Voting Rights: A Case Study of Madison Parish, Louisiana†

During the past decade Congress recognized that the fifteenth amendment had not succeeded in securing the franchise for all citizens. In the South, particularly, state-enforced registration laws prevented the majority of blacks from participating in the electoral process. To remedy this situation, national legislation reaffirmed the right to vote and forged methods of federal enforcement of that right. Although the initial Civil Rights Acts of 1957 and 1960 provided necessary predicates for relief from discrimination, they did not terminate the need for county-by-county litigation. Accordingly, Congress designed the Voting Rights Act of 1965 to transfer enforcement from the courthouse to the registrar's office through utilization of administrative remedies. This shift from a litigative to an administrative approach soon achieved impressive levels of black registration. However, the recalcitrance of registrars and local officials persisted. Discriminatory practices reemerged in attempts to prevent free exercise of the franchise through manipulation of electoral procedures. Consequently, the tedious litigation which preceded the Act did not abate; judicial intervention was still required to force compliance with fifteenth amendment guarantees.

This comment will attempt to trace the development and effects of voting rights litigation in Madison Parish, Louisiana, a black belt community which has experienced four major voting rights suits in the past ten years. Following a brief description of the parish, the discussion will focus on the emergence of private party and government suits, the implementation of the Voting Rights Act of 1965, the new discriminatory practices in the exercise of the franchise, and the concomitant effects on Madison Parish politics. It is hoped that this case study will, therefore, not only capture the flavor of voting rights litigation but also

† This study was performed under a research grant from the American Bar Foundation. The analyses, conclusions, and opinions expressed are those of the authors, however, and not those of the Foundation, its officers and directors, or others associated with its work.

During the course of research, extensive interviews were conducted with residents and local officials in Madison Parish and with attorneys and other participants in voting rights litigation. When requested, the identity of the person interviewed has been withheld to preserve anonymity.
suggest the policy considerations which should underly future efforts to secure the right to cast an effective ballot.

I. The Setting

Madison Parish, whose eastern border meets the Mississippi River, is situated in the Delta country of northeast Louisiana.\footnote{The parish, with a land area of 662 square miles, was organized by the Louisiana legislature in 1838 and named after President Madison. For a written history of Madison Parish, see the undocumented essay by a Tallulah attorney, Murphy, \textit{The History of Madison Parish, Louisiana}, 11 \textit{La. Hist. Q.} 39 (1928).} The tracks of the Illinois Central and the Missouri Railroads divide the parish seat, Tallulah,\footnote{The original parish seat, Richmond, was destroyed during the Civil War. Tallulah, founded in 1857, has a romantic origin much cherished by its residents. A railroad construction engineer fell captive to the charm of a rich widow who convinced him to build the railroad across her land. Once the line was completed, the widow's romantic interest waned. The disillusioned engineer named the station he established Tallulah, in commemoration of his lost love.} both physically and racially—to the west the residences and business are black-owned and -occupied, to the east they are white. There is no municipal park, no municipal swimming pool, no indoor movie theater, no bowling alley, no municipal transportation system, no functioning hospital. An outdoor movie theater, the only public recreational facility in Tallulah, is located in the white section of town; the private Tallulah Country Club provides members with a nine-hole golf course.

Traditionally, the parish has been a plantation society\footnote{The Mississippi Delta area, in northeast Louisiana ... remains a plantation society. There are plantation owners in Tensas and Madison parishes who take pride in the resemblance between the plantations of 1856 and 1956, in terms of the physical appearance of the Negro and his cabin, and of the social and economic relationships between Negro and white. The survival of this kind of power depends upon excluding the Negro from all political and economic power. Fenton & Vines, \textit{Negro Registration in Louisiana}, 51 \textit{Am. Pol. Sci. Rev.} 704, 708 (1957). Compare the following 1899 description of the "peculiar conditions" in Madison Parish which led to the lynching of six Italian immigrants in front of the courthouse: It is the blackest district in the United States. In a population of 16,000 there are only one hundred and sixty white families. There are twenty negroes to one white, and in some sections they stand one hundred to one. Yet the entire power is in the hands of the whites. They own all the land and other property. They alone vote; they alone sit on juries. They elect all the officers and administer all the affairs of the parish. Their administration is excellent ... But with so small a white population in the midst of such an overwhelming majority of Negroes 'a strong hand' has been deemed necessary to keep the latter in subjection ... . . . . Walker, \textit{Tallulah's Shame}, 43 \textit{Harper's Weekly} 779 (1899).} with a black majority population.\footnote{Between 1880 and 1920, blacks comprised approximately 90.0\% of the total population. \textit{Bureau of the Census, U.S. Dep't of Commerce, Negro Population 1790-1915}, at 782 (1918). In 1930 the figure dropped to 64.5\%. \textit{Bureau of the Census, U.S. Dep't of Commerce, Negroes in the United States 1920-32}, at 742 (1935). The black-white population ratio remained at 65:35 until 1970, when it dropped to 60:40.} Farming\footnote{Of 423,860 acres only 185,069 are under crop production. Figures available from Madi-} still provides the area's economic base,
primarily through extensive government subsidies. Mechanization of agriculture has resulted in consolidation, however, and the majority of residents now live in Tallulah.

A changing racial profile has accompanied this demographic shift. Since 1940, white population has risen in city and parish alike, while nonwhite population has increased in Tallulah but decreased in the parish as a whole. In other words, a few rural blacks have migrated to the city while a greater proportion have left the parish altogether.

Lack of industrial development helps explain this exodus. The only source of large-scale employment in Tallulah itself is a lumber mill.

In 1969, 112 farms received $1.7 million in grants and subsidies. Eighteen farms and corporations received over $120,000 apiece in cotton surplus. The overall average subsidy was $13,900, with one farm garnering $79,000. Interview with Carl Smith, Director, Delta Community Action Association (funded by the Office of Economic Opportunity), in Tallulah, La., Oct. 30, 1970. Compare the fact that the Chicago Mill and Lumber Co. pays no taxes to the city of Tallulah.

Between 1950 and 1959 the number of farms decreased from 1669 to 735 and the average size increased from 142.4 to 281.5 acres. Public Affairs Research Council, A Statistical Profile of Madison Parish 13 (June, 1965) (out of print; copy on file at The University of Chicago Law Review [hereinafter cited as Statistical Profile].

In 1940, 69% of the parish’s residents were settled in rural areas. By 1960, city dwellers were in the majority, with 57.2% of the population. Additionally, of the 42.8% representing rural population, 17.2% are classified as nonfarm. Bureau of the Census, U.S. Dept of Commerce, Eighteenth Decennial Census of the United States, Census of Population: 1960 pt. 20, at 10, 230 (1963).

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<td>3,757</td>
<td>5,613</td>
<td>6,539</td>
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* 1970 figures not yet available.


Between 1950 and 1964, the number of farms operated by blacks decreased from 1,058 to 152 while the number of white-owned farms increased from 611 to 368. Statistical Profile, supra note 7, at 13 (1950 figures); Bureau of the Census, U.S. Dept of Commerce, Census of Agriculture: 1964, Louisiana 326-27 (1965) (1964 figures).

Although Madison Parish does not meet the 6% unemployed criterion for classifica-

...
Welfare payments, therefore, support a substantial segment of the population, both black and white.\(^2\)

Madison Parish has always been a black majority community under white control.\(^3\) In 1884 the ratio of black to white voters was ten to one, the highest of any parish in Louisiana.\(^4\) Blacks did not, however, govern themselves, and following the post-Reconstruction era they were disenfranchised.\(^5\) For the next half century, the apparatus of state-sup-

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\(^2\) In 1959, of 3,619 families, 63.2% earned under $3,000 and 4.6% earned over $10,000. The median annual income was $2,190. \(\text{Bureau of the Census, U.S. Dep't of Commerce, City and County Data Book 1967, at 153 (1967)}\). Comparative Louisiana state figures: 35.6% of the population earn less than $3,000 per year, 9.9% earn more than $10,000; the median income for Louisiana is $4,272. \(\text{Id. in December, 1970, 1,092 families received food stamps for 5,271 individuals, amounting to $120,885 in coupons. Madison Journal (La.), Jan. 28, 1971, at 3A. Aid to Dependent Children funds reached 427 families, representing 1,695 children and amounting to payments of $38,829. \(\text{La. Public Welfare Statistics, Report on April, May and June 1970, at 10} (\text{figures as of June 1970})\). Contributing to the dominance of welfare in the Madison Parish economy are the age level and educational background of residents. The percentage of citizens over 65 rose from 4.8% in 1940 to 7.7% in 1950 to 10.2% in 1960, while the percentage of those 21 and over decreased from 59.5% in 1940 to 55.5% in 1950 to 51.7% in 1960. \(\text{Bureau of the Census, U.S. Dep't of Commerce, Sixteenth Census of the United States: 1940, Population pt. 3, at 372 (1943); 2 Bureau of the Census, U.S. Dep't of Commerce, Report of the Seventeenth Decennial Census of the United States, Census of Population: 1950 pt. 18, at 72 (1952); 1 Bureau of the Census, U.S. Dep't of Commerce, Eighteenth Decennial Census of the United States, Census of Population: 1960 pt. 20, at 82 (1963). Only 19.6% of the residents have completed high school, and 36.8% have finished less than five years of school; 10.9% of the adults have no schooling. 1967 Data Book, supra, at 153. With a median school year completion level of 6.7 grades for those 25 and over, \text{id.}, Madison Parish ranks 54th of the 64 parishes. \(\text{Statistical Profile, supra note 7, at 5.}\)


\(^4\) 1886 \textit{La. Sec'y of State Ann. Rep.; 1884 La. Sec'y of State Statement, at 51-52 (1886).}

\(^5\) See Walker, supra note 3. Carpetbag government existed in Louisiana until April, 1877. During the following twenty years, the Democratic Party secured its position by buying black votes while running on a white supremacy ticket. The 1898 state constitution established three alternative qualifications for electors: an educational requirement which included demonstrating ability to read and write by filling out an application form containing "traps for the unwary," a property requirement of $300 assessed value and paid-up taxes, and a grandfather clause. \(\text{La. Const. art. 197, §§ 3-5 (1898).}\) The grandfather clause was a substitute for the understanding clause, which had been condemned as a fraud. \(\text{United States v. Louisiana, 225 F. Supp. 353, 372 n.46 (E.D. La. 1963), aff'd, 380 U.S. 145 (1965).}\) Judge Wisdom's scholarly opinion provides a concise historical overview...
ported segregation insured that black citizens would be denied the right to vote. The white primary served to prevent blacks from influencing the nominating process and, following its invalidation, the Louisiana Constitution itself provided the means by which local officials deprived all blacks of the franchise—under the "voucher requirement," all prospective registrants were required to establish their identity to the registrar's satisfaction. In Madison Parish, the registrar invariably demanded that black applicants obtain personal verification from two registered voters. Since all registered voters were white and no white would "vouch" for a black, total disfranchisement on racial grounds resulted.

World War II appears to have been an important catalyst in changing this system. Although segregation existed in the army, black men trained with whites and were expected to perform similar jobs. Readjustment to Southern expectations of servility and self-deprecation was difficult. Moreover, an election for President had been held in 1944. White soldiers could cast absentee ballots, but many black men could not.

It was a time when President Franklin D. Roosevelt was run-

in addition to a detailed study of statutory and discretionary discriminatory devices. See also W.E.B. DuBois, Black Reconstruction (1935); E. Lonn, Reconstruction in Louisiana After 1868 (1918); Fenton & Vines, supra note 3.

16 When the Supreme Court invalidated the grandfather clause, Guinn v. United States, 238 U.S. 347 (1915), Louisiana's 1921 constitutional convention replaced it with an equally odious practice. The interpretation test required voter applicants to be able to read and write and to interpret the state and federal constitutions. La. Const. art. 8, § 1(c) (1921). A provision permitting registration if the applicant could "understand and give a reasonable interpretation of any section of either Constitution when read to him by the registrar" protected illiterate white voters against disenfranchisement. Id. at § 1(d), repealed in 1960 by constitutional amendment, La. Const. art. 8, § 1(c).


18 Until 1962 no Madison Parish black was registered; as of 1956 only three other parishes could report zero black registration. U.S. Comm'n on Civil Rights, Report 567-69 (1959) [hereinafter cited as 1959 Civil Rights Report].


20 See United States v. Ward, 222 F. Supp. 617 (W.D. La. 1963), rev'd, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965). The voucher requirement was even more pernicious than either the interpretation test or the selective purge. Although federal law did not require officials to preserve records, cf. 42 U.S.C. § 1974 (Supp. V, 1965-69), some registrars kept files of rejected applications, which enabled investigators to document technicalities employed to disfranchise blacks. By contrast, when the voucher requirement was used no black ever even filled out an application form and no documents existed to contradict a registrar's avowal of nondiscriminatory practices.

