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The literacy test,[1] used by many states in determining the qualifications of voters, has proved to be a major obstacle to the elimination of voter discrimination based on racial characteristics.[2] Under recently enacted statutory provisions, citizens who attempt to register to vote in certain states are faced with test questions of such difficulty that it is virtually impossible to answer them satisfactorily.[3] Where there is permanent voter registration, the effect is to secure a position of political dominance for those registered prior to the institu-

1. Literacy tests have been defined by Congress as including "any test of the ability to read, write, understand, or interpret any matter." Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C.A. § 1971 (1964). See generally SMITH, VOTING AND ELECTION LAWS 17-18 (1960).

2. See generally BARNETT & GARAI, WHERE THE STATES STAND ON CIVIL RIGHTS (1962). Where there are proper standards for judging the answers, literacy tests have been held constitutionally valid. See Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949).

3. See, *e.g.*, ALA. CODE tit. 17, §§ 31-33 (1958); GA. CODE ANN. §§ 34-117 to -119 (1962); LA. REV. STAT. § 18:31 (Supp. 1963); MISS. CODE ANN. § 3130, 3213 (Supp. 1962). Compare ARIZ. REV. STAT. ANN. § 16-101 (1956); CAL. ELECTIONS CODE § 310(g); MASS. GEN. LAWS ch. 51, § 1 (1964); N.Y. ELECTIONS LAWS §§ 150, 168; N.C. GEN. STAT. § 163-28 (1964); VA. CODE ANN. § 24-68 (1964). See generally *Hearings on S. 83 Before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. 863 (1957); MENDELSON, DISCRIMINATION 5-32 (1962); Note, 31 NOTRE DAME LAW. 251, 256, 259-60 (1956).

An example of the difficulty of the new literacy tests was demonstrated in Detroit, where a newspaper asked leading citizens to answer three of the questions used in the recent registration of Negroes in Selma, Alabama. The questions asked were: (1) "If no person receives a majority of the electoral vote, the vice-president is chosen by the Senate. True or false?" (2) "Ambassadors may be named by the president without approval of the Senate. True or false?" (3) "Where do presidential electors cast ballots for president?:—home state; —Washington, D.C.; —home county." The results of the poll showed that of eight federal judges questioned, none answered all three correctly, only one of eight state circuit judges was able to answer all three

tion of the tests.[4] In those states in which individuals had been denied registration by prior discriminatory practices of a registrar, the effect is to perpetuate that voter discrimination.

A challenge to the utilization of one of the new literacy tests, based upon the racially discriminatory effect of its use, was made in the recent case of *United States v. Duke*.[5] In this case the Department of Justice sought to enjoin the registrar of voters in Panola County, Mississippi, from engaging in certain practices in the registration of Negro applicants resulting in discrimination against them. It was shown that as of the time of the trial only two of over 7200 Negroes of voting age were registered, whereas over seventy per cent of the eligible whites had been permitted to register. The trial court denied the injunction, finding no discrimination, and the case was appealed to the Court of Appeals for the Fifth Circuit. The court of appeals reviewed the development of the Mississippi voter qualification laws since 1955, noting that the literacy test requirements had become increasingly formidable.[6] Finding that discrimination had in fact existed, the court reversed the trial court. Although the new Mississippi literacy test provisions had been held

correctly, and a sampling of professors and city officials revealed a similarly small percentage of correct answers. See Detroit News, Jan. 24, 1965, § A, p. 1, cols. 1-5.

4. See, *e.g.*, United States v. Ramsey, 331 F.2d 824, 837 (5th Cir. 1964); United States v. Atkins, 323 F.2d 733, 743 (5th Cir. 1963).

5. 332 F.2d 759 (5th Cir. 1964). The case was brought under the Civil Rights Acts of 1957 and 1960, 71 Stat. 637 (1957), 42 U.S.C. § 1971 (1958), amending REV. STAT. § 2004 (1875), as amended, 74 Stat. 90 (1960), 42 U.S.C. § 1971 (Supp. V, 1964).

6. Prior to 1955, MISS. CONST. § 244 (1890) read: "On and after the first day of January, A.D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of this State, *or* he shall be able to understand the same when read to him; *or* give a reasonable interpretation thereof." (Emphasis added.)

The current constitutional and statutory provisions are MISS. CONST. § 244: "Every elector shall, in addition to the foregoing qualifications be able to read *and* write any section of the Constitution of this State *and* give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government. . . ." (Emphasis added.)

MISS. CONST. § 241-A: "In addition to all other qualifications required of a person to be entitled to register for the purpose of becoming a qualified elector, each person shall be of good moral character."

