OWEN M. FISS

GASTON COUNTY v. UNITED STATES: FRUITION OF THE FREEZING PRINCIPLE

In the effort to secure a position of equality for the Negro in American society, the predominant strategy of our legal system has been to prohibit racial discrimination. In the recent past, attention has primarily focused on the question: What areas of human activity should be covered by the prohibition against racial discrimination? That question is considerably less important today. With the enactment of the Civil Rights Acts of 1964 and 1968 and the recent reconstruction of the Civil Rights Acts of 1866 in *Jones v. Alfred H. Mayer Co.*,[1] the federal prohibition against racial discrimination, once applicable only to governmental activity, has been applied to major areas of private activity, such as public accommodations, employment, and housing, which were the principal subjects of the coverage controversies. The coverage questions that remain are in many aspects interstitial.[2]

Today the central problem for antidiscrimination strategy is that of enforcement, in both its procedural and substantive guises. The

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[1] 392 U.S. 409 (1968). See Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUPREME COURT REVIEW 89; Note, *Racial Discrimination in Employment under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615 (1969).

[2] *Compare, e.g.*, Daniel v. Paul, 395 U.S. 298 (1969), *with* Griffin v. Maryland, 378 U.S. 130 (1964) (amusement parks).

that the initial legislation following *Brown v. Board of Education*[7]—the first civil rights act since Reconstruction, the Civil Rights Act of 1957—authorized general injunctive litigation[8] to be brought by the United States to enforce the prohibition against racial discrimination in voting. After 1960 that authority was used with some vigor, and the result was a large body of case law addressed to the enforcement question. In turn, that litigation—by revealing and carefully documenting the nature and magnitude of the wrongs and the inadequacies of the existing remedial tools—was partly responsible for three more major enforcement acts passed by Congress within the decade: the Civil Rights Act of 1960, the Civil Rights Act of 1964, and the Voting Rights Act of 1965.[9]

Central to this enforcement experience has been the effort to determine whether seemingly innocent standards imposed as qualifications for voting violate the prohibition against racial discrimination. In doing so, the enforcement agencies focused on the relationship of such standards to past discrimination that had already ended

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[7] 347 U.S. 483 (1954).

[8] § 131(c), 42 U.S.C. § 1971(c) (Supp. IV 1968). Although that statute spoke only in terms of "preventive relief," it was early decided that the injunctive litigation authorized could be corrective of discriminatory practices as well as preventive. United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962). Prior to 1957, the only statutory remedy available to the United States for enforcement of voting rights was the criminal prosecution. That remedy was used on occasion, even to challenge ostensibly innocent qualifications for voting. See, *e.g.*, Guinn v. United States, 238 U.S. 347 (1915). The procedural safeguards of such proceedings, the risk of nullification by juries, and the fact that the outcome of a criminal prosecution is punishment rather than correction limited its value as an enforcement device. It could reach only rank, crude, and dramatic forms of racial discrimination, and was a clumsy tool for the development of sophisticated answers to subtle enforcement questions. See also United States v. Louisiana, 225 F. Supp. 353, 356 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965); United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965). In dissent, Judge Brown had indicated a willingness to rely on *In re* Debs, 158 U.S. 564 (1875), for filling any gaps in the statutory authorization to conduct general injunctive litigation in voting. And see Voting Rights Act of 1965, § 12(d), 42 U.S.C. § 1973j(d) (Supp. IV 1968).

[9] For this relation between the litigation and this enforcement legislation see, Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1053 (1965); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

Title I of the Civil Rights Act of 1968 also provided a specific criminal remedy for forcible interferences with exercises of the right to vote as part of a larger category of federally protected activities.

substantive question is what conduct violates the prohibition against racial discrimination? The procedural question asks: What legal processes and techniques are most effective and appropriate for preventing and remedying conduct that violates that prohibition? Although the components are interrelated, the substantive one is at least logically prior. The difficulty with that question stems from the unwillingness of the legal system to rule that only overt racial discrimination—such as exclusions and refusals explicitly based on race—violates the prohibition. Instead, it is committed to evaluating apparently innocent conduct to determine whether in fact it violates the prohibition. This evaluation requires the formulation of governing principles.

It is appropriate, therefore, to turn to the rich enforcement experience in the area of voting rights. The richness of this experience derives in part from its age: the prohibition against racial discrimination in voting was an early, specific guarantee of federal law, expressed both by the Fifteenth Amendment and by statute.[3] While coverage questions have arisen, such as those relating to party primaries,[4] challenges to the qualification of registered voters,[5] and private interferences with attempts to exercise the right to vote,[6] they have been resolved at an early stage and with relative speed and ease, certainly as compared with the coverage questions in other fields, such as housing, employment, and public accommodations. The rich enforcement experience may also be attributed to the fact

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[3] Act of May 31, 1870, ch. 114, § 1, now 42 U.S.C. § 1971(a)(1) (1964).

[4] Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).

[5] United States v. McElveen, 177 F. Supp. 355 (E.D. La. 1959), 180 F. Supp. 10 (E.D. La. 1960), *aff'd with modifications sub nom.* United States v. Thomas, 362 U.S. 58 (1960). The Supreme Court, in a per curiam opinion affirmed the district court judgment insofar as it prohibited the respondent registrar from giving effect to discriminatory challenges. See also United States v. Association of Citizens Councils, 196 F. Supp. 908 (W.D. La. 1961); United States v. Wilder, 222 F. Supp. 749 (W.D. La. 1963).

[6] United States v. Bruce, 353 F.2d 474 (5th Cir. 1965); United States v. Beaty, 288 F.2d 653 (6th Cir. 1961); United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (E.D. La. 1965). See also the predecessor to 18 U.S.C. § 241, as construed in *Ex parte* Yarbrough, 110 U.S. 651 (1884) (criminal remedy for private interferences in federal elections); § 131(c) of the Civil Rights Act of 1957, 42 U.S.C. § 1971(c) (Supp. IV 1968) (civil remedy of Government for private interferences in federal elections); § 101(a) of the Civil Rights Act of 1968, 18 U.S.C. § 245(b)(1)(A) (Supp. IV 1968) (criminal remedy for private interferences in all elections).

or was near an end.[10] The agencies recognized that such standards could have a "freezing effect," *i.e.*, could perpetuate past discrimination, and a principle—the "freezing principle"—emerged which invalidates standards that would perpetuate or continue the effects of past discrimination.

I. The Grandfather Clause Cases

In the classic grandfather clause case, *Guinn v. United States*,[11] the first in which the Court invalidated a law establishing a voting qualification, some recognition was given to the freezing principle. An amendment to the Oklahoma constitution imposed a literacy requirement as a condition of registering to vote. At the same time, it provided an exemption from this literacy requirement for persons who were entitled to vote on January 1, 1866, and for their lineal descendants. The validity of a literacy requirement itself as a qualification for voting was not challenged on Fifteenth Amendment grounds. It was the exemption that was challenged on the ground that it constituted a form of racial discrimination prohibited by the Fifteenth Amendment. The Court found this exemption discriminatory because "on its face [it] was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment."[12] The literacy requirement was also declared to be invalid, but only on the ground—explicitly recognized by the Court as a question of state law—that it was inseparable from the prohibited exemption. The right to vote granted by state law was not affected.[13]

In *Guinn*, the perpetuation of the past discrimination was patent.

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[10] Past discrimination may also indicate how serious a risk is created by vesting discretion. Louisiana v. United States, 380 U.S. 145 (1965). It is relevant to the determination of a present need for injunctive relief. United States v. Atkins, 323 F.2d 733 (5th Cir. 1963); United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965). And it may explain conduct that might otherwise be ambiguous, such as Negroes' failure to register. United States v. Dogan, 314 F.2d 767 (5th Cir. 1963). It has also been relevant in voting cases to show that a "discriminatory act" was part of a "pattern or practice" of discrimination. *Ibid.*; Kennedy v. Lynd, 306 F.2d 222 (5th Cir. 1962). See text *infra*, at note 64.

[11] 238 U.S. 347 (1915). See also Myers v. Anderson, 238 U.S. 368 (1915) (Maryland grandfather clause).

[12] 238 U.S. at 364.

[13] The Court made this clear in the companion *Myers* case. 238 U.S. at 382.

The linkage with the past was explicit. No legitimate state interest could be served by an exemption tied so unambiguously to January 1, 1866. The racial contour of the exempted class was as clear as possible, short of explicit use of racial criteria. Conceivably, some whites could not qualify as grandfather electors, and some Negroes might. But it was historical fact that at the point in the past chosen as the criterion, Negroes were excluded from voting because of their race and were therefore outside the class entitled to the exemption.

Residual problems about the grandfather clause confronted the Court. Grandfather voters had obtained discriminatory benefits before the clause had been declared invalid. Although *Guinn* was argued before the Supreme Court in October, 1913, it was not until June, 1915, that the opinion was rendered. In that period of two years, a general election was held. *Guinn* was a federal criminal prosecution against local officials applying the grandfather clause. But it did not inhibit the use of the grandfather clause in the 1914 election, in which whites were registered as grandfather electors and Negroes were subjected to the literacy test. Presumably few Negroes were registered.

Thus, the question arose what to do with the nongrandfather electors who, but for the literacy test, could have qualified as voters at the time of the 1914 election. Oklahoma responded by establishing a short period of registration—twelve days in the spring of 1916—for those who were qualified but who did not vote at the time of the 1914 election. Although no different standards would be imposed on those applicants for registration from those imposed on grandfather electors and although there was a short extension of the time for those who for some exceptional reason, such as sickness, could not register during that twelve-day period, those failing to register during that period would be forever barred from voting.

This 1916 Oklahoma law was not tested until twenty years later. In *Lane v. Wilson*[14] the Court held that denying a Negro the right to vote in the 1934 election on the basis of the 1916 law violated the Fifteenth Amendment. The Court viewed this supplemental registration period as inadequate to correct the effects of past discrimination: "We believe that the opportunity thus given Negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and con-

[14] 307 U.S. 268 (1939).

fined."[15] The disenfranchisement of qualified voters who had not taken advantage of the supplemental registration period was viewed as a means of perpetuating the discrimination effected by the operation of the grandfather clause in 1914. In reaching this conclusion, the Court was not troubled by the fact that "there were probably also some whites who were qualified to vote at the 1914 election who did not vote" and that "they were on the same footing as to registration as were the qualified Negroes."[16] There is language in the opinion of the Court by Justice Frankfurter suggesting that the Court considered the shortness of the supplemental registration period more of a burden for Negroes than for whites, and for that reason a form of unequal treatment.[17]

It also seems likely that the Court built on the insight of *Guinn:* a class was exempt from the requirement to register within the twelve-day period, and past discrimination had excluded Negroes from the class. In *Lane v. Wilson* the exempt class was not simply grandfather electors but also those who had taken advantage of the exemption in the general election of 1914. That did not obscure the racial contours of the exempted class. The Negroes who voted in the 1914 election could do so only after they passed the literacy test. Thus the two opportunities that Negroes qualified by age and residence had for registering—passing the literacy test in 1914 or registering without one in the twelve-day period in the spring of 1916—differed significantly from the two opportunities afforded whites who could register without a literacy test in 1914 or in the twelve-day period in 1916. One had only to assume that those exempted from the literacy requirement in 1914 took advantage of that exemption to conclude that a significant additional opportunity had been afforded whites. The 1916 law not only perpetuated but aggravated past discrimination by permanently disenfranchising Negroes who did not take advantage of the twelve-day period to bring themselves within the exempted class.

In *Lane v. Wilson* the Court did not have to ask whether a requirement—such as literacy—not imposed on earlier registrants

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[15] *Id.* at 276.

[16] 98 F.2d 980, 984 (10th Cir. 1938).

[17] "The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise." 307 U.S. at 276.

could be imposed upon all post-1914 registrants. The litigation, brought by a single Negro, was an action for damages. The immediate effect of the Supreme Court decision was simply to set aside a directed verdict in favor of the election officer who, acting under the authority of the 1916 statute, had denied the Negro plaintiff the opportunity to vote in the 1934 election.[18] Moreover, Oklahoma had not yet indicated that the standard to be applied to the electors qualified as of 1914 but who did not vote at the 1914 election was to be any different from that applied to those who did vote in that election. In fact, it appeared that the standard applied to those who qualified after 1914 was the same as that applied to the 1914 grandfather electors, with no literacy requirement. In *Guinn*, the Supreme Court reached the state law question and held that the Oklahoma literacy requirement in the amendment containing the grandfather clause was inseparable from that clause and fell with it. At the time of *Lane v. Wilson* that literacy requirement had not been resurrected in Oklahoma.

In 1957, however, North Carolina did what Oklahoma apparently did not do. It imposed a literacy test that would exempt those already registered, including grandfather electors, who had taken advantage of the original exemption. In 1902 the constitution of North Carolina was amended to include a grandfather clause almost identical to the Oklahoma one: an ability to read and write the North Carolina constitution was a qualification for voting, with an exemption for grandfather electors if they registered before December, 1908, and with a provision that made such registration permanent. In addition, the North Carolina amendment contained an

[18] The record and briefs in the Supreme Court suggest that the wrong was not as personal or individual as the form of the litigation would indicate. Negroes constituted about 30 percent of Wagoner county population. In the twenty years before the trial only two Negroes were registered to vote. Under the 1916 law, apparently thirteen Negroes registered in the county during the twelve-day supplemental period. There were allegations that the shortness and specificity of this supplemental period facilitated the organization and operation of a conspiracy forcibly to prevent Negroes from registering. There was also the suggestion that none of the thirteen who registered in the county during this supplemental period was allowed to cast a ballot. The highly individualized form of this action for damages may be attributable to a desire to avoid the effect of Giles v. Harris, 189 U.S. 475 (1903), which the Supreme Court in *Lane v. Wilson* seemed to assume was still good law, but distinguished *Giles* because it was a suit in equity rather than an action for damages. See text *infra*, at note 151.

indivisibility clause.[19] The implementing statute incorporated the literacy requirement with an explicit exemption for grandfather electors as provided in the 1902 amendment. In 1957 that statute was amended to eliminate any mention of grandfather electors. Instead, it required that all persons "presenting" themselves for registration "be able to read and write any section of the Constitution of North Carolina in the English language."[20]

Before this statute reached the Supreme Court in *Lassiter v. Northampton Board of Elections*,[21] the question whether under its constitution the state legislature had the power to pass this statute was resolved. The state supreme court held—somewhat tortuously—that the 1902 amendment authorized the 1957 legislation imposing the literacy requirement.[22] A 1945 amendment of the state constitution that did no more than declare, "Every person born in the United States and every person naturalized, twenty-one years of age and possessing the qualifications set out in this article, shall be entitled to vote," was construed by the state supreme court to free the 1902 amendment of the indivisibility clause and to incorporate the unchallenged provisions of that amendment, including the literacy requirement, notwithstanding the invalid exemption for grandfather electors. As a result, the state court thought, "the way was made clear for the General Assembly to act."[23]

In *Lassiter*, the Supreme Court went to great lengths to avoid invalidating the North Carolina legislation. If it was not prompted by doctrinal reasons, perhaps it acted to avoid exacerbating the hostile response that had developed after *Brown v. Board of Education*.[24] Or the Court may have been moved by confidence in the new voting legislation which the Court quickly supported in the following Term by validation of the authorizing statutes and the Government's initial efforts under those statutes.[25] Relying on the

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[19] N.C. Const. Art. VI, §§ 4, 5 (1902).

[20] N.C. Gen. Stat. 163-28.

[21] 360 U.S. 45 (1959).

[22] 248 N.C. 102 (1958).

[23] 248 N.C. at 110, 112. The state legislature acted after Lassiter had filed suit to declare the literacy requirement invalid. See Lassiter v. Taylor, 152 F. Supp. 295 (E.D. N.C. 1957).

[24] At a special Term, immediately prior to the Term in which *Lassiter* came down, the Court had decided Cooper v. Aaron, 358 U.S. 1 (1958).

[25] United States v. Raines, 362 U.S. 17 (1960) (Civil Rights Act of 1957); United States v. Thomas, 362 U.S. 58 (1960) (Civil Rights Act of 1957). And see Alabama v. United States, 371 U.S. 37 (1962) (Civil Rights Acts of 1957 and 1960); United States v. Alabama, 362 U.S. 602 (1960) (Civil Rights Acts of 1957 and 1960).

Government's concession in *Guinn* and the Court's adoption of that concession,[26] the Court in a unanimous opinion in *Lassiter*, disposed of what it perceived as claims under the Fourteenth and Seventeenth Amendments[27] by holding that legitimate state interests—promoting the "intelligent use of the ballot"—were served by the North Carolina law requiring an ability "to read and write any section of the Constitution of North Carolina in English." That was not, however, the end of the inquiry. For the Court also had to deal with two Fifteenth Amendment claims.

The first Fifteenth Amendment issue arose from the claim that the unfettered discretion vested in the registrars charged with applying this test presented a serious risk of discriminatory abuse and that no legitimate state interest justified exposing Negroes to that risk. No evidence of actual abuse was presented, nor did it seem necessary under the doctrine of *Davis v. Schnell*.[28] There the federal district court had invalidated on a similar risk-of-abuse theory a similar Alabama literacy test, and the Supreme Court summarily affirmed. Although the discretionary elements in the Alabama "understand and explain" test may be more apparent than one couched in terms that the voter "be able to read and write any section of the Constitution of North Carolina in the English language," the discretionary elements in the latter are still large. The registrar had discretion to decide who was to be tested, since all that was required was an "ability" to read and write; the registrar had discretion to determine which section of the constitution was to be

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[26] In *Guinn* the whole of the Court's discussion on the question consisted of a single sentence: "No time need be spent on the question of the validity of the literacy test considered alone [*i.e.*, apart from the grandfather clause exemption] since we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted." 238 U.S. at 366.

