use of the due process clause in these situations permits a finer analysis and creates a more precise remedy for many aspects of the election process that now proceed hapazardly and seriously abridge the right to vote.

*G. Section 5 of the Voting Rights Act*<sup>236</sup>

Congress has provided a special weapon to combat recently adopted discriminatory mechanisms. When it passed the Voting Rights Act of 1965, Congress realized that registration gains produced by the suspension of literacy tests easily could be nullified by new discriminatory mechanisms.<sup>237</sup> The congressional reponse to this possibility was section 5 of the Voting Rights Act. This section is an open-ended provision that requires federal preclearance of any changes in voting procedures by any state or subdivision thereof in which the coverage "trigger" provisions have operated to suspend literacy tests. Although the suspension of tests by section 4 always has been the center of attention, the preclearance requirement in section 5 has surfaced as the truly ingenious part of the Act.

Under the preclearance requirement, any new voting regulation—"voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting"—adopted in a covered state after November 1, 1964, is automatically suspended. The suspension will continue until the state or political subdivision obtains a declaratory judgment from a District of Columbia three-judge court certifying that the proposed change has no racially discriminatory purpose and will have no racially discriminatory effect. As a simpler alternative to this procedure, the state or subdivision may seek preclearance by submitting the change to the Attorney General, in which case it may enforce the

235. See, e.g., *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972).

236. 42 U.S.C. § 1973(c) (1970).

237. "Mr. Katzenbach: The justification for that is simply this: Our experience in the areas that would be covered by this Bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. I refer, for example, to the new voter qualifications that have been put into the statutes of Louisiana, Mississippi, and Alabama following the enactment of the 1964 act which made things more difficult for people to vote. . . .

"The same thing was true, as the Chairman may recall, in Louisiana at the time of the initial school desegregation, where the legislature passed I don't now [sic] how many laws in the shortest period of time. Every time the judge issued a decree, the legislature . . . passed a law to frustrate that decree." *Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 60 (1965).

change unless the Attorney General "objects" within 60 days. In either case, the burden of proof is no longer on the voter opposing the change; it shifts to the state or subdivision, which must show that the change is nondiscriminatory.

In *South Carolina v. Katzenbach*,<sup>238</sup> the Supreme Court noted that section 5, which suspends state laws, limits the state's litigation to a single District of Columbia court and places the burden of proof on the state, "may have been an uncommon exercise of congressional power." Nevertheless, the Court found the provision justified, given the gravity of the evil at which it was aimed:

Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself . . . Congress responded in a permissibly decisive manner.<sup>239</sup>

The significance of section 5 did not become apparent until 1969, when the Supreme Court in *Allen v. State Board of Elections*<sup>240</sup> clearly stated that this section covers changes that dilute black citizens' votes as well as simpler devices of disfranchisement. *Allen* involved four types of voting changes: first, a statute changing district elections to at-large elections for Mississippi county governing boards; secondly, a statute changing from elective to appointive the selection of school superintendents in several Mississippi counties; thirdly, a statute making it more difficult for independent candidates to run in Mississippi by increasing the number of required signatures, shortening the time allowed, and adding other inconvenient requirements; and lastly, a Virginia regulation governing assistance to illiterate voters. The Supreme Court stated that "Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way"<sup>241</sup> and held that all four changes must be submitted for preclearance. Two years later, the Supreme Court reiterated the broad coverage of section 5 in *Perkins v. Matthews*, which held that municipal annexations and new locations for polling places had to be precleared.<sup>242</sup>

The importance of section 5 in combatting voting discrimination cannot be underestimated. Under its terms, a voting change that is not precleared may not be enforced. Thus, the Attorney General's refusal

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238. 383 U.S. 301 (1966).

239. *Id.* at 335 (footnote omitted).

240. 393 U.S. 544 (1969).

241. *Id.* at 566.