MISS. CODE. ANN. § 3213 (Supp. 1962): "A person shall not be registered unless he be able to read and write any section of the constitution of this state and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government; he shall also demonstrate to the county registrar that he is a person of good moral character.

"The person applying to register shall make a sworn, written application for registration . . . without assistance or suggestion from any person or memorandum whatever . . . . As originally enacted each provision is and it is further declared to be mandatory and not directory. . . .

"Provided, however, the provisions herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954. . . ."

constitutional on their face by lower federal courts, a position recently reversed by the United States Supreme Court,[7] the court enjoined the registrar for approximately one year from using these stringent tests in qualifying those Negroes who were eligible prior to the trial, but who had been denied registration through racial discrimination. The order did not prohibit the application of the new tests to those who had for the first time become eligible for registration after the commencement of the trial. This injunctive remedy has been termed "freezing," which the court defined as "keeping in effect, at least temporarily, those requirements for qualification to vote, which were in effect, to the benefit of others, at the time the Negroes were being discriminated against."[8]

The utilization of the freezing remedy suspends, for a limited time, valid state statutes.[9] Thus, before ordering such a remedy, it would seem that the court should determine that the policy and practical factors involved warrant its use. In *Duke*, the court found that the discriminatory practices were part of a "pattern or practice" of discrimination in Panola County.[10] No such finding is prerequisite to the granting of injunctive relief under the Civil Rights Act of 1957,[11] although it is a basic requirement for the use of the federal voting referee plan, added by the Civil Rights Act of 1960.[12] The court evidently considered that the breadth of its order, both in terms of people and statutory provisions affected, indicated that a finding should be made that the discriminatory practices were at least as comprehensive as would be needed to satisfy the require-

7. United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd and remanded*, 33 U.S.L. WEEK 4258 (U.S. March 8, 1965). *But see* United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 33 U.S.L. WEEK 4262 (U.S. March 8, 1965). The Department of Justice has recently filed suit against the State of Alabama, challenging the validity of its literacy tests. See N.Y. Times, Jan. 31, 1965, § 1, p. 55, col. 1.

8. United States v. Duke, 332 F.2d 759, 769 (5th Cir. 1964).

9. In Comment, *The Federal Voting Referee Plan and the Alteration of State Voting Standards*, 72 YALE L.J. 770 (1963), the author investigates the appropriateness of legislation which seems to authorize federal courts to modify state voting laws.

10. United States v. Duke, 332 F.2d 759, 770 (5th Cir. 1964).

11. 42 U.S.C. § 1971(c) (Supp. V, 1964): "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsections (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. . . ."

12. 42 U.S.C. § 1971(e) (Supp. V, 1964). Under the provisions of the referee plan, after finding that the discrimination was pursuant to a pattern or practice, the court may appoint a citizen to serve as federal voting referee. This referee certifies to the court the qualifications of anyone who claims to have been denied registration because of discrimination and who is qualified under state law, using standards no more stringent than those used to qualify others. If this certification is not successfully challenged, the court will order the applicant registered. See generally United States v. Mayton, 335 F.2d 153 (5th Cir. 1964); Heyman, *Federal Remedies for Voteless Negroes*, 48 CALIF. L. REV. 190 (1960); Comment, *The Federal Voting Referee Plan and the Alteration of State Voting Standards*, 72 YALE L.J. 770 (1963).

ments of the similarly broad federal voting referee provision. In determining that a pattern or practice of discrimination existed, the *Duke* court considered the high percentage of Caucasians registered as compared to the infinitesimal figure for the Negroes, the fact that whites were helped in filling out the application form and in answering the test whereas the Negroes were not, and the discrepancy in the degree of difficulty of the test questions asked of the two groups, if indeed the Caucasians were asked questions at all. Additionally, the court noted the harassment and long delays attending the Negro registration, factors which have been prominent in the recent registration drive in Selma, Alabama.[13] Furthermore, the *Duke* court considered the pervasive factor of discouraging voting by Negroes. The possibility that only a few instances of discrimination would discourage a much greater number of Negroes from even attempting to register has been accorded varying significance by the courts.[14] In *Duke*, the trial court emphasized the fact that only six Negroes had attempted to register from 1932 to 1959.[15] However, exemplary discrimination directed against only a few can serve as effectively as economic and physical reprisals used directly to discourage others from attempting to register.[16] The actual impact of the discriminatory practices can be seen most vividly if a court will consider the factor of discouragement in conjunction with the stark figures of voter registration.