[27] The Court in *Lassiter* introduced the problem whether the literacy law served a permissible state purpose in these terms: "We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color." 360 U.S. at 50.

[28] 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd per curiam*, 336 U.S. 933 (1949). The Supreme Court in *Lassiter* described the theory of *Davis v. Schnell:* "The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy." 360 U.S. at 53. Presumably, the Court was not attaching any great significance to "the legislative setting" of the Alabama provision, because—as the Court knew from reviewing the origin of the North Carolina law—the setting of the North Carolina literacy test was equally suspect.

given; the registrar had discretion to determine when the mere pronouncement of a series of symbols was reading, since "reading" entails understanding the symbols; and the registrar had to determine which errors in pronunciation, explanation, or transcription of symbols were so serious as to indicate that the applicant for registration could not read or write.[29] But the Supreme Court was unpersuaded by this range of discretionary elements. Although the Court left open the possibility of subsequent relief upon proof of actual discretionary abuse or misapplication of the test, it was unprepared to invalidate the requirement under the risk-of-abuse theory.

The Supreme Court was also unprepared to deal fully with the second Fifteenth Amendment claim, that which perceived the freezing effect of the literacy test to be applied under the statute. The past discrimination issue, like that in *Lane v. Wilson*, arose from the fact that the grandfather clause stayed in effect longer than it should have. While *Guinn* was decided in 1915, the North Carolina grandfather clause gave grandfather electors an exemption from the literacy requirement which they could—from the terms of the law—take advantage of from 1902 to 1908, and thereafter permanently retain the benefits thereof. The 1957 literacy requirement perpetuated that exemption, since it was not conditioned upon a general registration and applied only to new applicants. As the Supreme Court understood this claim: "Appellant points out that although the cutoff date in the grandfather clause was December 1, 1908, those who registered before then might still be voting. If they were allowed to vote without taking a literacy test and if appellant were denied the right to vote unless she passed it, members of the white race would receive preferential privileges of the ballot contrary to the command of the Fifteenth Amendment."[30]

This claim focusing on the perpetuation of past discrimination was one of the issues the Court refused to decide in *Lassiter*.[31] The

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[29] *Compare* discussion in United States v. Louisiana, 225 F. Supp. 353, 386–87 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965), *with* United States v. Mississippi, 229 F. Supp. 925, 950–51 (S.D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965). See also Dent v. Duncan, 360 F.2d 333 (5th Cir. 1966), a post–Voting Rights Act of 1965 case where Judge Rives described the question, "Can you read or write?" as deceptive because there are "all degrees of the ability to read," and noted that the question "can never set a qualitative standard subject initially to an objective test." *Id.* at 337.

[30] 360 U.S. at 49–50.

[31] It did not deal with the issue of actual abuse of the test, and the theory of

Court justified its refusal on the ground that it had "not been framed in the issues presented for the state court litigation."[32] Perhaps the Court anticipated subsequent proceedings for further fact-finding, although it is not clear what findings of fact it thought essential to the theory. One could be a determination whether a substantial number of grandfather electors actually took advantage of the privilege, even though it might have been fair to infer that they did. Another could have been whether those grandfather electors constituted a significant segment of the electorate, though statistics from the census were cited in appellant's brief on that question. A third could have been whether a substantial number of Negroes were registered by 1957 and whether those Negroes were tested for literacy, even though, once again, it could be presumed from the presence of the grandfather clause statute up to 1957 that the literacy component of the grandfather clause was given its effect on the nonexempt class whenever necessary.[33]

The Court in *Lane v. Wilson* had not paused to find such facts, although they might have been equally relevant there. Perhaps in *Lassiter* there was reason for more caution. All that was at stake in *Lane v. Wilson* was a rule that denied the right to vote to nongrandfather electors on the ground that they failed to register during the twelve-day supplemental period, a rule that did not seem to serve any permissible state interest and had a punitive appearance. But in *Lassiter* what was at stake was a rule that denied the right to vote to nongrandfather electors on the ground that they were unable to read and write, a rule that the Court was prepared to say furthered permissible state interests. Notwithstanding this reluctance to examine the full implications of appellant's concern with the perpetuation of past discrimination, the Court in *Lassiter* did state that this claim of appellant "would be analogous to the problem posed in the classic case of *Yick Wo* v. *Hopkins*," and the

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Gaston County v. United States, 395 U.S. 285. See text *infra*, at note 82. And see Katzenbach v. Morgan, 384 U.S. 641 (1966); and the dissenting opinion of Mr. Justice Douglas, in Cardona v. Power, 384 U.S. 672, 675 (1966).

[32] 360 U.S. at 60.

[33] The opinion below made reference to a 1919 amendment to the grandfather clause, which seemed to presuppose the continued operational existence of the literacy test. See also Allison v. Sharp, 209 N.C. 477 (1936); Clark v. Statesville, 139 N.C. 490 (1905); where Fifteenth Amendment challenges to the literacy requirement were rejected.

Court was careful to make it clear that nothing in its opinion "will prejudice appellant in tendering that issue in the federal proceedings which await the termination of the State court litigation."[34]

II. Louisiana v. United States

In the grandfather clause cases the issue of past discrimination was linked to an exemption structured by the explicit terms of the law. In *Guinn* the exempt class was those who were entitled to vote before 1866 and their lineal descendants, and in *Lane v. Wilson* and *Lassiter* the exempt class was those who actually took advantage of the original grandfather exemption. Thus, in each instance, the exempted class of grandfather electors, with its racial exclusionary contours, was provided for and defined by the terms of the law.

In the version of the freezing principle represented by *Louisiana v. United States*,[35] the issue of past discrimination was still linked to exemptions. Unlike the grandfather clause cases, however, the exemption derived from two facts: (1) The standard was to be applied only to new registrants, including both whites and Negroes. (2) This standard was not applied to those previously registered either because it had not existed in the past or, if it had existed, it had not been implemented.

The standard in question in *Louisiana v. United States* was not a read-and-write literacy test; it was a "citizenship test." It was first imposed as a qualification for voting in 1962. The pertinent statute directed the state board of registrars to "prescribe and direct the registrars of voters to propound an objective test of citizenship under a republican form of government."[36] Pursuant to this direc-

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[34] 360 U.S. at 50. Following the Supreme Court decision, the federal district court, stating that "the cause has now been completely litigated and . . . there are no more questions of law or fact to be determined," dismissed the case. Lassiter v. Taylor, E.D.N.C., Raleigh Div., C.A. 1019, March 3, 1960. The order recited that plaintiff consented to the dismissal, and from a letter dated October 1, 1969, from plaintiff's attorney it appears that this issue was not tendered to the district court, probably owing to a failure to understand that the issue was preserved.

[35] 380 U.S. 145 (1965), *aff'g*, 225 F. Supp. 353 (E.D. La. 1963).

[36] Act 62 of 1962, amending LSA-R.S. § 18:191. In the November, 1962, general election, after the board of registrars adopted a resolution to implement the statute, a similar constitutional amendment to Art. VIII, § 18, was adopted. The district court noted that since 1898 there had been a provision in the state constitution that an applicant "shall be of good character, and shall understand the duties and obli-

tive the state board devised a testing procedure—obviously designed to avoid the reach of *Davis v. Schnell*—whereby an applicant for registration would draw one of ten cards, on each of which there were six multiple-choice questions testing specific knowledge of the theory and structure of government. An applicant was required to answer four of the six questions correctly.

Serious questions might have been raised whether such a test served any legitimate government interest.[37] But the Court was not prepared to treat the citizenship test on those terms because that "test was never challenged in the complaint or any other pleading."[38] Instead, the Court dealt with it in relation to the interpretation test, which in essence required an applicant "to be able to understand and give a reasonable interpretation of any section of the [state or federal] Constitution when read to him by the registrar."[39] In the first part of its opinion in *Louisiana v. United States*, the Court held invalid the interpretation test under the risk-of-abuse theory of *Davis v. Schnell*. The Court, noting that the virtually unlimited discretion vested in the registrars had been exercised to keep Negroes from voting because of their race, affirmed the decree below that had enjoined the use of the citizenship test in part because it would perpetuate the past discrimination attributable to the use of the interpretation test. The Supreme Court said:[40]

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gations of citizenship under a republican form of government," but apparently that provision had never been applied. 235 F. Supp. at 392.

[37] As Judge Wisdom put it in his opinion in the district court: "Considering Louisiana's unhappy position as the State with the highest rate of illiteracy and the lowest percentage of citizens with a high school education, the citizenship test can be regarded as a step forward only by those in favor of a severely limited representative government of guardians elected by a small, elite electorate." 225 F. Supp. at 392.

[38] 380 U.S. at 154 n. 17.

[39] La. Const. Art. 8, § 1(d) (1921).

[40] 380 U.S. at 154–55. The link between the two tests was not as complete as the Court would make out. The district court found that in the twenty-one parishes where the interpretation test had been applied there was a great disparity in the number of white and Negro voters caused by past racial discrimination. But there was no finding—and the initial sentence of the Court quoted above is careful to avoid attributing one to the district court—that the abuse of the interpretation test was the sole or even primary racially discriminatory conduct that was responsible for the disparities. Various historical forms of racial discrimination were responsible, including registration of grandfather electors, the inhibiting effect of the white primary, and an organized campaign to purge registered Negroes from voting lists. See 225 F. Supp. at 393. In fact, as the Court noted, in 1944 only about 0.2 percent of the registered voters in the state were Negro (Negroes then constituted at least

> The court found that past discrimination against Negro applicants in the 21 parishes where the interpretation test had been applied had greatly reduced the proportion of potential Negro voters who were registered as compared with the proportion of whites. . . . Since the new "citizenship" test does not provide for a reregistration of voters already accepted by the registrars, it would affect only applicants not already registered and would not disturb the eligibility of the white voters who had been allowed to register while discriminatory practices kept Negroes from doing so. . . . Under these circumstances we think that the court was quite right to decree that, as to persons who met age and residence requirements during the years in which the interpretation test was used, use of the new "citizenship" test should be postponed in those 21 parishes where registrars used the old interpretation test until those parishes have ordered a complete reregistration of voters, so that the new test will apply to all or to none.

The keynote of the opinion is the declaration that in enforcing the prohibition against racial discrimination the equity court had "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[41] There is language in the opinion that suggests a purely tactical dimension to the freezing principle—that, like provisions requiring the submission of monthly reports, it is simply one principle governing the chancellor's decision how to make the decree most "effective."[42] There was little sugges-

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30 percent of the voting-age population), and the registrars began to use the interpretation test only in the mid-1950's, after the decision in *Brown v. Board of Education*. 380 U.S. at 149; 225 F. Supp. at 377–81. The record may provide that explanation for the narrowness of the order. Because initial focus was on the interpretation test, there was some evidence in the record—such as the disparity by race between voting-age population and registered voters—as to the twenty-one parishes that used the interpretation test. 225 F. Supp. at 385 n. 81. With respect to the remaining parishes, there does not seem to be much of a record. The breadth of the order so as to reach all twenty-one parishes where the interpretation test had been used—even where there was no affirmative record of abuse—may be explained either by the willingness of the Court to presume the existence of past discrimination from the spectacular statistical disparities or its willingness to deem the inhibiting effect derived from the mere existence of the interpretation test as sufficient "past discrimination" that would be perpetuated by the citizenship test.

41 380 U.S. at 154.

42 For example, the citizenship test is discussed only in the context of evaluating the district court's decree, along with other facets of the decree. The Court emphasized that it expressed "no opinion as to the constitutionality of the new 'citizenship'

tion of a substantive dimension to the principle that the perpetuation of past discrimination violates the prohibition against racial discrimination and must be corrected by the decree. Yet the Court's language recognized that the new citizenship test was not challenged in the pleadings. In *Louisiana v. United States* the Court spoke not only of the power but of the duty to forbid the application of a standard that perpetuates past discrimination, and the existence of that duty had to be based on the view that the freezing effect violates the prohibition against racial discrimination.

As in the grandfather clause cases, the freezing effect in *Louisiana v. United States* was related to an exemption. A class was exempted from the application of the statute, and it was claimed that currently exempting this class and applying this standard to all others was to perpetuate past discrimination. The racially discriminatory nature of that exemption in *Louisiana v. United States*, however, begins to get blurred because the class exempted consists of all those already registered and, unlike *Lane v. Wilson*, where reliance can be placed on the terms of the law, it cannot be assumed in this context that in the past Negroes had been excluded from that class. The existence of past discrimination thus remained to be established, and the mere disparity in percentage of registered voters was not logically sufficient to establish that. The claim was not that disparity was being perpetuated, but rather that discrimination was being perpetuated, although in many instances the disparity was so overwhelming[43]

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test," that any "question as to that point is specifically reserved." 380 U.S. at 154 n. 17. It described the impact of the decree as a "postponement." The district court, probably less troubled by the alleged gap in the pleadings, was more direct. "The new tests discriminate against Negroes of voting age by subjecting them to standards to which the registered applicants (most of whom are white) were not subjected." 225 F. Supp. at 396. "Our order forbids enforcement of the citizenship test until Negro applicants can be judged by the same standards used in qualifying those persons already registered." *Id.* at 397.

[43] The percentages of voting-age population registered in the 21 parishes as of the end of 1960 were (white and Negro, respectively): Bienville—92, less than 1; Claiborne—86, less than 1; De Soto—89, 1; East Carroll—95, 0; East Feliciana—58, 2; Franklin—92, 9; Jackson—88, 19; LaSalle—100, 26; Lincoln—72, 15; Morehouse—73, 4; Quachita—62, 4; Plaquemines—83, 2; Rapides—68, 17; Red River—100, 1; Richland—80, 6; St. Helena—100, 60; Union—84, 20; Webster—78, 2; West Carroll—84, 1; West Feliciana—80, 0; Winn—94, 42. 225 F. Supp., at 385 n. 81. Similar patterns were present in those cases in which the lower federal courts applied the *Louisiana v. United States* freezing principle. See, *e.g.*, United States v. Logue, 344 F.2d 290 (5th Cir. 1965) (Wilcox County, Ala.; 90 percent to 100 percent, as compared to no Negroes); United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962) (Montgomery

that there could be only one inference—that discrimination had to be responsible for it, at least in part. The one ameliorating factor is that under the theory it did not matter whether some Negroes had been included in the exempted class on nondiscriminatory terms. Discrimination would occur if some portion of the Negro population were excluded from registering in the past because of their race. It is perpetuated by imposing the new test upon these victims of past racial discrimination while continuing to exempt the class of persons already registered. This was held sufficient to preclude the application of the new test unless the state conducted a general reregistration, an option that was carefully preserved by the Court. There were valid interests served by not conducting such a reregistration—the interest in minimizing administrative costs as well as the human and political costs of disenfranchising people who had voted all their adult lives but who would be unable to meet the new standard. But these interests were not sufficient to justify failure to take action that would eliminate the wrong of perpetuating past discrimination against a substantial segment of the Negro population.

The logic of this theory and the norm that corrective action by the judiciary extends only to the "victims of a wrong" seem to have dictated that one of the benefits of the remedial order—enjoining the use of the new test until there be a reregistration—should be limited to the Negroes who had been excluded because of their race from the class being exempted. This would be a subclass of the whole class of Negroes eligible to vote in the past. The nullification

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County, Ala.; 54 percent, compared to 11 percent); United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964) (Elmore County, Ala.; 89 percent, compared to 8 percent); United States v. Duke, 333 F.2d 759 (5th Cir. 1964) (Panola County, Miss.; almost 100 percent, while only one Negro, who was 92 years old, was registered); United States v. Mississippi, 339 F.2d 679 (5th Cir. 1964) (Walthall County, Miss.; almost 100 percent, compared to no Negroes); United States v. Ward, 345 F.2d 857 (5th Cir. 1965) (George County, Miss.; almost 100 percent, compared to 2 percent); United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965) (Clarke County, Miss.; 83 percent, compared to only 3 Negroes); United States v. Dogan, 314 F.2d 768 (5th Cir. 1963) (Tallahatchie County, Miss.; almost 100 percent, compared to no Negroes); United States v. Ward, 349 F.2d 795, 352 F.2d 330 (5th Cir. 1965) (Madison Parish, La.; 81.4 percent, compared to no Negroes). See also the disparities in 12 Mississippi counties in June, 1962, United States v. Mississippi, 229 F. Supp. 925, at 994 n. 86, where the percent of voting-age whites registered runs from 57 percent to 100 percent, compared to a range of 0–2.9 percent for Negroes.

of the standard, however, was not confined to this subclass, and there are three explanations for that.