Voting Rights

ning for reelection. All of us black soldiers stood there and felt like fools as we watched white soldiers going to cast their absentee ballots for Roosevelt. You know all of us liked Roosevelt and, man, I wanted to vote so bad that it just hurt. But they told me I couldn't vote because I wasn't a registered voter in my hometown. Now here I was an American soldier way over in Europe fighting for some white people's freedom and I couldn't even vote for the president of my own country. That hurt me bad. I said to myself right then that when I get back to Tallulah [and Madison Parish] I was gonna start laying the groundwork for black people to get the right to vote.22

This resolution gained strength from evidence that blacks throughout the South were resisting discriminatory social patterns23 and from the increased black registration in some areas following invalidation of the white primary24

In Madison Parish, returning veterans began their first attempts to register during 1947. These individuals still reside in the parish and provide the continuity of leadership which has been a major factor in securing the black community's strong political position.26 Zelma C. Wyche, the acknowledged leader of the parish's blacks, described the nature of prelitigation history:

[In 1947] we drew up a petition with the names of the taxpayers in the town and presented it to the Mayor and the Sheriff after an appointment had been made with them.

[T]hey said they would take it under consideration and notify us at a later date and this date was never given. We were

22 The statement is that of Village Marshal Zelma C. Wyche, quoted in Sanders, Black Lawman in KKK Territory, EBONY, Jan., 1970, at 57, 60.
24 It is estimated that in 1940 only 5% of voting-age blacks were registered to vote in eleven Southern states. By 1947 the number increased to 12% and by 1952 to 20%. M. Price, THE NEGRO VOTER IN THE SOUTH 1 (1957). In Louisiana, black registration in 1948 was only 3% but by 1952 it had reached 10.2% of the eligible adult blacks. Hearings Before the U.S. Comm'n on Civil Rights 424 (1961) [hereinafter cited as 1961 Civil Rights Hearings].
26 My primary reason for coming back to Madison Parish after World War II was to do something about the situation that we were in in Madison Parish as black people . . . . We were really under a bondage . . . . [B]lack people were primarily slaves, I might say, because there was nothing constructive that black people could do in Madison Parish that would help them. The only thing that the white man wanted out of us was work for nothing or a little pay. After that they were through with you. I knew I was going to stay in Madison Parish the rest of my days and that was why I thought it was necessary to band ourselves together to do something to help eradicate these conditions that we were in.

Interview with Zelma C. Wyche, in Tallulah, La., Oct. 29, 1970 [hereinafter cited as Wyche Interview].
asking for the privilege of registering and voting in Madison Parish.

[After the meeting with the Mayor and the Sheriff] we went to the Register office on the first occasion, we asked the Registrar if we could be registered at that time and she said, "Yes, but you will have to have two electors who are on my books to identify you."

And we asked if any Negroes were on the books and we were told no. We said, are there any whites registered? And she said, "Yes." We said, "who are some of them?" And she said, "practically all the white people in Madison Parish are registered."

"Would you give us some of the names?" We asked,—this is on the first occasion—and she said, "quite a few are registered." Or, "All are registered." And we asked if we could get some of the names and she said: "You might bump into some of them on the streets any place." And we left the office.

. . . . .

[In 1951] we had a committee to go and try to register.26

. . . . .

[The Registrar] said, "You will have to have certain identification." And I told her I had my driver's license and also I had my tax receipts in my pocket, which I thought were identification enough, and at that time I had my honorable discharge from the Army in a small pocketbook size and I offered to show these but she said, "you still will have to have someone who is on our books to identify you." She told us we should see the Sheriff about registering, and we left the office and went across the hall to the Sheriff's office. He wasn't in on that particular date and we didn't see him.27

Repeated frustration led black residents to retain the only black attorney in that part of the state, James Sharp, Jr.,28 as counsel. Con-

26 The committee was composed of barbers Wyche, Harrison Brown, and Ike Oliver, and dry cleaning store owner Martin Williams.

27 Record at 5-11, United States v. Ward, 222 F. Supp. 617 (W.D. La. 1963), rev'd, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965) (testimony of Zelma C. Wyche) [this portion of the Record hereinafter cited as Wyche Testimony]. (The questions put to the witness are omitted from this quoted portion to permit a continuous narrative statement. The testimony has been edited to avoid repetitions, and bracketed words and phrases have been inserted for clarification.)

28 Sharp was at that time the only black attorney in northeast Louisiana. For a documentation of the difficulties he encountered before Southern judges, see Sharp v. Lucky, 148 F. Supp. 8 (W.D. La. 1957), rev'd, 252 F.2d 910 (5th Cir. 1958), on remand, 165 F. Supp. 405 (W.D. La. 1958), aff'd, 256 F.2d 342 (1959), in which Sharp sued for money damages alleging injury to him as a black attorney. For a discussion of Sharp's difficulties as counsel for black plaintiffs, see M. Price, supra note 17, at 43. Sharp's client, Dr. Reddix, technically won his suit, Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958), but class relief was denied and Reddix dismissed Sharp.
continuing the negotiation approach preferred by parish representatives, Sharp contacted the Registrar of Voters, the town’s Mayor, and the Judge of Louisiana’s Sixth Judicial Court to seek their cooperation in correcting the registration procedures. Having received no response to his inquiry, Sharp visited the Registrar’s office. Registrar Mary K. Ward informed him that there was an agreement between the parishes of East Carrol, Madison, and Tensas to the effect that Negroes would not be permitted to register. She stated that she was operating under instructions from several public officials, including Sheriff C. E. Hester, and that Sharp should discuss the matter with them.

At Sheriff Hester’s office two armed officers were present during the interview.

I was somewhat surprised at the intimidating fashion in which he went about it . . . . Sheriff Hester began at that moment to denounce the administration of Mr. Truman, and he did seem to express just a little more regard for the administration of Mr. Eisenhower, and he told me that I was sitting on a powder keg; that in effect he said that if I pursued what appeared to be my purpose any further, that he would take me for a ride. He further stated that any efforts that I would make in that direction I could assure myself that I would not have any protection whatsoever from his office.

In a letter to Wyche recounting this experience, Sharp concluded that “legal proceedings are indicated and in my opinion . . . in order.” An additional unsuccessful attempt to register confirmed the necessity for litigation and provided the incident on which to base a complaint.

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29 “I wish to confirm our decision at a recent conference to use all peaceful means to solve this problem before legal action is taken; to withhold legal proceedings in any event until the books are closed for registration in the coming election.” Letter from James Sharp, Jr. to Zelma C. Wyche, Mar. 1, 1954.

30 Letter from James Sharp, Jr. to Judge Frank Voelker, Sr., of the Sixth Judicial District Court of Louisiana, Mar. 1, 1954 (copies were sent to Mayor Sevier and Registrar Ward) (copy on file at The University of Chicago Law Review).

31 Mrs. Ward had held the appointive position of Registrar of Voters since 1931; she retired in 1955.


33 1961 Civil Rights Hearings, supra note 24, at 35 (testimony of James Sharp, Jr.).

34 Id. at 36. Compare the sworn statement submitted by Sheriff Hester to the Commission on April 26, 1961. Id. at 755.

35 Sharp Letter, supra note 32.

36 This experience was a duplicate of previous attempts to register. However, Sheriff Hester erased any doubts concerning the feasibility of future applications by stating that there “wasn’t any niggers registered on the books, and . . . ‘as long as I am Sheriff there won’t be any registered on the books, and I am tired of you coming up here.’” Wyche Testimony, supra note 27.
II. PRE-VOTING RIGHTS ACT LITIGATION

A. The Private Suit: A Lesson in Futility

In 1954, blacks faced substantial barriers when instituting litigation. While the Department of Justice could file criminal charges, it was assumed that only the aggrieved private parties, and not the federal government, had standing to bring civil actions for damages or equitable relief. Moreover, fear of intimidation, lack of finances, difficulty in adducing evidence, and expectations of unfavorable verdicts from Southern jurors deterred individuals from initiating proceedings.

In weighing these factors, Madison Parish blacks deemphasized possible intimidation. Although harassment could be anticipated, black leaders believed that citizens in northeast Louisiana rarely resorted to violence when dealing with civil rights problems. Additionally, individuals who attempted to register were self-employed and served the black community; the impact of unofficial economic sanctions by local...
whites would, therefore, be minor. Since the complainants were willing to testify about discussions held with Mrs. Ward and Sheriff C. E. Hester during recent unsuccessful attempts to register, the only anticipated difficulty was proving that the Registrar did not require "unknown" white applicants to meet the standards imposed on black citizens. In this regard, the plaintiffs hoped that a 1952 injunctive order against discriminatory use of the voucher in Bossier Parish would provide the basis for asking the district judge to find discrimination through statistical evidence. Noting that more than nine thousand whites and no blacks were registered to vote, Judge Porterie of the Western District of Louisiana had concluded in the Bossier Parish case: "This is enough taken arithmetically to give plaintiffs the injunction they seek."\(^{42}\)

Since "the time to act had arrived,"\(^{43}\) Sharp filed a class action suit in the United States District Court for the Western District of Louisiana on June 16, 1954.\(^{44}\) The complaint alleged, first, that the identification requirement of the Louisiana registration laws was unconstitutional on its face and, second, that even if constitutional the regulation was being discriminatorily applied by Mrs. Ward. The plaintiffs sought damages of $5,000 apiece.\(^{45}\) Judge Benjamin G. Dawkins, Jr. set the hearing for November 23, 1954.\(^{46}\)

Because of a flat tire, the complainants arrived late at the courthouse, which is located in Monroe, 75 miles from Tallulah. Judge Dawkins called their case first and, the plaintiffs not being present, dismissed the complaint with prejudice.\(^{47}\) Participants contend that Sharp did not file another suit for financial reasons. However, a sec-

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42 Byrd v. Brice, 104 F. Supp. 442, 443 (W.D. La 1952), aff'd, 201 F.2d 664 (5th Cir. 1953). The population of Bossier Parish was composed of 22,227 whites and 13,912 blacks.

It would be impossible for a white person to understand what happened within black breasts on that Monday. An ardent segregationist has called it "Black Monday." He was right, but for reasons other than the ones he advances: that was the day we won; the day we took the white man's laws and won our case before an all white Supreme Court with a Negro lawyer, Thurgood Marshall, as our chief counsel. And we were proud.


46 Judge Dawkins, a Democrat, was appointed by President Eisenhower in 1953 to succeed his father, Benjamin C. Dawkins, Sr., who had sat on the bench since 1924. Judge Dawkins has sat as trial judge in every voting case concerning Madison Parish.
47 The litigants contend that they were only five minutes late. "The Judge, knowing that this was an opportune moment to get rid of us once and for all, called us up first. We were not there and he threw the case out. We lost that round." Wyche Interview, supra note 41. On September 14, 1959, a formal order of dismissal was made by the court in the absence of counsel's submission of a formal decree.
ond filing fee of $25 would not have drained the plaintiffs' financial resources. Rather, it appears that counsel saw no hope of receiving favorable rulings from Judge Dawkins, and the plaintiffs became discouraged as they envisioned a succession of futile suits.\footnote{Wyche v. Ward represents only one of the cumulatively expensive\footnote{and unsuccessful}\footnote{private attempts undertaken at this time to secure the franchise. Locally, these suits forced community leaders to create strong grass-roots organizations which could function as pressure groups in the face of insufficient legal remedies and the exercise of unbridled discretion by local officials and the federal judiciary. Nationally, these cases\footnote{provided the evidence for early arguments that the inequities in the dual school system described in Brown v. Board of Education\footnote{represented only one discrediting aspect of race relations in the South. This contention gained support as state legislatures acted to insure}}.}

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adherence to the philosophy of white supremacy. Moreover, state agencies and local organizations cooperated in a program of retrenchment designed to maintain white control of state and local politics.

B. The Government Suit: A Lesson in Frustration

Congress eventually gave formal recognition to the inadequacy of private party litigation by passing the Civil Rights Acts of 1957 and 1960. The 1957 Act authorized preventive relief to be sought by the Attorney General on behalf of one or more individuals threatened with deprivation of the right to vote, prohibited any person from purposefully maintaining segregation of the races in all phases of life in accordance with the customs, traditions and laws of the state. The Louisiana Legislature established a Joint Legislative Committee "to provide the ways and means whereby the existing social order shall be preserved," and further emphasized its intention by mandating that the Committee "preserve the existing social order." For a discussion of Northern state government activity, see Note, Federal Protection of Negro Voting Rights, 51 Va. L. Rev. 1051, 1068-79 (Louisiana), 1081-91 (Mississippi), 1093-1100 (Alabama) (1965).

