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Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982

Cover Page Footnote

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NOTES

ERADICATING RACIAL DISCRIMINATION IN VOTER REGISTRATION: RIGHTS AND REMEDIES UNDER THE VOTING RIGHTS ACT AMENDMENTS OF 1982

INTRODUCTION

The right to vote is fundamental in American society because it preserves all other rights.¹ Since passage of the Voting Rights Act (VRA or Act)² in 1965, the most obvious impediments to voter registration, such as literacy tests and poll taxes, have been abolished.³ More recently, national attention has shifted to other methods of impairing exercise of the franchise, such as discriminatory redistricting plans and at-large voting schemes.⁴ Nonetheless, state-erected barriers to registration continue to discourage citizens, particularly blacks, from exercising their right to vote.

For example, citizens living in the northern part of Sunflower County, Mississippi, must travel 100 miles roundtrip to register to vote in county, state and federal elections.⁵ Because of a procedure called dual registration,⁶ the same individuals must venture to yet another location to register for municipal elections.⁷ In a rural area near Tuscaloosa, Alabama, the only registration office in the county is

1. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

2. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (current version at 42 U.S.C.A. §§ 1971, 1973 to 1973bb-1 (West 1981 & Supp. 1983)).

3. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax held unconstitutional); U.S. Const. amend. XXIV (same); 42 U.S.C. § 1973aa (1976) (prohibiting literacy tests); *id.* at § 1973h (prohibiting poll tax).

4. See S. Rep. No. 417, 97th Cong., 2d Sess. 6 (1982) [hereinafter cited as Senate Report], reprinted in 1982 U.S. Code Cong. & Ad. News 177, 183; Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 552-54 (1973).

5. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 503 (1981) (statement of Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law) [hereinafter cited as *House Hearings*].

6. See H.R. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981) [hereinafter cited as House Report]. Dual registration requires a citizen to register to vote in two different jurisdictions, typically a county and a municipality, to be eligible to vote in those jurisdictions. *Id.*

7. *House Hearings*, *supra* note 5, at 503 (statement of Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law). Dual registration exacerbates the problems of inconvenient registration locations. Mississippi is the only state to explicitly require this two-step registration procedure. See Miss. Code Ann. §§ 21-11-1, -3 (1972). In contrast, Florida is the only state to explicitly prohibit dual registration. See Fla. Stat. Ann. § 98.041 (West 1982). Most states fall somewhere in the middle. Arizona, for example, explicitly permits municipi-

closed weekends, evenings and lunch hours.⁸ In DeKalb County, Georgia, where over 80 percent of whites and less than 25 percent of blacks were registered in 1980,⁹ the League of Women Voters and the NAACP were temporarily authorized to conduct registration drives at more convenient hours and locations than were otherwise provided by the county election board.¹⁰ After successful efforts in early 1980, however, the election commission abruptly discontinued authorizing such drives.¹¹

These restrictive practices are not isolated; they are typical of voter registration procedures throughout the nation.¹² There is substantial

palities to require separate registration, *Ariz. Rev. Stat. Ann.* § 16-114 (1975). Most states, however, are silent on this issue. Thus, local officials generally have the power to invoke the process if they wish. See Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C.L. Rev. 189, 198 (1983) (dual registration in Alapaha, Georgia). Dual registration, however, has never been challenged and its constitutionality is in doubt. *Cf. Haskins v. Davis*, 253 F. Supp. 642 (E.D. Va. 1966) (per curiam) (invalidating election system which treated citizens registered for federal elections differently from those registered for all elections).

8. 1 *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 328 (1982) (statement of Ruth J. Hinerfeld, President, League of Women Voters of the United States) [hereinafter cited as *Senate Hearings*].

9. See *NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 670 (N.D. Ga. 1980).

10. *Id.* at 672-73; 1 *Senate Hearings*, *supra* note 8, at 316 (testimony of Ruth J. Hinerfeld, President, League of Women Voters of the United States).

11. *NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 670 n.2, 673 (N.D. Ga. 1980); 1 *Senate Hearings*, *supra* note 8, at 316 (testimony of Ruth J. Hinerfeld, President, League of Women Voters of the United States).

12. See, e.g., *United States v. Dallas County Comm'n*, 548 F. Supp. 875, 888-89 (S.D. Ala. 1982) (inconvenient location and hours, failure to appoint deputy registrars), *appeal docketed*, No. 82-7362 (11th Cir. Nov. 18, 1983); *Clark v. Marengo County*, 469 F. Supp. 1150, 1164 (S.D. Ala. 1979) (short hours, inconvenient location, failure to appoint deputy registrars); *Latin Am. Union for Civil Rights, Inc. v. Board of Election Comm'rs*, 349 F. Supp. 987, 988 (E.D. Wis. 1972) (failure to appoint deputy registrars); 1 *Senate Hearings*, *supra* note 8, at 315, 327-30 (testimony of Ruth J. Hinerfeld, President, League of Women Voters of the United States) (inconvenient times and locations, failure to appoint deputy registrars); *House Hearings*, *supra* note 5, at 549-50 (testimony of Fred Banks, Mississippi State Representative and President of the Jackson Branch, NAACP) (inconvenient hours and location); *id.* at 378 (testimony of Michael G. Brown, Coordinator of Branch and Field Activities, Va. St. Conference, NAACP) (refusal to appoint deputy registrars); *id.* at 405-07 (testimony of James Gay, Esq.) (inconvenient hours); *id.* at 844 (testimony of Fred Gray, Esq.) (failure to appoint deputy registrars); *id.* at 823-24 (testimony of Eddie Hardaway, Jr., District Judge, Sumter County, Ala.) (inconvenient hours and locations); *id.* at 472 (testimony of Dr. Aaron Henry, President, Miss. St. Conference, NAACP) (inconvenient locations); *id.* at 753, 774-75 (testimony of Abigail Turner, Legal Serv. Corp. of Ala.) (inconvenient hours); *id.* at 410 (testimony of Rev. I. Joseph Williams) (inconvenient hours and locations); Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 706 n.365 (1983) (inconvenient hours and locations). The existence of restrictive registration practices has been well

evidence linking these practices to depressed voter registration rates.¹³ Although restrictive registration practices burden all potential voters,

documented over the last twelve years. See *Universal Voter Registration Act of 1977: Hearings on H.R. 5400 Before the House Comm. on Administration*, 95th Cong., 1st Sess. 265-66 (1977) (statement of Archie E. Allen, Admin. Director, Voter Educ. Project) [hereinafter cited as *Hearings on Universal Voter Registration*]; *Voter Registration By Mail: Hearings on S. 1177 Before the Senate Comm. on Post Office and Civil Service*, 94th Cong., 1st Sess. 369 (1975) (ABA Special Committee on Election Reform, Report to the House of Delegates (1974)) [hereinafter cited as *Hearings on Mail Registration*]; *id.* at 30-31 (testimony of Sen. Kennedy); *The Concept of National Voter Registration: Hearings Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service*, 92nd Cong., 2d Sess. 436-37 (1972) (testimony of Kenneth Guido, Director, Voting Rights Project, Common Cause) [hereinafter cited as *Hearings on the Concept of National Voter Registration*]; *id.* at 401-02 (Report of the Youth Democratic Clubs of Am.); *id.* at 85 (testimony of Gary Nelson, Att'y Gen., Ariz.); *Hearings on S. 1199, S. 2445, S. 2457 and S. 2574 Before the Senate Comm. on Post Office and Civil Service*, 92nd Cong., 1st Sess. 116 (1971) (statement of Sen. Chiles) [hereinafter cited as *McGee Hearings*]; *id.* at 232 (testimony of Russell Hemenway, Committee for an Effective Congress); *id.* at 57 (testimony of Sen. Humphrey); *id.* at 173 (testimony of Charlotte Roe Kemble, Executive Director, Frontlash); *id.* at 254 (testimony of Thomas C. Matthews, Jr., ACLU); House Report, *supra* note 6, at 14; H.R. Rep. No. 778, 93rd Cong., 2d Sess. 7-8 (1974) [hereinafter cited as House Report No. 778], *reprinted in* Senate Comm. on Post Office and Civil Service, *Voter Registration By Postcard 77-78 (1974)* [hereinafter cited as *Postcard Registration*]; S. Rep. No. 91, 93rd Cong., 1st Sess. 3 (1973) [hereinafter cited as Senate Report No. 91], *reprinted in* *Postcard Registration, supra*, at 17; 119 Cong. Rec. 1481, 1483-84 (1973) (League of Women Voters Educ. Fund, *Administrative Obstacles to Voting (1971)*) [hereinafter cited as *League Report*]; *id.* at 1485 (remarks of Sen. Humphrey); *id.* at 1479 (remarks of Sen. Kennedy); P. Kimball, *The Disconnected* 5, 15, 301 (1972); U.S. Comm'n on Civil Rights, *The Voting Rights Act: Unfulfilled Goals 24-27 (1981)* [hereinafter cited as *Unfulfilled Goals*]; U.S. Comm'n on Civil Rights, *The Voting Rights Act: Ten Years After 71-78 (1975)* [hereinafter cited as *Ten Years After*]; Lewis & Allen, *Black Voter Registration Efforts in the South*, 48 *Notre Dame Law.* 105, 121 (1972).

13. See *Hearings on Mail Registration, supra* note 12, at 780, 819, 859-60 (Daniel Yankelovich, Inc., *A Study of the Registration Process in the United States (1973)*); Bureau of the Census, U.S. Dep't of Commerce, *Voting and Registration in the Election of November 1980*, ser. P-20, No. 370, Table 19, at 89 (1982) [hereinafter cited as *Voting & Registration*]; R. Wolfinger & S. Rosenstone, *Who Votes? 77 (1980)*; Kelley, Ayres & Bowen, *Registration and Voting: Putting First Things First*, 61 *Am. Pol. Sci. Rev.* 359, 368-69 (1967); see also Terchek, *Political Participation and Political Structures: The Voting Rights Act of 1965*, 41 *Phylon* 25, 28 (1980) (data suggests that more limited opportunities to register, rather than the lower average income of blacks, accounts for disproportionately low black voter registration). While voter apathy may be a cause of some nonregistration, see *Voting & Registration, supra*, Table 19, at 89 (14.4 million Americans attribute their failure to register to lack of interest); *N.Y. Times*, Sept. 25, 1983, § 1, at 33, col. 1 (simplified registration procedures unlikely to increase voter turnout), the studies cited above and legislative sources indicate that restrictive registration practices are a major cause of nonregistration. See, e.g., *McGee Hearings, supra* note 12, at 66 (testimony of Sen. Inouye); *id.* at 5 (testimony of Sen. Moss); *id.* at 158-59 (testimony of Anne Wexler, Director, Voting Rights Project, Common Cause); House Report No. 778, *supra* note 12, at 7, *reprinted in* *Postcard Registration at 77. But see* 127 Cong. Rec.

such practices particularly handicap minorities in their efforts to register.¹⁴

This Note examines the problems caused by restrictive voter registration practices and outlines potential solutions to those problems. Part I reviews the history of racial discrimination in voting and the manner in which restrictive registration practices perpetuate the effects of this history. Part II demonstrates that states and counties have an affirmative duty under the fourteenth amendment to eliminate election procedures that, though facially neutral, perpetuate the effects of past racial discrimination in voting. Part III of this Note contends that Congress, by enacting the 1982 amendments to the VRA, intended to implement that duty with regard to voter registration. Part IV examines the source of the federal judicial power to remedy restrictive registration practices and suggests possible remedies and the factors that courts should consider in deciding which remedy is appropriate in a particular situation.

H6846 (daily ed. Oct. 2, 1981) (remarks of Rep. Hyde) ("[You] can open the door, but you cannot push people through. You can make the process open and accessible, but you cannot make people exercise it."); Note, *Federal Voter Registration: A Proposal to Increase Voter Registration*, 8 Colum. J.L. & Soc. Probs. 225, 246 (1975) (easing registration procedures may not be enough to encourage people to register) [hereinafter cited as *Federal Voter Registration*]. The Court of Appeals for the Fifth Circuit, recognizing that discriminatory election procedures would be immune from attack if jurisdictions could attribute all disproportions in registration to apathy among eligible black citizens, has ruled that a court may not, without a strong factual basis, attribute present disparities in black voter registration to lack of interest on the part of blacks. See *Cross v. Baxter*, 604 F.2d 875, 881 (5th Cir. 1979), *vacated and remanded mem.*, 103 S. Ct. 1515, *remanded per curiam*, 704 F.2d 143 (5th Cir. 1983) (for consideration of the 1982 amendments to § 2 of the VRA); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977).

14. See *infra* notes 15-54 and accompanying text. A primary justification for enacting voter registration laws in the late 1800's was to exclude blacks in the South and new immigrants in the North and Midwest from participation in the political process. See *McGee Hearings*, *supra* note 12, at 73 (remarks of Sen. Kennedy); P. Kimball, *supra* note 12, at 4 (1972); K. Phillips & P. Blackman, *Electoral Reform and Voter Participation* 50 (1975); Burnham, *A Political Scientist and Voting-Rights Litigation: The Case of the 1966 Texas Registration Statute*, 1971 Wash. U.L.Q. 335, 336. Ostensibly, registration laws have been justified by the need to prevent voter fraud and mismanagement. See *Federal Voter Registration*, *supra* note 13, at 231. Most election fraud, however, occurs in voting rather than registration. See *McGee Hearings*, *supra* note 12, at 196 (remarks of Sen. McGee). Typically, election fraud is committed by election officials rather than private individuals and, as such, registration is largely ineffective in preventing it. See *id.* at 78 (testimony of Sen. Kennedy); *id.* at 159 (testimony of Anne Wexler, Director, Voting Rights Project, Common Cause). For example, in North Dakota, the only state without a registration requirement, see N.D. Cent. Code § 16.1-02 (1981), elections have been conducted free of fraud. See *McGee Hearings*, *supra* note 12, at 202-10 (Omdahl, *Fraud Free Elections Are Possible Without Voter Registration—A Report on the North Dakota Experience*

I. PERPETUATING PAST DISCRIMINATION IN VOTING

In the past two decades, great strides have been taken in increasing minority participation in the political process.¹⁵ Blatantly discriminatory registration requirements no longer stand in the way of black voter registration.¹⁶ As a result, the historical racial disparity in voter registration rates has narrowed considerably,¹⁷ and the number of black candidates elected to public office has increased dramatically.¹⁸ Nonetheless, blacks remain underrepresented in government, and the black registration rate continues to lag far behind the corresponding rate for whites.¹⁹ The progress that has been made is jeopardized by

(May 1971)). Furthermore, a 1974 study issued by the Office of Federal Elections reported that since 1963 only three percent of 6233 election boards surveyed reported any complaints of fraud, and complaints of inconvenient registration were also reported. *Hearings on Mail Registration, supra* note 12, at 639, 646 (statement of the Young Lawyers Section, Bar Ass'n of the Dist. of Columbia (May 20, 1975) (citing Office of Federal Elections, Survey of Election Boards—Final Report 22-23 (1974))). Voter registration requirements have dramatically reduced voter participation among all citizens, *see* Senate Report No. 91, *supra* note 12, at 2, *reprinted in* Postcard Registration at 16, but less affluent members of society have been hindered to the greatest degree, *see* Burnham, *supra*, at 337. Because a disproportionate percentage of minorities are economically disadvantaged, *see* Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Consumer Income, ser. P-60, No. 137, Money Income of Households, Families and Persons in the United States: 1981, Table 52, at 184 (1982) [hereinafter cited as Consumer Income], the registration requirement places a disproportionately greater burden on minority voters. *See infra* notes 15-54 and accompanying text.