The first is an evidentiary one, the enormous difficulties of identifying with any degree of accuracy this subclass, particularly because of its historical dimension and because the records and memories of the past are so often fragmentary and unreliable. The second explanation inheres in the ripple effect of any discriminatory act. The class of victims might go far beyond those Negroes who applied to vote and had been discriminatorily turned away—the only members of the subclass likely to be identified with any degree of accuracy at all. Aside from those turned away, there were those who never applied because, on the basis of what they understood to be the experience of other Negroes, applying to register would be idle formality.[44] There were also those Negroes who did not apply because they did not have the qualifications required by the law on the books[45] but who had other qualifications that the registrar found sufficient for white applicants. And there were those Negroes—some with the paper qualifications and some with only actual qualifications—who did not apply because there were other discriminatory practices that would keep them from casting their ballots, or because they believed there would be little point in voting since others with similar interests were discriminatorily excluded from voting.[46] Recognizing these persons as victims would not only compound the evidentiary difficulties but would expand the subclass to such a size that the margin of overinclusion of a class of all Negroes eligible in the past would likely be of little significance. A third explanation is that because this subclass could not be identified by a finite list of names,[47] there was a need to define it in terms

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[44] 225 F. Supp. at 393, 397. See United States v. Duke, 332 F.2d 759 (5th Cir. 1964). Not more than 5 or 6 Negroes had applied to register between 1932 and 1959. More than 2,000 had received seven or more years of schooling and 750 had some high school training. See also United States v. Ramsey, 331 F.2d 824, 833–38 (5th Cir. 1964) (dissenting opinion); United States v. Dogan, 314 F.2d 967 (5th Cir. 1963); United States v. Mississippi, 339 F.2d 679 (5th Cir. 1964).

[45] The district court noted that after the announcement of the litigation, the state board of registrars had discontinued the use of the interpretation test or supplanted it with the citizenship test. But the Court proceeded to determine its validity in part because of the inhibiting effect it might have, since it was still on the books. 225 F. Supp. at 382, 384. See note 40 *supra*.

[46] See generally Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966).

[47] In United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1961), *aff'd per curiam*, 371 U.S. 37 (1962), the district court provided

of a set of criteria. Such criteria would have to be capable of easy application in order to minimize administrative costs and minimize the risk of abuse. No such criteria that would identify the subclass of victims were readily apparent.

While these factors would lead a court delineating the class of beneficiaries away from the limited subclass of victims and, notwithstanding the margin of overinclusion, to the class of all Negroes who were eligible by age and residence to register in the past, the Court did not stop at that point.[48] Instead, the class of beneficiaries of the freeze order was extended to both whites and Negroes who were eligible by age and residence standards during the period of discrimination. This could also be justified. First, there was the understandable desire to avoid injecting a racial distinction into the remedial order. This desire might have been based on the mistaken view[49] that the constitutional prohibition against racial discrimination ordinarily precluded any distinction based on race or on the view that such a distinction would only impair the acceptance of the order in the community. Second, there may have been an unwillingness to exclude whites from this order when the class of all eligible Negroes admittedly had a margin of overinclusion based on an expansive concept of the notion of a "victim." Third, the registration statistics were such that it did not seem there were many unregistered whites left who would have been eligible but for the test. Fourth, there may have been a recognition that even apart from racial considerations, there are elements of arbitrariness in imposing qualifications on some voters and not on others solely because the latter had already registered and the former, for some reason, had

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a list of names of fifty-four Negroes to be registered by the defendant. But that relief was designed to provide dramatic correction of some type for past discrimination—an immediate, highly visible change—and not to exhaust the relief the plaintiffs were entitled to. Similar individualized relief was given in United States v. Lynd, 349 F.2d 785 (5th Cir. 1965); United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962); United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964). But see United States v. Ward, 345 F.2d 857 (5th Cir. 1965).

[48] The capacity of the Court to expand the class of beneficiaries because of these considerations was enhanced by the fact that the plaintiff was the United States, not any particular individual or segment of the community. See Alabama v. United States, 304 F.2d at 591. See generally United States v. Raines, 362 U.S. 17 (1960).

[49] See generally United States v. Montgomery County Board of Education, 395 U.S. 225 (1969); Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 575–83 (1965).

not. Fifth, there was the recognition that, if the registrars, some of whom are elected and others appointed by elected officials and most if not all of whom are white, were not allowed to apply the test to Negroes, then they would be likely to extend the same privilege to a similar class of whites on their own. Sixth, there was the desire to provide some symmetry to the option that was preserved in the freeze order as an alternative corrective, a complete reregistration of the voters, which would apply to both whites and Negroes.[50] Thus, the order in *Louisiana v. United States*, although rooted in the freezing principle and the duty to eradicate the effects of past discrimination, applied in general terms to all who were eligible to vote during the period of past discrimination[51] and prohibited the imposition of the new citizenship test until the risk of perpetuating past discrimination was eliminated by a reregistration.

The version of the freezing principle represented by *Louisiana v. United States* was also applied by the lower federal courts to old qualifications that had been on the books in the past but not applied to those allowed to register. The past discrimination consisted of excluding Negroes from the class of registered persons, and that discrimination would be perpetuated because, although the registrar was applying or intending to apply the test to all who registered in the future, both whites and Negroes, those already registered would retain their discriminatory exemption. In these cases, two remedial issues not present in *Louisiana v. United States* arose: one related to the alternative of a purge of voting lists and the other to the need to determine what standards could be applied in the future if no reregistration were required.

The alternative of purging the voting lists of persons who did not possess the qualifications purportedly required under the old test would have the distinct advantage of avoiding the costs involved in a general reregistration or in nullifying a voting requirement that was assumed to serve a legitimate state interest. But this was rejected

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[50] The logic of these last three factors may be to extend the class of beneficiaries to those who become eligible by age and residence during the period after the freeze order is entered. See text *infra*, at notes 80–81.

[51] In paraphrasing the district court decree, the Supreme Court defined the class of beneficiaries as "persons who met age and residence requirements during the years in which the interpretation test was used." 380 U.S. at 155. The district court delineation was, in fact, sharper. It included all who became eligible by age and residence by August 3, 1962, the date the citizenship test was implemented. See notes 40 and 45 *supra*.

as a viable alternative because of the inherent risks and costs of such a purge.[52] Under *Louisiana v. United States*, the plaintiff would have to establish that the standard had not been applied to those registered and, absent an admission, the plaintiff would have to prove this by demonstrating either that individual, identified whites, often a substantial number, who were registered in the past could not have met those standards or that they were not asked to meet them. Thus, the famous "Frdum Foof Spetgh" example.[53] But this proof respecting particular individuals would be suggestive of a more general pattern and an effort to identify everyone so exempted from the requirement could not generally be undertaken. It would consume enormous investigative and judicial resources and, given the gaps and ambiguities of records and memories, would at best afford an unsatisfactory result. It would be impossible for a court to specify a list of individuals to be purged that would be corrective of the past wrong. Nor could administrative costs be avoided by giving the task to local officials. Their past misconduct suggested, at least to the courts and to the victims, that they could not be trusted. The factors that made it difficult for the court to do the job itself would also make meaningful supervision of this selective purge all but impossible.[54]

Having rejected the alternative of a purge and remaining unwilling to order (as opposed to permitting) a reregistration in the

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[52] United States v. Louisiana, 225 F. Supp. at 396–97; United States v. Duke, 332 F.2d 759, 768 (5th Cir. 1964); United States v. Mississippi, 339 F.2d 679, 682 (5th Cir. 1965); United States v. Ward, 345 F.2d 859 (5th Cir. 1965). Two exceptions were United States v. Ramsey, 321 F.2d 824 (5th Cir. 1964), and United States v. Atkins, 323 F.2d 733 (5th Cir. 1963). Neither case, however, seems to be a persuasive precedent. As the court later said in United States v. Ward, 349 F.2d 795 (5th Cir. 1965), after rehearing there was nothing left to *Ramsey*. In the second *Ramsey* appeal, 353 F.2d 650 (5th Cir. 1965), the option of a purge was clearly foreclosed.

[53] "A white applicant in Louisiana satisfied the registrar of his ability to interpret the State constitution by writing 'Frdum Foof Spetgh.' United States v. Louisiana, 225 F. Supp. 353, 384." South Carolina v. Katzenbach, 383 U.S. at 312 n. 2. See also United States v. Penton, 212 F. Supp. 193, 210–11 (M.D. Ala. 1962) (registrar filled out entire form for a white applicant who had never completed the first grade of school).

[54] In United States v. Ward, 349 F.2d 795, 802 n. 12 (5th Cir. 1965), the court rejected the option of a purge in more doctrinaire terms: "Purging of whites does not correct the federal wrong—racial discrimination—but merely rectifies violations of State law." The court also justified this per se rule in terms of avoiding a conflict with the freeze provisions of the Civil Rights Act of 1960, 42 U.S.C. § 1971(e), which does not explicitly provide for a purge. See text *infra*, at notes 64, 66.

cases involving an old test, the courts had the responsibility to decide what standards could properly be applied to the class of beneficiaries. In *Louisiana v. United States* the Court could merely "postpone" or prohibit the imposition of the new test absent a reregistration, since a new test is one that by definition had not been applied to anyone in the exempt class of those already registered. This was not possible in the old-test cases. In those cases it is possible that the old test was applied to some whites, including those already registered, but not to others, or that, because of the great discretionary elements vested in the registrars, only parts of the test or lax versions of it were given.

This possibility does not preclude the application of the freezing theory to old tests. The theory requires two elements: (1) Negroes had been excluded because of their race from becoming members of the class of persons already registered. (2) The old test had not generally been applied in the past. The second element establishes the existence of the exemption being perpetuated by currently applying the standard. It indicates that the practical impact of the exemption is not de minimis. And, given the striking racial homogeneity of the class of persons already registered, it lends inferential support to the first element, which establishes the racially discriminatory contours of that exemption. Proof that the old test was not generally applied in the past, however, would not be the same as proof that it never had been applied in the past. It is possible that it had been applied sporadically, particularly given the changes in local officials and the varied, complicated political and personal relationships often existing among the registrars, the candidates, and the applicants for registration. A decree so general that it did no more than provide that the registrar continue to apply the standards he had generally applied to whites in the past would not give any meaningful guidance to the registrars and would contain serious risks of abuse.

As a guide in discharging this responsibility, the United States on some occasions has proposed that courts hold the registrar to the past low watermark—the standards "of the least qualified white person who has been registered."[55] Although this low-watermark guide might seem attractive, it is too uncompromising and is not based on the logic of the freeze theory. The standards had to be linked to

[55] See, *e.g.*, prayer for relief quoted in United States v. Ramsey, 321 F.2d 824, 825 (5th Cir. 1964).

those applied to a class from which Negroes were excluded, and those applied to the least qualified white person who had been registered in the past do not necessarily meet that requirement. For example, one white person may have been totally relieved of the standards for political or personal reasons unrelated to his race, while the standard generally applied to whites might have been quite different. The courts did not acquiesce in this proposal. In cases involving old tests the courts embarked on the more unstructured task—one allowing great room for unarticulated compromises with the full logic of the freezing principle—of determining what standards were generally applied in the past to those persons allowed to register.

The lower federal courts applied this version of the freezing principle not only to old tests as well as new tests but also to a great variety of types of tests and requirements qualifying persons to vote. It was applied to the requirements that persons wishing to pay the poll tax personally see the sheriff,[56] that the application for registration be filled out without assistance,[57] that an applicant for registration establish his identity, residence, and absence of disqualification by having a registered voter vouch for him,[58] and that an applicant for registration fill out a perfect registration form.[59] It was also applied to the Mississippi versions of the interpretation and citizenship tests.[60] With all these tests and requirements, as with the

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[56] United States v. Dogan, 314 F.2d 767 (5th Cir. 1965) (requirement not prescribed by state law).

[57] United States v. Lynd, 301 F.2d 818 (5th Cir. 1963), *cert. denied*, 371 U.S. 893 (1963). See also the subsequent order in *Lynd* described in United States v. Louisiana, 225 F. Supp. at 395; United States v. Duke, 332 F.2d 759 (5th Cir. 1964); United States v. Lynd, 349 F.2d 785 (5th Cir. 1965); United States v. Lynd, 349 F.2d 790 (5th Cir. 1965); United States v. Ward, 349 F.2d 795 (5th Cir. 1965).

[58] United States v. Logue, 344 F.2d 290 (5th Cir. 1965); United States v. Hines, 9 RACE REL. REP. 1332 (N.D. Ala. 1964). See also United States v. Ward, 349 F.2d 795 (5th Cir. 1965).

[59] United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962).

[60] Question 18 of the Mississippi application form required that the applicant write and copy a section of the Mississippi constitution selected by the registrar; question 19 required that the applicant write a reasonable interpretation of that section; and question 20 required a statement setting forth the applicant's understanding of the duties and obligations of citizenship. United States v. Lynd, 349 F.2d 790, 792 (5th Cir. 1965). The freezing theory was applied to relieve applicants from the requirement of answering questions 19 and 20. United States v. Duke, 332 F.2d 759 (5th Cir. 1964); United States v. Mississippi, 339 F.2d 679 (5th Cir. 1964); United States v. Ward, 345 F.2d 857 (5th Cir. 1965); United States v. Lynd, 349

citizenship test of *Louisiana v. United States*, it was difficult to perceive any significant state interest that would be served by them, particularly since their creation, or imposition after years of nonuse, coincided with increased voter registration drives in the Negro community. Some had an even more tenuous relationship to legitimate state interest than the citizenship test, and in some such instances the freeze order did not preserve the option of a general registration.[61] It was inconceivable that the state would conduct a general reregistration to further the interests served by the nullified test or requirement.

In spite of this breadth of the freezing principle, one voting qualification seemed immune to its logic—the read-and-write literacy test, the test the Supreme Court had said, in *Lassiter*, served a permissible state purpose. The district court in *Louisiana v. United States* carefully avoided applying the freezing principle to such a literacy test, although there was every reason to believe—or if the record was not fully adequate on this score, at least to suspect—that no literacy test had been applied to whites in the past.[62] In other cases, where

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F.2d 785 (5th Cir. 1965). Following the reversal and remand in United States v. Mississippi, 380 U.S. 128 (1965), and almost contemporaneous with the decision in the *Lynd* appeal, the Mississippi constitution was amended so that the literacy requirement was limited to an ability to read and write and the good moral character requirement that had been added in 1960 was eliminated. United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965). See also United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964).

[61] See, *e.g.*, United States v. Logue, 344 F.2d 290 (5th Cir. 1965).

[62] The district court in *United States v. Louisiana* wrote: "No one doubts the broad scope of the State's power to fix reasonable, nondiscriminatory qualifications for voting consistent with the Constitution. Thus, a literacy test bears a reasonable relation to a governmental objective and, if it does not perpetuate past discrimination, is a permissible requirement. . . . Since Louisiana has the highest illiteracy rate in the nation, the State has even more reason than most states to use a literacy test as a spur to improve the level of the electorate. *But the understanding clause, which is an interpretation test of the constitutions, must not be confused with a literacy test or the two treated as peers.* Under Louisiana law, any literacy qualification is met by the requirement that the applicant read to the registrar the Preamble of the United States Constitution. In fact, an applicant need write the Preamble only in his mother tongue, through the dictation of an interpreter if he cannot speak, read, or write English. La. Const. Art. VIII, § 1(c). For good measure, ability to fill out an application form is an additional test of literacy. Moreover, under another statute and provision of the state constitution, until 1960 *all of the time Louisiana had an interpretation test it allowed illiterates to vote.* (LSA-R.S. 18:36). In November 1962 the State carried 37,365 illiterates on the registration rolls." 225 F. Supp. at 385–86. (Emphasis in original.) See *id.* at 357 n. 6, for further discussion of the

the record was clear that no read-and-write literacy requirement had been applied in the past, where the United States specifically requested that the freeze order extend to that requirement, and where the freezing theory was adopted in most emphatic terms, the lower federal courts silently declined—at least until specific congressional assistance arrived—to have the full force of the *Louisiana v. United States* freezing principle reach that requirement.[63]

Legislative assistance soon came. In the Civil Rights Acts of 1960 and 1964, in existence at the time *Louisiana v. United States* was decided, Congress gave recognition to the freezing principle. In Title V of the Civil Rights Act of 1960 Congress provided for a mechanism for a federal court to declare named Negroes qualified to vote in local, state, and federal elections and that any refusal to honor such an order would constitute a contempt of court.[64] This

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ambiguous nature of the read-and-write literacy test at that time. This test was not discussed in the Supreme Court opinion.

[63] United States v. Duke, 332 F.2d 759, at 762–63, 766 (5th Cir. 1964); United States v. Mississippi, 339 F.2d 679 (5th Cir. 1964); United States v. Ward, 345 F.2d 857 (5th Cir. 1965); United States v. Lynd, 349 F.2d 785, 788 (5th Cir. 1965); United States v. Ward, 349 F.2d 795, 806 (5th Cir. 1965).

For an observation on the limitations of *Lynd* and *Ward*—otherwise read, along with *Duke*, as the strongest adoption of the *Louisiana v. United States* freezing theory—see the subsequent decisions in United States v. Ward, 352 F.2d 300 (5th Cir. 1965); United States v. Ramsey, 353 F.2d 650 n. 20 (5th Cir. 1965).

[64] 74 Stat. 86, 90 (1960), now 42 U.S.C. § 1971(e) (1964). In United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962), it was decided that even absent this statutory provision, the federal courts could enter similar decrees as part of their general equitable powers. In that case the district court granted such relief to Negroes who were denied the right to vote before the court had entered the finding of a pattern or practice of discrimination, rather than after, as required under the § 1971(e) provision.

The Civil Rights Act of 1960 contained other provisions also designed to perfect the litigative tool authorized in the Civil Rights Act of 1957: (1) A provision, requiring the retention of records relating to applications to vote in federal elections and giving the Attorney General access to those records before the commencement of litigation and on the basis of a written demand. (2) A provision authorizing the appointment of voting referees—similar to masters—to assist in the process of listing qualified voters described in the text. (3) A provision authorizing the joinder of the state as a party defendant even when only the conduct of a local official is involved. For analyses of the problems in the litigative process that gave rise to these provisions see Note, note 9 *supra*.