To insure administrative compliance, the Louisiana Legislature enacted a series of laws regulating the activity of registrars, see Kommers, supra note 37, at 397-98, and amended the Louisiana Constitution to provide for registrant disqualification on grounds of "bad character," which included conviction of a misdemeanor carrying a six-month prison sentence, participation in a common law marriage, and parentage of illegitimate children. These designations were not exclusive and other evidence of bad character could be used by the registrar to disqualify. La. Const. art. VIII, § 1(c); see 1961 Civil Rights Report, supra note 21, at 68-70; Kommers, supra note 37, at 397-98.

The Association of Citizens Councils of Louisiana arranged to purge black registrants, suggested means to discipline or remove uncooperative registrars, and published an inflammatory "manual of procedure for registrars of voters"; the pamphlet, entitled "Voter Qualification Laws in Louisiana: The Key to Victory in the Segregation Struggle," provided the basis for discussion at conferences sponsored by the Joint Legislative Committee and the State Board of Registrars. See 1961 Civil Rights Hearings, supra note 24, at 526-29, 532-46. See also United States v. Association of Citizens Councils, 187 F. Supp. 846 (W.D. La. 1960).


While black participation in elections may have rankled less than the anticipated desegregation of schools, see the "rank order of discrimination" analysis in G. Myrdal, An American Dilemma 60-61 (1944), fear of the effect of black voting is reflected in the sudden reversal of the trend in Louisiana of increased black registration. The percentage of blacks registered in Louisiana, having jumped from 3.0% in 1948 to 10.2% in 1952, reflected steady growth until July, 1954, when 13.3% of eligible blacks were on the rolls. The figure stabilized near the 13.7% level (except for a sporadic jump to 15.3% in May, 1956) until July, 1960. 1961 Civil Rights Hearings, supra note 24, at 424.


74 Stat. 86 (1960).

fully interfering with that right,\textsuperscript{61} and established the United States Commission on Civil Rights.\textsuperscript{62} While ambitious, the 1957 Act did not materially aid disfranchised blacks. Between 1957 and 1960 the Department of Justice initiated only four actions,\textsuperscript{63} not one of which resulted in placing blacks on the voting rolls for the first time.\textsuperscript{64} The Commission, which had been authorized to investigate complaints of voting rights deprivation, met with a series of legal challenges which delayed its effective functioning.\textsuperscript{65} In 1959 the Commission finally concluded: "Against the prejudice of registrars and jurors, the U.S. Government appears under present laws to be helpless to make good the guarantees of the U.S. Constitution."\textsuperscript{66}

Congress, therefore, strengthened the means for securing registration of qualified applicants in the 1960 Civil Rights Act.\textsuperscript{67} Whenever a government-initiated suit established denial of the franchise because of race, color, or creed, the Attorney General could request that a federal district court enter a finding of deprivation of rights pursuant to a pattern or practice of discrimination. Such determination would permit any resident within the defendant's jurisdiction to apply to the court for an order declaring him qualified to vote in any election, providing the applicant was qualified to vote under state law and had, subsequent to the court's "pattern or practice" finding, been denied

\textsuperscript{61} Id. at § 1971(b).

\textsuperscript{62} Id. at § 1975. The Act also restated the Enforcement Acts' right-to-vote policy, id. at § 1971(a)(1); exhausted the exhaustion of remedies requirement for federal jurisdiction, id. at § 1971(d); empowered district court judges to hear criminal contempt cases without a jury if the sentence did not exceed a $300 fine and 45 days' imprisonment, id. at § 1995; provided for an additional assistant attorney general, 5 U.S.C. § 295-1 (1964); and eliminated the requirement that federal jurors must qualify under state law, 28 U.S.C. § 1861 (1958).

\textsuperscript{63} Christopher, supra note 40, at 4.

\textsuperscript{64} For an explanation of the year's delay in filing this small number of suits on grounds that the first cases had to be "factually strong" to provide support against assertions of the Act's unconstitutionality, see Hearings on S. 2684, S. 2719, S. 2763, S. 2814, S. 2722, S. 2785 and S. 2535 Before the Senate Comm. on Rules and Administration, 86th Cong., 2d Sess. 360 (1960) (testimony of Attorney General William P. Rogers), criticized and evaluated in 1959 Civil Rights Report, supra note 18, at 128-33; Note, The Civil Rights Act of 1960, supra note 37 at 957-61.


\textsuperscript{66} Id. at 33.

\textsuperscript{67} The Act, 74 Stat. 86 (1960), was signed on May 6, 1960, by President Eisenhower. For a general history and preliminary analysis, see Note, The Civil Rights Act of 1960, supra note 37. For a detailed account of the legislative history, see D. Berman, A Bill Becomes a Law: The Civil Rights of 1960 (1962).
the opportunity to register or to vote by persons acting under color of state law. Additionally, the legislation permitted discretionary court appointment of federal referees to receive applications, hear evidence *ex parte*, and present findings to the court on the applicant's eligibility for relief.68

However, even after passage of the 1960 Act, severe hurdles to government action remained. These deficiencies are highlighted in *United States v. Ward*,69 a 1961 suit in which the Government sought to force abandonment of the voucher requirement as applied in Madison Parish, and to enjoin local officials from subjecting black applicants for registration to different and more stringent standards than were applied to white persons.

The first problem the Government encountered was convincing black residents to make the necessary attempt to register which would enable the Department of Justice to bring suit. While preparing a voting discrimination case in neighboring East Carroll Parish,70 government attorneys periodically visited Tallulah and discussed the Madison Parish situation, giving informal assurances that failure of a new attempt to register would initiate an investigation likely to result in the filing of a federal suit.71 However, black residents took no action until August 28, 1961; once again failure to fulfill the voucher requirement defeated the registration attempt.72 The Government filed suit on October 21, 1961.

While black residents do not remember why they hesitated to act despite the obvious desire of government attorneys to begin proceed-

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69 222 F. Supp. 617 (W.D. La. 1963), **reversed**, 349 F.2d 795, **modified**, 352 F.2d 329 (5th Cir. 1965).


71 Interviews with attorneys in the Civil Rights Division, United States Department of Justice, in Washington, D.C., Nov. 23-24, 1970 [hereinafter cited as Department of Justice Interviews].

72 The registration attempt produced a unique dialogue indicating the tragicomic absurdity of Miss Ward's application of the voucher requirement. Wyche testified at the *Ward* trial:

[The Registrar told us] "you will have to have two electors, as I have previously said, because I don't know any of you."
And I said, "I am Zelma C. Wyche."
And the Registrar said, "You are the one who filed the lawsuit against my mother [the former Registrar]."
I said, "I am."
She said, "I still don't know you. You will have to get someone to identify you."
Wyche Testimony, **supra** note 27.
it appears that increasing harassment influenced their decisions.\textsuperscript{74} A black minister was arrested twice and beaten\textsuperscript{75} after testifying before the Civil Rights Commission in September, 1960.\textsuperscript{76} Wyche was subjected to unusual harassment in his Army Reserve unit, which eventually forced his resignation after sixteen years' service.\textsuperscript{77} Harrison Brown, another leader of the black community, declined to testify before the Commission because he feared subsequent financial retaliation by whites and the possible loss of his wife's teaching position.\textsuperscript{78}

The second problem attached to government suits filed under authority of section 1971(a) was the necessity for county-by-county litigation. Although an action attacking the voucher requirement had been brought in neighboring East Carroll Parish,\textsuperscript{79} a favorable decision from Judge Dawkins in that case could not aid Madison Parish blacks. No assumption was permitted that lopsided registration figures and a "pattern or practice" finding against one registrar were conclusive of discriminatory activities in another parish, despite identity of legal theory and striking similarity of evidence.\textsuperscript{80} Nor could the Government rely solely on statistical evidence of voting patterns within Madison Parish itself to prove its case. Although the Fifth Circuit had suggested,\textsuperscript{81} and Judge Dawkins eventually held,\textsuperscript{82} that disparate registration and popu-

\textsuperscript{73} Elliot C. Nolley, a store owner registered in Ouachita Parish until he was purged in 1956, had written to the Department of Justice and had been visited by Federal Bureau of Investigation agents requesting him to register; he declined. Fieldworker's Report, Aug. 8, 1960, on file at the United States Commission on Civil Rights.

\textsuperscript{74} Madison Parish blacks continually denied, however, that harassment or intimidation affected their activities. Interviews with local residents, in Tallulah, La., Oct. 26, 1970.

\textsuperscript{75} Fieldworker's Report, Nov. 15, 1960, on file at the United States Commission on Civil Rights. Compare United States v. Deal, 6 Race Rel. L. Rep. 474 (1961), in which East Carroll residents retaliated against farmer Joe Atlas, who had testified before the Commission, by refusing to gin his cotton and conduct ordinary business with him. Following intervention by the Department of Justice, the court issued a consent decree by which boycotting merchants agreed to desist.

\textsuperscript{76} 1961 Civil Rights Hearings, supra note 24, at 29 (describing in detail another attempt to register). Compare the account given by Sheriff Hester in a sworn statement submitted to the Commission on April 26, 1961, following the Commission's invitation to respond to Rev. Neal's testimony. \textit{Id.} at 754.

\textsuperscript{77} Fieldworker's Report, Apr. 4, 1960, on file at the United States Commission on Civil Rights (report of interview with Wyche). Wyche specifically stated that his Army trouble stemmed from the fact that white citizens had learned he was to appear at a Commission hearing in Shreveport, Louisiana. \textit{Id.}

\textsuperscript{78} Fieldworker's Report, Aug. 8, 1960, on file at the United States Commission on Civil Rights.


\textsuperscript{80} No blacks had been registered in Madison Parish during this century, United States v. Ward, 222 F. Supp. 617, 618 (W.D. La. 1963), rev'd, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965), nor in East Carroll since 1922, United States v. Manning, 205 F. Supp. 172 (W.D. La. 1962).

\textsuperscript{81} Alabama v. United States, 304 F.2d 583, 586 (5th Cir.), aff'd mem., 371 U.S. 37 (1962).

\textsuperscript{82} Where it is shown, as in this case, that, prior to the trial, none of the more than
lation figures could constitute prima facie evidence of discrimination, establishing the fact of segregated patterns was not enough. To obtain effective relief the Government needed to identify specific acts of discrimination. In Ward, 21 blacks testified that they had been denied applications for failure to meet the personal identification requirement. Additionally, the Government called Katherine Ward, the new Registrar, to describe the registration system she used; presented testimony that a general understanding existed among white people that they would not identify blacks; and demonstrated that Miss Ward knowingly utilized the voucher requirement to prevent registration of blacks.

Amassing the evidence necessary to supplement registration statistics

United States v. Ward, 222 F. Supp. 617, 620 (W.D. La. 1963), rev'd, 349 F.2d 795, modified, 352 F.2d 829 (5th Cir. 1965); accord, United States v. Wilder, 222 F. Supp. 749 (W.D. La. 1963); United States v. Manning, 205 F. Supp. 172, 174 (W.D. La. 1962). Since the Government did not rest upon presenting the statistical evidence in these cases, it is impossible to know whether Judge Dawkins would have made his conclusion of law absent the additional evidence of attempts by blacks to register. But see the refusals of other district courts to grant statistics even probative value. United States v. Logue, 9 RACE REL. L. REP. 770 (S.D. Ala. 1964), rev'd, 344 F.2d 290 (5th Cir. 1965) (Thomas, J.); United States v. Ramsey, 8 RACE REL. L. REP. 156 (S.D. Miss. 1963), rev'd, 331 F.2d 824 (5th Cir. 1964), modified, 353 F.2d 650 (5th Cir. 1965) (Cox, J.); United States v. Duke, 9 RACE REL. L. REP. 788 (M.D. Ala. 1963), rev'd, 332 F.2d 759 (5th Cir. 1964) (Clayton, J.). Compare the Fifth Circuit's refusal to find discrimination based on voting statistics showing that 92% of white applicants were accepted while 62% of Negroes were not. United States v. Atkins, 323 F.2d 733 (5th Cir. 1963), aff'g 210 F. Supp. 441 (S.D. Ala. 1962).

Miss Ward did not use the literacy test, which was optional, 47 LA. REV. STAT. §§ 18:35-36 (1969), but “qualified her voters” by determining age, residency, citizenship, and absence of conviction of a crime, id. at § 18:31, before permitting an applicant to fill out a form. If she knew an applicant or if the applicant had previously registered, no additional identification was required for issuance of a new certificate. Miss Ward stated that she knew many white people in the parish because she had been born and raised there but that she knew very few Negroes, “only those who work for me or help me.” Record at 122, 104-105, 107-108.