This Note will primarily address the problems blacks confront in registering to vote. Nonetheless, the principles established apply to all minorities because all confront similar problems. *See* Complaint, Puerto Rican Coalition v. O'Tremba, Civ. No. B 83 497 (D. Conn. 1983) (Letter from Cesar A. Battalla, Chairman of the Board, Puerto Rican Coalition, to Edward T. O'Tremba and Martin T. Fischer, Registrars, Bridgeport, Conn. (June 21, 1983) (refusal to appoint minority deputy registrars)).

15. House Report, *supra* note 6, at 7; Unfulfilled Goals, *supra* note 12, at 11.

16. *See* Derfner, *supra* note 4, at 552-53; *see supra* note 3 and accompanying text.

17. House Report, *supra* note 6, at 7-10.

18. *Id.*

19. *Id.*; Unfulfilled Goals, *supra* note 12, at 13, 21. The Census Bureau reports that nationally 68.4% of whites are registered, compared with 60% of blacks and 36.3% of Hispanics. Voting & Registration, *supra* note 13, Table 5, at 31. The census data are compiled through a survey during which respondents are asked if they are registered to vote. Perhaps fearing the interviewer would consider their failure to register to be a "lapse in civic responsibility," some persons who were not registered may have reported that they were. *Id.* at 7. One study reported that black nonvoters are twice as likely as their white counterparts to claim they had voted. *See* R. Wolfinger & S. Rosenstone, *supra* note 13, at 140-41 n.2 (citing Weisberg, Michigan 1976 National Election Study (1979)). State data, on the other hand, are compiled by registrars who can determine independently whether the respondent is actually registered. State statistics suggest that census figures understate the racial disparity in

complacency with past gains.²⁰ As Judge Wisdom has noted regarding the progress made in eradicating racial discrimination: "[I]t is not how far the blacks have come that is important, but how far they still have to go."²¹

The Supreme Court has referred to our nation's history of racial discrimination in voting as an "insidious and pervasive evil."²² Electoral discrimination has taken many forms.²³ Prior to passage of the Voting Rights Act in 1965, for example, citizens wishing to register in several southern states were required to read, understand and interpret provisions of federal and state constitutions.²⁴ Inevitably, these literacy tests were applied discriminatorily and served to deny blacks their right to register.²⁵ County registrars were commonly empowered to refuse to register any applicant who they believed lacked "good-morals." Again, primarily blacks were excluded from registering because of this requirement.²⁶ Racially motivated violence was commonly directed against blacks who attempted to register or engage in other political activities.²⁷ Consequently, the notion that "politics is

registration rates. For example, in both South Carolina and Louisiana, the Census Bureau overestimated black registration, relative to white, by 10% as compared to state figures. *Compare* Voting & Registration, *supra* note 13, Table 5, at 31-32 *with* Unfulfilled Goals, *supra* note 12, at 21. Most states, however, do not maintain registration data by race. Consequently, census statistics are the only available national data.

20. House Report, *supra* note 6, at 11; *see House Hearings, supra* note 5, at 2129-31 (testimony of Drew S. Days, III, former U.S. Asst. Att'y Gen. for Civil Rights).

21. Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases*, 39 Law & Contemp. Probs. 134, 147 (1975); *see* 1 *Senate Hearings, supra* note 8, at 317 (testimony of Ruth J. Hinerfeld, President, League of Women Voters of the United States).

22. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

23. Derfner, *supra* note 4, at 535-38, 552-58.

24. *See South Carolina v. Katzenbach*, 383 U.S. 301, 312 n.13 (1966); *Louisiana v. United States*, 380 U.S. 145, 148-50 (1965); H.R. Rep. No. 439, 89th Cong., 1st Sess. 11-13 (1965) [hereinafter cited as House Report No. 439], *reprinted in* 1965 U.S. Code Cong. & Ad. News 2437, 2444.

25. *South Carolina v. Katzenbach*, 383 U.S. 301, 312 (1966); *Louisiana v. United States*, 380 U.S. 145, 151-53 (1965); S. Rep. No. 162, 89th Cong., 1st Sess. 9-12 (1965) (Joint Views of Twelve Members of the Judiciary Comm.) [hereinafter cited as Senate Report No. 162], *reprinted in* 1965 U.S. Code Cong. & Ad. News 2508, 2547-50; House Report No. 439, *supra* note 24, at 11-13, *reprinted in* 1965 U.S. Code Cong. & Ad. News at 2443-44.

26. *South Carolina v. Katzenbach*, 383 U.S. 301, 312-13 (1966); Senate Report No. 162, *supra* note 25, at 12, *reprinted in* 1965 U.S. Code Cong. & Ad. News at 2550.

27. S. Lawson, *Black Ballots: Voting Rights in the South 1944-1969*, at 97-98, 131-32 (1976); C.V. Woodward, *The Strange Career of Jim Crow* 142 (2d rev. ed. 1966); Lewis & Allen, *supra* note 12, at 112-14.

white folks' business" prevailed in many black communities before adoption of the Voting Rights Act.²⁸

Historical disfranchisement continues to inhibit black political participation.²⁹ Lower educational levels among blacks,³⁰ often resulting from a history of unequal opportunity,³¹ have caused diminished political awareness.³² Moreover, the depressed socioeconomic status of blacks³³ may inhibit effective political participation.³⁴

As a result of these historical adversities, blacks are particularly vulnerable to the burden of inconvenient registration hours and loca-

28. Lewis & Allen, *supra* note 12, 114; accord S. Lawson, *supra* note 27, at 331; see *United States v. Duke*, 332 F.2d 759, 766 (5th Cir. 1964) (political nonparticipation of blacks became an accepted pattern of life for many blacks).

29. *Rogers v. Lodge*, 102 S. Ct. 3272, 3279-80 (1982); S. Lawson, *supra* note 27, at 330-31. De jure discrimination prior to passage of the VRA created an apolitical attitude in blacks. See *Hearings on the Concept of National Voter Registration*, *supra* note 12, at 177. A sense of futility engendered by such discrimination continues to discourage blacks from entering the political process. See *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 n.13 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Major v. Treen*, No. 82-1192, slip op. at 36-40 (E.D. La. Sept. 23, 1983). Unfortunately, this attitude may linger for generations as evidenced by the fact that a person's voting behavior is strongly correlated to the voting behavior of his or her parents. See N.Y. Times, Sept. 25, 1983, § 1, at 33, col. 1 (reporting results of ABC News poll). But see *United States v. Dallas County Comm'n*, 548 F. Supp. 875, 906 (S.D. Ala. 1982) (historical discrimination not the cause of present black voter apathy), *appeal docketed*, No. 82-7362 (11th Cir. Nov. 18, 1982); R. Wolfinger & S. Rosenstone, *supra* note 13, at 90 (after controlling for socioeconomic differences, no evidence of the lingering effects of disfranchisement of blacks in the South).

30. Bureau of the Census, U.S. Dep't of Commerce, 1980 Census of Population and Housing: Provisional Estimates of Social, Economic and Housing Characteristics, Table P-5, at 47 (68.7% of whites have completed four years of high school, in contrast to 50.5% of blacks) [hereinafter cited as *Population & Housing*].

31. See generally Segregation and the Fourteenth Amendment in the States (B. Reams & P. Wilson eds. 1975) (outlining history of de jure discrimination in education until 1954); U.S. Comm'n on Civil Rights, *Desegregation of the Nation's Public Schools: A Status Report* (1979) (discrimination in education 1954-1979).

32. See P. Kimball, *supra* note 12, at 16-17, 24; *Unfulfilled Goals*, *supra* note 12, at 22 (citing Washington Research Project, *The Shameful Blight: The Survival of Racial Discrimination in Voting in the South* 13 (1972)); R. Wolfinger & S. Rosenstone, *supra* note 13, at 62, 90; Note, *Access to Voter Registration*, 9 Harv. C.R.-C.L. L. Rev. 482, 493 (1974) [hereinafter cited as *Voter Registration*]; N.Y. Times, Sept. 25, 1983, § 1, at 33, col. 1.

33. See *Consumer Income*, *supra* note 14, Table 52, at 184. The average white male earns \$18,181 annually compared with an \$11,953 annual income for black males. *Id.* The mean income of white families—\$24,279—is over 60% greater than the \$15,721 mean for black families. See *Population & Housing*, *supra* note 30, Table P-5, at 47.

34. *White v. Regester*, 412 U.S. 755, 766-67 (1973); see *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Major v. Treen*, No. 82-1192, slip. op. at 39-40 (E.D. La. Sept. 23, 1983); Senate Report, *supra* note 4, at 29 n.114, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 207 n.114.

tions.³⁵ In the South, for example, most blacks reside in rural communities.³⁶ Because registration is often permitted only at the county courthouse, registration locations are inaccessible to many southern blacks.³⁷ The inconvenience in registration is often exacerbated by the absence of public transportation.³⁸

Inconvenient hours also disproportionately inhibit black voter registration. Registration times are often limited to working hours.³⁹ Consequently, blue collar employees, whose working hours are generally less flexible than those of white collar employees, often find it difficult to register.⁴⁰ Because larger percentages of blacks than whites are blue

35. See *Hearings on Universal Voter Registration*, *supra* note 12, at 265 (testimony of Archie E. Allen, Admin. Director, Voter Educ. Project). *But see* R. Wolfinger & S. Rosenstone, *supra* note 13, at 90 (blacks not disproportionately affected by the South's restrictive registration laws).

36. See *Unfulfilled Goals*, *supra* note 12, at 25.

37. *E.g.*, 1 *Senate Hearings*, *supra* note 8, at 327-28 (statement of Ruth J. Hinerfeld, President, League of Women Voters of the United States); *House Hearings*, *supra* note 5, at 377-78 (statement of Michael G. Brown, Coordinator of Branch and Field Activities, Va. St. Conference, NAACP); *id.* at 503 (testimony of Frank Parker, Director, Voting Rights Project, Lawyers' Comm. for Civil Rights Under Law); 119 Cong. Rec. 1485 (1973) (remarks of Sen. Humphrey); see *Unfulfilled Goals*, *supra* note 12, at 22, 25; Lewis & Allen, *supra* note 12, at 121. In Tennessee, where blacks are concentrated in urban areas, one local government set up registration sites along the perimeter of the city to minimize black voter registration. See *McGee Hearings*, *supra* note 12, at 173-74 (testimony of Charlotte Roe Kemble, Executive Director, Frontlash). Inconvenient registration locations are not limited to the South. *E.g.*, Senate Report No. 91, *supra* note 12, at 3 (inconvenient locations in New York, Cleveland), *reprinted* in *Postcard Registration* at 17; League Report, *supra* note 12, at 1484 (same nationwide); P. Kimball, *supra* note 12, at 88 (same in Newark, N.J.); Booth, *How to Rig Votes Without Buying Them*, *Washington Post*, Sept. 10, 1972, at B1, col. 1, B5, cols. 1-4 (same in Boston, Milwaukee, Plainfield, N.J.).

38. League Report, *supra* note 12, at 1484; *Unfulfilled Goals*, *supra* note 12, at 22. Blacks are forced to rely on public transportation to a greater degree than whites because blacks have less access to automobiles. See *House Hearings*, *supra* note 5, at 823-24 (testimony of Eddie Hardaway, Jr., District Judge, Sumter County, Ala.) (citing 1975 study by the Task Force on Southern Rural Dev.); Trial Record at 399, *Gingles v. Edmisten*, No. 81-203-CIV-5 (E.D.N.C. July 27, 1983) (testimony of Paul Luebke, Prof. of Political Sociology, Univ. of N.C. at Greensboro, based on census data).

39. See *Unfulfilled Goals*, *supra* note 12, at 25; Lewis and Allen, *supra* note 12, at 121.

40. Carlson, *Personal Registration Systems Discourage Voter Participation*, 60 *Nat'l Civic Rev.* 597, 598 (1971); see 1 *Senate Hearings*, *supra* note 8, at 328 (statement of Ruth J. Hinerfeld, President, League of Women Voters of the United States); *Hearings on Universal Voter Registration*, *supra* note 12, at 267 (testimony of Sherrill Marcus, Field Director, Voter Educ. Project); *id.* at 361 (testimony of C. De Lores Tucker, Secretary of State, Pennsylvania); *Hearings on Mail Registration*, *supra* note 12, at 369 (ABA Special Comm. on Election Reform, Report to the House of Delegates, Recommendations (1974)); *Hearings on the Concept of National Voter*

collar employees,⁴¹ limited hours impose a disproportionate burden on black registration.⁴²

The practice of locating registration sites in local government offices or in neighborhoods traditionally hostile to minority political participation further inhibits minority registration.⁴³ For many blacks it may still be true that "the trip to the courthouse recalls centuries of oppression and degradation."⁴⁴ These feelings are reinforced by white registrars who persist in harrasing blacks who attempt to register.⁴⁵

The discretionary nature of the registration system also impedes black registration. States are vested with primary authority over elec-

Registration, *supra* note 12, at 416; *McGee Hearings*, *supra* note 12, at 150 (testimony of Donald Ellinger, International Ass'n of Machinists); *id.* at 173-74 (testimony of Charlotte Roe Kemble, Executive Director, Frontlash); *id.* at 238-39 (statement of Kenneth A. Mielejohn, Legislative Rep., AFL-CIO); P. Kimball, *supra* note 12, at 15.

41. Thirty-six percent of black workers are classified by the Census Bureau as blue collar, as compared with only 31% of white workers. Almost 54% of white workers are classified as white collar, in contrast to only 36% of blacks. Consumer Income, *supra* note 14, Table 52, at 184; *cf.* *Labat v. Bennett*, 365 F.2d 698, 723-27 (5th Cir. 1966) (disqualification of hourly wage earners from jury duty violated Constitution because it disqualified a larger percentage of blacks than whites), *cert. denied*, 386 U.S. 991 (1967).

42. 1 *Senate Hearings*, *supra* note 8, at 314, 327-28 (testimony of Ruth J. Hinerfeld, President, League of Women Voters of the United States); *House Hearings*, *supra* note 5, at 410 (testimony of the Rev. I. Joseph Williams); *Hearings on Universal Voter Registration*, *supra* note 12, at 62 n.8 (Att'y Gen. Griffin Bell, The Constitutionality of the Proposed "Universal Voter Registration Act" (citing Rosenstone & Wolfinger, The Effect of Registration Laws on Voter Turnout 27-29 (Sept. 1976) (study))); *id.* at 265 (testimony of Archie E. Allen, Admin. Director, Voter Educ. Project); 119 Cong. Rec. 1485 (1973) (remarks of Sen. Humphrey); Unfulfilled Goals, *supra* note 12, at 22.

43. See *Perkins v. Matthews*, 400 U.S. 379, 387-88 & n.7 (1971); 1 *Senate Hearings*, *supra* note 8, at 322, 328 (testimony of Ruth J. Hinerfeld, President, League of Women Voters of the United States); House Report, *supra* note 6, at 14-17; Unfulfilled Goals, *supra* note 12, at 22-24; *Voter Registration*, *supra* note 32, at 493. For example, as recently as 1978, a federal district court in Georgia reported that the Burke County, Georgia courthouse still has a " 'Nigger-hook' at the water fountain, and the toilet signs for 'Coloreds' and 'Whites' still appear through the faded paint." *Lodge v. Buxton*, No. 176-55, slip. op. at 12 (S.D. Ga. Oct. 26, 1978), *aff'd*, 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 102 S. Ct. 1372 (1982).