The Civil Rights Act of 1964 also attempted to perfect the litigative tool in voting by authorizing the Attorney General to request a three-judge district court and providing for expedition of these proceedings, a provision designed to deal with the

statutory provision was applicable in suits brought by the United States under the Civil Rights Act of 1957 where a finding had been made that the discrimination was "pursuant to a pattern or practice" of racial discrimination. For at least one year, or until the court found that the pattern or practice had ceased, a Negro was entitled to an order declaring him qualified to vote if, so the statute provides, he establishes, first, that he is qualified under state law to vote and, second, that since the finding of a pattern or practice he has not been allowed to register. With respect to the latter determination there was no need to show racial discrimination. This provision became applicable only if there was a finding that the state officials had recently engaged in a pattern or practice of discrimination. With respect to the first determination, whether the individual is qualified under state law, the statute provides:[65]

> [T]he words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) [containing the general Fifteenth Amendment prohibition] in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

This section had been viewed as being predicated on or incorporating a freezing principle similar to that of *Louisiana v. United States* and as contributing to the development of the principle. The word "used" looks to the past and has been construed to forbid the use of standards higher than those used in the period for which a pattern or practice existed, rather than just those in the period following the entry of the finding. Moreover, Congress preserved the option of reregistration by providing that the Court order declaring

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difficulties of delay occasioned by a trial judge refusing to decide. 42 U.S.C. § 1971(g) (Supp. IV 1968). Although the Voting Rights Act of 1965 generally shifted the enforcement process out of the courts, and in that sense expressed a lack of confidence in ever perfecting the litigative tool to the point of making it do the job fully, that act had some minor provisions for improving it, such as authorizing the court to appoint examiners.

[65] 74 Stat. 92 (1960), 42 U.S.C. § 1971(e) (1964). See United States v. Duke, 332 F.2d 759 (5th Cir. 1964); United States v. Ramsey, 331 F.2d 824 (5th Cir. 1964); United States v. Ward, 349 F.2d 795 (5th Cir. 1965); United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965); United States v. Palmer, 356 F.2d 951 (5th Cir. 1966). See Comment, *The Federal Voting Referee Plan and the Alteration of State Voting Standards*, 72 YALE L. J. 770 (1963).

the person qualified "shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote."

Unlike the Civil Rights Act of 1960, however, the Civil Rights Act of 1964 is not confined to a litigative context. It provides:[66]

> (2) No person acting under color of law shall—(A) in determining whether any individual is qualified under State law or laws to vote in any Federal election, apply any standard, practice or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by the State officials to be qualified to vote.

Although this provision has been recognized as embodying the freezing principle,[67] the prohibition against applying different standards in the future from those applied in the past is not—at least on the face of the statute—conditioned in any way upon a determination that Negroes were excluded from the class of those allowed to register in the past or that whites were exempted from those standards in the past. That probably accounts for the fact that the provision is limited to federal elections, evoking a broader array of sources of congressional power than just the Fifteenth Amendment. That limitation, of little significance because of the practice of a single registration for state and federal elections, was soon eliminated by § 15 of the Voting Rights Act of 1965.[68] There, Congress amended this section of the Civil Rights Act of 1964 by eliminating the word "Federal."

This amendment was not the only role the freezing principle played in fostering the Voting Rights Act of 1965—the congressional response to a long chain of dramatic events, which included *Louisiana v. United States*, its companion *United States v. Mississippi*,[69] which after pending for almost three years was returned

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[66] 78 Stat. 241 (1964), 42 U.S.C. § 1971(a)(2)(A) (1964). See 110 CONG. REC. 6750, 8205 (1964), acknowledging the recognition of this principle in existing case law.

[67] United States v. Duke, 332 F.2d 759, 769 (5th Cir. 1964); United States v. Palmer, 356 F.2d 951, 952–53 (5th Cir. 1966); United States v. Cox, 11 RACE REL. REP. 269, 291 (N.D. Miss. 1964, 1965).

[68] 42 U.S.C. § 1971(2)(A) (Supp. IV 1968).

[69] 380 U.S. 128 (1965).

to the trial court for its first evidentiary hearing, and the historic events involving Selma, Alabama.[70] The principle was one of the important justifications for the central enforcement technique provided in the act with regard to voting qualifications: to suspend literacy tests and similar qualifications for voting in all jurisdictions that fell within the coverage formula of the act.[71] Such an enforcement technique could in part be justified on some version of the risk-of-abuse theory—the suspension was necessary in order to eliminate the discretionary elements vested in local registrars by such tests, a discretion which Congress believed had been abused in nearly all of those jurisdictions identified by the coverage formula.[72] Another explanation for the suspension of tests was the freezing theory of *Louisiana v. United States*. In sustaining the suspension provisions, the Supreme Court in *South Carolina v. Katzenbach* ac-

[70] The decisions in *Louisiana v. United States* and *United States v. Mississippi* were announced on Monday, March 8, 1965, the day the national newspapers carried photographs of club-swinging deputies riding into a group of Negroes protesting the denial of voting rights in Selma. Then followed the historic march from Selma to Montgomery. See Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965); Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785, 787–92 (1965); and President Johnson's address to Congress and the nation on March 16, 1965. For further litigation involving the right to vote in Dallas County and Selma, see United States v. Atkins, 323 F.2d 733 (5th Cir. 1963); United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967).

[71] The statutory phrase is "test or device," and is defined in the act to 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." 42 U.S.C. § 1973b(c) (Supp. IV 1968).

[72] One year earlier, in the Civil Rights Act of 1964, Congress had tried to eliminate some of the discretionary elements. It prohibited the use of "any literacy test as a qualification for voting in any Federal election unless . . . such a test is . . . conducted wholly in writing. . . ." It defined literacy test to include "any test of the ability to read, write, understand, or interpret any matter." The act also provided that no one shall be denied the right to vote in a federal election because of immaterial errors or omissions in the registration process. Finally, the Act of 1964 also attempted to facilitate injunctive litigation by the Attorney General by providing that in such proceedings completion of the sixth grade would create a rebuttable presumption of literacy, comprehension, and intelligence to vote in any federal election. Section 15 of the Voting Rights Act of 1965 eliminated the restriction of these provisions to federal elections; but even before that, the single registration process probably extended their practical significance.

knowledged the congressional recognition of the freezing principle embodied in the Voting Rights Act of 1965:[73]

> Congress knew that continuances of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants. Congress permissibly rejected the alternative of requiring a complete re-registration of all voters, believing that this would be too harsh on many whites who had enjoyed the franchise for their entire adult lives.

Through the coverage formula the tests would be suspended in those jurisdictions where there was risk of perpetuating past discrimination by imposition of an ostensibly innocent standard.

Viewed as an implementation of the freezing principle, the suspension technique of the Voting Rights Act of 1965 embodied several innovations, some of which were immediately adopted by the courts in the few cases that remained from the early regime where litigation predominated. First, the option of reregistration was eliminated, an option not likely to be utilized anyway. Second, as with the earlier Civil Rights Acts the principle was not confined to suspect tests or qualifications such as the citizenship test. It was clearly applicable to the read-and-write literacy tests of *Lassiter*.[74] After the Voting Rights Act the courts took this same step.[75] Third, the special problem of applying the principle to old tests, namely, determining precisely what standard could be applied in the future by making a determination as to what standards were applied in the past, was eliminated. The tests were suspended in toto.

Fourth, the period during which the tests were to be nullified or suspended was extended to five years. Under case law, the suspension of the test or order enjoining its enforcement generally could be brought to an end by a general reregistration, but it was necessary to prescribe a period of time—the "freeze period"—for which the

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[73] 383 U.S. at 334. The omitted footnotes referred to H. Rep. No. 439, 89th Cong., 1st Sess. 15; S. Rep. 162, pt. 3, 89th Cong., 1st Sess. 16; Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. 17; Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 22–23. See also Dent v. Duncan, 360 F.2d 333 (5th Cir. 1966).

[74] See Dent v. Duncan, 360 F.2d 333 (5th Cir. 1966); United States v. Mississippi, 256 F. Supp. 344 (S.D. Miss. 1966); United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1966), *aff'd per curiam*, 386 U.S. 270 (1967).

[75] United States v. Ward, 352 F.2d 329 (5th Cir. 1965); United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965); United States v. Palmer, 356 F.2d 951 (5th Cir. 1966).

test would be suspended or nullified in the likely event that a general reregistration was not held. In the early cases, such as *Louisiana v. United States*, the freeze period was not defined in very specific terms. There the freeze period was to be "until the discriminatory effect of the test [had] been vitiated to the satisfaction of the court."[76] Perhaps for reasons of judicial administration, a minimum number of years was imposed by the court of appeals before the trial court could bring the suspension to an end by finding that the effects of the past discrimination had been vitiated. Initially, this minimum component of the freeze period was set at one year, drawing some guidance from the provision of the Civil Rights Act of 1960 that acknowledged the freezing principle.[77] Then this minimum period was extended to two years, in part to accommodate the large number of persons to be registered under its terms and to avoid frequent resort to the courts,[78] and finally, after the Voting Rights Act of 1965, to five years,[79] the period provided in the statute.

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[76] 225 F. Supp. at 397.

[77] United States v. Duke, 332 F.2d 759 (5th Cir. 1964). Similar considerations of judicial administration led the Court in *Duke* to prescribe the precise terms of the decree to be entered by the district court on the remand, and indicated—as a forerunner to the uniform circuit-wide school desegregation decree in United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), adopted *en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967)—that it should be the model or standard. See, *e.g.*, United States v. Mississippi, 339 F.2d 679 (5th Cir. 1964); United States v. Ward, 345 F.2d 857 (5th Cir. 1965); United States v. Lynd, 349 F.2d 785 (5th Cir. 1965), all Mississippi cases using the *Duke* decree. This innovation might well have been triggered by the willingness of the trial judges in Mississippi, Judge Cox in the Southern District, and then Judge Clayton in the Northern District (now of the Court of Appeals), to tolerate and defend such rank practices described by the court of appeals in *Duke*, 332 F.2d at 766, which were reflective of the larger syndrome. See Comment, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963).

[78] United States v. Ward, 349 F.2d 795 (5th Cir. 1965). The Voting Rights Act was signed on August 6, 1965. Louisiana was brought under its coverage the next day. Although this first decision in *Ward* was dated Aug. 11, 1965, it was obviously written before the act became law, and it was not until the second decision, 352 F.2d 329, that full account of the act was taken. It also seems that the two-year period in the first *Ward* decision was designed to give further effect to another innovation made in that decision, namely, extending the class of beneficiaries to all those eligible during this period. Neither the extension of the freeze period from one to two years nor the extension of the class of beneficiaries was specifically requested by the United States.

[79] United States v. Ward, 352 F.2d 329 (5th Cir. 1965); United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965).

The fifth innovation of the act, made almost contemporaneously by the courts, was the expansion of the class to whom the test could not be applied. The benefit of the nullification was made available not only to those who were eligible by age and residence to vote during the period of past discrimination, as in *Louisiana v. United States*, but also to those who became eligible during the freeze period.[80] This innovation, like the others, may be explained by considerations that are not rooted in the freezing theory but that undoubtedly played a role in justifying the suspension under the act, such as the fact that the suspension was also a means of eliminating discretion. It may also be a technique to increase the electorate. But it could be explained by the factors tied to the *Louisiana v. United States* freezing theory that led to the expansion of the class of beneficiaries from the Negro victims, to the class of Negroes eligible by age and residence during the period of discrimination, to the class of all persons—both white and Negro—so eligible.[81] Any distinction based solely on when voters became eligible has tones of arbitrariness. Administrative and political difficulties are avoided by applying one set of qualifications to all voters. And expanding the class to those who became eligible by age and residence during the freeze period would have the greatest symmetry with the one option preserved in the freeze order that would concededly eradicate the effects of past discrimination, a general reregistration.

III. Gaston County v. United States

Nominally, *Gaston County v. United States*[82] involved the same literacy test as *Lassiter*, that of North Carolina. But, by the time this problem once again appeared before the Supreme Court,

[80] United States v. Ward, 349 F.2d 795 (5th Cir. 1965).

[81] See note 50 *supra*. The Court in *Ward* assigned two further reasons for this extension: (1) the provisions of the order should be harmonized with the freeze provision of the Civil Rights Act of 1960, otherwise the applicants would take advantage of the more lenient court procedure of the 1960 act, throwing more registration to the courts than on the registrar subject to the freeze order; and (2) not only should the Negroes eligible in the past be compared to the whites previously registered but all Negroes now applying should be so compared. 349 F.2d at 802–03. The latter reason is not particularly persuasive, since there still must be a reason why those Negroes who become eligible to register after the court order should be compared to the whites registered in the past as opposed to those whites who became eligible to register after the court order. See note 54 *supra*.

[82] 288 F. Supp. 678 (D.D.C. 1968), *aff'd*, 395 U.S. 285 (1969).

three significant changes had taken place in the implementation of this law in Gaston County.[83] The first was that the problem of exemptions raised but not decided in *Lassiter* had been eliminated by a general reregistration in the county. Second, administrative action by the board of elections eliminated many of the discretionary elements inherent in a read-and-write literacy test. Third, the law had been suspended in the county by operation of the Voting Rights Act of 1965 because a determination had been made that the county fell within the § 4(b) coverage formula.

The exemptions arising since the reregistration seem, on the record before the Court, to be of little significance, hardly sufficient for invoking *Louisiana v. United States*. For a significant portion of the period in question, fairly complete records of those who attempted to register seem to have been maintained by the board of elections.[84] The evidence established that a relatively small number of white illiterates were registered.[85] There was some proof of a few illiterate Negroes being registered. There was no dramatic disparity by race in the percentages of voting-age population registered.[86] It was the existence of this disparity, among other things,

[83] Within the territorial limits of Gaston County there are at least eleven municipalities, including the city of Gastonia, the county seat where about one-third of the population lives. The Gaston County board of elections is generally responsible for the administration of all federal, state, county, and township elections. It has no jurisdiction over registration in the municipalities, where the registration process is handled by separate registrars in each municipality. (It also appears that some of the municipalities, including Gastonia, have their own school systems.) Although there is considerable ambiguity in the record as to the distinction between the county and the municipalities, references to the county have been construed to include only the jurisdiction of the county board of elections, and to exclude the municipalities. This distinction provides the basis of the concurring decision of one of the trial judges. See note 93 *infra*.

[84] See notes 62 and 72 *supra*.

[85] There is no finding as to the precise number. Fifteen registered whites admitted in deposition that they could not read or write; and another fourteen whites said that they were not required to demonstrate literacy. A notebook of registration forms was introduced which, the district court said, indicated that these twenty-nine persons "were not the only whites who were permitted to register although they were incapable of satisfying the literacy requirements of North Carolina law." 288 F. Supp. at 683. The Government's brief put this unspecified number at seventy. Brief of the United States, at 12 n. 6. Thus, at most, one hundred illiterate whites were established as registered, in a county with about 43,000 white voters.

[86] The statistics provided in the record and post-trial brief of the United States are for the county as a whole, including the municipalities. In a sense the most accurate voting statistics by race are those for May, 1966, and June, 1967, for they

that generalized the proof that the test in question was not applied to individual whites and laid the foundation for the conclusion that there was a class exempted from the standard to which Negroes were subjected. At the time of the November, 1964, general election, a time when the literacy test was in effect, about 52 percent of the adult Negro population was registered, compared to about 66 percent of the adult white population. This statistic did not readily lend itself to the theory of a racial class being exempted, a necessary condition for the application of the *Louisiana v. United States* freezing principle.[87]

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are the contemporaneous count of persons actually registered, thus reflecting intervening purges. The voting-age population base used here is the 1960 census (64,154 whites, 8,365 Negroes) until the 1966 special census figures (69,252 whites, 8,407 Negroes) were available. The statistics of registered voters by race (whites and Negroes, respectively) are: November, 1962—33,162 (51.7 percent), 2,809 (33.6 percent); November, 1964 (general presidential election, following the adoption of a simplified literacy test)—42,376 (66.1 percent), 4,371 (52.3 percent); November, 1966 (general election, following the suspension of the literacy test)—42,898 (61.4 percent), 4,381 (52.1 percent); June, 1967 (date of trial)—43,874 (63.4 percent), 4,388 (52.2 percent). While it appears, on the basis of the above statistics, that the suspension of the test had no appreciable effect on reducing the disparity, that might be attributable to the absence of a general presidential election between the suspension of the test and the trial. However, in a letter from the attorney for the board of elections, dated October 10, 1969, it was stated that the registration statistics at the time of the general presidential election in November, 1968 were: 51,892 (74.9 percent) of the total white voting-age population, compared to 5,172 (61.5 percent) of the total Negro voting-age population. Compare the statistics in *Louisiana v. United States*, note 43 *supra*.

[87] This perhaps explains the gradual evaporation of this theory in *Gaston County*. In the Government's pleading and its trial brief it was the principal theory of discrimination relied on. The district court noted that "[s]ince there is evidence that in the past illiterates have been permitted to register, we could simply find that unless reregistration rolls are purged of all illiterates, Gaston County cannot, under § 101(a) of the Civil Rights Act of 1964, reinstate its literacy test." 288 F. Supp. at 685. But it refused to rest on this theory, since another was available. In the Government's brief in the Supreme Court, the theory emerged as nothing more than a long footnote awkwardly added to the last sentence of text, indicating that it was likely to be either ignored or jettisoned on oral argument. It is not even so much as mentioned in the Supreme Court opinion.