Tax Assessor Speigner, who had vouched for two white persons, stated that he did not want to identify blacks because “he didn't care to have anything to do with it.” Record at 26. The Government demonstrated that 37 whites had been identified by public officials (including two by Sheriff Hester, four by Clerk of Court Post, and 23 by six of the sheriff's deputies), and four blacks testified that white men they approached refused to identify them. Brief for Plaintiff, App. B, Table 2.

Miss Ward testified she knew that no blacks had been registered in the past while most whites had, and that no black had ever been identified by a white person. Moreover, when Wyche's group appeared at her office on August 28, Miss Ward testified, “[T]hat was the first time any colored persons had been in my office and it struck me as being a little peculiar or strange.” Record at 103.
required exhaustive preparation. Each government case demanded the presence of five lawyers for a minimum of one month to analyze all registration forms. Thus, for each county in which it brought suit, the Government spent at least 1,200 attorney-hours just to acquire complete command of registration material;\(^8\) it is impossible to estimate the time spent interviewing residents, preparing for trial, litigating the case, filing memorandums, and, inevitably, briefing and arguing appeals.\(^8\)

While the inherent delays in county-by-county litigation compounded the Government's difficulties, the discretionary nature of relief under the 1957 and 1960 Civil Rights Acts eventually proved to be the major obstacle. Despite a finding that the voucher requirement unconstitutionally deprived Madison Parish blacks of the right to vote,\(^8\) Judge Dawkins did not grant adequate relief. His final decree merely (1) enjoined use of the voucher to establish identity, (2) provided that the Registrar's records be available to government agents, and (3) required submission of periodic reports to the court detailing progress in processing registration applications.\(^9\)

These orders did not seriously affect the defendants' activities. Registrar Ward had already abandoned the voucher requirement in September, 1962, substituting more stringent registration procedures.\(^9\) Therefore, the injunction merely proscribed the application of a standard no longer in use, and Judge Dawkins' condemnation of the strict identification practice amounted to no more than judicial affirmation that the "voluntary abandonment" must continue. Similarly, since the Civil Rights Act of 1960 required registrars to make records available to government agents, the order's provision for inspection and photographing at all reasonable times merely insured future access without resort to court order. Moreover, the Government itself had indicated a willingness to accept less coercive sanctions by suggesting that Judge Dawkins adopt the monthly reports requirement as an alternative to appointing a voter referee.\(^9\) Thus, the plaintiff's victory

\(^8\) Compare this Department of Justice estimate with Attorney General Katzenbach's statement that it has become routine to spend as many as six thousand man-hours only in analyzing the voting records of a single county. H.R. Rep. No. 439, 89th Cong., 1st Sess. 10 (1965).

\(^8\) Department of Justice Interviews, supra note 71.

\(^9\) \(222\) F. Supp. at 620.

\(^{90}\) Id. at 620-21.

\(^{91}\) See text at notes 94-96 infra.

\(^{92}\) Judge Dawkins had previously assumed this overseer role at the Government's suggestion. United States v. Manning, \(205\) F. Supp. 172, 175 (W.D. La. 1961). The Manning decision included a finding of discrimination pursuant to a "pattern or practice." It has been conjectured that Dawkins did not realize the implications of using the statutory
amounted to a decree ordering the defendants to do that which they
were already doing or could be required to do through pro forma
application for a court order. The real significance of this decision lies,
therefore, in Judge Dawkins' power to deny, subject to appeal, certain
relief requested by the Government: (1) a finding of discrimination
pursuant to a "pattern or practice;" (2) an order that standards applied
to future applicants for registration be those which had been used be-
tween January 1, 1961 and August 31, 1962 (freezing relief):93 and
(3) an assessment of costs against the State of Louisiana as well as
Registrar Ward.

The failure to make a "pattern or practice" finding precluded either
judicial registration of voters or the appointment of referees pursuant
to section 1971(e) of the 1960 Civil Rights Act. The defendants, there-
fore, remained in control of the Madison Parish voter registration ma-
chinery. Moreover, the defendants had freedom to operate that
machinery in a discriminatory manner as a result of Judge Dawkins'
failure to order use of the former registration requirements in judging
future voter applicants. Even at the time of trial it had been quite
clear that the defendants were shifting to other discriminatory tactics
in lieu of the voucher requirement.

First, in September, 1962, Registrar Ward had put into practice the
"citizenship test" approved by the Louisiana legislature the previous
month.94 Using this standard, an applicant could not qualify for
registration unless he answered correctly four out of six multiple choice
questions on citizenship, government, and history. Additionally, appli-
cants were required to read and write from dictation a portion of the
preamble to the United States Constitution.95 Since a system of perma-
nent registration had been instituted in February, 1963, the stricter
requirements were inapplicable to those persons who had registered
prior to September, 1962 on the basis of age, residence, and no criminal
conviction, all of whom were white.

A second pre-trial innovation concerned the application form which

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93 Prior to trial no blacks had been registered and registration was periodic; a com-
plete registration was held every four years. See LA. REV. STAT. §§ 18:231, 18:249 (Supp.
1969). On February 14, 1963, the police jury changed to a system of permanent registration.
Therefore, the Government argued, past inequities would be perpetuated for many years
if the lenient pre-September, 1962 requirements were not applied—at least until the
effects of discrimination were eradicated. For extensive discussions of freezing relief, see
379; Note, supra note 55, at 1137-52.

95 Record at 131-32.
had been used formerly as a means to obtain and record essential information about substantive qualifications of applicants; with abandonment of the voucher it had been transformed into a device to test literacy. The applicant was required to fill in the card himself without any assistance or supervision. To avoid “passing” through memorization, five different forms were used to elicit the same information.\textsuperscript{96}

Having anticipated that the Registrar might attempt to use literacy as a means of disqualifying blacks should the voucher procedure be prohibited, the Government had sought to establish at trial the standard of acceptability for application forms previously set by Miss Ward. Each card was examined for mistakes; in court the Government presented successive cards with identical but unique mistakes, raising the inference that many applicants copied one form.\textsuperscript{97} Searches were made for the “lowest standard” registered voter who had filled out his own card. Arguably, his form would become the basis of comparison for all future applications\textsuperscript{98} since the Louisiana Constitution had been amended in 1960 to refuse illiterates the right to vote.\textsuperscript{99} Moreover, a handwriting expert attested to the Registrar’s practice of completing cards for applicants. Through testimony the Government established that 1760 out of 1762 applicants or 99.9 per cent were registered, that Miss Ward accepted all applications unless they looked “ridiculous,” and that she pointed out errors to applicants and permitted them to fill out new cards.\textsuperscript{100}

Abrogation of these lenient standards would inevitably place a heavy burden on all future registrants, but, more importantly, the results of past, flagrant discrimination would be frozen in and perpetuated.\textsuperscript{101} However, the attempt to set a literacy standard which

\textsuperscript{96} Id.

\textsuperscript{97} This thorough preparation revealed facts unknown to the defense. Counsel, caught unawares, merely continued to argue Miss Ward’s adherence to the law. Moreover, counsel for Miss Ward never submitted a post-trial brief.

\textsuperscript{98} This technique was first adopted in Mississippi. Investigators would tour the community looking for the most deplorable living accommodations and then would determine whether the occupants were registered. Madison Parish’s most “illiterate literate white voter” was found living under a railroad bridge siding. He was so far removed from the white power structure and so poorly informed about the parish’s struggle to prevent black voting that on being subpoenaed to appear at trial, rather than ask a white citizen for a lift, he requested Wyche to help him get to the federal courthouse in Monroe. Since it was a civil rights matter, he assumed that Wyche was behind it and that no white citizens would be involved. Department of Justice Interviews, \textit{supra} note 71.

\textsuperscript{99} L.A. CONST. art. 8, § 1(d), as amended on November 8, 1960. However, it should be noted that illiterates already on the rolls would remain registered.

\textsuperscript{100} Record at 98, 122.

\textsuperscript{101} In presenting this evidence, the Government raised the possibility of future discrimination through registrar discretion by questioning the timing behind altered registration procedures. If prior to September, 1962, whites registered at will without
would, in effect, reflect past standards failed. Despite a century of segregation and evidence of current discrimination, Judge Dawkins refused either to take the voter registration machinery out of the defendants' hands or to control significantly the way in which the defendants operated that machinery.

The Government did not challenge Judge Dawkins' omission of the "pattern or practice" finding, which would trigger the assignment of voter referees, or the judicial registration of voters under section 1971(e). Department of Justice analysts felt that the court's decision included statements sufficient to set the 1971(e) machinery in force "even though the judge clearly does not intend for it to." Referees were never requested, however; until proven insufficient the Government was willing to accept Judge Dawkins' adoption of the limited overseer role.

The Department of Justice, did, however, appeal Judge Dawkins' refusal to grant freezing relief. In August, 1965, the Fifth Circuit reversed the Ward decision and ordered suspension of nondiscriminatory voting qualifications not previously applied to white citizens. The court, additionally, used this opportunity to indicate the contours of the freezing remedy. Of primary importance, however, was the Fifth Circuit's recognition that the 1960 Act erred in permitting significant being subject to any test while blacks were not permitted to register at all because of their race, the Department of Justice suggested, it was far from coincidental that strict standards and difficult tests were adopted following initiation of federal court action—that is, only after the Registrar recognized that she would be forced to permit blacks to apply.

102 Memorandum from Frank Dunbaugh, attorney in the Civil Rights Division, United States Department of Justice, to Assistant Attorney General John Doar, Nov. 12, 1963. This assumption was borne out by the Fifth Circuit when Ward was appealed. 349 F.2d at 800. Judge Brown stated: "The decree entered by the District Court . . . although not using the exact phraseology of 42 U.S.C. § 1971(a) . . . found a discriminatory pattern and practice." The court, additionally, took this opportunity to instruct that the "pattern or practice" finding was not discretionary and should be made in the terminology of the statute to expedite post-finding voter applications. Cf. United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965), rev'g 331 F.2d 824 (5th Cir. 1964) (Rives, J., dissenting strongly) (holding that the finding was discretionary).

103 United States v. Ward, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965).

104 First, the court characterized the freeze order as "an effective equitable tool to eradicate the consequences of past discrimination" rather than as an additional sanction to the 1971(e) "pattern or practice" machinery. 349 F.2d at 803. Second, Judge Brown repudiated past decisions denying the remedy, id. at 801; explained the necessity for a two-year conditional period of suspension, id. at 803 (but see United States v. Louisiana, 380 U.S. 145, 155 (1965); Note, supra note 53, at 1148); and extended coverage of related registration standards to all applicants, whether or not they were of eligible age and residence during the discriminatory period, noting that restricting eligibility created an "incongruous conflict" between requirements placed on the Registrar, who could reject applicants on the more rigid current standards, and those lax requirements used by the court once rejection had been established, id. at 803-04.
relief to depend on the discretion of Southern district judges.\(^{105}\) Accordingly, the Court instructed:

Voter registrars should come to learn that when the cases are tried on the application for permanent injunction and the facts establish a pattern or practice, the District Court must so find. Next, the Judge must make the finding to set in operation the §1971(e) machinery. Next, he must enter a decree, which, through suitable freeze provisions, effective for an adequate period of time, will assure that the evils of past discrimination be eradicated before new and more stringent state provisions may be exacted of Negro applicants. The handwriting is indeed on the wall—in Mississippi Ward, in Lynd and now Louisiana Ward.\(^{106}\)

The court also withdrew the district judge's discretion in apportioning costs.\(^{107}\) Although Judge Dawkins had taxed litigation expenses of $1,468.77 against Miss Ward in her capacity as Registrar of Voters, he had entered no assessment against the State of Louisiana. Characterizing the suit as a battle "between two sovereigns," the Fifth Circuit summarily instructed the State to assume these costs.\(^{108}\)

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\(^{105}\) Not only did district judges avoid the "pattern or practice" finding, but even those who made the determination might decline to utilize 1971(e) machinery. See, e.g., United States v. Parker, 236 F. Supp. 511 (M.D. Ala. 1964); cf. United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964) (not specifically rejecting a voter referee assignment but decreeing only that certain named individuals be placed on the rolls).