242. 400 U.S. 379 (1971).



to preclear is equivalent to an injunction.<sup>243</sup> As the Act has developed, an administrative "injunction" is obtained through a speedy administrative procedure—in only one instance has the state or subdivision not elected to submit the change to the Attorney General in lieu of seeking a declaratory judgment. The governing standards for the two procedures are identical: the submitting authority carries the burden of showing that the change has no discriminatory purpose and will have no discriminatory effect.<sup>244</sup>

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243. Ordinarily, the filing of a suit before an election in which an uncleared change is scheduled to be implemented will result in an order barring implementation of the change or, if the change is to be an integral part of the election, an order postponing or enjoining the election. *Johnson v. West*, Civil No. 72-680 (D.S.C., June 14, 1972) (postponing primary elections throughout South Carolina because of planned use of uncleared numbered post system); *Perkins v. Matthews*, 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd*, 400 U.S. 379, *on remand*, 336 F. Supp. 6 (S.D. Miss. 1971) (partial new election ordered). See *Howell v. Mahan*, Civ. No. 105-71-N (E.D. Va. order of May 24, 1971).

When an election has been held using an uncleared change, the general rule governing the remedy of new elections applies, *i.e.* a new election will be ordered if the violation—use of an uncleared change—might have affected the outcome. See *United States v. Garner*, 349 F. Supp. 1054 (N.D. Ga. 1972); *United States v. Cohan*, Civil No. 2882 (S.D. Ga., Oct. 29, 1971); *Perkins v. Matthews*, 336 F. Supp. 6 (S.D. Miss. 1971); note 251 *infra*. In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), a new election was not ordered because this case represented the first interpretation of a complex statute.

244. 28 C.F.R. § 51.19 (1972). See *Evers v. State Bd. of Election Comm'rs*, 327 F. Supp. 640 (S.D. Miss. 1971). See generally H.R. REP. NO. 71-742, 92d Cong., 1st Sess. 2-4 (1971).

For the first few years of the Voting Rights Act, there were few submissions and there was no set procedure for dealing with them. After *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), and especially after *Perkins v. Matthews*, 400 U.S. 379 (1971), submissions began flooding in. The Attorney General began establishing regular procedures, which were published in late 1971. 28 C.F.R. pt. 51 (1972).

Among the significant procedures are the following: (1) the burden of proof is placed squarely upon the submitting jurisdiction ("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 60-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." 28 C.F.R. § 51.19 (1972)); (2) the Attorney General may request additional information after receiving the initial submission and the 60-day period does not begin running until he has received adequate information to evaluate the submission. 28 C.F.R. § 51.18 (1972); (3) comments from interested persons supporting or opposing submissions are welcomed. 28 C.F.R. § 51.12 (1972); (4) a registry of interested persons is established, and anyone who wishes may be placed on the registry for receipt of a weekly notice list of submissions received by the Attorney General. 28 C.F.R. § 51.13 (1972); (5) finally, an open file containing all material relating to each submission (except internal memoranda and investigative files) is maintained for public use. 28 C.F.R. § 51.26 (1972).

A number of these procedures, specifically the allocation of the burden of proof and the tolling of the 60-day period pending receipt of an adequate submission, are being challenged by Georgia. *United States v. Georgia*, 351 F. Supp. 444 (N.D. Ga.), *prob. juris. noted*, 409 U.S. 911 (1972). A number of other cases have been decided recently, involving jurisdictional aspects or construction of this complex statute.

One line of cases involves the relationship of § 5 review to judicial review of the same change under the fourteenth or fifteenth amendment. In *Connor v. Johnson*, 402 U.S. 690 (1971), the

The number of submissions and objections has mushroomed since the *Perkins* decision in 1971. As of December 31, 1971, with the Act being in force for less than eight years, there have been nearly 3,000 submissions, and the Attorney General has objected 141 times.<sup>245</sup> The types of changes most frequently submitted are redistricting, reregistration and purging, polling place changes, changes in precinct boundaries, and annexations. The types of changes that usually draw objections are majority requirements, numbered place systems, redistricting, and at-large elections. Among the specific changes to which the Attorney General has objected are: the redistricting of both houses of the Louisiana Legislature; the redistricting of the Georgia House of Representatives; major annexations by Richmond and Petersburg, Virginia; numbered

Supreme Court said cryptically that § 5 does not apply to federal court decrees. In *Johnson v. West*, Civil No. 72-680 (D.S.C., June 14, 1972), a district court construed *Connor v. Johnson* to mean that only voting changes devised by federal courts (e.g., court-drawn reapportionment plans) are excluded from § 5 coverage. In *Sheffield v. Itawamba County Bd. of Supervisors*, 439 F.2d 35 (5th Cir. 1971), the Fifth Circuit held that, in some circumstances, a federal court using its equity power can order voting changes which might be technically objectionable under § 5—so long as there is no possibility of discrimination.