Section 101(a) of the Civil Rights Act of 1964, as amended by the Voting Rights Act of 1965, is cast in more doctrinaire terms, not explicitly linking the exemption to any finding of a pattern or policy of racial discrimination and thus creates no need to prove an exemption to a racial class. See text *supra*, at notes 66–67. That is perhaps in part why the Government in its Supreme Court brief viewed § 101(a) merely "as a statutory bar" to the reinstitution of the literacy test once the suspension of the Voting Rights Act was terminated, rather than as a basis for informing the Court's decision whether the test had been used since the reregistration to dis-

The implementation of the North Carolina literacy test in the county also made this case an inappropriate one to reexamine the holding of the *Lassiter* Court that the test was not invalid under the doctrine of *Davis v. Schnell*. The details of the literacy test administered in the county from the spring of 1962 until the summer of 1964 remain somewhat unclear in the record. There was some evidence that the board, operating under a state court decision limiting some of the more striking elements of discretion,[88] still required an oral reading. In any event, most of the discretionary elements in the test were eliminated by the board in the summer of 1964. In response to the enactment of the Civil Rights Act of 1964,[89] and in time to register for the general election in November, 1964, the board of elections eliminated the oral reading aspect of the test altogether and implemented the writing aspect by printing on a card three of the provisions of the North Carolina constitution—according to testimony, "the shortest provisions"[90]—and requiring an applicant for registration to copy one of the provisions.

It was this test that was suspended by operation of § 4(a) of the Voting Rights Act of 1965, and the Court considered this literacy requirement in the context of a proceeding to terminate the suspension. The determination was made in March, 1966, that Gaston County[91] fell within the coverage formula of § 4(b) of the act.

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criminate on the basis of race, a decision that had to be made in order to terminate the suspension. It is also significant that the Voting Rights Act requires a measure of substantiality in the discrimination. 42 U.S.C. § 1973b(d) (Supp. IV 1968).

[88] Bazemore v. Bertie County Board of Elections, 254 N.C. 398 (1961). The court declared that writing from dictation was not required under the law; that occasional misspelling and mispronunciation of more difficult words should not count; that it was not an endurance test; and all that was required was "reasonable proficiency."

[89] While the provisions requiring the literacy test to be "wholly in writing" applied in terms only to federal elections, Gaston County apparently had a single registration for all elections. See note 72 *supra*.

[90] The three sections of the North Carolina constitution were Art. IV, § 17; Art. VII, § 8; Art. XIV, § 6.

[91] On August 7, 1965, the day after the Voting Rights Act went into effect, the § 4(b) coverage determination was made on a statewide basis for Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and for twenty-six North Carolina counties. 30 FED. REG. 9897 (1965). Two more North Carolina counties were covered on January 4, 1966, 31 FED. REG. 19 (1966), and two on March 2, 1966, 31 FED. REG. 3317 (1966). Gaston County was in the last group of ten North Carolina counties brought within the coverage on March 29, 1966. 31 FED. REG.

Although at the time of the presidential election of November, 1964, the percentage of registered voters was greater than the 50 percent required for coverage, the county was brought within the coverage of the act because fewer than 50 percent of the residents of voting age had actually voted in that election.

Soon after learning of the inclusion of the county and the resulting suspension of the literacy test, in August, 1966, the board of elections commenced a declaratory proceeding against the United States in a three-judge court in the District of Columbia under the § 4(a) termination provision. Under § 4(a), the Voting Rights Act suspension may be terminated whenever the court determines "that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color."[92] In applying this standard the Court focused on the

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5080–81 (1966). See *Voting Rights Act Extension,* Hearings before Subcommittee No. 5, Committee on the Judiciary, House of Representatives, 91st Cong. 1st Sess. on H.R. 4249, Serial No. 3, p. 273 (1969) (hereinafter cited as House Hearings).

[92] This case exposed two ambiguities in the language of § 4(a). The reference to "no *such* test" in § 4(a) has two possible interpretations: (*a*) it is a necessary (and sufficient) condition of a termination that no test meeting the statutory definition of "test or device" had been discriminatorily used during the past five years; or (*b*) it is a necessary (and sufficient) condition of termination that the particular test which was suspended and which would be reinstated on the termination not have been used discriminatorily in the past five years. This question arose because in a sense Gaston County had two literacy tests, one from the spring of 1962 to the summer of 1964 and the other from the summer of 1964 to the suspension in 1966. It was the latter which the county sought to reinstitute. The Court did not resolve this ambiguity. See note 95 *infra.* The implication of the Court's opinion, however, was to choose the second alternative. This seems to be in accord with the general tenor of § 4(d) of the act. See note 87 *supra.*

The second ambiguity derives from the failure to specify the area for measuring the use of the test. This was the basis of a separate concurrence in the trial court by a judge who rejected the freezing principle approach of the majority. He construed this provision of § 4(a) in a geographic rather than a jurisdictional sense. Thus, even though the municipalities are not within the jurisdiction of the plaintiff county board of elections, see note 83 *supra,* they are within the territory of the county and he thought it incumbent upon the county board of elections to prove that the literacy test was not discriminatively used in those municipalities during the past five years. There was no evidence on that issue. The Supreme Court did not mention this as an alternative ground for decision. The argument does derive strong support from the fact that the coverage and suspension aspects of § 4(a) seem to have a territorial dimension. When the § 4(b) certification of the State of Mississippi was made, see United States v. Mississippi, 256 F. Supp. 344, 349 (S.D. Miss. 1966); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); and of Alabama, Had-

problem of past discrimination—not in administration of voting qualifications, but in public education. It held that the imposition of the literacy test violated the prohibition against racial discrimination in voting by perpetuating past discrimination in public education.[93]

This theory relating to the past discrimination in education is dependent on two factual assertions: (1) At the time a significant proportion of the current electorate was in school—the period from 1908 to 1949—the public school system provided inferior and unequal educational opportunities to Negroes. (2) The level and quality of the education was such as to impair the Negroes' chances—as compared to that of whites—to pass the literacy test now. The first assertion establishes past discrimination, and the second is a necessary condition for claiming that past discrimination is being "perpetuated" by imposition of the literacy test or, more specifically by denying or threatening to deny the right to vote to those who do not pass the test.

The trial record supporting these assertions was thin. Neither assertion received much support from the registration statistics by race. As noted, a significant portion of the Negro voting-age population was registered, and the differential between that figure and the proportion of the white voting-age population registered was not so striking as to make racial discrimination the most plausible

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nott v. Amos, 394 U.S. 358 (1969), the tests were suspended throughout the state. Administrative considerations would seem to extend that to a county certification, although there may be jurisdictional power in a state over all its subdivisions that does not exist in the county with regard to municipalities. These administrative considerations do not seem to be present in a § 4(a) termination, where the locality has all the initiative and where it is possible for the Court to tailor its judgment to terminate the suspension only within the jurisdiction of the plaintiff board of elections rather than the entire county.

[93] Mr. Justice Black, author of the Court's opinion in *Louisiana v. United States*, was the only dissenter in *Gaston County*. Mr. Justice Black dissented for "substantially the same reasons he stated in § (b) of his separate opinion in *South Carolina v. Katzenbach*." His position is not altogether clear.

In *South Carolina v. Katzenbach* his dissent was addressed only to the Court's holding that § 5 was valid. That section established a clearance procedure for new voting laws. *Gaston County*, which was a § 4(a) termination procedure, did not in any way implicate the § 5 clearance procedure.

Nor did the reason Mr. Justice Black articulated in § (b) of his opinion in *South Carolina v. Katzenbach* for believing § 5 to be unconstitutional—that it "distorts our constitutional structure of government"—seem to be applicable to a § 4(a) termination proceeding.

explanation.[94] On the second factual issue there was virtually no evidence in the record.[95] The first factual issue was made easier by the Court's assumption that "most of the adult residents of Gaston County resided there as children"[96] and that evidence concerning past education in Gaston County was all that was needed. The evidence in the record on that issue consisted of four types of statistics that indicated the difference according to race: (1) annual salary for teachers from 1908 to 1949; (2) the number of teachers who received certification in 1919; (3) the valuation of the school prop-

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[94] In United States v. Texas, 252 F. Supp. 234 (W.D. Tex.), *aff'd on other grounds*, 384 U.S. 155 (1966), a similar theory was advanced for invalidating the poll tax, but the Court refused to apply it because of the existence of comparable statistics. In that case it was asserted that in the past the state had discriminated in education, that discrimination impaired the income-producing potential of Negroes, and the imposition of the poll tax perpetuated that discrimination. While the district court acknowledged the soundness of the theory and found that there was past discrimination in education that left "a substantial proportion of the present adult Negro population as products of its discrimination," the small disparity was fatal in that instance. See note 86 *supra*. *Cf.* Swain v. Alabama, 380 U.S. 202 (1965). Negroes represented 26 percent of those eligible for jury panels. The jury panels averaged 10 percent to 15 percent Negroes. The Court held that the disparity was not sufficient to make out a prima facie case of discrimination under the doctrine of Norris v. Alabama, 294 U.S. 587 (1935). According to the 1960 census, Negroes constituted 11.5 percent of the voting-age population in Gaston County, including the municipalities. At the November, 1964, election Negroes were 9.4 percent of the persons registered. See note 86 *supra*.

[95] Mr. Justice Harlan rested on two very weak reeds to support this argument. One, a quotation from Bazemore v. Bertie County Board of Elections, 245 N.C. 398 (1961), which he used to show that the literacy requirement was "high." The other, testimony by a Negro minister active in voter registration who "testified that [the literacy] test placed an especially heavy burden on the county's older Negro citizens."

When the state court in *Bazemore* used the word "high," it was referring not to the read-and-write test but rather to what had to be read and written (a section of the state constitution). Moreover, the court in *Bazemore* had placed limitations on the test. And, in any event, *Bazemore* did not address itself to the test being administered in Gaston County after the Civil Rights Act of 1964. See note 92 *supra*. Nor did Mr. Justice Harlan accurately represent the Negro minister's testimony. The word "especially" related to the age and not the race of the applicant, and the thrust of his testimony was that the burden would be as heavy on the county's older white citizens as it was on the county's older Negro citizens.

[96] 395 U.S. 293, n. 9. In that same footnote the Court, perhaps somewhat uneasy with its assumption added: "It would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems." *Ibid.* There still needs to be a basis for finding that the school systems from which some of the current adult residents of Gaston County came were "segregated and unequal" when they went to school.

erty per pupil and per classroom from 1908 to 1949;[97] and (4) the number of persons over twenty-five years of age in 1960 with no schooling or with four years or less of schooling.[98]

In each instance, the difference by race was striking and substantial, but hardly sufficient to carry the burden. The story told by the statistics was at best fragmentary and incomplete. Its burden was not that the public school system discriminated by making a differential financial input for Negroes but that the training in reading and writing was poorer for Negroes than for whites. The financial issue would be critical for determining correction of a school system; the reading and writing issue would be critical for determining whether the use of literacy tests perpetuated past discrimination. The differential pay may reflect, not an inferior quality of Negro teachers, but that a dual pay structure existed based on racial discrimination or the operation of supply and demand in different markets. The difference in the number who received certificates may reflect, again not an inferior performance by Negro teachers, but merely the absence of appropriate paper credentials or discrimination in the administration of the certification program. Differences in the valuation of the buildings, if they are an indication of the quality of training, may have been attributable simply to the location of these buildings and the impact of racial discrimination on the real estate market. And the difference in the 1960 proportion of the Negro and white over-twenty-five population with little or no schooling need not have been due to the nonavailability of public education or to a negative reaction to poor schools, but to a host of other factors, such as the family structure and the financial need for the children to work.

The existence of these possible alternative explanations of the statistics meant that the statistics hardly told the whole story. Both the district court and the Supreme Court placed considerable stress on the fact that because this proceeding was commenced by Gaston County, it had the burden of proof. But this allocation of the

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[97] The district court had stated: "The evidence also shows that in the earlier years Negro schoolhouses tended to be constructed of wood whereas white schoolhouses were built of brick, and that in white schools the pupils had desks rather than the benches provided Negro pupils." 288 F. Supp. at 678, n. 18.

[98] In United States v. Texas, 252 F. Supp. 234 (N.D. Tex. 1966), another type of statistic was also used, the number of pupils per teacher. See also cases cited in notes 105 and 112 *infra*.

burden—which had been construed by the Court essentially as one of refuting the evidence of the Government[99]—cannot serve to make the statistical evidence less fragmentary. The Court did not assert that under § 4(a) a suspension should be continued on a finding by the trial court that plaintiff failed to prove no past discrimination in public education which was or would be perpetuated by the imposition of the literacy test. Instead, the Court assumed that the trial court, as a condition of denying the termination, must make an affirmative finding of discrimination in the educational system in the past which was or would be perpetuated by the imposition of the literacy test. Such a finding seems difficult to predicate solely on the fragmentary statistical evidence in the records in this case. The failure of the county to establish that these alternative explanations of the statistics are their actual explanations did not eliminate them as possible alternative explanations.

If the evidentiary gap left by these statistics was ever closed, it was by evidence of the existence of the dual school system in the county for the entire pertinent period. The Court was unwilling to rely on this undisputed fact because that might prove an embarrassment in light of the legislative history and the very existence of the termination option.[100] But the fact of segregated education seems to be the only one that could fill the gap left by statistics and impart credibility to the finding. Even without laying great stress on the perceived effect of segregated education on the quality of educational opportunity afforded Negroes, it was possible to draw certain inferences about the quality of education afforded Negroes under the dual school system.[101] These inferences are either

[99] The burden of refutation imposed in *Gaston County* is significantly more difficult than that envisaged in South Carolina v. Katzenbach, 383 U.S. at 332, where the Court said: "South Carolina contends that these termination procedures are a nullity because they impose an impossible burden of proof upon States and political subdivisions entitled to relief. As the Attorney General pointed out during hearings on the Act, however, an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government. Section 4(d) further assures that an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings. The burden of proof is therefore quite bearable, particularly since the relevant facts relating to the conduct of voting officials are peculiarly within the knowledge of the States and political subdivisions themselves."

[100] See text *infra*, at notes 105–09.

[101] See generally Fiss, note 49 *supra*, at 589–96.

confirmed by the statistics or possible alternative explanations are made less plausible, and the factual assertion concerning past discrimination in education in the county is made all the more credible.

The district court made these findings. The Supreme Court accepted them—though not without protecting itself with an oblique reference to the clearly erroneous rule. The Court reasoned that when a substantial portion of the current voting-age population attended school between 1908 and 1949, "the County deprived the black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test."[102] What thus emerges from *Gaston County* is a robust form of the freezing principle. As put in the closing sentences of the Supreme Court opinion: "From this record, we cannot escape the sad truth that throughout the years, Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. 'Impartial' administration of the literacy test today would only perpetuate these iniquities in a different form."[103]

The reach of this version of the freezing principle cannot be ignored. Even if it were confined to the special § 4(a) termination proceedings of the Voting Rights Act, it would seem to effect a greater change than the Court would have us believe. It will clearly preclude most jurisdictions now within the coverage of the act from effectively seeking termination.[104] Although the Court's opinion minimized any explicit reliance on the existence of the dual school system and emphasized certain statistics of the Gaston County educational system during the first half of this century, it is not unduly speculative to suggest that these statistics could be found in virtually all the covered jurisdictions, almost all of which had

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[102] 395 U.S. at 291.

[103] *Id.* at 296–97.

[104] Areas now subject to the coverage of the act are Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, thirty-nine counties in North Carolina, one county in Arizona, and one in Hawaii. House Hearings at 273.

One anomaly is the United States' consent to a termination judgment for another North Carolina county, Wake County. D.D.C. Civil Action No. 1198-66, January 23, 1967. This may be explainable by what was obvious throughout the *Gaston County* proceeding, that the theory that viewed the imposition of the literacy test as discrimination because it perpetuated past discrimination in education was an afterthought of the attorneys representing the United States and that the trial court, particularly Judge Wright, gave the theory its prominence. The consent judgment in *Wake County* was entered shortly before the filing of the United States' answer in *Gaston County*, and there was no mention of this particular freezing theory at all in that pleading.

dual school systems at the time of *Brown v. Board of Education.* It was unlikely that the Court was unaware of this. In a school desegregation case from Alabama, there had been findings in the record about the inequalities in public education throughout the state; and the Court had affirmed in a per curiam opinion.[105] In a case involving voting qualifications in Mississippi, the voluminous responses to interrogatories prepared by the United States indicated a similar pattern in that state.[106] In the uniform circuit-wide decree formulated by the Fifth Circuit in *United States v. Jefferson County Board of Education,*[107] the general nature of the alleged special facts of *Gaston County* was implicitly recognized in the requirement that as part of the minimum program required to disestablish the dual school system a remedial education program would have to be provided for those who attended Negro schools in the past.

Although in its brief in the Supreme Court the Department of Justice emphasized the so-called special facts of Gaston County's dual school system and represented that an "all-encompassing rule" was not at issue, but one requiring a case-by-case adjudication,[108] it was subsequently more candid. On June 26, 1969, three weeks after the Court's decision in *Gaston County* the Attorney General appeared before the House Judiciary Committee and stated: "Evidence in our possession indicates that almost all of the jurisdictions in which literacy tests are presently suspended did offer educational opportunities which were inferior."[109] Given the allocation of the burden of proof by the Court in *Gaston County*, that it is up to the local jurisdictions to refute that "evidence" in the Attorney Gen-

[105] Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom.*, Wallace v. United States, 389 U.S. 215 (1967).

[106] See United States v. Mississippi, 229 F. Supp. 925, 990–93 (S.D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965).

[107] 372 F.2d 836, 891–92, 900 (5th Cir. 1966), adopted *en banc*, 380 F.2d 385 (5th Cir.), *cert. den.*, 389 U.S. 840 (1967).