\(^{106}\) After four years of litigation, Congress also recognized its error. The omnibus 1964 Civil Rights Act authorized three-judge district courts to decide suits at the request of the Attorney General or the defendant when the Government requested a finding of discriminatory pattern or practice. Hearing would be immediate and the decision would be directly appealable to the Supreme Court. 42 U.S.C. § 1971(g) (Supp. V, 1965-69). The provision did aid in removing some delays. Prior to 1964 the time lapse between the filing of the complaint and the beginning of trial was 16.33 months, more than six months of which was spent awaiting an answer. Between July, 1964 and February, 1965, of the seven 1971(a) suits filed the average time lapse between complaint and answer was less than one month. One case went to trial during that time, and in two suits offers of consent judgments were made by the defendants. 1 Hearings Before the U.S. Comm'n on Civil Rights 259-60 (1965) (statement of Burke Marshall). The Act also established a rebuttable presumption of literacy, id. at § 1971(c), and prohibited, in elections held solely or in part for federal offices, registration procedures different from those used in the past, rejection of applicants for immaterial errors or omissions, and use of literacy tests as a voting qualifications unless administered and conducted wholly in writing, id at § 1971(a)(2).

\(^{107}\) 349 F.2d at 805. Additionally, the court framed a proposed uniform decree which would serve as a model for district judges and would be entered on remand, thereby cutting down the time lag between formal grant of judicial relief and implementation of that relief. Id.

\(^{108}\) Id. The court further characterized the state as having given Mrs. Ward aid and comfort, financial as well as moral. Cf. United States v. Duke, 392 F.2d 759, 770 (5th Cir.
C. The Effects of Litigation

It has been argued that once the Fifth Circuit established freezing relief and voter referee assignments to be mandatory, an effective barrier to discriminatory registrar procedures had been erected and no further federal legislation was necessary.\(^{109}\) Judge Tuttle, for example, stated that

> the courts of our circuit . . . by the midsummer of 1965 had disposed of substantially all of the legal questions that had arisen from the continued reluctance of local officials in some counties to accept the century-old command of the Fifteenth Amendment.\(^{110}\)

It is admittedly idle to speculate whether the federal bench responded to the need for a radical remedy or to the pressure of impending federal legislation in developing the criteria for ordering and fashioning "complete" substantial relief.\(^{111}\) However, a reconsideration of the delays, costs, and consequences incident to county-by-county litigation vividly demonstrates the easily anticipated inadequacy of continuing dependance on the judiciary to effectuate voter registration policies.\(^{112}\)

First, it could not be assumed that the Fifth Circuit's pronouncements would be followed. In the past, frequent and explicit instructions

\(^{109}\) It seems certain that if Congress had not invalidated discriminatory state voting provisions and provided means to correct the effect of prior disfranchisement, the judicial doctrines formulated by 1965 would have accomplished a similar result.

Note, supra note 53, at 1189. But compare the statement of a knowledgeable northeast Louisiana attorney:

> After Brown, the derision heaped on the Supreme Court filtered down to the lower federal courts. No Southerner expected honest compliance with district court orders. While state officials expressed sympathy for the plight of Negroes, and had no interest in resisting Negro registration once the [federal] examiners were sent in, nothing at all would have happened if Congress hadn't forced it. A court order could be ignored. An act of Congress commanded respect.


\(^{112}\) United States v. Louisiana, 380 U.S. 145 (1965) (attacking use of the interpretation and citizenship tests in 21 parishes) and United States v. Mississippi, 380 U.S. 128 (1965) (challenging a variety of state voting procedures) represent attempts to avoid repeated suits, but alternative discriminatory methods were still available. See Note, supra note 53, at 1175-89.
to the inferior courts had not halted evasive tactics. There is little reason to conclude that further explication of controlling legal doctrines and specific articulation of the court's expectations would automatically produce compliance.

Second, eight years of litigation provided the most persuasive argument that adjudication and court-developed enforcement tools could not ensure extensive registration. In Madison Parish, for example, between the Ward trial and August 5, 1965, only 327 black citizens succeeded in passing the citizenship and literacy tests. While whites argued that this low registration demonstrated lack of interest in political matters, other factors seem to provide a more plausible explanation. Initially, apprehension of “incorrectly answering” the citizenship questions restrained many from applying to register. School teachers, among others, refused to permit white persons to gossip that “they didn’t even have enough sense to pass that simple test.” Once the district court ordered termination of the Registrar’s unofficial discretion, threats of job loss replaced fear of failure. Additionally, some black residents alleged that discriminatory delaying tactics were used—admitting only one black applicant into the Registrar’s office while permitting four and five whites to fill in the forms at the same time, using hypertechnical errors and omissions to invalidate application cards, and refusing such identification as electric bills to establish residency because the company-issued receipts did not include dates.

As the culmination of a concentrated effort to provide both the opportunity and the means for eradicating racially motivated disfranchisement, United States v. Ward and the seventy other Department of

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113 See, e.g., Katzenbach v. McClellan, 341 F.2d 922 (5th Cir. 1965) (per curiam); Kennedy v. Lynd, 306 F.2d 222 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963).

114 Progress has been painfully slow, in part because of the intransigence of state and local officials and repeated delays in the judicial process. Judicial relief has had to be gaged not in terms of months—but in terms of years... The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.


115 By February 23, 1962, ten weeks after trial and eight months prior to Judge Dawkins' decree, 174 blacks had been registered. 349 F.2d at 799.

116 Wyche Interview, supra note 41.

117 Sheriff Hester’s fiat that “as long as I am Sheriff, there won’t be any [niggers] registered on the books,” Record at 16, strongly negated the argument that the absence of black voters resulted from voluntary disinterest. Judicial recognition of the Sheriff’s superordinate role and of the Registrar’s complicity therein was established by the district court. 222 F. Supp. at 619.

Justice suits filed between 1957 and 1964\(^{119}\) present a dismal recommendation for redressing grievances through legal action. After eight years of litigation, only 37,146 of 548,358 voting-age blacks had been registered in the 46 counties which had been subjects of government suits.\(^{120}\) Moreover, intensive litigation in Alabama, Louisiana, and Mississippi\(^{121}\) did not generate accelerated enrollment of black voters. Between 1956 and 1965, black registration rose by only 3.0 per cent in these three states as compared to an 18.3 per cent average increase for the eleven Southern states.\(^{122}\)

While these figures highlight certain inadequacies of judicial enforcement, secondary gains should not be overlooked when evaluating the effect of litigation. In addition to opening registration rolls, through voting rights suits the Government sought to influence behavior patterns of the white leadership. Department of Justice attorneys indicate that they succeeded, for example, in forcing some district judges to confront the blatant misconduct of local officials.\(^{123}\) They believe, moreover, that Judge Dawkins became so indignant over the refusal of officials to register blacks that he threatened in private to appoint a voter referee if intransigence persisted.\(^{124}\)

\(^{119}\) Department of Justice Interviews, *supra* note 71.


\(^{121}\) Between 1960 and 1964, the Department of Justice filed twelve voting discrimination suits in Alabama, 22 in Mississippi, and fourteen in Louisiana, all of which resulted in findings of discrimination by either the district court or the court of appeals. H.R. Rep. No. 499, 89th Cong., 1st Sess. 12 (1965).

\(^{122}\) 1956 Black 1956 Black 1965 White

<table>
<thead>
<tr>
<th>Registration</th>
<th>Number</th>
<th>Per Cent</th>
<th>Number</th>
<th>Per Cent</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alabama</strong></td>
<td>73,272</td>
<td>14.0(^a)</td>
<td>92,737</td>
<td>19.3(^e)</td>
<td>69.2(^e)</td>
</tr>
<tr>
<td><strong>Louisiana</strong></td>
<td>152,587</td>
<td>31.7(^b)</td>
<td>164,601</td>
<td>31.6(^e)</td>
<td>80.5(^e)</td>
</tr>
<tr>
<td><strong>Mississippi</strong></td>
<td>19,347</td>
<td>3.9(^c)</td>
<td>28,500</td>
<td>6.7(^e)</td>
<td>69.9(^e)</td>
</tr>
<tr>
<td><strong>Eleven Southern States</strong></td>
<td>1,200,000</td>
<td>25.0(^d)</td>
<td>2,174,200</td>
<td>43.3(^f)</td>
<td></td>
</tr>
</tbody>
</table>

*Sources:*

\(^a\) 1959 *Civil Rights Report, supra* note 18, at 578 (unofficial 1958 figures).

\(^b\) Id. at 569 (official 1956 figures).

\(^c\) Id. at 580 (official 1956 figures).

\(^d\) Id. at 40.

\(^e\) U.S. Comm'n on Civil Rights, *Political Participation* 222 (1965) [hereinafter cited as *Political Participation*].

\(^f\) U.S. Comm'n on Civil Rights, *The Voting Rights Act: The First Months* 8 (1965) [hereinafter cited as *The First Months*].

\(^g\) *Political Participation, supra*, at 227-46.

\(^{123}\) White attorneys in northeast Louisiana discount the influence of informal discussions with federal judges. Interviews with northeast Louisiana attorneys, Oct. 26 & 28, 1970.

\(^{124}\) Department of Justice Interviews, *supra* note 71. Charles Hamilton recounts a
As a second objective, Government attorneys hoped to provide the black community with vital information. Referring to the Ward trial, one attorney stated:

I got the registrar on the stand and the galleries were packed with Negro leaders in the county. So I asked her questions for the benefit of the Negroes. Questions like: Now what are your office hours? What days are you in your office? Now just what do you require of persons who come to make application to register? And the Negroes are sitting right there and they leave the courtroom armed with all that information. Plus, you see, I purposely ask the registrar if she intends to register all persons who come in and who are qualified.

Now we just recently tried that case before Judge Dawkins and he is nowhere near a decision, but the next week seventy Negroes were registered. I expect they'll get 1000 Negroes registered in that Parish and it won't make much difference what sort of ruling we get from Dawkins.\(^{125}\)

While black registration did not approach this optimistic prediction, the actions of community leaders acknowledge the efficacy of such trial technique. As soon as the trial was completed, and before the Registrar's books had arrived from the federal courthouse in Monroe, black residents appeared at Miss Ward's office to apply for certification.\(^{126}\)

Additionally, a not wholly unintended benefit developed from this trial process:

When the suit was called up Wyche and four or five others were on the stand. Everyone listening to our story and writing it down. Miss Ward was called, also. And she found she was the only one involved. All the lawyers in town were there to watch but they couldn't help her. She just sat there, looking around, with no one to answer the questions but her.\(^{127}\)

A civil rights attorney who had handled Madison Parish voting suits observed that when black leaders reminisce about the early stages of their struggle,

> [o]ne of the things they repeat over and over again is how great it felt to see the registrar without anyone to protect her. Also, I think the psychological lift of showing the sheriff to dis-

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\(^{126}\) When permitted to apply, black resident Joe Neal registered first, followed by Wyche and Brown. Interview with Moses Williams, in Tallulah, La., Oct. 27, 1970.

\(^{127}\) Brown Interview, *supra* note 118.
advantage gave many of the less activist Negroes the courage to register once the trial ended. After all that time and after all the misery those [white] people dished out, having their vulnerability revealed probably bothered them more than the knowledge that Negroes would register and vote.\textsuperscript{128}

However, these subsidiary benefits neither outweighed the futility of judicially policing the voting process nor blurred recognition that federally sanctioned litigation produced the same frustrations as those arising from out-of-court negotiation and private suits. To thwart state-supported disfranchisement required additional legislation which would not only withdraw all discretion from white registrars but also provide efficient enforcement mechanisms against post-registration discrimination by local officials.\textsuperscript{129}

\section*{III. Post-Voting Rights Act Litigation}

The Voting Rights Act of 1965\textsuperscript{130} provided three enforcement mechanisms against continuing deprivation of the franchise. First, Congress provided an alternative to enforcement through litigation by developing a plan under which the Department of Justice could automatically suspend literacy tests and similar discriminatory devices.\textsuperscript{131} These provisions, which are the only mandatory, administrative remedies under

\begin{itemize}
  \item Interviews with attorneys from the Lawyers Constitutional Defense Committee, in New Orleans, La., Oct. 23, 1970 [hereinafter cited as LCDC Interviews].
  \item Compare the statement of Justice Holmes in Giles v. Harris, 189 U.S. 475, 488 (1903):
    \begin{quote}
      The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed on the [registration] lists . . . will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form.
    \end{quote}
  \item 79 Stat. 437 (1965) 42 U.S.C. § 1973 et seq. (Supp. V, 1965-69). Several authors have noted the historical precedents to the Voting Rights Act in previous civil rights legislation, Christopher, supra note 40, at 2 nn.6-11, and have detailed its provisions, see id. at 9-15; Note, supra note 53, at 1195-1204; Statute Note, 44 Tex. L. Rev. 1411 (1966).
  \item In any state or political subdivision in which fewer than 50\% of the eligible voters had been registered or had voted in the 1964 presidential election, suspension was automatic. 42 U.S.C. § 1973b(b) (Supp. V, 1965-69). The legislation provided an opportunity for the state to rebut the presumption of discrimination through a declaratory judgment proceeding, id. at § 1973b(a), but a judicial finding of voting rights denial through racially discriminatory tests concluded the issue until five years after final judgment, id., whether entered prior or subsequent to statutory enactment. See United States v. Ward, 352 F.2d 329 (5th Cir. 1965). Additionally, following suspension no new tests or devices could be adopted unless approved by the Attorney General or by the District Court for the District of Columbia in a declaratory judgment proceeding. Id. at § 1973c; see Allen v. Board of Elections, 598 U.S. 544 (1969), holding \textit{inter alia} that private parties have standing to seek a declaratory judgment that a new state statute is subject to the § 1973c procedure and that such coverage questions may be brought in local district courts since they do not determine the substantive discriminatory effects of new state enactments.
\end{itemize}
the Act, withdrew from the district courts discretion to enforce federal law and to impose available sanctions. Additionally, the coverage formula eliminated the need for county-by-county litigation, the concomitant search for aggrieved parties, and the exhaustive preparation required under earlier voting rights legislation.