Another line of cases deals with reviewability of § 5 determinations made by the Attorney General. The right of a submitting jurisdiction to gain a trial de novo in a 3-judge district court after an objection by the Attorney General has always been clear, but the standards have been set out only recently in *City of Petersburg v. United States*, Civil No. 509-72 (D.D.C., Oct. 24, 1972), *aff'd*, No. 72-865 (U.S. Mar. 5, 1973). The statute provides no right of review in the opposite situation, i.e. review by a disappointed voter of a decision by the Attorney General *not* to object to a change. Two recent cases have found such a right under the Administrative Procedure Act, while another recent case has rejected that claim. *Compare Harper v. Kleindienst*, Civil No. 1607-72 (D.D.C., Aug. 11, 1972), *and Perkins v. Kleindienst*, Civil No. 1309-72 (D.D.C., Nov. 2, 1972) (review available), *with Common Cause v. Mitchell*, Civil No. 2348-71 (D.D.C., Mar. 30, 1972) (review denied).

245. The totals are as follows:

| Type of Change               | No. Submitted | Objections |
|------------------------------|---------------|------------|
| Redistricting                | 354           | 47         |
| At-Large Elections           | 46            | 9          |
| Reregistrations, Purges      | 50            | 1          |
| Polling Place Changes        | 358           | 8          |
| Precinct Boundaries          | 274           | 4          |
| Majority Requirements        | 24            | 10         |
| Numbered Place Systems       | 29            | 17         |
| Annexations                  | 599           | 4          |
| Total of All Covered Changes | 2787          | 141*       |

\*The total of 141 objections includes 16 objections to changes that constitute tests or devices. Letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, to Armand Derfner, March 16, 1973.

Section 5 enforcement has been studied in detail. See *Hearings on the Enforcement of the Voting Rights Act Before the Civil Rights Oversight Subcomm. of the House Judiciary Comm.*, 92d Cong., 1st Sess. (1971); WASHINGTON RESEARCH PROJECT, note 111 *supra*.

place systems for the state House of Representatives and local offices in South Carolina; a Mississippi enabling statute authorizing counties to shift from district to at-large elections; and an Alabama statute increasing the requirements for qualification as an independent candidate.<sup>246</sup>

As an administrative substitute for lawsuits and injunctions, section 5 has provided several enormous benefits wholly apart from the time and money saved by avoiding litigation. First, the shifting of the burden of proof in section 5 has resulted in objections to many changes that could not have been judicially enjoined because the burden of proving discrimination could not be met.<sup>247</sup> Secondly, an awareness of the pre-clearance requirement has had the in terrorem effect of preventing state

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246. Section 5 objections by the Attorney General are not reported. They take the form of letters from the Assistant Attorney General for the Civil Rights Division to the law officer of the submitting authority and are kept on file at the Civil Rights Division of the United States Department of Justice.

For examples cited in text see Letter from Assistant Attorney General David L. Norman to Louisiana Attorney General Jack Gremillion, August 20, 1971; Letter from David L. Norman to Georgia Attorney General Arthur K. Bolton, March 3, 1972; Letter from David L. Norman to Richmond City Attorney Conard B. Mattox, May 7, 1971; Letter from David L. Norman to Petersburg City Attorney John Davenport, February 22, 1972; Letter from David L. Norman to South Carolina Attorney General Daniel R. McLeod, June 30, 1972; Letter from Assistant Attorney General Jerris Leonard to Mississippi Attorney General A. F. Summer, May 21, 1969; Letter from David L. Norman to Alabama Attorney General William Baxley, August 14, 1972.