[108] Brief for the United States, p. 30 n. 21.

[109] Statement of Attorney General John N. Mitchell before Subcommittee No. 5 of the House Judiciary Committee on H.R. 4949, June 26, 1969. House Hearings, 218–27. To make the linkage between that "evidence" and the dual system clearer, the Attorney General added: "Furthermore, I believe that the *Gaston County* decision would continue to suspend existing literacy tests . . . in those areas outside of the seven states covered by the 1965 Act where publicly proclaimed school segregation was prevalent prior to 1954. This would include all or part of Florida, Arkansas, Texas, Kansas, Missouri, Maryland, the District of Columbia, Kentucky, and Tennessee." House Hearings at 222–27.

eral's possession, the inevitable effect of the *Gaston County* freezing principle is an "all-encompassing rule" making § 4(a) termination unavailable to virtually all covered jurisdictions.

The *Gaston County* principle reaches beyond the § 4(a) termination proceeding. The Court did not attempt to limit the principle to invalidating or suspending voter qualifications already suspended by operation of the statute. Instead, it emerged from the opinion as a sufficient basis for further action of the nature taken in the Voting Rights Act, namely, for congressional suspension of literacy tests that still remain in effect. As such, this version of the freezing principle would be much more encompassing than the theory focusing on the risk of abuse in light of past discriminatory disenfranchisement and the freezing theory of *Louisiana v. United States.*[110] Unlike the other theories, this theory for suspension does not seem to be regionally confined. Accordingly, *Gaston County* immediately became the basis for the Attorney General's request for a nationwide suspension of literacy tests, reaching the thirteen states outside the South that have literacy tests.[111] The litigation concerning the unequal quality of education in the areas outside the South may not have as yet been as rich as the school or voting litigation in the South.[112] But the census statistics concerning number of years of school completed by race indicate a disparity similar to that relied on in *Gaston County*,[113] and for the Attorney General the

[110] See text *supra*, at notes 72 and 73.

[111] According to the Attorney General's testimony, Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington, and Wyoming are the states outside the South that have literacy tests, and Idaho has a good character requirement. House Hearings at 223.

[112] See, *e.g.*, *In re* Skipwitch, 14 Misc.2d 325 (N.Y. Dom. Rel. Ct. 1958); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Horowitz, *Unseparate but Unequal—the Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. REV. 1147 (1966); Rousselot, *Achieving Equal Educational Opportunity for Negroes in the Public Schools of the North and West: The Emerging Role for Private Constitutional Litigation*, 35 GEO. WASH. L. REV. 698 (1967).

[113] According to the Attorney General's testimony: "In the Western states, 3.5 percent of the white males have only a fourth grade education as opposed to 10.6 percent of the Negro males over 25 years of age; in the North Central states, 3.1 percent of the white males have only a fourth grade education as opposed to 14.6 percent of the Negro males; and in the Northeast, 4.2 percent of the white males have only a fourth grade education as opposed to 8 percent of the Negro males." House Hearings at 224. These statistics compare favorably with the same ones in

migration statistics tell the rest of the story that seems to be required by *Gaston County*. As emphasized in the Attorney General's testimony several weeks after *Gaston County*:[114]

> The Bureau of the Census estimates that, between 1940 and 1968, net migration of nonwhites from the South totaled more than four million persons.
>
> Certainly, it may be assumed that part of that migration was to those Northern and Western states which employ literacy tests now or could impose them in the future; and that, as was true in Gaston County, the effect of these tests is to further penalize persons for the education they received previously.

This theory seems all the more plausible because the Court in *Gaston County* stated that it would be of no legal significance if some of the adult residents of Gaston County received their past unequal education in other states and counties, because the differential rate of registration in Gaston County could probably be duplicated in many other regions of the country.[115]

As broad a thrust as the *Gaston County* version of the freezing principle might have in its statutory context, whether it be the special § 4(a) termination proceeding or a nationwide expansion of the Voting Rights Act by further congressional action, this is not the limit of its utility. True, the standard applied was a statutory one—"used . . . with the purpose or effect of denying or abridging the right to vote on account of race or color." But this statutory phrase essentially expresses the general prohibition against racial discrimination, which is made applicable to voting in the Fifteenth Amendment.[116] Mr. Justice Harlan, the author of *Gaston County*,

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Gaston County, although the comparable figure in the South is somewhat more striking. The Attorney General said: "[I]n the South, 8.5 percent of the white males over 25 have only a fourth grade education as opposed to 30 percent for Negro males." *Ibid.* He based these statements on BUREAU OF CENSUS, CURRENT POPULATION REPORTS, Series P-20, No. 182 (1969); Educational Attainment: March 1968, table 3.

[114] House Hearings at 223. The footnote omitted refers to BUREAU OF CENSUS, CURRENT POPULATION REPORTS, Series P-23, No. 26 (July 1968). Social and Economic Conditions of Negroes in the United States, p. 2.

[115] See note 86 *supra*. It nevertheless appears difficult to obtain percentage statistics on the racial disparity of registered voters.

[116] In litigation that might be brought where the literacy tests were not suspended by virtue of the operation of the Voting Rights Act of 1965 but based instead on the self-operative provisions of the Fifteenth Amendment or 42 U.S.C. § 1971(a) it might well be argued that certain considerations of fairness—relating to such

dissented in *Morgan v. Katzenbach*,[117] indicating his belief that congressional power to invalidate state laws under the appropriate-legislation clause of the Fourteenth and Fifteenth Amendments is limited to those instances where the judiciary has determined or would be prepared to determine that the laws violated the self-operative, general prohibitions of the initial clauses of those amendments. The identity between this statutory phrase and the general antidiscrimination prohibition is also made clearer by the paraphrasing of the statutory phrase in *Gaston County* and *South Carolina v. Katzenbach;* the frequent use of that particular phrase throughout the statute; the previous use of the standard in litigation that immediately preceded the legislation; the role that the principal litigator, the Department of Justice, had in drafting the legislation; the legislative history of the act; and the formulations of the prohibition against racial discrimination in other cases.

The statutory phrase "purpose or effect" has no special limiting significance.[118] It was used simply to distinguish the ways in which an apparently innocent test could violate the prohibition. A test with a racially discriminatory purpose is one that could serve or further no legitimate state interest, but instead could serve only as a means of preventing Negroes from voting because of their race. A test with a racially discriminatory "effect" is one that might serve some legitimate state interest, such as the read-or-write literacy test, but the test through its operation—inevitable or actual—discriminates against Negroes on the basis of race. Nor does the Court's reliance on the legislative history of the Voting Rights Act—which seems in any event overstated[119]—have the effect of confining the

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questions as who is likely to have knowledge of the facts, who has the resources needed to uncover the facts, and whose view of the facts comport with widely shared beliefs—should lead the court to shift a substantial part of the burden of proof to the defendant, this time the locality that imposed the test. See Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (4th Cir. 1966).

[117] 384 U.S. 641, 659, 666–68 (1966).

[118] See Louisiana v. United States, 380 U.S. 145 (1965), *aff'g* 225 F. Supp. 353 (E.D. La. 1963); Smith v. Texas, 311 U.S. 128 (1940); United States v. Dogan, 314 F.2d 767 (5th Cir. 1963); United States v. Atkins, 323 F.2d 733 (5th Cir. 1963); South Carolina v. Katzenbach, 383 U.S. at 326; Sellers v. Trussell, 253 F. Supp. 915, 917 (M.D. Ala. 1966); Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962); Hawkins v. North Carolina Dental Soc., 355 F.2d 718 (4th Cir. 1966); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1099–1101 (1969).

[119] The *Gaston County* freezing principle emerges from the Supreme Court opinion as an independent, alternative justification for the central enforcement

principle to the interpretation of a peculiar statutory phrase, divorced from the general prohibition against racial discrimination. The pertinent statements in the legislative history may have informed the Court's judgment in applying the statutory standard. But, to be sure, they could do so only on the premise that the statutory standard is identical with the Fifteenth Amendment prohibition against racial discrimination. One statement relied on by the Court was that of the Attorney General:[120]

> The impact of a general re-registration would produce a real irony. Years of violation of the 14th amendment right of equal protection through equal education, would become the excuse for continuing violation of the 15th amendment right to vote.

The other statement relied on is that of twelve of the sixteen members of the Senate Judiciary Committee:[121]

> [T]he educational differences between whites and Negroes in the areas to be covered by the prohibitions—differences which are reflected in the record before the Committee—would mean that equal application of the test would abridge 15th amendment rights.

As a principle to guide the application of the general prohibition against racial discrimination, the version of the freezing principle that emerges from *Gaston County* should be placed on a continuum with those of the grandfather clause cases and *Louisiana v. United States*. There are, however, two interrelated innovations.

First, the *Gaston County* principle is not linked, as were the earlier cases,[122] to the problem of exemptions. Past discrimination does not result in the creation of a class from which some Negroes have been excluded and which is now exempt from the application of the standard. Instead, past discrimination relates to the distribution of government services—public education—and allegedly impairs the ability of Negroes compared with that of whites to satisfy a stan-

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technique of the Voting Rights Act of 1965, *i.e.*, test suspensions. It is hardly supported by the legislative history.

120 395 U.S. at 289. Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 22 (1965).

121 Quoted in 395 U.S. at 290; S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, at 16 (1965).

122 But see *Hamer v. Campbell*, discussed in note 127 *infra*.

dard to be applied to all. Some whites might not have the ability to pass the test and some Negroes do have the ability; but it is the factual premise of the *Gaston County* theory that at least a substantial proportion of those Negroes without this ability do not have it because of discrimination in the past against Negroes.

This departure from the traditional concern with exemptions has in turn two further consequences for the principle. It increases the evidentiary burden involved in establishing the causal links involved in the concept of perpetuation. What must be demonstrated to establish the freezing effect is not only that there was racial discrimination in the past but that this past discrimination was of such a nature originally and has so persisted during the intervening years that the imposition of the challenged test will be a perpetuation of that discrimination. Account must be taken of the significant possibility that over the years the disabling quality of the original discrimination has been dissipated or reinforced by a great number of factors and experiences, and, as a result, the disability may have disappeared or lost its racial contours. With *Louisiana v. United States*, however, as long as the local registrars persisted in refusing to register Negroes because of their race and the Negroes generally remained unregistered, as was invariably the case up to the filing of the complaint, and sometimes after, the exemption and its racial contours remained; and thus the freezing effect was clear.

The absence of a connection in *Gaston County* with exemptions also means that certain remedies are no longer available to correct the freezing effects: suspension for a limited number of years or reregistration. In the courts, the freezing principle of *Louisiana v. United States* prohibited the enforcement of the test but generally, or at least nominally, gave the local officials the option of avoiding or terminating that prohibition at any time and instituting the test, provided they conducted a reregistration. The costs of a reregistration were some measure of the importance local officials attached to the test. Moreover, even if this option of reregistration was not exercised, the nullificaton of the standard was limited to a relatively short period of years, just enough to give the otherwise nonexempt class the same opportunities as the exempt class. Hence the use of the words "suspension" or "postponement." Under the *Gaston County* version of the freezing principle, however, if it is not tied to the special termination proceeding of § 4(a) but governs the interpretation of the Fifteenth Amendment self-operative prohibi-

tion,[123] the nullification takes on an air of permanency. Short of instituting a remedial education program for persons educated in the past, which admittedly is not inconceivable, it is hard to see how or when the effects of the past discrimination in public education—which may be reinforced by other consequences of its own making, such as unemployment—are ever to be dissipated so that the literacy test could be imposed without freezing those effects.

The second innovation of the *Gaston County* version of the freezing principle is that it is freed from any requirement that the past discrimination be in the same area as the perpetuating act. The past discrimination in *Gaston County* did not occur in the qualifying of persons to vote, as was true in the grandfather clause cases and *Louisiana v. United States*, but in public education. By so sensitizing the principle to discrimination in areas of human activity other than voting and thus making it a two-dimensional theory, the potential of the freezing principle is magnified considerably. This is particularly true because the second dimension—public education—seems to play such an important role in our society, and the effects of past discrimination in education may be perpetuated by standards and conduct in areas not related to voting but also covered by a prohibition against racial discrimination.

This new two-dimensional quality of the freezing principle also has the effect of blurring the identity between the past discriminator and the perpetuator and changes the nature of the evidentiary inquiry. In *Guinn* there was not much of an issue of identity between the past discriminator and the perpetuator, since, presumably, the state legislature was responsible for the past discrimination and its perpetuation. With regard to *Louisiana v. United States* there was only slightly more of an issue. While the past discriminators differed from the perpetuators in name and person, sufficient identity was established by emphasizing the identity of the office and the fact that

[123] Unless the present act is extended, an issue currently before congressional committees, regardless of the discriminatory nature of the test, those covered jurisdictions will be able to obtain a § 4(a) termination five years after they were brought within the coverage of the act, for no test would have been used for five years. Section 4(a) also provides that the district court is to retain jurisdiction of the action for five years after judgment and is to reopen the matter upon motion of the Attorney General alleging discriminatory use of a test or device. The Attorney General stated that even if the Voting Rights Act were not extended, and literacy tests reintroduced, in light of *Gaston County* and the evidence in his possession he would "be obliged to move, shortly after reintroduction of the literacy test, to have the test suspension reimposed in the seven covered States." House Hearings at 222.

the officeholder has little personal stake in the qualifications imposed on voters.[124] In *Gaston County* the concern with past discrimination in public education and present discrimination in voting qualifications either eliminates a requirement of identity between the past discriminator and the perpetuator or finds it satisfied: (1) by the interrelationships of different government units or officers; (2) by the appropriateness of evaluating one entity's behavior in terms of its effect on the wrongs of another, if the second has power to correct those wrongs or avoid the perpetuation of them in a different form; or (3) by the fact that whatever costs there may be to the corrective action—administrative costs or costs in terms of the quality of the electorate—will be spread throughout the entire community. Although different governmental entities may be involved in this two-dimensional freezing theory, both entities speak for the same community.

There is a suggestion in a footnote in *Gaston County* that the identity between the discriminator and the perpetuator can be even further attenuated in the remark that it was of "no legal significance" which counties or states were responsible for inferior and unequal education. But the force of this suggestion is unclear, since it is made on the assumption that a substantial portion of the present adult population of the county had been educated in the county education system. Instead of saying that it will hold Gaston County responsible for the past discrimination of another county or state, it might be saying that the standard is discriminatory simply on the basis of its impact on Gaston County–educated Negroes. Just as the theory does not require that the past discrimination be of a quality to impair the chance of every Negro to pass the literacy test, the presence in the electorate of some Negroes who were educated elsewhere does not defeat the theory. What is critical is that in the

[124] See, *e.g.*, United States v. Mississippi, 339 F.2d 679 (5th Cir. 1964), where in the course of the appellate proceedings the notorious Registrar Wood of Walthall County, see United States v. Wood, 295 F.2d 772 (5th Cir. 1961), died, and the freeze order was issued against his successor.

In United States v. Duke, 332 F.2d at 770, the court of appeals said that the "state's presence was essential to the granting of complete relief." But it made that remark in justifying the joinder of the state. It is clear that a federal court can enjoin a local official from enforcing a statewide law in his jurisdiction without making the state a party, particularly when its action is predicated on abuse of that statute by a local official. See 28 U.S.C. § 2284(2) (requiring notice to the governor or Attorney General if the injunctive suit involves the enforcement, operation or execution of state statutes or state administrative orders).

past there was discrimination against Negroes in their education in the county—by a substantially related government institution—and that discrimination is being perpetuated by the imposition of the test on some significant segment of the same class of Negroes.

Finally, this two-dimensional quality radically changes the nature of the evidentiary inquiry required to establish past discrimination —a necessary condition for the application of the principle. In *Guinn* the past exclusion was judicially noticeable and confirmed by the choice of dates in the statute. In *Louisiana v. United States* an inquiry was undertaken to determine whether Negroes had been excluded from registering and what standards were applied to those who were registered in the past. This inquiry was a significant one. But the evidentiary inquiry called for by the *Gaston County* version of the freezing principle is significantly more ambitious. Two things are required. First, an assessment of the quality of education that is not satisfied simply by proof of the segregated character of student attendance patterns. Second, an evaluation of that education, as well as all the other factors responsible for the level of an adult's present ability. The staggering proportions of such an inquiry, assuming it is possible, are clear even when the interest is limited to the present educational system or that of the recent past.[125] But those dimensions are magnified when one has to reach further into the past to evaluate the education received by significant segments of the present electorate, and then go perhaps even deeper.[126]

IV. The General Contours of the Freezing Principle

The freezing principle is applicable in evaluating apparently innocent standards to determine whether they violate the prohibi-

[125] Judge Wright, the author of the trial court opinion in *Gaston County*, was no doubt aware of this. See his opinion in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub. nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[126] When one ambiguity with the 1960 statistics concerning the disparity in the proportion of all Negroes and whites with four years or less of schooling was pointed out—that this might not be attributable to the inferior educational opportunity provided Negroes but to other factors, such as "economic necessity"—the district court raised the specter of an earlier historical inquiry: "Gaston County would, of course, also have to show the economic necessity was not itself the result of segregated education of the Negro parents." It is conceivable at that point that the inquiry may get easier because one is back to the cardinal past discrimination—slavery.

tion against racial discrimination because of their actual or inevitable effects. To understand the theoretical role that the freezing principle plays in this evaluation, two types of voting standards should be distinguished: past-required-act standards and content standards.