Although automatic suspension removed locally enforced barriers to registration, Congress did not trust county officials to comply voluntarily and to register blacks without delay. The legislation's second enforcement mechanism prevented dilatory tactics by providing the Attorney General with discretionary power to appoint federal examiners to any political subdivision designated under the automatic suspension sections. To insure that individuals once registered would be permitted to cast their ballots, Congress authorized the Attorney General to assign federal observers to oversee elections within any political subdivision designated an "examiner county." This provision, like that mandating examiner appointments, differed in kind from the voting referee approach of the 1960 Act in that authority to exercise discretion was vested in the Attorney General rather than in the various district judges.

Finally, Congress proscribed voting-oriented intimidation, threats, and coercion by both private individuals and those acting under color of law. To enforce these provisions, the Act authorized both criminal sanctions and preventive, civil actions, which included specific power to request a court order directing state or local election officials to permit listed persons to vote and to count their ballots.


134 Initially, the Department of Justice designated several counties as requiring an examiner merely to trigger the right to appoint observers. POLITICAL PARTICIPATION, supra note 122, at 159. This was the case, for example, in Madison Parish, where incidents of harassment reported by blacks prompted the Department to appoint observers on August 12, 1966, one day prior to a Democratic primary. For the United States Commission on Civil Rights' discussion of the observer program, see id. at 157-62 & nn. 23-26.


136 Id. at § 1973j. Note that the definitions of these crimes do not require purpose to render these acts criminal. Criminal contempt is provided for in id. at § 1973l(a).

137 Id. at § 1973j(d). To expedite judicial determinations, Congress eliminated the exhaustion requirement for federal district court jurisdiction, id. at § 1973j(f), and authorized examiners to receive and substantiate complaints from listed and eligible persons who alleged within 48 hours after the polls closed that they had not been permitted to vote. If the Attorney General agrees that the complaint is well founded, he can apply to the federal district court for an order requiring the individual's ballot to be cast and counted before final certification of election results. The district court must hear and determine such applications immediately. Id. at § 1973j(e).
Measured as a means to register blacks, the shift from litigation to administrative procedures has achieved commendable results. In Madison Parish, for example, 1,819 voting-age blacks registered between August 7 and September 29, 1965, and by October, 1967, black registration reached 3,862 voters or 74.5 per cent of eligible black citizens. Concomitantly, local registrars in the nonexaminer counties of Alabama, Georgia, Louisiana, Mississippi, and South Carolina placed more than 110,000 blacks on the books during the first few weeks after passage of the Act. Throughout the South, registrars and federal examiners together brought black registration to 2,810,763 or 57.2 per cent.

Additionally, during this period 49 whites were accepted and three blacks rejected. The First Months, supra note 122, at 62; Political Participation, supra note 122, at 240-41.

Madison Parish was not designated an examiner county at this time.

The First Months, supra note 123, at 2. The first black to receive a certificate under the Voting Rights Act resided in Selma, Alabama. Mrs. Ardies Maulden was described as “typical of thousands of black people across the Deep South.” Neither a civil rights leader, militant, nor activist, she was “simply an Alabama woman who feels she is entitled to the right to vote the same as anyone else.” Hearings on H.R. 4249, H.R. 5538 and Similar Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., Ser. 3, at 192 (1969) (statement of Vernon E. Jordan, Director, Voter Education Project).

The comparable figure for whites is 14,750,811 or 76.5%. During congressional hearings to amend the Voting Rights Act (the automatic suspension provisions, among others, would have terminated on August 6, 1970, absent renewal), it was estimated that 800,000 blacks had been given the opportunity to register as a result of the Act. See Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2nd Sess. 661-2 (1970) (hereinafter cited as Senate Hearings). Despite this marked increase in registration, critics have contended that the Government refused to utilize fully the examiner provision. Political Participation, supra note 122, at 153. See also P. Watters & R. Cleghorn, Climbing Jacob’s Ladder 245-47, 259-65 (1967). But see R. Claude, The Supreme Court and the Electoral Process 135-43 (1970). Arguing that, as a minimum, examiners were required in every county in which a judicial determination of discrimination had been made, observers rejected the Government theory that voter registration drives would have more impact locally than would the presence of examiners.

It is impossible to determine why local registrars in some areas performed their duties voluntarily, albeit grudgingly, while other officials refused to comply. However, a comparison of Madison and East Carroll Parishes indicates that failure by the Attorney General to exercise discretion through blanket appointments of examiners did not necessarily impede registration progress. The Attorney General designated examiners for East Carroll on August 9 (nonwhite voting-age population 4,183). The First Months, supra note 122, at 50. By September 29, only 33 blacks had been registered there, id. at 61, while in Madison Parish the local registrar had enrolled 1,819 blacks (nonwhite voting-age population 5181), id. at 62. This initial imbalance abated, however, and on November 25, 2,647 blacks were on the rolls in East Carroll, compared with 2,086 in Madison Parish. Letter from Attorney General Katzenbach to Stephen Currier, Nov. 21, 1965. Since the Fifth Circuit’s modification of Ward did not issue until October 21, 1965, voluntary compliance cannot have been caused by the court’s decree, which included changes suggested by the Government “to eliminate any possible doubt as to the
However, Congress designed the Voting Rights Act not only to secure registration\textsuperscript{142} but also to facilitate enforcement of the constitutional right to vote in its entirety.\textsuperscript{143} Although the coverage formula protects against threshold discrimination through denial of registration, the Act fails to extend automatic, administrative protection to every stage in the electoral process. Moreover, the success of administrative sanctions depends upon strong executive pressure. Absent persistent enforcement, local officials will create increasingly subtle barriers to formal political participation, thereby increasing the situations which require judicial intervention. Accordingly, emphasis has shifted from denial of the vote to dilution of its effectiveness through discriminatory manipulation of election procedures, and the need for litigation has not diminished.\textsuperscript{144}

In comparing recent litigation to that undertaken prior to the passage of the Voting Rights Act, two familiar problems appear. First, judicial reluctance to invoke available sanctions substantially undercuts the value of adjudicated relief. Second, delayed compliance with congressional mandates burdens the court with continuous, repetitious litigation. However, post-1965 legal actions also present interesting contrasts to the registration suits. Reluctance to utilize available sanctions is no longer limited to the judiciary. Government policy repudiates the mandatory provisions of section 5\textsuperscript{145} and eschews the initia-

\textsuperscript{142} Southern reaction to unilateral displacement of state voting requirements is well presented in Brief for Louisiana as Amicus Curiae at 13-14, South Carolina v. Katzenbach, 383 U.S. 301 (1966):

Instead of carefully weeding out the remnants of resistance to the Fifteenth Amendment, Congress has been shooting from the hip with all sorts of trigger clauses which leave gaping holes in State statutes, however fairly they are administered. . . . There is no good reason for Congress to start a whole prairie fire and burn up State statutes wholesale to kill the few remaining weeds of discrimination still surviving in the South.

\textsuperscript{143} Many legislators recognized that the Act might prove inadequate to the task. See 2 U.S. Code Cong. & Ad. News, 89th Cong., 1st Sess. 2483 (1965) (statement of Congressman Lindsay); accord, Senate Hearings, supra note 141, at 9-11 (statement of Senator Mathias); cf. 18 U.S.C. § 245 (Supp. V. 1965-69). However, the dominant trend of thought supported the predictions that the Act would make the fifteenth amendment "a real part of the United States Constitution" and that "much of the turmoil over the rights of citizens to participate in this basic governmental function will now be eliminated." Tuttle, \textit{Equality and the Vote}, supra note 110, at 263. But see Judge Wisdom's pre-enactment prediction in United States v. Barnett, 346 F.2d 99, 108 (5th Cir. 1965) (dissenting opinion):

If Congress should adopt the proposed Voting Rights Act of 1965, that law too will change many local customs and further exacerbate state federal functions. . . . I cannot see into the unknown. But the dark realities of the past militate against the Court's taking a rosy, relaxed view of the future.

\textsuperscript{144} See \textit{Political Participation}, supra note 122, at 162-67.

\textsuperscript{145} During the Congressional hearings to extend those provisions of the Voting Rights Act due to expire, Attorney General Mitchell submitted the Nixon Administration's proposal to eliminate the prior approval procedure (in favor of a plan which would
tion of legal proceedings.\textsuperscript{146} Abdication of executive responsibility for preventing discrimination in voting has therefore forced private attorneys to institute most litigation. Additionally, the delay inherent in using the courts for enforcement has disillusioned black leaders who expected simplified access to sanctions and has undermined belief in the electoral process. The following subsections document the limited efficacy of the Voting Rights Act by examining the new resistance\textsuperscript{147} and by analyzing the Madison Parish litigation necessary to redress continued voting rights infringement.

A. Brown v. Post\textsuperscript{148} (Post I)

One year after the Voting Rights Act suspended registration requirements,\textsuperscript{149} Harrison Brown successfully sustained a Democratic primary challenge against the white incumbent\textsuperscript{150} for a seat on the school board.\textsuperscript{161} Although the black community had assumed that the No-

\textsuperscript{146} In 1966, twelve suits were decided pursuant to the Voting Rights Act in which the United States had either initiated action or had been a party plaintiff. In 1970 the Department of Justice reported activity in only three suits, one of which is Toney v. White, Civil No. 15,641 (W.D. La., filed May 4, 1970), discussed in text and notes at \textsuperscript{256-92 infra}. An indication of the declining importance of voting rights can also be gleaned from the manpower distribution in the Civil Rights Division: education has thirty attorneys, employment 27, but voting and public accommodations only thirteen. Letter from Civil Rights Division, Department of Justice, to \textit{The University of Chicago Law Review}, Mar. 17, 1971.

\textsuperscript{147} \textit{Political Participation}, supra note 122, at 21-131 (systematically documenting the various techniques utilized throughout the South).

\textsuperscript{148} 279 F. Supp. 60 (W.D. La. 1968).

\textsuperscript{149} The decision in United States v. Ward, 349 F.2d 795 (5th Cir. 1965) issued on August 11, 1965. However, its terms were superseded by the Voting Rights Act, which had been signed by President Johnson on August 5. See United States v. Ward, 352 F.2d 829 (5th Cir. 1965).

\textsuperscript{150} Brown defeated Dorothy Provine in the August 13, 1966 Democratic primary by 1,682 to 1,592 votes. The Attorney General had designated Madison Parish an examiner county the preceding day and had designated federal observers to oversee the primary contest, which proceeded without incident. 279 F. Supp. at 61-62 (W.D. La. 1968). Every subsequent Madison Parish election has been observed.

\textsuperscript{161} Madison Parish is divided into political subdivisions called wards from which the single-district school system recruits its board members. Ward 4 includes but is not coterminous with Tallulah.
November 8 general election would be a mere formality.\textsuperscript{182} Brown was defeated by J.T. Fulton, a white write-in candidate who had not campaigned openly\textsuperscript{183} and whose 1,891- to 1,622-vote victory included 510 of the 512 absentee ballots counted, all of which had been cast by white voters.\textsuperscript{184}

The gravamen of the complaint\textsuperscript{185} in \textit{Brown v. Post} was that Clerk of Court Jerome C. Post and his deputies intentionally discriminated against black voters by illegally making absentee ballots available to ineligible white voters in the general election.\textsuperscript{186} Fifteen months after the contest, Judge Dawkins found that the defendant's administration of the absentee process, while undertaken in good faith, did discriminate in fact against blacks, rendering the election invalid.\textsuperscript{187}

\textit{Post I}, the first of three suits challenging the conduct of parish elections,\textsuperscript{188} highlights the changing nature of discriminatory practices.

\textsuperscript{182} Since the Republicans had not selected a school board nominee in a primary, state law forbade designating a Republican candidate on the ballot. \textit{La. Rev. Stat. Ann.} § 18:281 (1969). Proposed constitutional amendments were the only other contested items in the election.