44. Lewis & Allen, *supra* note 12, at 122; *accord* 1 *Senate Hearings*, *supra* note 8, at 322, 328 (testimony of Ruth J. Hinerfeld, President, League of Women Voters of the United States); *cf.* *Green v. County School Bd.*, 391 U.S. 430, 440 n.5 (1968) (fear and hatred generated by past school segregation may deter black students in segregated schools from transferring to more convenient integrated schools when given the opportunity) (quoting U.S. Comm'n on Civil Rights, *Southern School Desegregation, 1966-1967*, at 88 (1967)).

45. See *House Hearings*, *supra* note 5, at 1774-75 (testimony of Arthur S. Fleming, Chairman, U.S. Comm'n on Civil Rights); *Hearings on Universal Voter Registration*, *supra* note 12, at 265 (testimony of Archie E. Allen, Admin. Director, Voter Educ. Project); Unfulfilled Goals, *supra* note 12, at 22-24; Ten Years After, *supra* note 12, at 78-82; U.S. Dep't of Justice, Press Release, Oct. 21, 1983.

tion procedures by the Constitution.⁴⁶ Most states, however, delegate their electoral responsibilities to counties.⁴⁷ County registrars are typically free to appoint, or refuse to appoint, deputy registrars to expand registration opportunities.⁴⁸ Although some states require convenient

46. U.S. Const. art. I, § 2, cl. 1; *see* *Kusper v. Pontikes*, 414 U.S. 51, 57 & n.11 (1973); *Oregon v. Mitchell*, 400 U.S. 112, 124-26 (1970); *Evans v. Cornman*, 398 U.S. 419, 422 (1970).

47. *See infra* notes 48-52 and accompanying text. Generally, the manner in which a state chooses to delegate government functions is outside the scope of judicial review. *See* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 366 n.42 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part). The delegation of election administration, however, insulates restrictive registration practices from attack. It is far more difficult to attack practices county-by-county than to challenge a state law which inhibits registration. *See* Derfner, *supra* note 4, at 559. Recognizing this, Congress has determined that the states have "statutory and practical control" over their political subdivisions regarding the administration of elections. Senate Report, *supra* note 4, at 56, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 235; *see* *City of Rome v. United States*, 446 U.S. 156, 162-69 (1980) (approving the concept of state responsibility for local actions); House Report, *supra* note 6, at 33 (same). States have a responsibility to exercise their power so that the franchise is not limited any more than is clearly necessary. *United States v. Alabama*, 252 F. Supp. 95, 106 (M.D. Ala. 1966) (Johnson, J., specially concurring); *see* Senate Report, *supra* note 4, at 56-57, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 235. This responsibility cannot be evaded by delegating authority to local officials, especially when the opportunity for abuse of discretion is high. *See* *Louisiana v. United States*, 380 U.S. 145, 153 (1965) ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar."); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959) (registrars should not be given much discretion) (interpreting *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949)); *United States v. Penton*, 212 F. Supp. 193, 202 (M.D. Ala. 1962) (same).

48. *See, e.g.*, Ala. Code § 17-4-158 (Supp. 1979); Fla. Stat. Ann. § 98.271(1), (2) (West 1982); Ga. Code Ann. § 21-3-120(d) (1982); Idaho Code §§ 34-209(1) (1981), 34-406(2) (Supp. 1983); Iowa Code Ann. § 48.4 (West Supp. 1983-1984); La. Rev. Stat. Ann. § 18:59 (West Supp. 1983); Me. Rev. Stat. Ann. tit. 21, § 42 (1983); Md. Elec. Code Ann. § 3-10(a) (Supp. 1982); Mass. Ann. Laws ch. 51, §§ 22, 22A (Michie/Law. Co-op. 1978); Mo. Ann. Stat. § 115.143(2) (Vernon Supp. 1983); Neb. Rev. Stat. § 32-208 (1978); Nev. Rev. Stat. § 293.505(2) (1981); N.J. Stat. Ann. § 19:31-2 (West Supp. 1983-1984); Or. Rev. Stat. § 246.250(1) (1981); Pa. Stat. Ann. tit. 25, § 951-5 (Purdon 1963); R.I. Gen. Laws § 17-9-5 (1981); S.C. Code Ann. § 7-5-20 (Law. Co-op. 1976); Tenn. Code Ann. § 2-12-201 (1979); Tex. Elec. Code Ann. § 5.20a(1) (Vernon Supp. 1982-1983); Utah Code Ann. § 20-2-7.1(1) (Supp. 1981); Wis. Stat. Ann. § 6.28(1)(b) (West Supp. 1983-1984). The few states that do mandate appointment of deputy registrars typically demand a very limited number of deputies. *See, e.g.*, Alaska Stat. § 15.07.100(a) (Supp. 1982); Conn. Gen. Stat. § 9-192 (1983); Mich. Comp. Laws Ann. § 168.29(1) (Supp. 1983-1984); Mont. Code Ann. § 13-2-102(2)(a) (1981); N.M. Stat. Ann. § 1-4-40(B) (Supp. 1983); N.C. Gen. Stat. § 163-41(b) (1982); Okla. Stat. Ann. tit. 26, § 4-105 (West Supp. 1982-1983); Wash. Rev. Code Ann. § 29.07.010 (Supp. 1983-1984). *But see* Cal. Elec. Code § 302(b), (f) (West 1977) (county clerk must deputize any qualified organization or individual that applies with no limit on the number of possible deputies); Ohio Rev. Code Ann.

office hours for a few days prior to the close of registration,⁴⁹ many states simply grant county officials broad discretion to decide whether or not to establish weekend and evening hours.⁵⁰ Similarly, states generally grant county registrars the power, but impose no obligation, to establish satellite registration locations⁵¹ or otherwise facilitate reg-

§ 3503.11(B)(2) (Page Supp. 1983) (any resident can distribute mail registration applications).

49. *See, e.g.*, Kan. Stat. Ann. § 25-2311(d) (Supp. 1982); Mass. Ann. Laws ch. 51, § 26 (Michie/Law. Co-op. 1978); Mich. Comp. Laws Ann. § 168.498 (West Supp. 1983-1984); Miss. Code Ann. § 23-9-431 (Supp. 1983); Nev. Rev. Stat. § 293.560(2) (1981); N.J. Stat. Ann. § 19:31-2 (West Supp. 1983-1984); Tenn. Code Ann. § 2-2-108 (Supp. 1983); Utah Code Ann. § 20-2-6 (Supp. 1981); W. Va. Code § 3-2-10 (1979).

50. *See, e.g.*, Ga. Code Ann. § 21-2-218(e) (Supp. 1983); La. Rev. Stat. Ann. § 18:134A-C (West Supp. 1983); Md. Elec. Code Ann. § 3-2(a) (1976); Neb. Rev. Stat. § 32-216.01 (1978); Pa. Stat. Ann. tit. 25, § 951-16(a) (Purdon Supp. 1983-1984); S.C. Code Ann. § 7-5-140 (Law. Co-op. Supp. 1982). Several states require counties to establish weekend and evening hours at times other than immediately prior to the close of registration. *See, e.g.*, Ill. Ann. Stat. ch. 46, §§ 4-6, 5-5 (Smith-Hurd Supp. 1983-1984); R.I. Gen. Laws § 17-9-4 (1981); Tenn. Code Ann. § 2-2-108(a) (Supp. 1983); Vt. Stat. Ann. tit. 17, § 2144(a) (1982); *see also* N.J. Stat. Ann. § 19:31-2 (West Supp. 1983-1984) (requiring counties to submit plans for evening and out-of-office registration to the Secretary of State for approval). Many states, however, only require that local registration offices be open during working hours. *See, e.g.*, Fla. Stat. Ann. § 98.051(1)(a) (West 1982); Ga. Code Ann. § 21-2-218(e) (Supp. 1983); Mont. Code Ann. § 13-2-201 (1981); Neb. Rev. Stat. § 32-216(3) (Supp. 1981); R.I. Gen. Laws § 17-9-3 (1981). Several states do not even require full-time working hour registration. *See, e.g.*, Ala. Code § 17-4-156 (Supp. 1979); Me. Rev. Stat. Ann. tit. 21, § 41(6) (1983); Okla. Stat. Ann. tit. 26, § 4-108 (West Supp. 1982-1983); S.D. Codified Laws Ann. § 12-4-3 (Supp. 1983); *see also House Hearings, supra* note 5, at 374 (testimony of Michael G. Brown, Coordinator of Branch and Field Activities, Va. St. Conference, NAACP) (discussing Virginia jurisdictions that do not conduct full-time registration).

51. *See, e.g.*, Ill. Ann. Stat. ch. 46, §§ 4-6.3, 5-16.3 (Smith-Hurd Supp. 1983-1984); La. Rev. Stat. Ann. § 18:133 (West 1979); Mo. Ann. Stat. § 115.143(3) (Vernon Supp. 1983); Tenn. Code Ann. §§ 2-2-111 (1979), 2-2-112(a)(1) (Supp. 1983) (counties with a population under 250,000); Utah Code Ann. § 20-2-7.1(4) (Supp. 1981); Wis. Stat. Ann. § 6.28(1)(a) (West Supp. 1983-1984). Several states, although providing no more guidance, make the intent of their statutes clear by mandating the establishment of satellite registration sites at convenient locations. *See, e.g.*, Cal. Elec. Code § 302(a) (West 1977); Del. Code Ann. tit. 15, § 1306(a), (b) (1981); Idaho Code § 34-406(4) (Supp. 1983); Ind. Code Ann. § 3-1-7-6.2(h) (Burns Supp. 1983); Tex. Elec. Code Ann. § 5.20a(4) (Vernon Supp. 1982-1983). Some states specifically permit registration at a citizen's place of employment. *See, e.g.*, Conn. Gen. Stat. § 9-19c(a) (1983); Mass. Ann. Laws ch. 51, § 42B (Michie/Law. Co-op. Supp. 1983). Other states permit mobile registration. *See, e.g.*, Del. Code Ann. tit. 15, § 2002 (1981); La. Rev. Stat. Ann. § 18:133 (West 1979). Only Mississippi specifically prohibits its county registrars from leaving their offices to conduct registration, except for one day each election year. *See* Miss. Code Ann. § 23-5-29 (1972). Several states require establishment of satellite registration sites under certain circumstances. *See, e.g.*, Ga. Code Ann. § 21-2-218(b) (Supp. 1983) (counties with a population over 100,000); Minn. Stat. Ann. § 201.091(8) (West

istration.⁵² Unfortunately, many county registrars consider the vote a privilege to be earned rather than a fundamental right to which citizens are entitled.⁵³ Thus, these registrars refuse to expand registration opportunities either through the appointment of deputies or the establishment of convenient registration times and locations.⁵⁴

Although discriminatory practices such as literacy tests and good-morals requirements no longer impede blacks from registering, restrictive registration practices perpetuate the discriminatory effects of such procedures. At first blush, these practices appear to be difficult to challenge because they are racially neutral on their face. Under the fourteenth amendment, however, facial neutrality is not a defense to the use of election procedures that perpetuate the effects of past purposeful discrimination.

II. THE AFFIRMATIVE DUTY TO ELIMINATE PRACTICES THAT PERPETUATE PAST DISCRIMINATION

Facially neutral election procedures are unconstitutional if they are created or maintained with the intent to perpetuate past discrimina-

Supp. 1983) (all counties); Neb. Rev. Stat. § 32-216(4) (Supp. 1981) (cities and villages); N.J. Stat. Ann. § 19:31-2 (West Supp. 1983-1984) (all counties); Tenn. Code Ann. § 2-2-112(a)(1) (Supp. 1983) (counties with a population over 250,000); Wash. Rev. Code Ann. § 29.07.105 (Supp. 1983-1984) (larger towns). A small minority of states have a system under which a registrar is required to travel to certain locations upon receipt of a petition signed by a predetermined number of citizens. *See, e.g.*, Conn. Gen. Stat. § 9-19c(a) (1983); Pa. Stat. Ann. tit. 25, § 951-16(b) (Purdon Supp. 1983-1984).

52. County officials generally have the power, but not the duty, to register citizens anywhere in their jurisdictions. *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-134(A) (Supp. 1982-1983), *as amended by* Act of Apr. 20, 1983, 1983 Ariz. Legis. Serv. 742 (West); Cal. Elec. Code § 302(b) (West 1977); Conn. Gen. Stat. § 9-19b(b) (1983); Ill. Ann. Stat. ch. 46, §§ 4-6.2, 5-16.2 (Smith-Hurd Supp. 1983-1984); Ky. Rev. Stat. § 116.045 (Supp. 1982); Mich. Comp. Laws Ann. § 168.497 (Supp. 1983-1984); Okla. Stat. Ann. tit. 26, § 4-104 (West Supp. 1982-1983); S.C. Code Ann. § 7-5-30 (Law. Co-op. Supp. 1982).

53. *Hearings on Universal Voter Registration, supra* note 12, at 123 (testimony of Rep. Bonker); League Report, *supra* note 12, at 1484; Booth, *supra* note 37, at B5, cols. 2-3. The United States is the only Western nation with free elections that places the onus of registering to vote on individuals rather than the government. K. Phillips & P. Blackman, *supra* note 14, at 23; *see* P. Kimball, *supra* note 12, at 13-14; Carlson, *supra* note 40, at 599. In Canada, for example, community residents, financed and coordinated by the government, travel door-to-door registering citizens who wish to vote. K. Phillips & P. Blackman, *supra* note 14, at 26. As a result, Canadian voter turnout for national elections is approximately 15% higher than the turnout in the United States. *Id.* at 26-27.

54. *See* 1 *Senate Hearings, supra* note 8, at 316, 329 (testimony of Ruth J. Hinerfeld, President, League of Women Voters of the United States); *House Hearings, supra* note 5, at 373-74 (statement of Michael G. Brown, Coordinator of Branch and Field Activities, Va. St. Conference, NAACP); *id.* at 1778 (testimony of Arthur Flemming, Chairman, U.S. Comm'n on Civil Rights); *Hearings on Universal Voter Registration, supra* note 12, at 266 (testimony of Archie E. Allen, Admin. Director,

tion.⁵⁵ The requisite intent can be inferred from a showing of a history of de jure discrimination in voting coupled with lingering vestiges of that discrimination.⁵⁶ The residual effects of past discrimination in voting are currently evidenced by the disproportionately low percentage of registered black voters as compared with white voters.⁵⁷

To remedy the present effects of past discrimination, courts have consistently relied on the equal protection principles of the fourteenth amendment.⁵⁸ The fourteenth amendment demands more from jurisdictions than merely ending past official discrimination;⁵⁹ they must

Voter Educ. Project); *Hearings on the Concept of National Voter Registration*, *supra* note 12, at 400 (testimony of Robert S. Weiner, National Youth Voter Registration Coordinator, Young Democratic Clubs of Am.); *id.* at 436-37 (testimony of Kenneth Guido, Director, Voting Rights Project, Common Cause); *id.* at 410-11 (testimony of Charlotte Roe Kemble, Executive Director, Frontlash); Senate Report No. 91, *supra* note 12, at 3, *reprinted in* Postcard Registration at 17; League Report, *supra* note 12, at 1481-84; Unfulfilled Goals, *supra* note 12, at 25-27.

55. See *Rogers v. Lodge*, 102 S. Ct. 3272, 3275 (1982); *White v. Regester*, 412 U.S. 755, 765-66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *Nevett v. Sides*, 571 F.2d 209, 222 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 142, 147 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976); *Ausberry v. City of Monroe*, 456 F. Supp. 460, 467 (W.D. La. 1978), *appeal dismissed*, 616 F.2d 565 (5th Cir. 1980).