Past-required-act standards require that some particular act have been done by the applicant in the past. The time when the act was done is as important to the standard as that the act was done. In such a context the risk of the freezing effect is clear, and the freezing principle has particular force. Under it the claim could be made that: (1) past discrimination either prevented the applicant from performing the required act when it was required or made it entirely excusable not to do the act then; and (2) to disqualify a person from voting for not doing the required act would perpetuate past discrimination. The relief sought could be either to relieve the applicant from doing the required act or, more modestly, relieve the applicant from having failed to act at the time it was required. In the latter instance the decree would require the registrar to accept *nunc pro tunc* performance of the act.[127]

These past-required-act standards have not been a significant barrier to Negro voting and thus have played a minor role in the litigation and legislation. Moreover, the freezing effect of such special standards is so easily perceived that no sophisticated doctrines need be developed to account for it.

With the standards that have been the subject of concern in the

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[127] In Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966), the court had occasion to apply the freezing principle to this special type of standard. The registrar of Sunflower County had engaged in a pattern or practice of discrimination in the registration process. The court entered an order enjoining the registrar from such discrimination in the future. The order also contained a freeze provision. Because of the short time between that order and the scheduled elections, two types of past-required-act voting-qualification standards were challenged on the basis of their freezing effect in subsequent proceedings in the district court: (1) a requirement that an elector register four months prior to the general election—a cutoff date that expired two months before the initial federal court order; and (2) a requirement that poll taxes must be paid for the two preceding years. The district court denied relief, and before the appellate court acted, the local elections were held, in which these two standards were imposed. The court of appeals set aside the election, ordered that new cutoff dates for registration be set, and ordered that nonpayment of the poll taxes for the preceding two years would not be ground for disqualification if the applicant now tenders poll tax for the two preceding years. See also United States v. Dogan, 314 F.2d 767 (5th Cir. 1963) (actual discrimination in acceptance of poll tax); § 10(d) of Voting Rights Act of 1965, 42 U.S.C. § 1973h(d) (Supp. IV 1968). *Cf.* Lane v. Wilson, 307 U.S. 268 (1939).

grandfather clause cases, in *Louisiana v. United States*, and in *Gaston County*, the freezing effect is more subtle. With content standards, such as the literacy test, the essence of the requirement is doing the act or having the ability required by the standard, not doing the act at some particular point of time. Thus, a freezing effect can be present and take at least two forms: (1) granting an exemption and (2) requiring performance when the chance of success is impaired by a disability for which government is responsible.

In grandfather clause cases and *Louisiana v. United States* the critical flaw in the operation or application of the standard consisted of the fact that a class was exempted from it. Without regard to considerations of racial discrimination, past or present, the exemption—itself a distinction, classification, or form of unequal treatment—can be invalidated under general guarantees of equal treatment if the interests served by it do not justify it.[128] Wholly apart from the racial dimensions of the claim, a serious question is whether any exemption from a voting qualification standard can be justified. With this perspective, the special role of the freezing principle is to relate the exemption to the prohibition against racial discrimination, to perceive the discrimination even though the standard is to be applied to both whites and Negroes who are not already registered. Attention is focused on the past and how the class now exempt was constituted. If it is determined that in the past Negroes were excluded from the class exempted, something admittedly violative of the antidiscrimination prohibition, the present exemption can be conceptualized as "the perpetuation of past discrimination" and a heavier burden of justification is required of the interest served by granting the exemption or not taking action that would eliminate that exemption (*e.g.*, reregistration). If that interest is of insufficient magnitude to justify the perpetuation of the past discrimination by the granting of the exemption, then the exemption

[128] See Carrington v. Rash, 380 U.S. 89, 95 (1965) (invalidation of Texas law disenfranchising servicemen stemmed in part from exemption of another group of likely nonresidents, students, from similar treatment). See generally Rinaldi v. Yeager, 384 U.S. 305 (1966) (exemption for unsuccessful appellants who were merely fined, as opposed to those imprisoned); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (exemption for embezzlers from statute providing for sterilization of habitual criminals). This past Term the Court formulated the balancing test in these terms: "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, interests which the State claims to be protecting, and interests of those who are disadvantaged by the classification." Williams v. Rhodes, 393 U.S. 23, 30 (1968).

cannot be given or the exemption must be extended to those excluded from that class and, for practical considerations, often to others.

The other, and perhaps more subtle, type of effect of these standards, such as that involved in *Gaston County*, is the impairment of the chances of success attributable to certain disabilities. The test is a "heavier burden" on a class. Once again with this effect, like the exemption, it is not a necessary condition of invalidating an ostensibly innocent standard that its differential impact be linked to past discrimination. The differential impact may be such as to offset any legitimate interest served by the standard and thus constitute a prohibited discrimination under more general guarantees of equal treatment. In *Harper v. Virginia Board of Education*,[129] for example, the payment of a poll tax was invalidated on this differential-impact theory: as a qualification for voting the poll tax cast a heavier burden on the poor than on the rich, and the legitimate state interest served by this law was not sufficient to justify the unequal treatment. This theory, which focuses on the differential impact without regard to historical or causal explanations, should be as sufficient a basis for establishing a violation of the prohibition against racial discrimination as it is for establishing a violation of the less clearly recognized prohibition that forbids discrimination against a less well-defined class, the "poor." The racial contours of this differential impact could be predicated on such statistics as the disparity by race of the number of years of schooling (without regard to the causal explanation for that disparity). Under this theory, apparently innocent standards that placed a heavier burden on Negroes would be evaluated on the basis of a balancing process between the harm—denial of the right to vote or the risk of being denied that vote—and the interest served by the standard.

Assuming the general availability of such a theory,[130] the added function of the freezing principle is to structure and facilitate this

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[129] 383 U.S. 663 (1966).

[130] See also Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). See Fiss, note 49 *supra*, at 588–89. In his opinion for the Court in *Gaston County* Mr. Justice Harlan clearly preserved his disassociation from the pure differential-impact theory by stating: "We have no occasion to decide whether the Act would permit reinstatement of the literacy test in the face of racially disparate educational or literacy achievements for which a government bore no responsibility." 395 U.S. at 293 n. 8.

balancing process between the harm and the legitimate interests. Once again, attention is focused on the past. This time the purpose of such a historical inquiry is not to determine the racial contours of an exempted class, as in the grandfather clause cases and *Louisiana v. United States*. Instead it is to seek the historical or causal explanation for the heavier burden and to determine whether it is attributable to a disability that is due to past discrimination by government. If it is determined that past discrimination is to some significant degree responsible for this disability and hence the heavier burden, then rejecting Negroes for not meeting that standard can be classified or conceptualized as "the perpetuation of past discrimination." This conceptualization in turn imposes a heavy burden of justification on the interests furthered by the standard. It requires compelling interests. If they are not present, the standard is held to violate the prohibition against racial discrimination. In *Gaston County* the Court in one sense did not have to consider the remedial consequences of that judgment, for the standard was already suspended by operation of a statute based at least in part on other theories. More generally, the remedial consequence could be similar to that of *Harper* and the post–Voting Rights Act application of *Louisiana v. United States*. Rather than leading to a more tailored decree enjoining the enforcement of the standard only against the direct victims of the past discrimination, the inhibiting effect of the standard and practical considerations, in fashioning a remedy, could result in a blanket decree totally enjoining the enforcement of the standard until it no longer poses the risk of perpetuating past discrimination.

Thus, stated more generally, in both the exemption and disability situations, the special office of the freezing principle is to structure and facilitate a balancing process between the effect of a seemingly innocent standard—disenfranchisement or the risk of disenfranchisement—and the legitimate interests served by that standard. That principle operates in two steps. If the effect of imposing the standard would be to perpetuate past discrimination, that is, have a "freezing effect," then a heavier burden of justification is imposed upon the legitimate interests served by that standard. If that burden cannot be sustained, the application of the standard violates the prohibition against racial discrimination.

While the freezing principle appears as a means of facilitating and structuring the balancing process, there are several difficulties

with its use that must be noticed. First, the evidentiary difficulty of reconstructing the past limits the capacity to classify the effects in question as the "perpetuation of the past." The second difficulty—a more normative one—requires the principle to have a margin of flexibility so that even after the evidentiary difficulties are overcome and the determination is made that the standard perpetuates past discrimination, it is possible to accommodate compelling state interests.

The difficulties inherent in attempting to reconstruct the past should not go unnoticed. These evidentiary difficulties place a genuine strain upon the legal system, particularly the judicial component. Under *Louisiana v. United States* theory it was necessary to establish both that there was a substantial class of Negroes excluded from the class of those already registered because of their race and, where the challenged standard had been on the books for some time, that the standard was not in fact imposed upon those already registered. This factual inquiry was made manageable because great reliance was placed on the striking racial disparities existing in the percentages of voting population registered, coupled with general familiarity with the social setting. The more vigorous proof—usually unavailable because of inadequate records and memories—concerning the experiences of particular individuals was confirmatory of the natural inferences from this disparity, and the disparity had the effect of generalizing the experience to a class. Similarly, the evidentiary responsibility in *Gaston County* was made manageable because the evidentiary requirements were not very exacting, nor could they have been. An inquiry into the nature of the public educational system during the past half-century and a determination of the quality of education provided Negroes and the effect it had on their present abilities to qualify borders on the hopeless. The evidence is likely to consist of nothing more than old surveys and reports, at best containing fragmentary and ambiguous statistics,[131]

[131] In *Gaston County* the Negro principal of the Negro high school testified for the county that, however bad the schools had been, they were of sufficient quality to enable the Negroes to pass the county's literacy test. But his testimony was dismissed by the district court on the ground that it was "unpersuasive," as the "mere contemporary conclusions from an interested witness," and on the ground that the witness came to Gaston County and started teaching there in 1932 and "his knowledge therefore dates only from that time." 288 F. Supp. at 668 n. 19. The word "only" is startling, when one realistically reflects on the witnesses usually competent to testify on these questions.

although in *Gaston County* these gaps appeared to be filled by inferences drawn from the existence of the dual school system during that period. Moreover, under both *Louisiana v. United States* and *Gaston County* types of theories, difficulties remained in identifying the victims of the past wrong.

The evidentiary inquiry to reconstruct the past need not, of course, be so difficult. There might well be various ameliorating factors and devices:[132] admissions, either from the lips of a witness or in records generously preserved from an earlier time when admissions of discrimination were less unfashionable; the fact that the alleged discrimination was in the recent past rather than the distant past; the existence of judicial findings of discrimination contemporaneous with the wrong; the fact that the discrimination may be quite easily perceivable even from the current perspective;[133] and the formulation of per se rules based on commonly shared empirical insights or the natural inferences from readily ascertainable facts, such as statistically demonstrable racial disparity or an open policy of maintaining a dual school system. The point is not, however, that the evidentiary burden is impossible, precluding any use of the principle, but rather that the evidentiary difficulties in reconstructing the past—if not the imagination and investigative resources of the litigators and the patience of the trial judge—will limit the role that the freezing principle can properly play in the effort of the legal system to evaluate apparently innocent standards. The judicial component of our legal system should be particularly sensitive to preserving this limitation. Because of its authoritarian, nonrepresentative nature as an institution, it is in no small measure dependent for its moral posture upon the integrity of its fact-finding processes.

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[132] One basis for placing time limits on the inquiry, namely, that predicated on the date when the past discrimination became "illegal," would not serve as much of a limitation in voting since that past discrimination is—at least now—likely to have been "illegal" under one of the century-old constitutional guarantees, if not the Civil Rights Act of 1866. *Cf.* United States v. Dogan, 314 F.2d 767 (5th Cir. 1963). In any event, as a bar to considering past discrimination, it would seem artificial, since the inquiry is whether certain present conduct violates the legal prohibition against racial discrimination, not whether the past conduct did. As Judge Wisdom pointed out in *United States v. Louisiana*, in *Guinn* the past discrimination—not allowing Negroes to vote before 1866—was not at the time it occurred "illegal." 225 F. Supp. at 394. Whether the past discrimination was "illegal" at the time it occurred might nevertheless be appropriate to consider in determining the strength of the normative force to be given to the conclusion that the present conduct perpetuates the past discrimination.

[133] See United States v. Ward, 349 F.2d at 801.

Even if the past can be reconstructed so that it could be established that past discrimination is being perpetuated, there are other factors that limit the force of the principle. These are the factors that deprive the past wrong of some of its moral force and thus make it sometimes permissible to say, as Judge Wisdom, one of the most sensitive judges, said, "This is a product of the past. We cannot turn back the clock."[134]

Part of the pressure in society to forget the past no doubt generates from either those who discriminated or those who have little or nothing to gain from the correction of past discrimination. As such, these pressures express nothing more than the assertion of self-interest. These assertions of self-interest will have to be confronted and will make the correctional task more difficult. But they are not a sufficient basis for the legal system—if it is to be a just system—to retreat from the task. They, like other forms of resistance, govern the choice of tactics for accomplishing that task, not the commitment to do so. There are other reasons to forget the past, and to the extent that these reasons are generally acknowledged as valid by the victims of the past wrong—as well as others in society—they are severed from considerations of self-interest and begin to supply a basis for a moral climate that sometimes makes it permissible to forget the wrongs of the past without suffering blame, reproach, or guilt. It is this moral permissibility of forgetting the past that will place a strain upon the legal system committed to a version of the freezing principle that is so absolute it would make the perpetuation of any past discrimination automatically a sufficient basis for invalidating the standard and coercing corrective action. It is a strain quite unlike and of a much more serious character than that attributable to the pressure rooted in self-interested resistance, for in this instance the morality of the corrective enterprise is thrown into question.

There are several general reasons that could have this significance. First, owing to the inherent evidentiary difficulties of reconstructing the past and the causal relationship between the past wrong and the present effect, even if the "past wrong" and its "perpetuation" were established, there would inevitably be error in identifying the victims of the past wrong. Either the concept of "victim" will be arti-

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[134] Whitfield v. United Steelworkers of America, 263 F.2d 546, 551 (5th Cir. 1959). Compare his opinion in Local 189, United Papermakers and Paperworkers v. United States, No. 25956, 5th Cir., July 28, 1969.

ficially restricted or there will be a margin of overinclusion in the class receiving the benefits of the corrective action. Second, the sheer passage of time, as well as the two-dimensional quality of the *Gaston County* freezing theory, means that one person or entity—the perpetuator—would in part be held responsible for the wrongs of another. This element of vicarious responsibility is likely to drain the concept of the force it would otherwise have, particularly when the passage of time between the past wrong and the perpetuation afforded the victims some opportunity to use self-help to correct the discrimination, thus casting some responsibility on the victims themselves for its perpetuation. Third, if the perpetuation of the past discrimination were to be an automatic basis for invalidating ostensibly innocent standards, change—some of which might otherwise be desirable, such as raising standards—will become more costly. Starting from a recognition of how widespread discrimination was in the past, instituting a change would generally have to be accompanied or preceded by action—such as a general reregistration or a remedial education program—that would eliminate the risk of perpetuating past wrongs. Such costs might be not only a tax upon the change but also a diversion of resources from other purposes that might generally benefit the community more. Fourth, the past plays such a pervasive role in determining an individual's ability or qualification and is so filled with "wrongs" that any principle committing the legal system to invalidating every standard that perpetuates past discrimination is likely to compromise another moral tenet—that each person should be judged on the basis of his individual ability. To some extent this norm of judging each on the basis of his ability holds the individual generally responsible for his own present ability or qualification without constantly making readjustments for the historical or causal explanation for the present level of ability or qualification. Such constant readjustments would make the principle administratively unworkable, given the pervasiveness of past wrongs and the likelihood of their continuing effect, and would deprive it of some of its motivational force as a prod to self-improvement. This is not obscured by the moral acceptability and administrative feasibility of giving a cripple a shorter distance to run in a handicap race. Such disability is dramatic and easily perceivable. The handicapped person may run one or two races, but he is not thought to be a full participant in the competitive system to which the other runners belong. Fifth, the disruptive and dislocative quality of correc-

tive action is particularly magnified when it is predicated on conduct that reaches far into the past and upon which further conduct and action are likely to have been built.

Considered separately, each of these factors might have only limited applicability to voting qualifications. Considered collectively, they have the force of making it morally permissible sometimes to forget the past. The conclusion of perpetuated past discrimination demands a very high degree of justification to avoid invalidation of the standard under the antidiscrimination prohibition. But it does not necessarily require invalidation of the standard or other corrective action by the legal system. There must be the further normative judgment that there is no compelling interest that would justify failure to take action necessary to eradicate the freezing effect. Thus the freezing principle has a margin of flexibility that enables it to accommodate these compelling considerations, which can present themselves with varying degrees of intensity in various situations.

This margin of flexibility is analytically consistent with the antidiscrimination prohibition. The conduct that concededly violated the prohibition—the discrimination—occurred in the "past," and it remains to be decided that the standard that perpetuates past discrimination presents a current occasion for corrective action by the legal system. Thus, while the Court in *Louisiana v. United States* spoke of the duty to eliminate the freezing effect, it realized that this duty—perhaps like all legal duties—had limits. It is the duty of the equity court to render a decision "which will so far as possible eliminate the discriminatory effects of the past." In the context of the legal system and particularly the equitable component, the concept "so far as possible" primarily guards against, not physical impossibilities, but normative impossibilities that would be involved in the corrective action. More generally, however, this margin of flexibility is not likely to be openly acknowledged, but instead the interests it might otherwise protect are likely to be silently accommodated in the finding that the claimant has not adequately established past discrimination, or in the specifics of the relief, given the considerable range of alternatives open to the court nominally committed to eliminating the freezing effect. For example, even under the *Louisiana v. United States* theory, a court has considerable latitude in deciding precisely which old standards can be imposed in the future, with what degree of vigor, and what the

appropriate class of beneficiaries is. The logic of the freezing principle provides no inexorable rules for these determinations. Guided only by concerns of fairness, account is likely to be taken of compelling state interests. Thus, while the Court of Appeals for the Fifth Circuit repeatedly formulated the *Louisiana v. United States* freezing principle in the most absolute terms, it quietly refused—perhaps overcrediting *Lassiter*'s declaration that the read-and-write literacy test served a permissible state purpose—to apply the principle so as to invalidate that test in toto, even though there was no doubt that a class with racially discriminatory contours had been exempted.