\textsuperscript{183} Fulton, who qualified as a write-in candidate on October 4, conducted an intensive but discreet campaign. Until November 8, the day of the election, no radio announcement appeared and not a single poster or newspaper advertisement apprised voters of Fulton's candidacy. Brief for Plaintiff at 14. Nor did the \textit{Madison Journal} inform voters that the school board seat was in contention. Although the paper had printed news stories about previous elections, including the August 13 primary, and carried an editorial commenting on the Ward 4 contest after the general election, Editor William Roundtree ordered a brief blackout on election news prior to November 8, later explaining: "It is a policy that I adopted." Brief for Plaintiff at 14 (deposition of William Roundtree). However, the campaign of white citizens between August 13 and October 8 increased Ward 4 white registration from 2,101 to 2,329. Figures available from Madison Parish Registrar of Voters.

\textsuperscript{184} 279 F. Supp. at 62.

\textsuperscript{185} Id.

\textsuperscript{186} On November 16, 1966, the Lawyers Constitutional Defense Committee had filed a class action on behalf of Brown and two other qualified electors, requesting that the Governor be enjoined from certifying the election returns and that Brown be declared the Ward 4 school board member. \textit{Brown v. Post}, Civil No. 12471 (W.D. La., filed Nov. 16, 1966). Although on November 9, Brown had protested the election in a letter to the Department of Justice, the Government took no action until January 9, 1967, when it brought a similar suit. \textit{United States v. Post}, Civil No. 12583 (W.D. La., filed Jan. 9, 1967). The delay was attributed to the "more thorough investigation" required before the Government brings suit. Department of Justice Interviews, supra note 71. The defendant's answer, filed January 26, 1967, denied the relevant allegations of discrimination and denied the district court's jurisdiction. Additionally, the answer claimed that defendant Post acted according to state law and did not subject any Madison Parish citizen to unusual treatment. Brief for Defendant at 4-11.

\textsuperscript{187} 279 F. Supp. at 63. The \textit{Brown} trial had been held on March 20-22, 1967, and the opinion was delivered on January 24, 1968. A preliminary injunction issued by Judge Dawkins on December 5 had prevented the issuance of a commission to any candidate for school board member.

\textsuperscript{188} This was also the first parishwide election in which a black candidate ran for public office or in which a significant number of black voted. See, however, allegations
following passage of the Voting Rights Act. Specifically, local officials shifted their tactics from denial of the vote to reduction of its effectiveness. The court was therefore required to determine, first, if dilution, absent a finding of intentionality, constituted a remedial grievance and, second, what form of relief would most capably protect the fifteenth amendment’s guarantee by insuring full weight to each ballot.

1. The Discrimination in Effect Standard. In the legislative context, Baker v. Carr has established that constitutional protection extended beyond absolute deprivation of the franchise. While judicial recognition of violations in electoral integrity had been limited to acts of fraud and circumstances in which racial motivations denied access to the polling place, in April, 1967 the Fifth Circuit recognized that acts which on their face are innocent but which in fact promote voting discrimination violate the fifteenth amendment. Post I established that a conclusion of unconstitutional dilution of the vote does not depend on a finding of discriminatory purpose.

In adopting the “discrimination in effect” standard, the court rejected strong evidence of intentional misconduct. The defendants had provided white residents with opportunities to vote absentee without extending the privilege to similarly situated blacks. Louisiana law provides that the clerk of court may establish substations to aid absentee voting. The procedure contemplates public notification and a permanent site, authorized by the police jury, at which regular hours are kept. Nevertheless, substations created by Clerk of Court Post of discrimination regarding the first local election to be held after the passage of the Voting Rights Act. POLITICAL PARTICIPATION, supra note 122, at 38-39.

See text at notes 185-88 infra.


See, e.g., Wells v. Wallace, 337 S.W.2d 18 (Ky. 1959); In re Dorgan, 44 N.J. 440, 210 A.2d 67 (1965); Ingram v. Burnette, 204 Tenn. 149, 316 S.W.2d 31 (1958).

Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966).

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


In defining the procedure to be followed with regard to substations, the Louisiana Attorney General had advised, quoting a February 22, 1958 opinion, that

should you decide, in the exercise of your sound judgment, that a sub-office or sub-offices should be opened for the purpose of facilitating absentee voting, then you should direct your request for suitable offices, furniture and equipment, to the [police jury], and obtain the necessary authority of that governing body to either purchase or rent a building or buildings, and to obtain the required furniture and equipment.

Brief for Plaintiff at 46. The Attorney General had also advised:

Although the statute is silent as to the days and hours these sub-offices are to be kept open, we would advise against keeping them open other than during the regular days and hours for absentee voting. Also, in the interest of fairness in elections, we advise that you give public notice of your intention to open a sub-office.

Id.
did not meet these standards. Without notice, a temporary, one-day office was established at the Scott Plantation, which is located one and one-half miles from Tallulah and which employed only white fieldhands.\textsuperscript{166}

Nor did fieldworkers' absentee ballots accepted by Post conform to Louisiana law. The procedure requires a qualified registered voter who expects to be absent from the parish on the day of a general election to apply between two to ten days before that election to the parish's district court clerk for an official ballot. In applying for his absentee ballot the voter must swear that he is duly registered and will be absent from the parish on election day. The applicant then executes his ballot in secret, seals it, and swears to its authenticity and secrecy.\textsuperscript{167} However, those voting absentee at the plantation uniformly testified that they had no genuine expectation of being absent from the parish on election day, that they were not asked if they would be outside the area, that their affidavits consisted of signing their names, and that they completed their ballots by marking an X next to the name of J.T. Fulton, which had already been written in for them.\textsuperscript{168}

Post repeated this procedure at the all-white Delta Haven Nursing Home because "[i]n a prior election Senator Brown, who was either a major stockholder or owner of the rest home called me up and asked me if these people would be allowed to vote and that they expressed a desire to vote."\textsuperscript{169} At this special substation, Deputy Clerk Jewell Willhite not only helped fill in the ballots, but also informed voters of Fulton's race and status as a write-in candidate.\textsuperscript{170}

Inpatients at the all-black Baptist Nursing Home received neither the opportunity to vote nor the assistance afforded whites in similar circumstances. Rev. Frank Wilson, unsuccessful candidate for Ward 2 school board member, testified:

\begin{quote}
I asked Mr. Post about bringing in some of the elderly people to let them sign an absentee ballot before the day of the election. Mr. Post said that I would have to bring them and they
\end{quote}

\begin{footnotes}
\textsuperscript{166} Post established the station at the request of Scott Plantation managers. This was an unusual circumstance and during this period of time the place had been sold. The employees that worked there were trying very hard to finish the Scott plantation crop. During the time of absentee balloting they were busy in the field, as it were. There were a number of them that were anticipating leaving town. At the same time the majority of them, if the crop was harvested before the voting date, were to be transferred to another place to work. I felt like it would expedite matters if he set up a station there rather than have these people go to town to vote absentee because it would save him and them time, too.

Brief for Plaintiff at 40 (testimony of Mrs. Warren Patrick, wife of part-owner).


\textsuperscript{168} Brief for Plaintiff at 40-43.

\textsuperscript{169} Record at 379 (emphasis added).

\textsuperscript{170} Record at 80 (testimony uncontradicted).
\end{footnotes}
would have to swear an affidavit they would be out of town on the day of the election. But I said I had no intention of them being out of town and I thought maybe they could sign an absentee [ballot] since they were old and couldn’t get about, but he said, no, they couldn’t do that unless they would be out of town.\textsuperscript{171}

In addition to providing opportunities for voting absentee at substations,\textsuperscript{172} the defendants aided those white citizens who came to the clerk’s office thinking they might like to avoid the polls on November 8 for reasons of personal convenience. Witnesses referred to being encouraged to vote absentee. While these encouragements were not attributable to the defendants, their conduct supported an inference of soliciting absentee ballots. Mrs. M. N. Ingram, who did not expect to be absent from the parish on election day, voted absentee because she might not have transportation to the polls on November 8. Mrs. J. J. Smith, who had never before voted absentee, did so in this election because she wanted to stay in her store all day. Mr. Roy Erwin was neither asked if he expected to be absent from the parish nor required to fill out his own affidavit—one of the clerk’s employees did that for him. Other residents received absentee ballots in the mail without having requested them.\textsuperscript{173} However, when Moses Williams, Brown’s campaign manager, inquired about absentee voting procedures, Post told him that “one must swear he is to be out of town or have reason to believe he will be out of town on election day,” that “absentee should be cast in the Clerk’s office,” and that “it couldn’t be cast nowhere but in the Clerk’s office.”\textsuperscript{174}

Intentional discrimination may also be inferred from the internal administration of the absentee voting process. Louisiana law provides that printed instructions for voting absentee be furnished to each absentee voter.\textsuperscript{175} These materials include detailed information on procedures to be followed in executing the ballot in person or by mail, and a simple statement of the method used to vote for a candidate whose name does not appear on the ballot. Each absentee voter received this material from the Clerk of Court’s office. However, Deputy Clerk

\begin{footnotes}
\item[171] Brief for Plaintiff at 49.
\item[172] In addition to the offices described in the text, Post set up six substations in private homes in the white Willow Bayou section of Tallulah “without a corresponding opportunity being given to Negroes similarly situated.” 279 F. Supp. at 63. The plaintiffs offered fifteen witnesses to explain the circumstances of their voting absentee at places outside the Clerk of Court’s office. Brief for Plaintiff at 19-46.
\item[173] The plaintiffs offered thirteen witnesses to describe the circumstances surrounding their use of absentee ballots. Brief for Plaintiff at 19-46.
\item[174] Brief for Plaintiff at 49.
\item[175] LA. REV. STAT. § 18:1074 (Supp. 1964).
\end{footnotes}
Grace Grimes also enclosed (1) a photocopy of an official ballot on which she wrote "J.T. Fulton" in the space provided for entering a candidate's name and (2) instructions telling the voter to "use a lead pencil containing black lead to mark your ballot, mark it as shown on the sample ballot enclosed. Mark the white square opposite the name in the blank column on your ballot." No comparable instruction guided voters desiring to mark their ballot in favor of Brown or the constitutional amendments.

Most incriminating of all, the defendants were unable to offer convincing reasons for having requested one thousand absentee ballots for the November election. Since fewer than 150 voters had cast absentee ballots in the August primary, lack of a substantial basis for expecting such a dramatic increase in absentee voting leads to the conclusion that the defendants intended to strengthen J. T. Fulton's write-in candidacy by promoting absentee balloting.

Ignoring the issue of intentionality for a moment, the tally of absentee ballots further supports an inference that the conduct of local officials aided Fulton's write-in campaign. While absentee ballots comprised thirteen per cent of the total votes cast in the election, nearly 27 per cent of the white voters cast absentee ballots. Moreover, Fulton's 169-vote margin of victory contained 26.9 per cent questionable absentee ballots while Brown's official tally included only two votes not cast at the polls. Thus Brown, whose supporters took the trouble to appear in person, trailed by 508 votes before the polls even opened.

176 Brief for Plaintiff at 20.
177 The plaintiffs offered six witnesses to explain the circumstances and procedure for voting absentee by mail. Brief for Plaintiff at 19-46.
178 La. Rev. Stat. Ann. § 18:1072 (1969) requires the Secretary of State to provide absentee ballots equal to 10% of the registration thirty days prior to election.
180 The justifications offered include Mrs. Grimes' assertion that increased "colored" registration between April and August necessitated increased ballots, Brief for Plaintiff at 19 (this rationale appears questionable since only eight blacks had voted absentee in the August primary), and Clerk of Court Post's testimony that he knew the Ward 4 election to be causing unusual interest which would result in a heavier vote, Record at 17 (this reasoning is similarly suspect since by his own admission Post appears to have requested the additional ballots prior to learning of Fulton's candidacy, id. at 18).
181

<table>
<thead>
<tr>
<th></th>
<th>Total Votes Cast</th>
<th>Votes Cast at Polling Places</th>
<th>Absentee Votes</th>
<th>Per Cent Absentee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fulton</td>
<td>1,891</td>
<td>1,881</td>
<td>510</td>
<td>26.94%</td>
</tr>
<tr>
<td>Brown</td>
<td>1,622</td>
<td>1,620</td>
<td>2</td>
<td>0.01%</td>
</tr>
</tbody>
</table>

Source: 279 F. Supp. at 62.
Despite all this evidence, Judge Dawkins refused to find that the defendants intentionally granted whites illegal advantage in order to discriminate against blacks.\textsuperscript{182} Under this view, the defendants merely discriminated in fact by omitting to grant blacks similar privileges.\textsuperscript{183} Hence, no absentee ballots were found to be illegal;\textsuperscript{184} rather, those accepted at the substations resulted in a discriminatory effect. Since giving preferential treatment to one class of voters promotes impermissible racial distinctions, the defendants’ motivation became irrelevant.\textsuperscript{185}

With \textit{Post I}, Judge Dawkins extended the ambit of activities constituting effective dilution of the franchise.\textsuperscript{186} In \textit{Bell v. Southwell},\textsuperscript{187} where the defendants’ “flagrant” and “completely indefensible” conduct included overt discriminatory acts on election day, the court held that an election tainted by such constitutional violations will be voided.

\begin{enumerate}
\item Judge Dawkins found, “[c]ontrary to the allegations of the complaint,” that:
\begin{enumerate}
\item There is no evidence whatsoever that defendant Post or his deputies obtained absentee ballots from the Secretary of State for white persons alone, or that the ballots were obtained to facilitate any particular class of voters. The unusual amount of interest in this election was known to defendants and therefore they obtained extra ballots commensurate with this unusual interest.
\item The name of all persons voting absentee in the subject election were posted in a conspicuous place in the Clerk’s office as provided by law.
\item No conspiracy by defendants to deprive Negroes of their right to vote has been shown even in the slightest respect.
\item There is no affirmative proof that it was the color of any candidate or any prospective voter which caused defendants to accept any allegedly illegal absentee votes. There is no basis or justification for the allegation that defendants accepted irregular absentee ballots from white voters merely because they were white and would therefore vote for J. T. Fulton because he was the white candidate.
\item None of the defendants actively campaigned for J. T. Fulton.
\end{enumerate}
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\textit{Id.} at 63.