56. See *Rogers v. Lodge*, 102 S. Ct. 3272, 3279-80 (1982); *Cross v. Baxter*, 604 F.2d 875, 881 (5th Cir. 1979), *vacated and remanded mem.*, 103 S. Ct. 1515, *remanded per curiam*, 704 F.2d 143 (5th Cir. 1983) (for consideration of the 1982 amendments to § 2 of the VRA). Once plaintiffs demonstrate a history of pervasive discrimination and a present disparity in voter registration, along with the disproportion in minority elected officials that inevitably follows, they have proven the present effects of past discrimination. See *McIntosh County Branch of the NAACP v. City of Darien*, 605 F.2d 753, 759 (5th Cir. 1979); *Cross v. Baxter*, 604 F.2d 875, 881 (5th Cir. 1979), *vacated and remanded mem.*, 103 S. Ct. 1515, *remanded per curiam*, 704 F.2d 143 (5th Cir. 1983) (for consideration of the 1982 amendments to § 2 of the VRA); *Zimmer v. McKeithen*, 485 F.2d 1297, 1306 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

57. See *City of Rome v. United States*, 446 U.S. 156, 186 n.22 (1980) (voter registration data may show the effects of past discrimination in registration or reflect minority political hopelessness); *Ely v. Klahr*, 403 U.S. 108, 115 n.7 (1971) (voter registration figures reflect present effects of past discrimination); *Lodge v. Buxton*, 639 F.2d 1358, 1377-78 (5th Cir. 1981) (lingering effects of past exclusion of blacks from electoral system caused a relatively lower black voter registration rate), *aff'd*, 102 S. Ct. 3272 (1982); *Mississippi v. United States*, 490 F. Supp. 569, 575 (D.D.C. 1979) (racial disparity in registration rates is a result of the state's history of racial discrimination in voting), *aff'd*, 444 U.S. 1050 (1980).

58. See *infra* notes 59-82 and accompanying text.

59. See *Cross v. Baxter*, 604 F.2d 875, 881 (5th Cir. 1979), *vacated and remanded mem.*, 103 S. Ct. 1515, *remanded per curiam*, 704 F.2d 143 (5th Cir. 1983) (for consideration of the 1982 amendments to § 2 of the VRA).

take affirmative steps to ensure equal opportunity in voting.⁶⁰ In recognition of this principle, one district court has declared that "all lingering vestiges of legally enshrined [electoral discrimination must] be eliminated, so that the legacy of racial discrimination no longer poisons our . . . democracy."⁶¹

Discrimination in education and in voting implicate similar equal protection principles because both are rooted in state-sponsored racial discrimination.⁶² The Supreme Court's rulings in the area of education are instructive in defining the state's duty in regard to voter registration.⁶³ In the area of school desegregation, a school board that has historically operated a dual school system is "clearly charged with [an] affirmative duty to take whatever steps might be necessary to convert to a unitary [school] system in which racial discrimination would be eliminated root and branch."⁶⁴ Accordingly, states have a duty to "eliminate from the public schools all vestiges of state-imposed segregation."⁶⁵

60. See *Kirksey v. Board of Supervisors*, 554 F.2d 139, 148 n.16 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Seamon v. Upham*, 536 F. Supp. 931, 976 (E.D. Tex.), *vacated and remanded on other grounds per curiam*, 456 U.S. 37 (1982); Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 719 (1982).

61. *Seamon v. Upham*, 536 F. Supp. 931, 976 (E.D. Tex.), *vacated and remanded on other grounds per curiam*, 456 U.S. 37 (1982); see Schnapper, *Perpetuation of Past Discrimination*, 96 Harv. L. Rev. 828, 831-34 (1983) (fourteenth amendment designed to eliminate devices that perpetuate past discrimination); Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 Harv. C.R.-C.L. L. Rev. 133, 170 (1979) (same).

62. See J. Nowak, R. Rotunda & J. Young, *Handbook on Constitutional Law* ch. 16 (1978); L. Tribe, *American Constitutional Law* ch. 16 (1978).

63. See *Searcy v. Williams*, 656 F.2d 1003, 1011 (5th Cir. 1981) (comparing perpetuation of discrimination in education and voting), *aff'd mem. sub nom. Hightower v. Searcy*, 455 U.S. 984 (1982); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 n.12, 148 n.16 (5th Cir.) (en banc) (same), *cert. denied*, 434 U.S. 968 (1977); *Zimmer v. McKeithen*, 485 F.2d 1297, 1308 n.27 (5th Cir. 1973) (en banc) (same), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976); *Seamon v. Upham*, 536 F. Supp. 931, 973-76 (E.D. Tex.) (same), *vacated and remanded on other grounds per curiam*, 456 U.S. 37 (1982); cf. Senate Report, *supra* note 4, at 31 & n.121 (citing education cases in calling for the courts to "completely" remedy electoral discrimination against minorities), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 208-09 & n.121.

64. *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968) (emphasis added); *accord Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in judgment in part and dissenting in part).

65. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); see *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-61 (1979); *Milliken v. Bradley*, 433 U.S. 267, 281-83 (1977).

Two theories support the proposition that a state's obligation in voting should be at least as rigorous as its responsibility in education.⁶⁶ A primary justification for promoting equal educational opportunities is the role education plays in affecting the ability of citizens to participate in government.⁶⁷ Thus, the affirmative duty the Supreme Court enunciated in its school desegregation decisions "has been implemented in pursuit of the ideal of participatory democracy."⁶⁸ Moreover, the Supreme Court has determined that equality in education, in contrast to equality in voting, is not a fundamental right.⁶⁹ It is highly unlikely the Court would provide greater protection to a non-fundamental right than to a fundamental right.⁷⁰

In *White v. Regester*,⁷¹ the Supreme Court moved toward applying the affirmative duties first established in education cases to the area of voting rights. In *White*, the Court ruled that a history of racial discrimination in voting justified a requirement that the state affirmatively remedy an at-large voting system that dilutes black voting strength.⁷² More recently, in *Rogers v. Lodge*,⁷³ the Court acknowledged the affirmative duty embodied in *White*.⁷⁴ The Court held that even a racially neutral, at-large voting system,⁷⁵ enacted by a jurisdiction with a history of racial discrimination in voting,⁷⁶ could not survive scrutiny under the equal protection clause if the challenged

66. See *Seamon v. Upham*, 536 F. Supp. 931, 976 (E.D. Tex.) (outlining justifications discussed *infra* at notes 67-70 and accompanying text), *vacated and remanded on other grounds per curiam*, 456 U.S. 37 (1982).

67. *Id.*; see *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1972); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); R. Wolfinger & S. Rosenstone, *supra* note 13, at 18, 62.

68. *Seamon v. Upham*, 536 F. Supp. 931, 976 (E.D. Tex.), *vacated and remanded on other grounds per curiam*, 456 U.S. 37 (1982); see *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system").

69. *Seamon v. Upham*, 536 F. Supp. 931, 976 (E.D. Tex.), *vacated and remanded on other grounds per curiam*, 456 U.S. 37 (1982); see *Plyer v. Doe*, 457 U.S. 202, 221 (1982); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973).

70. *Seamon v. Upham*, 536 F. Supp. 931, 976 (E.D. Tex.), *vacated and remanded on other grounds per curiam*, 456 U.S. 37 (1982); see L. Tribe, *supra* note 62, § 13-1 (access to the political process implicates "preferred rights" because of its relationship to due process, free speech and equal protection). Compare *Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972) (strictly scrutinizing durational residency requirements for voter registration) with *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40-41 (1973) (refusing to strictly scrutinize inter-district disparities in per-pupil educational expenditures).

71. 412 U.S. 755 (1973).

72. *Id.* at 765-67.

73. 102 S. Ct. 3272 (1982).

74. See *id.* at 3279-81; Hartman, *supra* note 60, at 719.

75. *Rogers v. Lodge*, 102 S. Ct. 3272, 3280-81 (1982).

76. *Id.* at 3279-80.

statute had a disproportionate racial impact.⁷⁷ The Court recognized that such a practice unconstitutionally perpetuates electoral discrimination and thus inferred the intent necessary to establish a fourteenth amendment violation.⁷⁸

In *Kirksey v. Board of Supervisors*,⁷⁹ the Fifth Circuit, following the lead of the Supreme Court in *White*, found that states have an affirmative duty to eradicate all vestiges of past purposeful electoral discrimination.⁸⁰ Failure to meet this responsibility, reasoned the court, "would emasculate the efforts of racial minorities to break out of patterns of political discrimination."⁸¹ Consequently, the court invalidated a facially neutral redistricting plan because it perpetuated a history of discriminatory denial of equal access to blacks.⁸²

Rogers, *White* and *Kirksey* primarily involve challenges to at-large voting schemes and redistricting plans rather than voter registration systems.⁸³ Discriminatory at-large voting schemes and redistricting plans permit all persons to register and vote, but dilute the votes cast by blacks.⁸⁴ Restrictive registration practices, however, inhibit political participation at its inception.⁸⁵ Despite this difference, all these procedures have the same discriminatory effect—inhibition of effective black political participation.⁸⁶ Thus, the principles established in *Rogers*, *White* and *Kirksey* should apply equally to a challenge to restrictive registration practices.

A jurisdiction's constitutional obligations transcend simple adherence to racially neutral principles. Jurisdictions have a responsibility to dismantle those aspects of their electoral structure that perpetuate a

77. *Id.* at 3279.

78. *See id.* (proof "was sufficient to support an inference of intentional discrimination").

79. 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977).

80. *Id.* at 148 & n.16; *accord* *Seamon v. Upham*, 536 F. Supp. 931, 976 (E.D. Tex.), *vacated and remanded on other grounds per curiam*, 456 U.S. 37 (1982).

81. *Kirksey v. Board of Supervisors*, 554 F.2d 139, 147 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *see* *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

82. *Kirksey v. Board of Supervisors*, 554 F.2d 139, 146-47 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977).

83. It is noteworthy, however, that in *White* the Court found that restrictive voter registration procedures perpetuated the exclusion of Mexican-Americans from the political process. 412 U.S. at 768.

84. *See* L. Tribe, *supra* note 62, §§ 13-8 to -9.

85. *See* *United States v. Manning*, 215 F. Supp. 272, 288 (W.D. La. 1963) (discrimination in registration is the most effective method of denying the right to vote); Senate Report, *supra* note 4, at 6 (registration is the first hurdle to effective political participation), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 183.

86. *See* House Report, *supra* note 6, at 30. *Compare* *South Carolina v. Katzenbach*, 383 U.S. 301, 312 (1966) (registration) *with* *Rogers v. Lodge*, 102 S. Ct. 3272, 3275 (1982) (at-large elections) *and* *Kirksey v. Board of Supervisors*, 554 F.2d 139, 142 (5th Cir.) (en banc) (redistricting), *cert. denied*, 434 U.S. 968 (1977).

racially-based disparity in access to the political process.⁸⁷ Disproportions in registration that persist to this day are evidence that many jurisdictions have not met their responsibilities under the Constitution. Cognizant of this neglect, Congress enacted the Voting Rights Act of 1965⁸⁸ to combat racial discrimination in voter registration.⁸⁹ The newest amendments to the Act,⁹⁰ passed in 1982, provide individuals with the most effective weapon yet devised to attack restrictive voter registration practices.

III. THE VOTING RIGHTS ACT: A REJUVENATED WEAPON IN THE FIGHT AGAINST RESTRICTIVE VOTER REGISTRATION PRACTICES

The Voting Rights Act is a complex web of enforcement provisions designed to assure all citizens equal access to the political process regardless of their race.⁹¹ Section 2 of the Act, which applies nationwide, prohibits the use of any election practice or procedure that has a racially discriminatory impact.⁹² Any private individual can bring a suit under section 2.⁹³ Jurisdictions that historically have perpetrated racial discrimination in voting are subject to additional requirements under the Act.⁹⁴ Under section 5, those jurisdictions covered must pre-clear any change in their election laws or practices with either the Justice Department or the District Court for the District of Columbia.⁹⁵ No change in the laws or practices of such a jurisdiction is

87. Cf. *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968) (school boards have a duty to dismantle dual school systems).

88. Pub. L. No. 89-110, 79 Stat. 437 (1965) (current version at 42 U.S.C.A. §§ 1971, 1973 to 1973bb-1 (West 1981 & Supp. 1983)).

89. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 564 (1969) (quoting *Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, ser. 2, 89th Cong., 1st Sess. 74 (1965) (testimony of Asst. Att'y Gen. Burke Marshall)) [hereinafter cited as *1965 House Hearings*]; Senate Report, *supra* note 4, at 6, reprinted in 1982 U.S. Code Cong. & Ad. News at 183.

90. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

91. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

92. Pub. L. No. 89-110, Title I, § 2, 79 Stat. 437 (1965) (current version at 42 U.S.C.A. § 1973(a) (West Supp. 1983)).

93. See *Gray v. Main*, 291 F. Supp. 998, 1000 (M.D. Ala. 1966); House Report, *supra* note 6, at 32.

94. The Act outlines a formula to identify these jurisdictions. 42 U.S.C. § 1973b(b) (1976). Under the formula, if a jurisdiction employed a literacy test or other similar device in the presidential elections of 1964, 1968, or 1972, and if less than half its electorate voted or was registered to vote, then it is subject to the requirements of § 5. *Id.* This formula is premised on the notion that certain devices, such as the literacy test, have been used historically to exclude black citizens from the political process. Low voting and registration rates evidence the effectiveness of such techniques. See *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966). For a listing of jurisdictions subject to § 5 preclearance requirements, see *Unfulfilled Goals*, *supra* note 12, at app. B.

95. Pub. L. No. 89-110, Title I, § 5, 79 Stat. 439 (1965) (current version at 42 U.S.C. § 1973c (1976)).

effective until the preclearance provisions have been satisfied.⁹⁶ Section 4 of the Act provides a procedure under which jurisdictions covered by section 5 can "bail out" of the stringent preclearance requirements.⁹⁷ Amendments to each of these sections⁹⁸ in 1982 evidence Congress' intent to make it easier to challenge restrictive registration practices under section 2.

A. Section 2

Section 2 provides, in pertinent part: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right . . . to vote on account of race"⁹⁹ The word "procedure" in section 2 was intended to be interpreted liberally to include any type of election practice.¹⁰⁰ During congressional hearings prior to passage of the Act, Attorney General Katzenbach, a drafter of the Act,¹⁰¹ declared that limited registration hours would be a procedure subject to attack under section 2.¹⁰² Katzenbach further suggested that registration locations remote from minority communities could result in disproportionate harm to minority citizens in violation of the Act.¹⁰³ Accordingly, registration procedures certainly come within the purview of section 2.¹⁰⁴

The 1970 amendments to the Act¹⁰⁵ were designed to eradicate "arbitrary, archaic and unfair barriers which have had the effect of

96. *Id.*

97. Pub. L. No. 89-110, Title I, § 4, 79 Stat. 438 (1965) (current version at 42 U.S.C.A. § 1973b(a) (West 1981 & Supp. 1983)). See *infra* notes 169-87 and accompanying text.

98. Act of June 29, 1982, Pub. L. No. 97-205, 96 Stat. 131 (to be codified at 42 U.S.C. §§ 1971, 1973 to 1973aa-6).

99. 42 U.S.C.A. § 1973(a) (West Supp. 1983).

100. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-67 (1969) (quoting *Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, pt. 1, 89th Cong., 1st Sess. 191-92 (1965) (testimony of Att'y Gen. Nicholas deB. Katzenbach) [hereinafter cited as *1965 Senate Hearings*]); House Report, *supra* note 6, at 5.

101. The Supreme Court has acknowledged that Attorney General Katzenbach played a major role in drafting the Act and explaining its intended operation to Congress. See *United States v. Board of Comm'rs*, 435 U.S. 110, 131 (1978). Therefore, his contemporaneous interpretation of the scope of the Act warrants great deference. *Id.* at 131-32; Senate Report, *supra* note 4, at 17 n.51, reprinted in 1982 U.S. Code Cong. & Ad. News at 195 n.51; see *Perkins v. Matthews*, 400 U.S. 379, 391 (1971).

102. *1965 Senate Hearings*, *supra* note 100, at 191-92 (testimony of Att'y Gen. Nicholas deB. Katzenbach); see *1965 House Hearings*, *supra* note 89, at 62 (suggesting registration hours can be discriminatory).

103. See *1965 House Hearings*, *supra* note 89, at 62.

104. *Voter Registration*, *supra* note 32, at 516-17.

105. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. § 1973 to 1973bb-1 (1976)).

inhibiting voter registration."¹⁰⁶ The clear intent of the amendments was to provide citizens with the broadest possible opportunity to register.¹⁰⁷ In doing so, Congress established a nationwide ban on literacy tests and all similar devices that burdened the registration process.¹⁰⁸ Restricted registration hours was among those practices identified as barriers to registration.¹⁰⁹ Nonetheless, restrictive registration practices continued to burden minority registration. After a twelve year hiatus, Congress confronted this problem more directly in 1982.

The reports of the congressional committees responsible for the 1982 amendments to the Act reflect a renewed commitment to eliminating restrictive registration practices.¹¹⁰ The House Judiciary Committee specifically identified "inconvenient location and hours of registration, dual registration for county and city elections, [and] refusal to appoint minority registration and election officials" as "continued barriers to registration."¹¹¹ Election procedures that have a discriminatory impact, reasoned the committee, perpetuate the effects of past electoral discrimination.¹¹² Thus, restrictive voter registration practices continue to deny blacks equal access to the political process.¹¹³ Recognizing this problem, the committee declared that section 2 prohibits any practice or procedure that denies minority groups equal opportunity to participate in the political process.¹¹⁴

Similarly, the Senate Judiciary Committee indicated that inconvenient registration hours and locations are "blatant direct impediments to voting"¹¹⁵ and, consequently, violations of the Act.¹¹⁶ Such practices, declared the committee, are simply the "latest in a direct line of repeated efforts to perpetuate the results of past voting discrimina-

106. *Bishop v. Lomenzo*, 350 F. Supp. 576, 585 (E.D.N.Y. 1972); see *McGee Hearings*, *supra* note 12, at 264-65 (statement of Prof. William Crotty).

107. *Bishop v. Lomenzo*, 350 F. Supp. 576, 585-86 (E.D.N.Y. 1972). See generally 116 Cong. Rec. 6989-91 (1970) (remarks of Sen. Goldwater, sponsor of the bill) (amendment intended to remove archaic statutory limitations on the franchise).

108. Pub. L. No. 91-285, 84 Stat. 315 (1970) (codified as amended at 42 U.S.C. § 1973aa (1976)).

109. See *Bishop v. Lomenzo*, 350 F. Supp. 576, 586 (E.D.N.Y. 1972) (interpreting legislative history).

110. See *infra* notes 111-17 and accompanying text. The most dependable sources of legislative intent are the reports of the committees that consider a piece of legislation. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 548 n.11 (1982) (Powell, J., dissenting); 2A C. Sands, *Sutherland Statutory Construction* § 48.06, at 203 (4th ed. 1973).

111. House Report, *supra* note 6, at 14.

112. *Id.* at 31.

113. See *id.*

114. *Id.*

115. Senate Report, *supra* note 4, at 10 n.22, reprinted in 1982 U.S. Code Cong. & Ad. News at 187 n.22.

116. See *id.* at 52 n.180, reprinted in 1982 U.S. Code Cong. & Ad. News at 231 n.180.

tion."¹¹⁷ During floor debate on the 1982 amendments, several Senators¹¹⁸ and Representatives¹¹⁹ stated that dual registration, inconvenient registration hours and inaccessible locations constitute unlawful discrimination. These members of Congress, while recognizing that restrictive registration practices are more subtle than poll taxes or literacy tests, nonetheless insisted that these practices deny minorities equal access to the political process.¹²⁰ Indeed, it is an oft-quoted maxim that "sophisticated, as well as simple-minded modes" of electoral discrimination are prohibited.¹²¹ Consequently, the legislative history of the VRA indicates that restrictive voter registration practices are extremely vulnerable to attack under section 2.¹²²

B. *New Burdens of Proof and New Obligations Under the 1982 Amendments*

The 1982 amendments to the Act change the burdens of proof in voting rights cases and impose new obligations on jurisdictions with respect to facilitating voter registration for minority citizens. These new burdens and obligations make it more difficult for jurisdictions to

117. *Id.* at 12, reprinted in 1982 U.S. Code Cong. & Ad. News at 189.

118. *See, e.g.*, 128 Cong. Rec. S7137 (daily ed. June 18, 1982) (remarks of Sen. Byrd) (inconvenient hours and locations); *id.* at S7111 (remarks of Sen. Metzenbaum) (dual registration, general inconvenience); *id.* at S7116 (remarks of Sen. Weicker) (dual registration).

119. *See, e.g.*, 127 Cong. Rec. H7007-08 (daily ed. Oct. 5, 1981) (remarks of Rep. Collins) (inconvenient registration); *id.* at H7004 (remarks of Rep. Lowry) (dual registration, inconvenient hours and locations); *id.* at H7003 (remarks of Rep. Pursell) (inconvenient hours); *id.* at H6868 (daily ed. Oct. 2, 1981) (remarks of Rep. Fowler) (inconvenient hours and locations); *id.* at H6845 (remarks of Rep. Hyde) (inconvenient hours); *id.* at H6842 (remarks of Rep. Rodino, Chairman, House Judiciary Comm.) (dual registration, inconvenience); *id.* at H6850 (remarks of Rep. Washington) (dual registration, inconvenient hours and locations); *see also id.* at H6969 (daily ed. Oct. 5, 1981) (remarks of Rep. Sensenbrenner) (failure to appoint deputy registrars viewed with skepticism); *id.* at H6968 (remarks of Rep. Washington) (same).

120. *See, e.g.*, 128 Cong. Rec. S7137 (daily ed. June 18, 1982) (remarks of Sen. Byrd); *id.* at S7116 (remarks of Sen. Weicker); 127 Cong. Rec. H7004 (daily ed. Oct. 5, 1981) (remarks of Rep. Lowry); *id.* at H6868 (daily ed. Oct. 2, 1981) (remarks of Rep. Fowler); *id.* at H6845 (remarks of Rep. Hyde).

121. Derfner, *supra* note 4, at 523 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (dictum)); *see* House Report, *supra* note 6, at 4. One district court has noted that "[t]here is no such thing as the State's legitimately being just a little bit discriminatory." *Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833, 835 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968). The congressional committees responsible for the 1982 amendments to the VRA apparently agreed. They declared that any statutory or constitutional voting rights violation should be presumed non-trivial. Senate Report, *supra* note 4, at 74, reprinted in 1982 U.S. Code Cong. & Ad. News at 253; House Report, *supra* note 6, at 44.

122. The new § 2 appears to embody an affirmative duty to liberalize voter registration procedures. *See* Blumstein, *supra* note 12, at 706-07.

maintain facially neutral registration procedures that perpetuate a history of unequal access to the political process.

1. Easing the Plaintiff's Burden Under Section 2

In *City of Mobile v. Bolden*,¹²³ a divided Supreme Court ruled that a showing of discriminatory purpose was a necessary element in establishing a violation under section 2 of the Act.¹²⁴ In most cases, however, the element of intent is simply too difficult to prove. Congress recognized that continued application of this requirement would be tantamount to condoning perpetuation of past discrimination.¹²⁵ In response to this problem, Congress adopted a "results"¹²⁶ standard modeled after the "totality of the circumstances" test enunciated by the Supreme Court in *White v. Regester*.¹²⁷ Following the lead of *White*, the Senate report lists several objective factors a plaintiff may demonstrate in order to establish a violation under this test.¹²⁸ No particular number of factors must be proven under the totality of circumstances test.¹²⁹ Rather, the necessary elements of proof vary depending on the nature of the practice being challenged and the result of that practice.¹³⁰

When a redistricting plan or an at-large voting scheme is challenged, plaintiffs are likely to allege that if blacks are not represented in public office in proportion to their percentage in the population, then a discriminatory result is shown.¹³¹ Although Congress conceded that proportional underrepresentation is one factor tending to show disproportionate access,¹³² it recognized that proportional representation would be antithetical to democratic principles.¹³³ Consequently,

123. 446 U.S. 55 (1980).

124. *Id.* at 60-74 (plurality opinion).

125. See Senate Report, *supra* note 4, at 36-37, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 214-15; House Report, *supra* note 6, at 31.

126. See 42 U.S.C.A. § 1973(b) (West Supp. 1983); Senate Report, *supra* note 4, at 27-30, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 204-08; House Report, *supra* note 6, at 28-31.

127. 412 U.S. 755, 769 (1973).

128. Senate Report, *supra* note 4, at 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 206-07.

129. *Id.* at 29, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 207; House Report, *supra* note 6, at 30.

130. Senate Report, *supra* note 4, at 30 n.118, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 207 n.118.

131. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980); *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

132. See 42 U.S.C.A. § 1973(b) (West Supp. 1983).

133. Senate Report, *supra* note 4, at 30-31, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 208-09; see *Rogers v. Lodge*, 102 S. Ct. 3272, 3288 (1982) (Stevens, J., dissenting); *City of Mobile v. Bolden*, 446 U.S. 55, 75-80 (1980); *Whitcomb v.*

a special proviso was added to the statute stating that members of a protected class have no right to be elected in numbers equal to their proportion in the population.¹³⁴ Underrepresentation standing alone, therefore, does not establish that a challenged redistricting plan or at-large voting scheme causes disproportionate access within the meaning of section 2.

Disproportionate registration rates, on the other hand, may present a stronger indication of unequal access. The use of disproportionate registration statistics as prima facie evidence of discrimination does not risk the imposition of proportional representation about which Congress was concerned. Moreover, in contrast to discriminatory redistricting and at-large election systems, discrimination in registration is the most egregious form of voter oppression because "it denies the right to vote before an individual has the chance to exercise it."¹³⁵ Thus, in a challenge to registration practices which Congress has found can be discriminatory, it appears that a showing of racial disproportions in registration rates may be sufficient to establish a prima facie violation under section 2.¹³⁶

The new burden of proof under section 2 facilitates an effective attack on restrictive voter registration practices.¹³⁷ Although some restrictive registration laws can be traced to intentional racial discrimination,¹³⁸ others simply persist from blind imitation of the past.¹³⁹

Chavis, 403 U.S. 124, 154-56 (1971). *But see* Hartman, *supra* note 60, at 738 n.311 (proportional representation is consistent with democratic principles).

134. 42 U.S.C.A. § 1973(b) (West Supp. 1983).

135. *United States v. Manning*, 215 F. Supp. 272, 288 (W.D. La. 1963); *see* League Report, *supra* note 12, at 1484.

136. Congress explicitly stated in the newest amendments to the Act that racial disproportions in voter registration are evidence a court should consider in deciding whether a jurisdiction has eliminated the remnants of past discrimination. 42 U.S.C.A. § 1973b(a)(2) (West Supp. 1983); *see* Senate Report, *supra* note 4, at 73-74, reprinted in 1982 U.S. Code Cong. & Ad. News at 252-53.

137. Plaintiffs have been extremely successful litigating under the new standard. *See, e.g.*, *Major v. Treen*, No. 82-1192, slip op. (E.D. La. Sept. 23, 1983); *Alonzo v. Jones*, No. C-81-227, slip op. (S.D. Tex. Feb. 2, 1983); *Thomasville Branch of the NAACP v. Thomas County*, No. 75-34-THOM, slip op. (M.D. Ga. Jan. 26, 1983); *Taylor v. Haywood County*, 544 F. Supp. 1122 (W.D. Tenn. 1982). *But see* *United States v. Dallas County Comm'n*, 548 F. Supp. 875, 887-90, 899 (S.D. Ala. 1982) (section 2 challenge failed because no racial disproportion in registration was shown), *appeal docketed*, No. 82-7362 (11th Cir. Nov. 18, 1983).

138. Mississippi law, for example, bars the establishment of satellite registration locations. Miss. Code Ann. § 23-5-29 (1972). This provision was added to the Mississippi Code in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), *see* 1955 Miss. Laws, Extraordinary Sess., ch. 103, as part of a collection of laws designed to maintain white supremacy, *id.* at ch. 104 (strengthening literacy tests to disfranchise blacks); *id.* at ch. 43 (prohibiting white children from attending state-supported schools with black children); *see* *United States v. Mississippi*, 380 U.S. 128, 143-44 (1965). Prior to *Brown*, county registrars were required to spend not less than one day at each polling place during a county election year. 1952 Miss. Laws ch. 399.

Practices that are the product of intentional discrimination are subject to attack under the equal protection clause of the fourteenth amendment.¹⁴⁰ Practices that persist from the past, or those for which scienter is impossible to prove, however, are immune from fourteenth amendment scrutiny.¹⁴¹ One contemporary commentator has noted that “[t]he essence of effective racial discrimination was and remains the creation of rules and circumstances that minimize the necessity for new acts of intentional discrimination.”¹⁴² Until the 1982 amendments to the Act, restrictive registration practices were a prime example of such a rule. By simply making no efforts to facilitate voter registration, state and county officials could perpetuate the political exclusion of minorities.¹⁴³ The new results standard permits citizens to challenge

Under the current law, registrars cannot spend more than one day outside their offices each election year. *See* Miss. Code Ann. § 23-5-29 (1972). The change in wording was subtle yet effective. According to one witness before the House Judiciary Committee last year: “In Mississippi it is easier to buy a gun or get a hunter’s license than it is to register to vote.” *House Hearings, supra* note 5, at 472 (testimony of Dr. Henry Aaron, President, Mississippi State Conference, NAACP).

Intent to discriminate on the basis of race was also evident in the actions of some members of the Alabama State Senate in 1981. A bill was introduced in the Senate to expand registration opportunities by permitting local officials to appoint city clerks as registrars. An amendment was offered, however, to exempt those counties with the largest percentages of black residents from being able to take advantage of this provision. House Report, *supra* note 6, at 17.

139. 119 Cong. Rec. 1478 (1973) (remarks of Sen. Kennedy); *see* House Report No. 778, *supra* note 12, at 2-3, *reprinted in* Postcard Registration at 72-73. Restrictive registration practices can often be traced to the attitudes of county registrars who put their own convenience ahead of that of the voters. *See Hearings on the Concept of National Voter Registration, supra* note 12, at 288 (testimony of Don Bonker, County Auditor, Clark County, Wash.). Expanded registration opportunities often entail extra effort by local officials, and as a result, such opportunities are slow in coming. *Cf. Schnapper, supra* note 61, at 836 (administrative convenience is often the basis for selection of discriminatory acts with enduring impact).

140. *City of Mobile v. Bolden*, 446 U.S. 55, 65-74 (1980) (plurality opinion); *City of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976).