There is likely to be a more open recognition of this margin of flexibility inherent in the freezing principle when the principle is applied to voting activity other than the qualifying of persons to vote. What is needed to bring this element of flexibility out into the open is the presence of compelling interests that might be more easily perceivable than those that purportedly justify voting qualifications. Then the refusal to conclude that the conduct or standard with the freezing effect violates the antidiscrimination prohibition would be more clearly understood not to imply a lack of commitment to enforce the antidiscrimination prohibition. Such a compelling interest was present when attempts were made to set aside elections because of the freezing effect.[135] In *McGill v. Ryals*,[136] the freezing principle was used as the predicate for a claim for relief that would declare certain local officers to be elected illegally and to schedule an election for those officers several years earlier than would occur under the ordinary operation of state law. It was alleged that these officers were elected at a time when Negroes were excluded from voting because of their race, and that allowing these officials to continue in office would perpetuate past discrimination. The three-judge district court decided the case on the basis of the pleadings. The court was prepared to assume that the plaintiffs could, after an evidentiary hearing, reconstruct the past discrimination and establish that the continued occupancy of the elected

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[135] See Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966); Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967). See also Mississippi Freedom Democratic Party v. Democratic Party, 362 F.2d 60 (5th Cir. 1966), refusing to postpone an election so as to enable additional Negroes to register before the election and thus overcome the effects of the past discrimination.

[136] 253 F. Supp. 374 (M.D. Ala. 1966), *app. dism.*, 385 U.S. 19 (1966).

offices by the incumbents was a form of perpetuating that discrimination. The court also made it clear that it thought it had the power to afford this type of relief and provided reminders of how vigorously the court had been committed to the eradication of the effects of past discrimination. But recognizing the community's interest in avoiding uncertainty in election results, the disruptive impact that the requested relief would have upon "planning and the orderly administration of public affairs," and that "in time" opportunities would present themselves for "easing" this effect of past discrimination, the court granted a motion to dismiss the complaint. The appeal to the Supreme Court was dismissed "for want of jurisdiction because the case was not appropriate for a three-judge court." But, significantly, the Court did not provide an order that would have preserved the plaintiff's right of appeal to the court of appeals, which might have been appropriate, since neither the court below nor the appellees had questioned the appropriateness of the three-judge court. There was a dissent by Mr. Justice Douglas stating that he thought a three-judge court was properly convened but that he would affirm the judgment below.

Nor could the district court's decision in *McGill v. Ryals* be understood as reflecting an ambivalence toward the freezing principle or a view that it was inapplicable beyond the voting-qualification situation or was anything but a recognition of the margin of flexibility in the principle, even once the freezing effect was established. Four weeks after its decision in *McGill v. Ryals*, in the inevitable next case, *Sellers v. Trussell*,[137] the principle was applied in the same general context. There the principle was used as a basis for invalidating a state law that not only perpetuated but in a sense aggravated past discrimination in another Black Belt county—Bullock County—by extending the term of office of the incumbent county commissioners from four to six years. Two of these commissioners were elected in 1962, when 100 percent of the whites of voting age were registered, compared to fewer than 0.2 percent of the Negroes of voting age. The court concluded that the compelling interests involved in *McGill v. Ryals* were not present, or if they were, to a lesser degree, and that the law violated the Fifteenth Amendment prohibition against racial discrimination in voting. As the Court said in *Sellers v. Trussell*, "The Act freezes into office

[137] 253 F. Supp. 915 (M.D. Ala. 1966) (alternative basis for decision was § 5 of the Voting Rights Act of 1965).

for an additional two years persons who were elected when Negroes were being illegally deprived of the right to vote. Under such circumstances, to freeze elective officials into office is, in effect, to freeze Negroes out of the electorate."[138]

Within these general contours, the freezing principle plays a role not dissimilar to the theory that assigns a special role to the right to vote because it is allegedly "a fundamental right, preservative of all rights."[139] This precious-right theory, which played some role in *Harper* as a supplement to the differential-impact theory of that case, can be used in connection with general prohibitions against discrimination, such as that of the Equal Protection Clause, as well as the more specific prohibition against racial discrimination, such as that of the Fifteenth Amendment. Its function is to require a very high burden of justification of any standard that denies the right to vote. As such, its function is quite similar to that of the freezing principle in evaluating putatively innocent state laws, but it does not supplant that principle. Although it would not be useful to speculate whether there are any differences in the weight of the burden of justification cast by the freezing theory as opposed to the precious-right theory, there are other reasons that make the freezing principle of some significance, notwithstanding this precious-right theory. First, the freezing principle is available to those who do not subscribe to the precious-right theory, and that no doubt accounts for the fact that Mr. Justice Harlan—who has steadfastly refused to subscribe to the precious-right theory as an adjunct to the guarantee of equality—wrote the opinion in *Gaston County* for a near unanimous Court with no mention of the fact that what was at stake was a "precious right." Second, the freezing principle is able to deal with an offsetting constitutional value present in the voting-qualification area that makes it difficult to place a heavy burden of justification on the standards qualifying persons to vote simply because the right to vote is at stake. The latitude of the states in setting voting qualifications, as opposed to most other general activity that falls within the reserved powers of the state,

[138] 253 F. Supp. at 917.

[139] See Reynolds v. Sims, 377 U.S. 533, 562 (1964); Harper v. Virginia Board of Elections, 383 U.S. 663, 667, 670 (1966); Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964); Carrington v. Rush, 380 U.S. 89, 96 (1965); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1885); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). But see McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

has some specific constitutional recognition. The Constitution specifically allows states to set standards for the election of federal officials and thus clearly implies that it has a similar power for state officials.[140] It is true that this latitude or power is specifically circumscribed by certain constitutional prohibitions, but the freezing principle is directly rooted in one of those specific prohibitions, that against racial discrimination, rather than simply in the fact that voting is involved.

Third, as an independent principle for guiding the application of the prohibition against racial discrimination, and one that *Gaston County* does not in any way tie to any alleged unique importance of voting, the freezing principle has greater potential for expansion and application in other areas of human activity, such as employment, housing, and education. As a principle linked to the prohibition against racial discrimination rather than to the activity (voting), it functionally resembles the suspect-classification theory. That theory treats any racial classification, among a select group of classifications, as inherently suspect, and thus once again requires a heavy burden of justification to avoid the conclusion that it violates the prohibition against racial discrimination.[141] The suspect-classification theory is of limited utility in guiding the application of the antidiscrimination prohibition to seemingly innocent standards. By definition, such a standard does not contain explicit racial classification as is envisaged by the suspect-classification theory. There may be a situation, and perhaps *Guinn* was one, where the racial classification is thinly veiled and the Court is prepared to say that the surface innocence is just a disguise; but that seems to be the unusual, less problematic situation.

Finally, the freezing theory, which makes disqualifications suspect because they perpetuate past discrimination, may rest on more realistic assumptions than that which makes these standards for voting suspect because the right to vote is allegedly "preservative of all rights." The fact of the matter is that while the right to vote may be a necessary condition for full participation in the political

[140] See the dissent of Mr. Justice Harlan in Katzenbach v. Morgan, 384 U.S. at 660–61.

[141] See Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967); McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969). See also Note, note 118 *supra*, at 1087–1131; Fiss, note 49 *supra*, at 576–77.

process, and its general availability critical on a theoretical level for that process to become meaningful, unfortunately it is too often the case that it is not preservative of all other rights, particularly from the individual's perspective. Sometimes it is not even preservative of itself, as emphasized in the post-Reconstruction wave of disenfranchisement.[142] That preservative role is dependent on a great number of other factors, such as the short-run self-interest of the majority and the number of persons with similar interests, and these factors often make the right to vote quite meaningless. Thus, under the precious-right theory a role is claimed for the right to vote that does not readily accord with some of our experiences and sense of reality, and this is often manifested in claiming that other rights—education, employment, and then housing—are basic rights. On the other hand, the freezing theory is more realistic in that it finally enables the Court—*Lassiter* notwithstanding—to confront the read-and-write test on its own terms. These terms were perceived in *South Carolina v. Katzenbach*, when the Court said:[143]

> Meanwhile beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia, enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named states, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of adult whites were unable to read or write.

In a footnote the Court gave a historical or causal explanation for this disability that directs the inquiry to the central, dominating past discrimination—slavery: "Prior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write."[144]

There is a special attractiveness to a principle that satisfies accepted criteria for a legal principle and at the same time is capable of dealing with the validity of a law on terms that accord with a

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[142] See generally Mills v. Green, 159 U.S. 651 (1895); Giles v. Harris, 189 U.S. 475 (1903); Giles v. Teasley, 193 U.S. 146 (1904); Williams v. Mississippi, 170 U.S. 213 (1898); United States v. Texas, 252 F. Supp. at 243. In United States v. Louisiana, 225 F. Supp. at 374, the court supplied the following statistics to show the disenfranchisement brought about in that state by the grandfather clause adopted in 1898: January 1, 1897: number of Negro voters, 130,344; white voters, 164,088. March 17, 1900: Negro voters, 5,320; white, 125,437.

[143] 383 U.S. at 310–11.

[144] *Id.* at 311 n. 10.

reality. Although in one sense it is perhaps fortunate that the *Gaston County* freezing theory was not advanced and thus not in any way foreclosed in the early literacy test cases, including the 1959 decision in *Lassiter*, in another sense it is surprising that it took so long to emerge if the observation of *South Carolina v. Katzenbach* is accurate. Its full emergence might have been, however, in some subtle way conditioned, not only upon a constant whittling away of the literacy test through other doctrines and upon the presence of the proper trial record, but also upon a general societal acceptance of *Brown*. Lawyers and judges are, of course, not blind to what they see as men, but sometimes they do not know how, or believe it appropriate, to say what they see.

V. Conclusion

The freezing principle emerged in evaluating standards by which to qualify persons to vote and the general contours of the principle have been sketched in that context. The natural, inevitable thrust of its logic extends to other areas covered by the prohibition against racial discrimination.[145] In these areas the risk of perpetuating past discrimination might be more acute and more generalized than in voting, where the freezing principle might be considered limited because of the constantly recurring opportunity to register,[146] the regular and frequent occurrence of elections, and the

[145] In areas other than voting, consideration of past discrimination has been relevant for some for answering not only the enforcement questions but also the coverage question. See note 10 *supra*. For example, present, admittedly discriminatory conduct has been viewed by some as a "relic" or "badge" of slavery, thereby eliminating any state action requirement by bringing the conduct within the self-operative provisions of the Thirteenth Amendment or at least within the grant of congressional power of that admendment. See Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 Harv. L. Rev. 1294 (1969).

[146] See United States v. Palmer, 356 F.2d 951 (5th Cir. 1966), where, following the district court decision in *United States v. Louisiana*, the registrars in East and West Feliciana parishes stopped registering persons altogether, and the Court, recognizing that this would most acutely perpetuate past discrimination (*i.e.*, the exclusion of Negroes from the class of those already registered), enjoined the registrars from failing to register or to slow down the registration process. See also United States v. Atkins, 323 F.2d 733, 745 (5th Cir. 1963), where the Court prohibited the registrar from not allowing rejected applicants to reapply, and thought "as long as there is the ability to reapply, it is unlikely that within this zone [of practices permitted by Alabama law] there would be any freezing effect so great as to amount to an injustice."

presence of special political incentives in voting for organizing self-help measures to correct the effects of the past. By comparison, the other areas are characterized by a general absence of decisions and by conduct having a mark of permanence, such as constructing a school, acquiring seniority rights in employment, and choosing a residence, a job, or a trade. This is not the occasion to judge the appropriateness of extending the principle to these other areas, but two striking aspects of the enforcement process in voting that might be responsible for the emergence of the freezing principle should be noted. Both underscore the fact that this has been the analysis of what many regard as a success story.[147]

The first is the lack of any ambivalence in recent years about the correctness of the antidiscrimination prohibition in voting and a vigorous commitment to the enforcement process. This may be due to a commonly shared belief in the unique importance of the right to vote. More realistically it seems to be due to the utter lack of justification for racial discrimination in voting. Voting is a government activity that leaves little room for personal associational interests which have—at least at certain points in our history—justified the refusal to extend the antidiscrimination prohibition to other areas of human activity and are responsible for resistance to and complications in the enforcement of that prohibition in covered areas. Extending the vote to those who are disenfranchised does not involve the reallocation of a scarce opportunity or resource, and the cost of this action is small to each individual who is franchised and to the community. Whatever costs are said to exist are difficult to defend on grounds consistent with democratic values concerning representative government or widely shared experiences. For example, we generally know too much about the nature of our own voting decisions to believe seriously the claim that the integrity of the electoral process will be impaired by dispensing with a requirement to read and write a section of a constitution as a qualification to vote. In addition, our notions of representative government may reflect an affirmative value in encouraging total participation in elections. The principle of "one man–one vote" reflects not only an ideal distribution of representatives so as to equalize voting pow-

147 See U.S. CIVIL RIGHTS COMMISSION, POLITICAL PARTICIPATION 222–56 (1968), giving registration statistics in jurisdictions covered by the Voting Rights Act of 1965. The Attorney General said, "Since 1965 more than 800,000 Negroes have been registered in the seven States covered by the act." House Hearings at 221.

er but also the democratic ideal that each man should have a vote. These factors might be present to varying degrees in other areas, but in voting they have coalesced to give additional moral impetus to the enforcement process. This is in part reflected in the fact that the prohibition against racial discrimination in voting has been a very specific constitutional guarantee for almost a century.

The second notable aspect of the enforcement process in voting —perhaps in part due to the general societal commitment to the process—is that the separation-of-powers doctrine has had a very special meaning in this context. The doctrine has not been used as a mere basis for resolving jurisdictional disputes. It does not emphasize the separation of the powers, but their existence. The enforcement process in voting has been a collective enterprise in which each branch has used its distinctive powers and facilities fully and inventively, and the exercise of power by one branch has been respected, supported, and built on by the others.[148]

The importance of this interplay to the strength of the enforcement enterprise and the emergence of the freezing principle is part of the message of *Gtuinn v. United States*, *Louisiana v. United States*, and *Gaston County v. United States*. It is also vividly illustrated by *Giles v. Harris*,[149] a case at the turn of the century when organized efforts to deprive Negroes of the franchise they had enjoyed since Reconstruction reached a crescendo. Giles, who brought the suit on behalf of himself and "about 5000 Negroes" in Montgomery, Alabama, alleged that whites had been permanently registered in the recent past under lax standards; that Negroes, including himself, were, because of their race, excluded from registering at the time whites were registered; and that in the future more severe standards would be required to qualify to vote. The theory—so strikingly similar to that of *Louisiana v. United States*—was that the continued exemption of whites from the higher standards imposed on Negroes would perpetuate past discrimination. In an opinion by Justice Holmes, the Court reached out to declare that "it seems impossible to grant the equitable relief which is asked."[150] Unwilling to stop at the ground or decision that "the tra-

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[148] See generally Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[149] 189 U.S. 475 (1903).

[150] *Id.* at 486. The first Justice Harlan, noting that the case involved "questions of considerable importance" and that it was submitted to the Court without oral

ditional limits of proceedings in equity have not embraced a remedy for political wrongs,"[151] the Court articulated two further grounds. The first, making little sense, was predicated on the view that there was inconsistency in the two claims to have "the whole registration scheme of the Alabama Constitution" declared void and to register as a qualified voter; the Court said that it could not resolve one claim without the other.[152] The second ground, and clearly the more important, candidly reflected a sense of the loneliness and helplessness of the judiciary in, as Justice Holmes described it, "a new and extraordinary situation":[153]

> 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 that 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.

Sixty years later, in *United States v. Alabama*,[154] a voting suit brought in the name of the United States under the Civil Rights Act

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argument, paused on certain jurisdictional problems which led him to believe that the Court should not decide the merits. But "to avoid misapprehension" he briefly added that on the facts alleged "the plaintiff is entitled to relief in respect of his right to be registered as a voter." *Id.* at 494, 504.

[151] *Id.* at 486.

[152] Persistent Giles also instituted an action for damages of $5,000 and applied for a writ of mandamus to compel the registrars to register him. The state court then denied relief on grounds quite similar to that of Justice Holmes: If the constitutional provisions were void under the Fifteenth Amendment, the board of registrars appointed under it would be a "nullity" (not liable for refusing to register him and could not be compelled to register him), and if they were valid, these registrars acted validly. The Supreme Court thought these were adequate, independent state grounds and dismissed the writs of errors in both cases. Giles v. Teasley, 193 U.S. 146 (1904).

[153] 189 U.S. at 486, 488.

[154] 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962).

of 1957, which postdated the decision in *Gomillion v. Lightfoot*,[155] the Court of Appeals for the Fifth Circuit not only understood the kind of equitable relief Justice Holmes had found incomprehensible but, more importantly, realized that, at least in voting, the era of *Giles v. Harris* had come to an end. What "*Giles* itself envisaged"[156] had been done. On a petition for certiorari, and without plenary consideration, the Supreme Court unanimously affirmed in a one-sentence per curiam.

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

[156] 304 F.2d at 592.