In *United States v. Atkins*,[17] the court presented forceful arguments for not applying the "freezing" remedy when any other reasonable alternative is available. Essentially, that court was concerned that freezing would permit the registrars to perpetuate the invalid practices of their predecessors[18] (*e.g.*, giving aid in filling out the applications when the statute requires that no assistance be rendered) and that the "use of this principle necessarily prevents the state from passing otherwise valid regulations."[19] It would

13. In Selma, a federal district court ordered the registration board to process one hundred applications a day when the board was open, enjoined the use of the difficult literacy test, and threatened to invoke the federal voting referee plan in an effort to speed up Negro registration. See N.Y. Times, Feb. 5, 1965, p. 1, col. 2 (city ed.).

14. *Compare* United States v. Dogan, 314 F.2d 767, 771 (5th Cir. 1963) *and* United States v. Louisiana, 225 F. Supp. 353, 393, 397 (E.D. La. 1963), *aff'd*, 33 U.S.L. WEEK 4262 (U.S. March 8, 1965), *with* United States v. Mississippi, 229 F. Supp. 925, 954, 972 (S.D. Miss. 1964), *rev'd and remanded*, 33 U.S.L. WEEK 4258 (U.S. March 8, 1965) *and* United States v. Fox, 211 F. Supp. 25, 32 (E.D. La. 1962), *rev'd*, 334 F.2d 449 (5th Cir. 1964).

15. 332 F.2d at 762.

16. See, *e.g.*, United States v. Wood, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962). See generally MENDELSON, *op. cit. supra* note 3, at 23; Heyman, *supra* note 12, at 200, 204.

17. 323 F.2d 733 (5th Cir. 1963). *Accord*, United States v. Crawford, 229 F. Supp. 898 (W.D. La. 1964).

18. United States v. Atkins, 323 F.2d 733, 744 (5th Cir. 1963); United States v. Crawford, *supra* note 17, at 902.

19. United States v. Atkins, *supra* note 18, at 744.

therefore appear desirable that other alternatives be explored before valid laws are suspended for even a limited period.

One available alternative would be to challenge directly the constitutionality of the recent, more stringent laws. This course was not open to the *Duke* court since a federal district court had previously held the laws constitutional,[20] but it is doubtful whether even a successful challenge would give the individualized relief needed. In some states the history of voter qualification statutes indicates a marked tendency toward laws whose purpose is to assure the continued disfranchisement of the Negro.[21] Thus, it would appear likely that if a particular statute is invalidated as unconstitutional, its successor may not completely eliminate the prior discrimination. Continued challenges to each successive statute would involve several years, during which time the Negro would still be without the right to vote.

The alternative of requiring the registrar to purge the rolls of illegally registered voters is also available.[22] The *Duke* court dismissed this option as being impossible on the facts of the case,[23] although this alternative was adopted in a recent and factually similar Fifth Circuit case.[24] Only where complete records are kept on each applicant can a determination be made as to the legality of each registration. Moreover, the purging would be accomplished, in many cases, by the same individuals who had registered these applicants initially, creating at least the potentiality of half-hearted and ineffective efforts. The result of such a purge would be merely to reduce the number of Caucasian voters, whose position of dominance as a group would still be assured by the application of more stringent registration laws. The Negroes who had been discouraged, harassed, or refused on technical grounds would remain disfranchised.

Another possible remedy, and one which the court in *Duke* held out to the state as an alternative to its injunction requiring freezing,[25] is to require a complete re-registration under the new laws. This alternative is most suitable where a previous law has been declared unconstitutional and the new statute contains stringent literacy tests. By ruling that no voter registered under the previous unconstitutional law would be allowed to rely on that

20. See United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd and remanded*, 33 U.S.L. WEEK 4258 (U.S. March 8, 1965).

21. See, *e.g.*, Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); United States v. Mississippi, *supra* note 20, at 983-97 (dissenting opinion); United States v. Louisiana, 225 F. Supp. 353, 362-80 (E.D. La. 1963).

22. Statutes in several states require periodic review of the registration lists and the cancellation of the registration of any voter not legally qualified. See, *e.g.*, LA. REV. STAT. §§ 18:131 -:132 (1950); MISS. CODE ANN. §§ 3113, 3240 (Supp. 1962).

23. 332 F.2d at 768.