141. *See City of Mobile v. Bolden*, 446 U.S. 55, 69-70 (1980) (plurality opinion). *But see Rogers v. Lodge*, 102 S. Ct. 3272, 3279 (1982) (court inferred intent from totality of circumstances).

142. Schnapper, *supra* note 61, at 863; *cf. Lawrence, Segregation “Misunderstood:” The Milliken Decision Revisited*, 12 U.S.F.L. Rev. 15, 40 (1977) (“Once the state has effectively institutionalized racial segregation as a labeling device, only minimal maintenance is required to keep it in working order.”).

143. One commentator graphically described the problem of perpetuation of past discrimination:

[V]estiges of past discrimination do not exist gratuitously or only to a small degree—creating systematic, pervasive, and enduring vestiges [of discrimination] is what effective discrimination was and is all about. Like a terrorist

such practices, and thus put a stop to the history of discrimination in voting.¹⁴⁴

2. Stiffening the Jurisdiction's Burden Under Section 5

After years of widespread resistance to minority suffrage, Congress decided to "shift the advantage of time and inertia from the perpetrators of the evil to its victims."¹⁴⁵ Section 5 of the VRA is the counterpart of section 2. Under section 2, individual plaintiffs must prove a jurisdiction is acting discriminatorily. Under section 5, on the other hand, covered jurisdictions—those having a cognizable history of racial discrimination in their electoral systems¹⁴⁶—must prove that any proposed changes in their election laws are nondiscriminatory.¹⁴⁷ In this way, jurisdictions are precluded from installing a new discriminatory device after an existing one is invalidated.¹⁴⁸

In *Beer v. United States*,¹⁴⁹ the Court interpreted section 5 to bar only those voting procedures that "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."¹⁵⁰ Under *Beer*, ameliorative changes in election procedures, even if discriminatory when viewed in isolation, are permitted if they are less discriminatory than the existing election scheme. Justice Marshall objected vigorously to this interpretation because ameliorative changes perpetuate discrimination in contravention of the Act.¹⁵¹

In *City of Lockhart v. United States*,¹⁵² decided early in 1983, the Court reaffirmed and expanded its holding in *Beer*.¹⁵³ The *Lockhart*

pouring poison into a city water system, an official who engages in racial discrimination intentionally sets in motion events that will cause harms that he cannot predict to victims whom he will never know.

Schnapper, *supra* note 61, at 839.

144. See *Major v. Treen*, No. 82-1192, slip op. at 55-56 (E.D. La. Sept. 23, 1983). In amending § 2, Congress "sought to enact a legislative prophylaxis, calculated to forestall the institution of potentially discriminatory electoral systems and extirpate facially neutral devices or procedures which continue to expose minority voters to harmful consequences rooted in historical discrimination." *Id.* at 54. Courts have an obligation to decide voting rights cases under the Act, rather than under the Constitution, if possible. See *New York Transit Auth. v. Beazer*, 440 U.S. 568, 582 & n.22 (1979).

145. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

146. 42 U.S.C. § 1973b(b) (1976). See *supra* note 94 and accompanying text.

147. 42 U.S.C. § 1973c (1976).

148. See Senate Report, *supra* note 4, at 5, reprinted in 1982 U.S. Code Cong. & Ad. News at 181-82; House Report, *supra* note 6, at 3-4.

149. 425 U.S. 130 (1976).

150. *Id.* at 141.

151. *Id.* at 151-52 (Marshall, J., dissenting).

152. 103 S. Ct. 998 (1983).

153. *Id.* at 1003-04.

plan, unlike that in *Beer*, was not even ameliorative. It was neither more nor less discriminatory than the plan in place; thus, the Court approved it.¹⁵⁴ Significantly, however, the Court expressly refused to consider the effect of the new amendments to the VRA on the section 5 standard of review.¹⁵⁵

The 1982 amendments to the VRA demonstrate that the central purpose of section 5, much like that of the section 2 results test,¹⁵⁶ is to prevent jurisdictions from perpetuating electoral discrimination.¹⁵⁷ Section 5 suspends all new voting procedures pending a determination that such practices do not "perpetuate voting discrimination."¹⁵⁸ Discriminatory practices initiated before passage of the VRA can be challenged under section 2. The same practices implemented more recently in a covered jurisdiction will not receive clearance under section 5. Thus, the lawfulness of a practice does not vary depending on when it was initiated or under which section it is evaluated.¹⁵⁹

The legislative history of the 1982 amendments to section 5 reveals Congress' intention to restore the symmetry between sections 2 and 5 that was disturbed in *Beer*. In addressing the amendments to section 5, the Senate Judiciary Committee acknowledged the existence of *Beer's* nonretrogression standard and stated: "In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2."¹⁶⁰ The restoration of the section 2 standard of review to section 5 was echoed by the principal sponsors of the amendment in both houses

154. *Id.* at 1003 & n.10; *id.* at 1007-08 (Marshall, J., concurring in part and dissenting in part).

155. *Id.* at 1003 n.9. The Court declined to rule on the effect of the new amendments because the district court had not had the opportunity to consider the issue. *Id.*

156. See House Report, *supra* note 6, at 31.

157. *City of Lockhart v. United States*, 103 S. Ct. 998, 1010 (1983) (Marshall, J., concurring in part and dissenting in part); see *City of Rome v. United States*, 446 U.S. 156, 182 (1980) (section 5 extended in 1975 "to counter the perpetuation of 95 years of pervasive voting discrimination"); Senate Report, *supra* note 4, at 12 (section 5 aimed at complex and subtle "schemes . . . [that are] clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination"), reprinted in 1982 U.S. Code Cong. & Ad. News at 189.

158. *South Carolina v. Katzenbach*, 383 U.S. 301, 315-16 (1966); see 42 U.S.C. § 1973c (1976).

159. House Report, *supra* note 6, at 28.

160. Senate Report, *supra* note 4, at 12 n.31, reprinted in 1982 U.S. Code Cong. & Ad. News at 189 n.31. The Justice Department has adopted this standard in its review of new voting procedures submitted under § 5. See Letter from William Bradford Reynolds, Asst. Att'y Gen., Civil Rights Div., to Thomas P. Lewis, Amite County Chancery Clerk, Amite County, Mississippi, June 6, 1983, at 1 (available in files of *Fordham Law Review*). The construction of the Act by the agency charged with its enforcement warrants great deference. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

of Congress.¹⁶¹ Although Congress did not explicitly repudiate the holding in *Beer*, it limited *Beer's* efficacy by forcing jurisdictions seeking to preclear a change to prove that the new procedure will not have a discriminatory result.¹⁶²

Restoration of the symmetry between sections 2 and 5 is particularly beneficial to a challenge of restrictive registration procedures. The Supreme Court has indicated that registration locations inaccessible to the black community may be discriminatory under section 5.¹⁶³ A lower federal court has ruled that failure to appoint deputy registrars may also bar preclearance under section 5.¹⁶⁴ The Senate report identifies inconvenient registration hours and locations as possible section 5 violations.¹⁶⁵ The House report, without specifying whether it was referring to standards under section 2 or 5, lists not only inconvenient hours and locations as barriers to registration, but also

161. 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner); *id.* at S7095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy); *accord* *City of Lockhart v. United States*, 103 S. Ct. 998, 1009-10 (1983) (Marshall, J., concurring in part and dissenting in part). As floor managers and principal sponsors of the 1982 amendments, the remarks of Senator Kennedy and Representative Sensenbrenner should be accorded substantial weight in determining congressional intent. *See* *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982). The only contrary remarks came from Representatives Fowler and Levitas. *See* 128 Cong. Rec. H3845 (daily ed. June 23, 1982) (Fowler-Edwards colloquy) (bill does not change preclearance procedures under § 5); *id.* at H3844 (Levitas-Edwards colloquy) (same). Remarks made by individual members of Congress not responsible for drafting a measure are generally accorded little weight. *See* *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 406 n.15 (1982) (Powell, J., dissenting); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976). In addition, it has been asserted that Levitas and Fowler did not intend to clarify congressional intent. Rather, they may have been seeking to manipulate the legislative history in order to influence the outcome of a pending lawsuit involving reapportionment of their congressional districts. Post-Trial Brief for Defendant-Intervenors at 12-15, *County Council of Sumter County v. United States*, No. 82-0912 (D.D.C. 1983); *see* *Busbee v. Smith*, 549 F. Supp. 494, 508 (D.D.C. 1982) (reapportionment jeopardized the seats of both incumbent congressmen), *aff'd*, 103 S. Ct. 809 (1983).

162. It was recognized that continued adherence to the nonretrogression principle would immunize preexisting black underrepresentation from judicial scrutiny. *See* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1105 (1978). Thus, Congress was forced to add the § 2 hurdle to § 5 review. Failure to do so would have allowed covered jurisdictions to "perpetuate the results of past voting discrimination and to undermine the gains won under other sections of the Voting Rights Act." Senate Report, *supra* note 4, at 12, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 189.

163. *See* *Perkins v. Matthews*, 400 U.S. 379, 387-88 (1971) (dictum); *NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 679 (N.D. Ga. 1980).

164. *NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 677 (N.D. Ga. 1980).

165. Senate Report, *supra* note 4, at 10 n.22, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 187-88 n.22.

dual registration and the failure to appoint deputy registrars.¹⁶⁶ The Attorney General has found all these types of restrictive registration practices discriminatory under section 5.¹⁶⁷

Whether a violation of the VRA originates under section 2 or section 5 should no longer be significant because both sections embody the same standard for determining what is discriminatory.¹⁶⁸ Thus, if restrictive registration practices are discriminatory under section 5, they are also a violation of section 2. The recent amendments to section 4 of the Act lend further support to this view.

3. Section 4: Congressional Recognition That Restrictive Registration Practices Perpetuate Past Discrimination

Section 4 of the VRA provides a mechanism through which jurisdictions covered by section 5 can “bail out” of the Act’s preclearance requirements.¹⁶⁹ To bail out, a jurisdiction must prove that for ten years it has not engaged in any discriminatory practices.¹⁷⁰ Restrictive registration procedures, therefore, foreclose a jurisdiction from meeting its burden under section 4.¹⁷¹

166. House Report, *supra* note 6, at 14-15. Most of those members of Congress who decried restrictive registration procedures as discriminatory also failed to mention whether they were referring to § 2 or § 5. See *supra* notes 118-19 and accompanying text.

167. See Motomura, *supra* note 7, at 198-200.

168. See 128 Cong. Rec. S7096 (daily ed. June 18, 1982) (“What the jurisdiction must prove [in a section 5 case] is the converse of what a voter has to prove in a section 2 case.”); *id.* at S6993 (daily ed. June 17, 1982) (remarks of Sen. Dole) (sections 5 and 2 are identical except for the burden of proof); *id.* at S6995 (remarks of Sen. Kennedy). The § 5 effects test, which bars only those plans that worsen conditions for minorities, is distinguishable from the § 2 totality of circumstances test. See 2 *Senate Hearings*, *supra* note 8, at 80 (remarks of Sen. Dole); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner). Yet, apparently any plan submitted under § 5 must pass the § 2 test in accordance with the 1982 amendments. See *supra* notes 160-61 and accompanying text. Thus, the principles embodied in preclearance are substantively identical to those contained in § 2.

169. 42 U.S.C.A. § 1973b(a) (West 1981 & Supp. 1983).

170. *Id.*

171. In addition to following the preclearance procedures of the Act, *id.* § 1973b(a)(1)(D), a jurisdiction must prove that it has not received an unfavorable decision in a § 2 suit, *id.* § 1973b(a)(3), that it has not filed any objectionable plans for preclearance under § 5, *id.* § 1973b(a)(1)(E), and that no federal examiners have been sent into the jurisdiction pursuant to the Act, *id.* § 1973b(a)(1)(C). Inconvenient hours and locations, coupled with a racial disparity in voter registration rates, are likely to prompt the Attorney General to send federal examiners into a jurisdiction. See Senate Report, *supra* note 4, at 52 n.180, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 231 n.180. Clearly, restrictive registration procedures could not survive review under §§ 2 or 5. See *supra* notes 123-68 and accompanying text. Thus, a jurisdiction that maintains restrictive registration procedures could not bail out under § 4.

One of the most persuasive indications of Congress' intent to outlaw restrictive registration requirements is found in the newest amendments to section 4. In 1982, Congress required a jurisdiction not only to refrain from discriminatory action, but to undertake constructive efforts to achieve full minority participation in the political process as a precondition to bailout.¹⁷² The purpose of this new requirement is to attack not only discriminatory barriers to participation, but also those more subtle procedures that perpetuate the effects of past discrimination.¹⁷³ Therefore, in order to bail out, a jurisdiction "must do more than simply maintain the status quo, if the status quo has the purpose or effect of discriminating against minority voters."¹⁷⁴ The jurisdiction must take "positive . . . result-oriented" steps to completely eradicate electoral discrimination.¹⁷⁵

The constructive efforts provision requires jurisdictions seeking to bail out to prove they are not engaging in any registration practices which could be successfully challenged under section 2.¹⁷⁶ The provision consists of three parts. One requires a jurisdiction to make a constructive effort to eliminate harassment and intimidation of minority voters.¹⁷⁷ It is unlikely such activities would be allowed to continue under section 2.¹⁷⁸

A second requirement of the constructive efforts provision calls for elimination of all procedures and methods which inhibit or dilute equal access to the political process.¹⁷⁹ Discriminatory procedures within the meaning of this section are evidenced by all "unduly restrictive voter registration procedures . . . [that] do not permit minor-

172. 42 U.S.C.A. § 1973b(a)(1)(F) (West Supp. 1983). These amendments will not take effect until August 5, 1984. *Id.*

173. Senate Report, *supra* note 4, at 53, reprinted in 1982 U.S. Code Cong. & Ad. News at 232.

174. House Report, *supra* note 6, at 42; see Senate Report, *supra* note 4, at 72, reprinted in 1982 U.S. Code Cong. & Ad. News at 251.

175. House Report, *supra* note 6, at 42; see Senate Report, *supra* note 4, at 72, reprinted in 1982 U.S. Code Cong. & Ad. News at 251.

176. See 128 Cong. Rec. S6993 (daily ed. June 17, 1982) (remarks of Sen. Dole); *id.* at S6964-65 (remarks of Sen. Heflin).

177. 42 U.S.C.A. § 1973b(a)(1)(F)(ii) (West Supp. 1983).

178. See Senate Report, *supra* note 4, at 10 n.22, 52 n.180, reprinted in 1982 U.S. Code Cong. & Ad. News at 187 n.22, 231 n.180; House Report, *supra* note 6, at 14-15. Cf. 18 U.S.C. § 594 (1976) (federal offense for anyone to intimidate or coerce a voter); 42 *id.* § 1973i(b) (same). It is noteworthy that the House rejected an amendment that would have required a jurisdiction seeking to bail out to eliminate only that intimidation and harassment "which the court finds existed." 127 Cong. Rec. H6982 (daily ed. Oct. 5, 1981). Presumably, the basis of this rejection was that if a court determined that intimidation or harassment of voters was occurring, § 2 would allow the court to order the jurisdiction to take steps to stop it even before the jurisdiction applied for bailout. See House Report, *supra* note 6, at 14-15.