Two cases have been decided by the 3-judge district court for the District of Columbia. In the first case, Petersburg, Virginia, sought to annex a suburban white area—an annexation that would have eliminated a black population majority within the city. The Attorney General entered a § 5 objection on the ground that this change would be discriminatory in the context of the city's at-large council elections. As § 5 allows, Petersburg sued for a declaratory judgment that the change was not discriminatory in purpose or effect. Although the declaratory judgment action was a trial de novo, Petersburg in effect appealed the Attorney General's objection. The district court, however, agreed with the Attorney General and declined to grant the judgment sought as long as the city retained its at-large elections. *City of Petersburg v. United States*, Civil No. 509-72 (D.D.C. Oct. 24, 1972), *aff'd*, No. 72-865 (U.S., Mar. 5, 1973).

In the other case, the Alabama Democratic Party sought a declaratory judgment certifying that its new rules for selecting delegates to the national convention were not discriminatory. The change was not submitted in the first instance to the Attorney General. The declaratory judgment was granted with the Attorney General's acquiescence. *Vance v. United States*, Civil No. 1529-72 (D.D.C., Nov. 30, 1972). See *Maguire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972).

247. The effect of this shifting of the burden of proof is being tested directly in *City of Richmond v. United States*, Civil No. 1718-72 (D.D.C., filed Aug. 25, 1972), a pending case involving the elimination of a black population majority by the annexation of a large white suburban area. As in the *Petersburg* case, the Attorney General entered a § 5 objection on the ground that the annexation, in the context of at-large elections, was discriminatory. In *Richmond*, however, another federal court already has held that the annexation in question did not violate the fifteenth amendment. *Holt v. City of Richmond*, 459 F.2d 1093 (4th Cir.), *cert. denied*, 408 U.S. 931 (1972). The pending lawsuit will, therefore, determine to what extent the shifted burden of proof gives § 5 a broader sweep than the fifteenth amendment.

and local governments from attempting certain tactics that officials know to be objectionable. Finally, a concentration of responsibility in one office has enabled the Justice Department to acquire an expertise in this area that aids in judging the discriminatory nature of certain voting practices. The best example of this factor involves numbered place systems and majority requirements. Courts have only recently begun to recognize the highly discriminatory nature of these two mechanisms, but the Justice Department previously identified them as typical vehicles of discrimination and therefore objected to the bulk of these submitted changes. Not only have dozens of these discriminatory mechanisms consequently been eliminated, but a new body of law also is developing that assists in fighting these mechanisms in other forums.

#### H. Judicial Remedies for Voting Discrimination

In the course of developing a body of law on voting discrimination, the courts have produced a varied set of effective remedies for violations. Their availability adds an important dimension to the battle against voting discrimination. Pre-election remedies have included adding candidates to the ballot,<sup>248</sup> allowing voters to cast provisional ballots,<sup>249</sup> and postponing or enjoining elections.<sup>250</sup> Courts also have developed the critical postelection remedy of setting aside the results of an election—or the equivalent remedy of shortening the terms of those elected—and ordering a new election.<sup>251</sup>

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248. *E.g.*, *Davis v. Adams*, 400 U.S. 1203 (1970); *Fowler v. Adams*, 400 U.S. 1205 (1970); *Matthews v. Little*, 396 U.S. 1223 (1969); *Toporek v. South Carolina State Election Comm'n*, Civil No. 72-1225 (D.S.C., Jan. 23, 1973); *see Williams v. Rhodes*, 393 U.S. 23 (1968).

249. *Ferguson v. Williams*, No. A-297 (Sept. 24, 1971) (Brennan, J.); *Vinik v. Smyth*, No. A-314 (Sept. 20, 1971) (Stewart, J.).

Courts have ordered that specific voters be allowed to cast ballots, *West v. Kusper*, Civil No. 72-C-2805 (N.D. Ill., Nov. 7, 1972), and that the polls be kept open late on election day because of irregularities or confusion. *Jaicks v. Mihaly*, Civil No. C-72-1042 (N.D. Cal., June 6, 1972); *Coyne v. Cuyahoga County Bd. of Elections*, Civil No. C-72-434 (N.D. Ohio, May 2, 1972).