24. United States v. Ramsey, 331 F.2d 824, 828 (5th Cir. 1964).

25. 332 F.2d at 769-70.

registration to vote in future elections,[26] a court could effectively force the state to re-register. This remedy would have avoided the anomalous situation confronting the voters in a Louisiana parish, where a three-judge federal district court held the old Louisiana voter qualification law unconstitutional and applied the freezing remedy to the new and very difficult literacy test.[27] Although those previously registered were permitted to continue to vote, the registrar in the parish closed his office entirely, refusing to register *any new* voters. His actions were upheld by another federal district court, which reasoned that the earlier decision had left this registrar without any qualification test to apply and, therefore, he could not judge the eligibility of new applicants.[28] Besides preventing the occurrence of this untenable situation, re-registration would probably cause the state to revise the literacy test to assure that most citizens could pass it.[29] As a side effect, re-registration would also necessitate some modification in normally valid statutes providing for permanent voter registration. It seems well settled, however, that a state may not rely on these statutes to condone and perpetuate discrimination.[30] However, re-registration is a time-consuming and expensive device, which would not be appropriate for every change in voting laws. Furthermore, the state could become involved in innumerable lawsuits in attempting to determine which changes in its registration laws would require re-registration.

The court could have compelled registration of specific Negroes who possessed the qualifications found by the court to be applicable.[31] This would immediately correct past inequities and, therefore, remove the necessity for holding in abeyance valid statutes and state constitutional provisions. This procedure has been employed several times;[32] however, where there are thousands of po-

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26. Similar orders have been suggested concerning the validity of future elections under unconstitutionally apportioned legislative districts. See, *e.g.*, Davis v. Mann, 377 U.S. 678, 693 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 675-76 (1964); Reynolds v. Sims, 377 U.S. 533, 585 (1964). It is highly unlikely that the courts would question the validity of past elections in which those who were registered under the previous law had voted because of the immensely chaotic impact of an order invalidating such elections. Analogous challenges to the validity of criminal statutes passed by malapportioned legislatures have been rejected. See, *e.g.*, Dawson v. Bomar, 322 F.2d 445 (6th Cir. 1963), *cert. denied*, 376 U.S. 933 (1964).

27. United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 33 U.S.L. WEEK 4262 (U.S. March 8, 1965).

28. United States v. Palmer, 230 F. Supp. 716 (E.D. La. 1964).

29. See United States v. Duke, 332 F.2d 759, 770 n.12 (5th Cir. 1964).

30. See, *e.g.*, Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915).

31. See United States v. Duke, 332 F.2d 759, 771 (5th Cir. 1964), where the court enumerates the criteria it found to have been used by the registrar for the Caucasian voters.

32. See, *e.g.*, Alabama v. United States, 304 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962); United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964); United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962).

tential registrants, judicial determination of their qualifications would occupy the court for an unnecessarily long period. Utilization of the federal voting referee plan[33] would probably reduce the amount of court time needed for this type of registration, but it would be effective only when used in conjunction with the freezing remedy, since the referee must apply the state's qualification laws.

It seems, therefore, that the application of the freezing principle as used by the court in *Duke* is a practicable and equitable solution.[34] Those Negroes toward whom the discriminatory practices were directed in the past are given a chance to register and vote on the same basis as that enjoyed by the Caucasians during that period.[35] In addition, continued judicial involvement will hopefully be kept to a minimum. Furthermore, the freezing remedy in this situation will not cause anyone to lose his vote, a result which would be likely under purging or re-registration.

In analyzing the ramifications of the freezing remedy, notice should be taken of the limitations in the *Duke* decision. First, freezing was used only after the court found a pattern or practice of discrimination based on race or color. Second, the freezing is to last for only a limited period of time and is to apply to a limited group—those Negroes who were eligible prior to the trial. Since freezing involves restrictions on the efficacy of a state's law-making powers, it seems that the limitations on the utilization of the freezing remedy were correctly considered by the *Duke* court and that the remedy should be invoked only in situations which present no other reasonable alternatives. So limited and utilized, the principle of freezing state laws and practices by a federal court can be an effective method of furthering the purpose of the fourteenth and fifteenth amendments, as well as the Civil Rights Acts.[36]

33. See note 12 *supra*.

34. The rationale of the *Duke* decision was adopted as a basis for the application of the freezing remedy in United States v. Mississippi, 339 F.2d 679 (5th Cir. 1964).

35. The decision has had an immediate effect. A member of the Student Nonviolent Coordinating Committee, working in Panola County as part of the Mississippi Summer Project of 1964, has reported that by mid-summer over five hundred Negroes had been registered there since the injunction was ordered in the last week of May, 1964. Ann Arbor News, Aug. 10, 1964, p. 17, col. 2.

36. The purpose of the Civil Rights Acts seems to have been stated most succinctly in H.R. REP. No. 291, 85th Cong., 1st Sess. 12 (1957): "This right to vote for Federal Offices is, as is the right to vote in all other matters, the foundation of our representative form of Government. It is the sole means by which the principle of consent of the governed as the source of governmental authority is made a living thing. . . . The right of franchise must be protected by the sovereign if representative government is to be maintained."