179. 42 U.S.C.A. § 1973b(a)(1)(F)(i) (West Supp. 1983).

ities 'to enter into the political process in a reliable and meaningful manner.' ”¹⁸⁰ To meet its burden of proof under this section, a jurisdiction must do more than simply end formal barriers to registration;¹⁸¹ it must make an empirical showing that registration procedures have neither a discriminatory purpose nor effect.¹⁸² In considering whether this burden is met, a section 2 results test is applied,¹⁸³ with the burden on the jurisdiction rather than on the private individual.¹⁸⁴

The third element of the constructive efforts requirement demands that jurisdictions take affirmative steps to expand opportunities for minority citizens to register and vote.¹⁸⁵ Those steps include: appointment of deputy registrars who are accessible to minority citizens, institution of evening and weekend registration hours and establishment of registration locations accessible to the minority community.¹⁸⁶ At first impression, requiring these liberalized registration procedures as a precondition for bailout does not necessarily suggest that restrictive registration procedures are per se unlawful.¹⁸⁷ The legislative history, however, is replete with evidence that failure to meet this requirement, like failure to meet the first two requirements of the constructive efforts provision, would constitute a violation of section 2.

For example, during debate on the bill, it was conceded that the constructive efforts provision requires jurisdictions to eliminate some practices, such as restrictive registration procedures, “which [had] not previously been considered unlawful.”¹⁸⁸ This statement suggests that restrictive registration procedures are now unlawful. Additionally, the Senate report suggests that the constructive efforts requirement is

180. House Report, *supra* note 6, at 42-43 (quoting *White v. Regester*, 412 U.S. 755, 767 (1973)); *accord* Senate Report, *supra* note 4, at 54 & n.184, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 233 & n.184.

181. Section 4 demands elimination of “all . . . structural and procedural barriers” to voting. House Report, *supra* note 6, at 43. Such procedural barriers “encompass requirements for voter registration and the registration process.” *Id.*

182. *Id.*; *see* 128 Cong. Rec. S6993 (daily ed. June 17, 1982) (remarks of Sen. Dole).

183. Senate Report, *supra* note 4, at 54, 72, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 232, 251.

184. *Id.* at 56, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 234.

185. 42 U.S.C.A. § 1973b(a)(1)(F)(iii) (West Supp. 1983).

186. *Id.*; *see* Senate Report, *supra* note 4, at 55, 73, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 233, 252, House Report, *supra* note 6, at 43-44.

187. *See* 127 Cong. Rec. H6846 (daily ed. Oct. 2, 1981) (remarks of Rep. Hyde) (interpreting § 4 narrowly so that only jurisdictions seeking to bail out had the responsibility to expand registration hours and locations).

188. *Id.* at H6960 (daily ed. Oct. 5, 1981) (remarks of Rep. Lungren).

not simply an option open to covered jurisdictions wishing to bail-out;¹⁸⁹ it is a requirement consistent with the positive spirit of the VRA.¹⁹⁰

The interplay between sections 2 and 4 became clear during debate on the Senate floor. Senator Dole, author of the amended section 2, explicitly stated that the factors to be considered in a section 4 bail out are identical to those considered in determining whether a section 2 violation has been established.¹⁹¹ As such, a jurisdiction seeking to bail out and an individual attacking restrictive registration requirements under section 2 must prove opposite sides of the same evidentiary coin. The jurisdiction must prove it has provided minorities with equal access to the registration process by eliminating not only formal barriers, but also the less tangible impediments to the registration process.¹⁹² Conversely, a plaintiff challenging a jurisdiction's restrictive registration procedures would simply have to prove the existence of such barriers or impediments.¹⁹³ To do so, the plaintiff need only show that the jurisdiction maintains restrictive registration practices that result in a racial disparity in voter registration.¹⁹⁴

The new constructive efforts requirement of the bailout provision is Congress' most explicit indication to date that restrictive registration procedures are unlawful under section 2. The new requirements were designed to eliminate restrictive registration practices that typically perpetuate a history of pervasive discrimination in voting.¹⁹⁵ The amended section 2 was intended to accomplish the same purpose.¹⁹⁶ Thus, it strains credulity to assert that restrictive registration practices could survive an attack under section 2. If section 2 were interpreted so narrowly as to permit such practices, its usefulness as a weapon against electoral discrimination would be vitiated.

IV. REMEDIES

A. Remedial Power of Courts

The legislative history of the VRA bespeaks Congress' intent to eliminate the use of restrictive registration procedures. The right to

189. In describing the debate over the constructive efforts provision, the Senate Judiciary Committee stated that civil rights groups initially opposed the provision because they did not think jurisdictions needed "any additional incentive to obey the law." Senate Report, *supra* note 4, at 46, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 224. Such a statement suggests that the provision encompasses steps that may be necessary to achieve full minority political participation as required by the Act.

190. 128 Cong. Rec. S6560 (daily ed. June 9, 1982) (remarks of Sen. Kennedy).

191. 128 Cong. Rec. S6993 (daily ed. June 17, 1982) (remarks of Sen. Dole); *see id.* at S6992 (remarks of Sen. Kennedy).

192. *See id.* at S6993 (remarks of Sen. Dole).

193. *See supra* notes 110-44 and accompanying text.

194. *See supra* notes 57, 136.

195. *See supra* note 173 and accompanying text.

196. *See House Report, supra* note 6, at 31.

register to vote free of unreasonable burdens is an empty promise unless courts have the power to impose remedies to facilitate voter registration. In recognition of this dilemma, the Supreme Court has ruled that courts have the power and the duty to end future discrimination in voting and the discriminatory effects of the past.¹⁹⁷

In the sixties, federal courts in the South developed the "freeze" remedy to combat procedures that perpetuated the effects of past discrimination.¹⁹⁸ The freeze theory is premised on the principle that the state must apply to black registration applicants the same standards used to judge white applicants.¹⁹⁹ For example, in *United States v. Palmer*,²⁰⁰ one type of restrictive registration practice, inconvenient hours, was invalidated pursuant to the freeze remedy.²⁰¹ After the Supreme Court barred use of the state literacy test,²⁰² the county

197. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); see *Hamer v. Campbell*, 358 F.2d 215, 219 (5th Cir.), cert. denied, 385 U.S. 851 (1966).

198. The "freeze" remedy was first adopted by Judge Johnson in *United States v. Penton*, 212 F. Supp. 193, 199 (M.D. Ala. 1962). The remedy is grounded on the theory that the effects of past discrimination in registration will persist unless the standards applied to white registration applicants are "frozen" for black applicants. Within a few years it had become the most popular remedy in cases involving racial discrimination in voter registration. See, e.g., *United States v. Palmer*, 356 F.2d 951, 952-53 (5th Cir. 1966); *United States v. Ramsey*, 353 F.2d 650, 655 (5th Cir. 1965); *United States v. Duke*, 332 F.2d 759, 768-69 (5th Cir. 1964). The remedy had its roots in the equitable principles first enunciated in earlier voter registration cases. See, e.g., *Lane v. Wilson*, 307 U.S. 268 (1939) (invalidating registration period of only twelve days after grandfather clause had disenfranchised blacks for years); *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating grandfather clause which exempted only whites from passing a literacy test); see Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 Sup. Ct. Rev. 379, 382-85. The remedy was approved by the Supreme Court in *Louisiana v. United States*, 380 U.S. 145, 154 (1965), and expanded by the Court in *Gaston County v. United States*, 395 U.S. 285 (1969); see Fiss, *supra*, at 390-426. In *Gaston County*, the Court invalidated a literacy test which, though impartially applied, had a discriminatory impact on black political participation. Gaston County's past systematic deprivation of equal educational opportunities, reasoned the Court, left its blacks unprepared for the rigors of the literacy requirement. *Id.* at 296-97. In much the same way, past educational and economic discrimination has left many blacks unprepared to meet the burden posed by restrictive registration practices. See *supra* notes 30-35 and accompanying text.

199. *United States v. Louisiana*, 225 F. Supp. 353, 393 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1980). The district court declared:

An appropriate remedy therefore should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination. If it were, the State could seal into permanent existence the injustices of the past.

Id.

200. 356 F.2d 951 (5th Cir. 1966).

201. *Id.* at 952-53.

202. *Louisiana v. United States*, 380 U.S. 145, 153 (1965).

registrar closed the only available registration office. Although the court conceded that the registrar's action precluded both blacks and whites from registering, it found the practice to be racially discriminatory because the use of the literacy test had enabled most whites and few blacks to register.²⁰³ Thus, closing the office effectively precluded only blacks from exercising their right to vote. By ordering the office to reopen, the court ensured that the standard previously applied to whites, that is, having an open registration office, was also applied to blacks.²⁰⁴ Although *Palmer* represents an extreme example of inconvenient registration hours, there is very little conceptual difference between the practices remedied in *Palmer* and the more subtle practices that many jurisdictions currently maintain.

Courts have exercised their broad power to eliminate electoral discrimination in other ways as well. Elections have been enjoined²⁰⁵ and even invalidated after the fact.²⁰⁶ In addition, courts have the power to alter the constituencies of elected officials to prevent unconstitutional dilution of black voting strength.²⁰⁷ In defining the power of a court to remedy discrimination in the analogous area of public education,²⁰⁸ the Supreme Court has declared: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."²⁰⁹ Accordingly, judicial intervention invoked pursuant to a congressional mandate, such as that contained in the VRA, presumptively embodies the power to effectuate the purposes of the Act—to guarantee black voters equal access to the ballot box.²¹⁰ The Senate Judiciary Committee²¹¹ and the principal

203. *United States v. Palmer*, 356 F.2d 951, 952 (5th Cir. 1966) ("[W]e cannot take seriously a registrar's wry defense that since the office was closed to applicants of both races, there was no discrimination.").

204. *Id.* at 953.

205. *E.g.*, *Ellis v. Mayor of Baltimore*, 352 F.2d 123 (4th Cir. 1965) (affirming injunction against referendum to validate an unconstitutional redistricting plan); *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981) (enjoining primary election for failure to comply with § 5 of the VRA).

206. *E.g.*, *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S. 851 (1966); *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968); *see Toney v. White*, 488 F.2d 310, 314-15 (5th Cir. 1973) (dictum); *United States v. Louisville Mun. Separate School Dist.*, 557 F. Supp. 1168, 1172 (N.D. Miss. 1983) (same).

207. *See Rogers v. Lodge*, 102 S. Ct. 3272, 3281 (1982); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Connor v. Williams*, 404 U.S. 549, 551 (1972).

208. *See supra* notes 62-70 and accompanying text.

209. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

210. *See Chayes, The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1295 (1976).

211. Senate Report, *supra* note 4, at 31, reprinted in 1982 U.S. Code Cong. & Ad. News at 208.

sponsors²¹² of the 1982 amendments to the Act reaffirmed the use of traditional remedies to combat racial discrimination in voting. Congress did not even prohibit courts from utilizing remedies that result in proportional representation.²¹³ Thus, courts remain free to order less drastic measures to eliminate racial disparities in registration rates including "detailed supervision of the day-to-day operation of voter registration."²¹⁴

B. *Relevant Factors in Fashioning a Remedy*

If a court decides that restrictive registration practices are inhibiting black political participation, the available remedies include: (1) appointing minority deputy registrars; (2) ordering weekend and evening registration hours; (3) establishing satellite registration locations in minority neighborhoods; (4) establishing a system of registration by

212. See 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner); *id.* at S6968 (daily ed. June 17, 1982) (remarks of Sen. Kennedy).

213. In amending the Act in 1982, Congress determined that disproportionate representation alone is not conclusive evidence of a violation of § 2. 42 U.S.C.A. § 1973(b) (West Supp. 1983). The legislative history of the amendments indicates, however, that Congress did not foreclose the imposition of remedies that result in proportional representation when a violation has been found. During debate on the 1982 amendments, Senator East offered an amendment that would have deprived courts of jurisdiction to require proportional representation. 128 Cong. Rec. S6966 (daily ed. June 17, 1982). The Senate overwhelmingly rejected the amendment, *id.* at S6969, because it would have altered the "traditional, equitable powers" of courts to provide "a fair opportunity for minorities to participate in the political process." *Id.* at S6968 (remarks of Sen. Kennedy). Senator Helms, however, was worried that rejection of the East amendment would be interpreted by courts as congressional approval of the remedy of proportional representation. *Id.* at S6969 (remarks of Sen. Helms). To counter this apparent expression of congressional intent, Helms offered an amendment, which he hoped would be defeated, explicitly permitting courts to remedy violations of the Act by ordering proportional representation. *Id.* The Helms amendment was resoundingly defeated. *Id.* at S6970. Several senators, however, rejected the notion that defeat of the Helms amendment should be construed as diminishing the latitude of courts to remedy violations of the Act. Senator Kennedy, for example, said that the Helms amendment was rejected because the 1982 amendments to the Act were not intended to interfere with the equitable jurisprudence of judicial remedies. *Id.* (remarks of Sen. Kennedy). Moreover, Senators Levin and Specter stated that defeat of the Helms amendment does not curtail the power of federal courts to order remedies that result in proportional representation. See *id.* at S6969 (remarks of Sen. Levin); *id.* at S6970 (remarks of Sen. Specter).

214. *Alabama v. United States*, 304 F.2d 583, 585 (5th Cir.), *aff'd*, 371 U.S. 37 (1962); see Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 27-28 (1979) ("The [court's] task is to remove the condition that threatens the constitutional values . . . [The court's] jurisdiction will last as long as the threat persists."). Cf. *Battle v. Anderson*, 708 F.2d 1523, 1539 (10th Cir. 1983) (if unconstitutional prison conditions exist courts have the power and duty to retain jurisdiction until those conditions are rectified).

mail; and (5) ordering a state-supported minority voter registration drive. In deciding which remedies are appropriate in a given situation, the following factors should be considered.

1. Organization of the Black Community

If the black community is highly organized, as evidenced by the prevalence of black membership organizations, increasing the number of deputy registrars may be an appropriate remedy.²¹⁵ With this authority, black organizations would have the power and capability to make registration convenient and unthreatening.²¹⁶ The burdens on deputies, however, like the burdens on potential voters, should be minimized. Thus, it is important that the deputies be authorized either permanently or for a fixed period of time to register persons anywhere in the county. Restrictions on the mobility of registrars or rules forcing them to reapply too often would also vitiate the effectiveness of the remedy.²¹⁷

2. Geographic Distribution of Blacks

If black residents are located in a rural, but fairly compact region, the establishment of a satellite registration office, open during weekend and evening hours and staffed by neighborhood deputy registrars,

215. In *United States v. Dallas County Comm'n*, 548 F. Supp. 875 (S.D. Ala. 1982), *appeal docketed*, No. 82-7362 (11th Cir. Nov. 18, 1982), however, the court's emphasis on the highly organized nature of the black community, *id.* at 899, 903, suggests that its decision not to order the appointment of deputy registrars, *id.* at 888-90, was premised on the court's belief that blacks could achieve full political participation without deputization.

216. White deputies may be disposed to avoid black neighborhoods, *see Hearings on the Concept of National Voter Registration*, *supra* note 12, at 144-45 (testimony of Erik O'Dowd, Esq.), and out-of-office registration is much less effective when the persons soliciting applicants are from different ethnic groups. *See* P. Kimball, *supra* note 12, at 88. Therefore, appointment of black deputy registrars may be critical to expanding black voter registration opportunities. *Cf.* 42 U.S.C.A. 1973b(a)(1)(F)(iii) (appointing minority election officials is a precondition to bailout); Senate Report, *supra* note 4, at 55 (appointing minority election officials may be necessary to achieve full minority participation in the political process), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 233.