250. For orders postponing elections see cases cited note 243 *supra*. For orders enjoining elections see *Ellis v. Mayor and City Council*, 352 F.2d 123 (4th Cir. 1965) (enjoining as futile a referendum to validate unconstitutional redistricting plan); *Weaver v. Muckleroy*, Civil No. 5524 (E.D. Tex. July 14, 1972) (enjoining referendum on grounds that summer date specifically was selected to disfranchise students); *Brass v. Morehouse Parish Police Jury*, Civil No. 17,177 (W.D. La., Sept. 19, 1971) (enjoining election to be held under unconstitutional apportionment plan).

251. These cases are collected in M. DERFNER, *THE SETTING ASIDE OF ELECTIONS OR SHORTENING OF TERMS OF THOSE ELECTED IN INVALID ELECTIONS* (Lawyers' Committee for Civil Rights, Wash., D.C. 1971). Apart from redistricting cases, new election cases mentioned included: *Hadnott v. Amos*, 394 U.S. 358 (1969); *Smith v. Paris*, 386 F.2d 979 (5th Cir. 1967); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S. 851 (1966); *United States v. Cohan*, Civil No. 2882 (S.D. Ga., Oct. 29, 1972); *United States v. Garner*, 349 F. Supp. 1054 (N.D. Ga. 1972); *Toney v. White*, 348 F. Supp. 188 (W.D.

Ordering a new election has become the most effective remedy against voting discrimination. Elections have been set aside when the discrimination was egregious, when the law was clear, or if neither of these conditions applied, simply when there was discrimination that *might* have affected the election's outcome. This once was called "drastic, if not staggering,"<sup>252</sup> but the characterization was made in an early case and no longer appears applicable. This characterization, in fact, probably was never true, but simply reflected the fact that, until 1965, when blacks began voting in large numbers, it would have been fruitless to claim that a particular election had been affected by discriminating acts and therefore should be conducted again. Such a claim is no longer novel, and when discrimination is shown, an order to hold new elections now seems the general rule rather than the exception.

In many situations, money damages are available for victims of voting discrimination. Many major cases of the past, including most white primary cases, arose as damage suits.<sup>253</sup> The practice of seeking damages virtually has disappeared, but the prospect of damage judgments conceivably might prevent someone from proceeding with an act of voting discrimination.

Finally, two additional judicial doctrines have developed that tend to increase the effectiveness of all other remedies. First, courts have begun to award substantial attorneys' fees to plaintiffs who prevail in voting discrimination cases.<sup>254</sup> Secondly, courts generally have aban-

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La. 1972); *Perkins v. Matthews*, 336 F. Supp. 6 (S.D. Miss. 1971); *Patterson v. City of Belle Glade*, Civil No. 71-1686-Civ-CF (S.D. Fla., Aug. 5, 1971); *United States v. Democratic Executive Comm.*, Civil No. 6047-70 (S.D. Ala., Dec. 23, 1970); *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969); *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969); *United States v. Democratic Executive Comm.*, 288 F. Supp. 943 (M.D. Ala. 1968); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968).

This remedy has been denied only once in a case in which discrimination was found. *McGill v. Ryals*, 253 F. Supp. 374 (M.D. Ala. 1966). Post election remedies have been denied twice, however, in cases when changes were implemented without being precleared under § 5 of the Voting Rights Act. In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), the changes ultimately were found to be discriminatory, but the Supreme Court already had held that new elections would not be ordered because of the novelty of the Voting Rights Act issues, and in *Oden v. Brittain*, Civil No. 69-433 (N.D. Ala., Feb. 2, 1970), new elections were not ordered because the change was found by the Attorney General not to be discriminatory.

252. *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967).

253. *See, e.g.*, *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) ("That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years."); *Smith v. Allwright*, 321 U.S. 649 (1944); *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Condon*, 286 U.S. 73 (1932). Even *Giles v. Harris*, 189 U.S. 475 (1903), conceded that damages were available for an illegal deprivation of the right to vote.