217. *See Hearings on the Concept of National Voter Registration*, *supra* note 12, at 451-52 (testimony of Carlos Alcalá, Youth Citizenship Fund). A danger posed by consideration of this factor is that courts may overestimate the degree of organization in the black community. *See id.* at 626 (League of Women Voters Educ. Fund, *Removing Administrative Obstacles to Voting* (1972)) (difficulty of identifying legitimate community groups and leaders). For example, a court could conclude that if there are enough blacks in a community to mount a challenge to restrictive registration practices, then appointing blacks to be deputy registrars would be all that is necessary. Such a narrow view could frustrate the purposes of the Act.

would probably be effective in increasing black political participation.²¹⁸ Rural blacks, however, are more likely to be dispersed over a wide area.

In such a case, targeted mail registration may be a more appropriate remedy. Congress has rejected both nationwide mail registration²¹⁹ and, through enactment of the VRA, exclusive state control of elections.²²⁰ Mail registration targeted at low voter participation areas represents a compromise between nationwide mail registration and exclusive state control over elections. The Senate report evidences Congress' intention, in amending the Act in 1982, to authorize remedial use of mail registration. In its discussion of devices which jurisdictions seeking to bail out might use to expand minority registration opportunities, the committee explicitly mentions mail registration.²²¹ Thus, ordering registration by mail appears to be within the scope of a court's broad power to eradicate restrictive registration practices.

3. Occupational, Educational and Economic Factors

A court should further consider occupational, educational and economic factors in determining what type of remedy to apply. In many

218. Deputy registrars alone may not be sufficient to increase black political participation. As a result, the institution of branch registration, which has proven extremely effective in facilitating minority registration, may be necessary. See P. Kimball, *supra* note 12, at 301. *But see* R. Wolfinger & S. Rosenstone, *supra* note 13, at 76 (appointment of deputy registrars and establishment of convenient locations would not increase voter turnout).

219. See R. Wolfinger & S. Rosenstone, *supra* note 13, at 65. Congress has considered several bills implementing mail registration. See, e.g., S. 1177, 94th Cong., 1st Sess. (1975), *reprinted in Hearings on Mail Registration, supra* note 12, at 7-19; S. 2574, 92nd Cong., 1st Sess. (1971), *reprinted in McGee Hearings, supra* note 12, at 40-50. None was successful. Twenty states, however, have instituted voter registration by mail. See Alaska Stat. § 15.07.050 (1982); Cal. Elec. Code § 301 (West Supp. 1983); Del. Code Ann. tit. 15, § 2012(a) (1974); Iowa Code Ann. § 48.3 (West Supp. 1983-1984); Kan. Stat. Ann. § 25-2309(a) (Supp. 1982); Ky. Rev. Stat. § 116.045(4)(b) (Supp. 1982); Me. Rev. Stat. Ann. tit. 21, § 102A (1983); Md. Elec. Code Ann. § 3-1(c) (Supp. 1982); Minn. Stat. Ann. § 201.054(1)(c) (West Supp. 1983); Mo. Ann. Stat. § 115.159(1) (Vernon 1980); Mont. Code Ann. § 13-2-203 (1981); N.J. Stat. Ann. § 19:31-6.3 (West Supp. 1983-1984); N.Y. Elec. Law § 5-210(4) (McKinney 1978 & Supp. 1982-1983); Ohio Rev. Code Ann. § 3503.11(B)(1) (Page Supp. 1983); Or. Rev. Stat. § 247.012(1) (1981); Pa. Stat. Ann. tit. 25, § 951-18.2 (Purdon Supp. 1983-1984); Tenn. Code Ann. § 2-2-115 (Supp. 1983); Tex. Elec. Code Ann. § 5.13a(1) (Vernon Supp. 1982-1983); Utah Code Ann. § 20-2-7(2) (1976); Wis. Stat. Ann. § 6.30(4) (West Supp. 1983-1984).

220. See Oregon v. Mitchell, 400 U.S. 112, 123-24 (1970) (Black, J., concurring in judgment); Katzenbach v. Morgan, 384 U.S. 641, 648-53 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 323-27 (1966); The Federalist No. 59 (A. Hamilton); Sentell, *Federalizing Through the Franchise: The Supreme Court and Local Government*, 6 Ga. L. Rev. 34 (1971).

221. See Senate Report, *supra* note 4, at 73, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 252.

parts of the South, for example, a plantation atmosphere still prevails for many black farmworkers.²²² Such an atmosphere tends to reinforce the apolitical attitude blacks have acquired through years of de jure discrimination in voting.²²³ As a result, even when registration is permitted at places other than the county courthouse, such as a community firehouse²²⁴ or other public building,²²⁵ blacks may still be too intimidated to register.

Moreover, a much larger percentage of blacks than whites are illiterate or semi-literate.²²⁶ Consequently, public notice in a local newspaper concerning an upcoming registration drive or the establishment of registration centers at public libraries may prove unsuccessful in increasing black political participation in areas with high illiteracy rates.²²⁷ Similarly, mail registration in such areas may do little to facilitate political participation. The impoverished status of many blacks also inhibits their political activity.²²⁸ As a result, satellite offices at banks or motor vehicle departments do little to facilitate registration for many blacks. The establishment of supplemental locations at unemployment offices or other places where unregistered

222. See *House Hearings*, *supra* note 5, at 2164-65 (statement of Ruth J. Hinerfeld, President, League of Women Voters of The United States); *id.* at 502-03 (statement of Frank Parker, Director, Voting Rights Project, Lawyers' Comm. for Civil Rights Under Law).

223. See S. Lawson, *supra* note 27, at 352.

224. Several states permit registration at firehouses. See, e.g., Del. Code Ann. tit. 15, § 1306(b) (1981); Wash. Rev. Code Ann. § 29.07.010 (Supp. 1983-1984).

225. E.g., Del. Code Ann. tit. 15, § 1306(b) (1981); Ga. Code Ann. § 21-2-218(f) (1983); see League of Women Voters Educ. Fund, *Easy Does It*, No. 522 (1980) ("Where to register").

226. See *Population & Housing*, *supra* note 30, Table P5, at 47 (16.6% of whites as against 27.6% of blacks over age 25 have not completed any high school).

227. See Trial Record at 474, *Gingles v. Edmisten*, No. 81-203-CIV-5 (E.D.N.C. July 27, 1983) (testimony of Samuel L. Reid, Chairman, Vote Task Force, Mecklenburg County, North Carolina) (libraries inaccessible to many unregistered citizens); Booth, *supra* note 37, at B5, col. 1 (police stations and libraries rarely frequented by the less educated).

228. Courts have recognized that disproportionate economic and educational levels arising from past discrimination tend to inhibit minority political participation. E.g., *Rogers v. Lodge*, 102 S. Ct. 3272, 3280 (1982); *White v. Regester*, 412 U.S. 755, 768 (1973); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977). Congress has determined that if these conditions are shown, and the level of black political participation is depressed, plaintiffs need not show any causal nexus between their disparate socioeconomic status and low level of political participation. Senate Report, *supra* note 4, at 29 n.114, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 207 n.114; see *Major v. Treen*, No. 82-1192, slip op. at 65 n.31 (E.D. La. Sept. 23, 1983). Requiring proof of causation would have insulated the harshest case from challenge, in which minorities are so oppressed that they have lost all hope. Hartman, *supra* note 60, at 728.

citizens are likely to be found, however, would provide those most in need with a greater opportunity to register.²²⁹

Due to unfavorable occupational, educational and economic conditions, many of the remedies a court might order that would ostensibly expand registration opportunities for blacks could prove ineffective. Where many of these unfavorable factors exist, especially when coupled with geographic dispersion of blacks and the existence of an unorganized black community, a state-supported minority registration drive might be necessary.²³⁰ Such a process could encompass the hiring of minority community members to go door-to-door in their neighborhoods to facilitate registration.²³¹ This type of canvassing would avoid the intimidation many blacks experience when the courthouse, or another public building, is the only place to register. Although there may be objections to the use of race-conscious remedies,²³² the Supreme Court has authorized the use of such remedies to vindicate the rights of minorities under the VRA.²³³ In fact, remedial use of racial

229. See Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States, Table 656, at 392 (103rd ed. 1982-83) (17.1% of minorities and 8.4% of whites unemployed in June 1982) Cloward & Piven, *Toward a Class-Based Realignment of American Politics: A Movement Strategy*, Social Policy 3, 11 (Winter 1983); Newman, *Project Vote! Tapping the Power of the Poor*, Social Policy 15, 18 (Winter 1983); see also P. Kimball, *supra* note 12, at 301-02 (registration facilitated at playgrounds, theatres, transit stations); Newman, *supra*, at 18-19 (same at minority churches and schools, and at public housing projects); Piven & Cloward, *supra*, at 11 (same at welfare and social security offices).

230. Note, *Affirmative Action and Electoral Reform*, 90 Yale L.J. 1811, 1825 (1981) [hereinafter cited as *Affirmative Action*].

231. Door-to-door registration is not unknown in the United States. See P. Kimball, *supra* note 12, at 302-03, nor is the hiring of deputy registrars. Some states, for example, pay deputies on the basis of how many persons the deputy registers. See, e.g., Alaska Stat. § 15.07.110 (1982); Idaho Code § 34-406(5) (Supp. 1983); Okla. Stat. Ann. tit. 26, § 4-106 (West Supp. 1982-1983); Wash. Rev. Code Ann. § 29.07.040 (Supp. 1983-1984). In addition, Congress has recognized that appointment of minority deputy registrars may be necessary to accord minority group members equal access to the political process. See *supra* note 216.

232. See Blumstein, *supra* note 12, at 636-40.

233. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 161 (1977) (plurality opinion); *id.* at 176-77 (Brennan, J., concurring in part); see *Zimmer v. McKeithen*, 485 F.2d 1297, 1308 & n.27 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); 128 Cong. Rec. S6945 (daily ed. June 17, 1982) (remarks of Sen. Thurmond, Chairman, Senate Judiciary Comm.). The Court has recognized Congress' special competence in identifying and remedying the effects of past discrimination. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 302 n.41 (1978) (Powell, J., concurring in judgment). Use of racial criteria is clearly permissible to eliminate past discrimination. See *id.* at 366 n.42 (Brennan, J., concurring in judgment in part and dissenting in part) (state interest in remedying past discrimination is sufficient to justify affirmative action); *Affirmative Action*, *supra* note 230, at 1825-26 (1981) (need for greater inclusion of minorities in the

criteria may not only be permissible, but required in some circumstances.²³⁴

4. Fiscal Considerations

Fiscal inability should not be an excuse for maintaining racially discriminatory restrictive registration procedures.²³⁵ Nor should the state deny a person the right to register because it is unwilling to hire new personnel or spend funds on new programs.²³⁶ Courts, nonetheless, may be reluctant to impose costs on already overburdened state and local governments.²³⁷

Prior to imposing the more costly methods of mail registration or canvassing to expand registration opportunities, courts can order

political process). Similarly, race-conscious remedies have been permitted in other areas of the law. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (upholding race-conscious statute designed to prevent perpetuation of past discrimination in allocation of government contracts to minority-owned businesses); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (Powell, J., concurring in judgment) (permitting consideration of racial criteria in medical school admissions to compensate for effects of past discrimination); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (preferential hiring permitted to eradicate effects of past discrimination in employment); *cf. Califano v. Webster*, 430 U.S. 313, 318-320 (1977) (*per curiam*) (upholding sex-based preference in social security to redress long standing disparate treatment of females); *Kahn v. Shevin*, 416 U.S. 351, 353-55 (1974) (upholding property tax exemption for widows, but not widowers, because spousal loss historically imposed a disproportionately heavy burden on widows).

234. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 337, 362 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in judgment in part and dissenting in part); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 46 (1971); *Brooks v. Beto*, 366 F.2d 1, 24 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967). As Justice Frankfurter proclaimed: "[T]here is no greater inequality than the equal treatment of unequals." *Dennis v. United States*, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting).

235. *See Plyer v. Doe*, 457 U.S. 202, 227 (1982); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); Schnapper, *supra* note 61, at 858.

236. *See Bishop v. Lomenzo*, 350 F. Supp. 576, 587 (E.D.N.Y. 1972) ("The state may not deny a voter the right to register (and hence to vote) because of clerical deficiencies. The remedy lies in providing more clerks rather than in registering fewer voters." (citation omitted)). The Supreme Court has declared that "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *cf. Lareau v. Manson*, 651 F.2d 96, 104 (2d Cir. 1981) (an economic motive cannot lawfully excuse deprivations of constitutional rights in prison); *Campbell v. Cauthron*, 623 F.2d 503, 508 (8th Cir. 1980) (unconstitutional conditions are not excused by the failure or refusal of prison officials to spend the necessary funds). For an equal protection analysis of this problem, see *Voter Registration*, *supra* note 32, at 502-505.

237. *Cf. National League of Cities v. Usery*, 426 U.S. 833, 845-47 (1976) (state power to determine wages of government employees); *Geduldig v. Aiello*, 417 U.S. 484, 492-96 (1974) (solvency of state disability insurance program); *San Antonio*

states to undertake one of the many cost-free methods available. For example, electors and civic organizations are generally willing to serve as deputy registrars on a volunteer basis. In addition, rent-free locations, such as churches and parks, may be available for satellite registration offices. Citizens living in minority neighborhoods might also make their homes available on a temporary basis for registration. Furthermore, rather than having to bear the costs of lengthening the registration period, local officials could simply reduce daytime hours while increasing weekend and evening hours.²³⁸

Regardless of the remedy a court may decide to impose, it must give the offending jurisdiction detailed directions on how that remedy is to be implemented. Simply ordering a jurisdiction to expand registration opportunities is likely to be ineffective.²³⁹ Indeed, one of the basic causes of restrictive voter registration practices is that states delegate excessive discretion to counties in the area of elections; counties then abuse that discretion by refusing to appoint deputy registrars or establish convenient registration hours and locations.²⁴⁰ Thus, any effective remedy must limit the discretion of local officials. Only in this way will courts be able to meet their constitutional and statutory responsibility to eliminate racial discrimination in voting.

CONCLUSION

Racial discrimination in voting continues to be a blight on the American political system. Vestiges of past legal discrimination in voting continue to haunt blacks. Recognizing that the lingering effects of past discrimination inhibit black voter participation, the Supreme Court has held that the fourteenth amendment imposes an affirmative duty on states and counties to eliminate procedures that perpetuate electoral discrimination.²⁴¹ Yet, states and counties continue to promulgate restrictive registration practices that perpetuate past de jure discrimination in voting.

This continued resistance to minority suffrage prompted Congress to strengthen the Voting Rights Act in 1982. The amendments offer victims of restrictive registration practices a rejuvenated weapon in

Indep. School Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) (state fiscal policy regarding educational spending).

238. See *Voter Registration*, *supra* note 32, at 514.

239. See *Louisiana v. United States*, 380 U.S. 145, 152 (1965) (failure to provide "definite and objective standards" tends to lead to "arbitrary and capricious action by registrars") (quoting *United States v. Louisiana*, 225 F. Supp. 353, 384 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965)).

240. See *supra* notes 46-54 and accompanying text.

241. See *supra* notes 71-78 and accompanying text.

their efforts to overcome the present effects of the nation's history of electoral discrimination. The legislative history of the amendments reflects a congressional intent to eradicate restrictive registration practices that permit the perpetuation of racial discrimination in voting.

In addition, the amendments reaffirm the power and duty of federal courts to eradicate discriminatory election procedures. A number of remedies are available to make registration more convenient. If courts are willing to avail themselves of these remedies, the United States will be one step closer to realizing its national commitment to ending racial discrimination in voting.

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