254. *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972). *See* other cases collected in M. DERFNER, ATTORNEYS' FEES IN PRO BONO PUBLIC CASES ¶ 100.01-100.16 (Lawyers' Comm. for Civil Rights, Wash., D.C., 1972).

done the traditional doctrine that the holding of an election renders most controversies about it moot.<sup>255</sup>

In general, therefore, the forging of effective remedies for voting discrimination has gone far to eliminate the strange but tenacious belief that elections are beyond judicial supervision.<sup>256</sup>

## VI. CONCLUSION

Voting discrimination will not end soon, although it has been curbed severely in the past few years. Moreover, the sophistication of today's methods of securing the right to vote is no guarantee of permanence. Reconstruction enfranchisement reached its high point precisely 100 years ago, yet its gains were obliterated quickly. While we are not likely to return to an era of total disfranchisement, we will not make lasting gains unless efforts to eliminate vote dilution persevere.<sup>257</sup> The right to vote cannot be protected or advanced solely in the courts;

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255. *Moore v. Ogilvie*, 394 U.S. 814 (1969). A case still may be mooted by an election when the controversy is not likely to arise again. *Hall v. Beals*, 396 U.S. 45 (1969) (residence statute changed in significant respects).

256. Unfortunately, it is still true that "over most of the United States, the conduct of elections is the most neglected and primitive branch of our public administration." V. KEY, *supra* note 43, at 443. This disgraceful condition owes its existence to the common acceptance of the notion that a little chicanery (or a lot) keeps elections human.

257. If one branch of government plays the most critical role in guaranteeing voting rights, it is the executive. Since the formation of the Civil Rights Section—especially since 1957—the role of the Justice Department has been critical not only in filing cases and developing new theories, but also in making clear that the national government is fully committed to equal voting rights. See *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 334 (E.D. La. 1965) ("This is an action by the Nation against a klan.").

In addition, the Justice Department has played a critical role in supporting and protecting private citizens from interference with their own efforts to secure the equal right to vote. The government has acted both against official interference, *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962), and against private coercion, *United States v. Beaty*, 288 F.2d 653 (6th Cir. 1961).

Cumbersome criminal remedies are little used today, but civil remedies are available to both the government and private citizens. The most obvious is 42 U.S.C. § 1971(b) (1970), which prohibits interference with a voter by anyone, whether acting under color of law or not. Section 1971(b) applies only to federal elections, but a series of recent cases appears to have discarded, at long last, the state action limitation on Congress' power to protect fifteenth amendment rights. In *United States v. Guest*, 383 U.S. 745 (1966), 6 Justices agreed that Congress has the power under § 5 of the fourteenth amendment to protect rights created by that amendment against private intrusions. *But see United States v. Harvey*, 250 F. Supp. 219 (E.D. La. 1966). Two years later, in *Jones v. Alfred I. Mayer & Co.*, 392 U.S. 409 (1968), the Supreme Court held that the thirteenth amendment empowers Congress to legislate against private conduct that it finds constitutes a "badge of slavery." This decision was reaffirmed 2 years ago when a unanimous Court held

notwithstanding recent judicial history, courts traditionally trail, not lead, democratic advances. In the last analysis, the equal right to vote will be protected only if our nation believes in it.

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that the thirteenth amendment authorized Congress to legislate against private conspiracies aimed at depriving blacks of equal rights. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

This expansion bore fruit in 1968 when Congress adopted a new criminal statute, 18 U.S.C. § 245 (1970), punishing anyone—regardless of action under color of law—who uses force or the threat of force to interfere with “any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election . . . .” In addition, § 245 also prohibits interference with anyone aiding another person in the exercise of these rights and prohibits interference with anyone lawfully engaged in free speech or assembly opposing the denial of these rights.

The constitutional basis for extending § 245 to reach private conduct is set forth in S. REP. NO. 721, 90th Cong., 1st Sess. (1967), *reprinted at* 2 U.S. CODE CONG. & AD. NEWS 1837, 1841-43 (1968).

Section 245 is a broad statute which has not yet been used in the area of voting. One hopes its use will not have to be extensive, but it stands both as a symbol of a national promise to achieve the equal right to vote and as a command to enforcement officials to see that promise is honored.