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\end{enumerate}

\textit{Id.} at 63.

\textsuperscript{183} \textit{Id.} However, the defendants, as clerks of court acting under state law, had a duty under the Fifteenth Amendment to the United States Constitution and under the Voting Rights Act of 1965 not to engage in any acts or practices in the absentee voting process which have the effect of discrimination among qualified voters in elections of any kind. This duty included refraining from any conduct which results in allowing white voters opportunities to vote without affording the same opportunities to Negro voters.

\textit{Id.} at 64.

\textsuperscript{184} “The result of the election would not have been different had the final tabulation not included absentee ballots \textit{cast outside the office of the Clerk} in violation of Louisiana law.” \textit{Id.} at 63 (emphasis added).

\textsuperscript{185} “Reiterating for emphasis, we do not find defendants engaged in any \textit{intentional} plan to deprive Negroes of their constitutional right to vote. However, the manner in which they administered the absentee process was discriminatory in fact.” \textit{Id.} (emphasis in original).

\textsuperscript{186} Judge Dawkins did not state that in recognition of a “discriminatory in fact [effect]” standard he was adding to the theoretical texture of franchise deprivation. His opinion, composed of sixteen findings of fact and nine conclusions of law, contains no jurisprudential discussion at all.

\textsuperscript{187} 376 F.2d 659 (5th Cir. 1967). The plaintiffs had alleged two sets of irregularities, but the court’s decision, which technically reversed a grant of summary judgment, treated only the maintenance of segregated voting lists and polling booths, which the defendants’ answer had admitted. \textit{Id.} at 664, 665 n.13.
even if the plaintiff cannot show they affected the final results. In Post I, however, Judge Dawkins predicated relief on discriminatory practices which neither influenced blacks not to appear at the polls nor personally intimidated individuals by deterring them from voting for black candidates. Therefore, a remedial grievance had been established even if election day activity was untainted and black voters lacked direct knowledge of racially motivated unequal conduct on the part of state officials, provided that the defendants' practices added a new, intervening factor which directly prejudiced the integrity of the entire electoral process. The plaintiffs could satisfy their burden of proof by demonstrating "discrimination in effect." Concededly, Judge Dawkins' approach may have been motivated by his desire not to characterize the defendants' acts as intentional. However, plaintiffs' attorneys, who had strongly argued for a finding of intentionality, recognized that in the future the "discrimination in effect" standard would be a far simpler one to satisfy.188

2. The Voiding Remedy. Having determined that the defendants' actions constituted a violation of electoral integrity, Judge Dawkins faced two alternative forms of relief—he could either declare the loser victorious189 or void the election.190 Awarding the office to Brown required vote counting either by determining if Brown would have

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189 Assuming that Judge Dawkins would find all absentee votes invalid, the plaintiffs contended that on the facts as they appeared subsequent to the election, had the illegally obtained and executed ballots been excluded, Brown would have beaten Fulton 1,620 to 1,381. There is an obvious danger to this line of reasoning—it denies the franchise to possibly innocent victims of official misconduct, including the victorious candidate. First, an undetermined number of absentee ballots were legally obtained and executed. Should these not have been counted, some white voters would have been denied their right to vote because of action to which they did not contribute and of which they had no knowledge. Second, of those who cast absentee ballots, a percentage did not intend to act illegally and relied on the defendant's statements and procedures by virtue of his office. Had they not believed themselves to be eligible to cast absentee ballots, they might have personally voted at the polls on November 8.

190 While courts have traditionally refrained from interfering with the electoral process by voiding or enjoining elections, following the Voting Rights Act district courts have set elections aside under extraordinary circumstances in which plaintiffs have diligently pressed their claims so as to avoid unnecessary disruption of governmental processes. Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966). But see McGill v. Ryals, 253 F. Supp. 374 (M.D. Ala. 1966) (three-judge panel) (denying declaratory relief to plaintiffs who sought to have Lowndes County offices declared vacant on the ground that an array of past constitutional violations had collectively denied blacks the right to vote and enabled a white minority to seize political power); accord, Mississippi Freedom Democratic Party v. Democratic Party, 362 F.2d 60 (5th Cir. 1966) (denying a request to enjoin state primary elections for four months to permit additional registration which would compensate for one hundred years of racial discrimination); cf. Hamer v. Ely, 410 F.2d 152 (5th Cir. 1969) (involving the election ordered in *Hamer*); Gray v. Main, 309 F. Supp. 207 (M.D. Ala. 1968).
beaten Fulton had a certain number of "white votes" been rejected, or
by adding to Brown's tally the hypothetical number of votes he could
have secured at the Baptist Nursing Home and substations set up on
plantations employing black fieldhands. Having refused to recognize
the illegality of any absentee ballot, Judge Dawkins precluded any
attempt at a vote count. Therefore, the question that ultimately con-
fronted him was whether to void the election. 191

Judge Dawkins followed Bell v. Southwell 192 and recognized the
defendants' offense to be against the election itself as a constitutionally
guaranteed process. The plaintiffs, having shown a discriminatory
effect and having seasonably filed their complaint one week following
the contest, were entitled to relief. The decree ordered a special elec-
tion between Brown and Fulton to be held within ninety days. Addition-
ally, Judge Dawkins ordered the defendants not to engage in the
practices which had caused invalidation of the first election or in any
other practices discriminatory in fact. 193

Although plaintiffs' attorneys had anticipated a more stringent de-
cree condemning the defendants' conduct, at this point they were will-
ing to exchange restraint in applying judicial sanctions for the more
flexible "discriminatory in effect" standard which would support future
applications to void elections. Additionally, the general portion of
Judge Dawkins' order enjoining any acts discriminatory in effect ap-
peared a sufficient basis for invoking the court's contempt power should
Post or the other defendants again disturb the election process.

The subsequent history of Brown indicates, however, that the voiding
remedy does not erase all barriers to effective relief and further suggests

191 The two factors which underlie the courts' granting of voiding relief are timing
and the intervening event test. Even if plaintiffs have filed timely objections, courts
appear to have determined as a matter of policy not to interfere as long as the spirit of
current legal standards is being met. The reward for acquiescence is thus judicial re-
straint should blacks request additional sanctions. See cases cited note 190 supra. For
example, in Mississippi Freedom Democratic Party and McGill, the plaintiffs desired
to catch up in the political process although no new official action impeded their progress.
They argued that accumulated past wrongs depriving them of the right to vote entitled their
class to preferential treatment, including the opportunity to time an election. In Hamer,
on the other hand, an additional causative factor intruded to affirmatively retard the
effects of judicially granted freezing relief. Using state residency and poll tax payment
laws, local officials sought to continue the condemned policy of disfranchising blacks. Cf.
United States v. Democratic Executive Comm., 288 F. Supp. 943 (M.D. Ala. 1968); Smith

192 376 F.2d 659 (5th Cir. 1967). Although Hamer v. Campbell, 385 F.2d 215 (5th Cir.
1966), had implicitly rejected the "affecting outcome" approach (only 1.1% of eligible
blacks were registered compared with 80% of eligible whites), Bell, handed down April
14, 1967, was the first case to so hold when pre-election relief had not been requested.

193 279 F. Supp. at 64.
that the plaintiffs misconstrued the reach of Judge Dawkins’ order. A purge of registered voters marred the conduct of the special election held on April 9, 1968. Judge Dawkins had issued specific orders respecting voter eligibility:

[T]he voters eligible to vote in the special election between J. T. Fulton, as a write-in candidate, and Harrison H. Brown, as Democratic nominee, shall be the same as those eligible to vote in the general election held on November 8, 1966, as determined by the eligible voters list used in that election.

However, Registrar Myrtis Bishop issued instructions to the voting commissioners that 271 black voters and 208 white voters who were eligible to vote in the general election would not be permitted to vote in the reelection. The commissioners followed these instructions, which were based on a purge of voters undertaken subsequent to the November 8 election, and did not permit the named individuals to vote on April 9 whether or not they had reregistered. With the purge in effect, Fulton again defeated Brown, by 1,579 to 1,510 votes.

The Lawyers Constitutional Defense Committee (LCDC) filed a civil contempt motion against Mrs. Bishop, alleging that violation of the court order may have altered the April 9 election results and request-

194 Compare the plaintiffs’ experience while awaiting Judge Dawkins’ determination in Post I. On October 11, 1967, plaintiffs’ counsel requested a further preliminary injunction amending the December 5, 1966 order. The plaintiffs filed in advance of the Democratic primary scheduled for November 4, 1967, in which seven black candidates were running for office, to avoid the litigation and uncertainty that resulted from the 1966 school board election. However, Judge Dawkins denied relief because the issue was not decided, thus rejecting the plaintiffs’ arguments that the facts in Post I were undisputed and that the only determination for the court was the application of federal law.

195 The defendants filed a motion to stay on February 15, which was denied, and a notice of appeal on February 20, but Judge Dawkins ordered the reelection of the general election held as scheduled on April 9, 1968.

196 The order followed by one day a request for clarification of the January 4 decree. Letter from Louisiana Attorney General Jack Gremillion to Judge Dawkins, Feb. 13, 1968. On February 8, 1968, a general election had been held under questionable circumstances. See text and notes at notes 208-54 infra. The Attorney General apparently desired to avoid a challenge to the special election.

197 In addition, Judge Dawkins instructed his clerk to advise all counsel “that the Board of Election Commissioners shall conduct this election, as to the write in candidate in full accordance with Louisiana Law as applicable on 11/8/66.” Information on file at the Lawyers Constitutional Defense Committee.

198 Katherine Ward had resigned as of January 1, 1966.

199 Complaint at 2.

200 This motion, filed on April 24, was predicated on the January 4 decree enjoining the defendants from engaging in “practices and procedures which may be discriminatory” and on the February 14 eligibility order.

201 Complaint at 2. The Registrar found 2,389 blacks and 2,121 whites eligible to vote on April 9. Figures available from Madison Parish Registrar of Voters. This special election is the only contest before 1970 in which black registration fell below that of whites.
ing that the 479 purged persons be permitted to cast their ballots within thirty days of entering the order. Three affidavits supported the complaint.

No hearing on the contempt proceeding was held. On August 21, the defendants filed a motion to vacate past injunctive relief and to require the governor to give Fulton his commission. Citing the civil contempt motion, the plaintiffs rejected the contention that "no proceedings have been filed herein contesting the result" of the special election. However, they decided to abandon the contempt proceeding because of insufficiency of proof. Accordingly, the plaintiffs did not contest that part of the defendant's motion to vacate that injunctive relief which prevented certification of the election of Fulton, but they did oppose the vacation of any permanent injunctive relief previously entered by the court.

The rationale offered by plaintiffs' attorneys for deciding to abandon the civil contempt proceeding is difficult to accept in light of the affidavits submitted with the complaint. Rather, it seems that the attorneys decided not to antagonize Judge Dawkins by requesting him to find a Madison Parish white official in civil contempt. By this time, the February 6 special election in which Republican Clayton Cox defeated Zelma C. Wyche for village marshal was being contested. When balanced against the remote possibility that counting purged persons' votes would reverse the April 9 results, the psychological importance of electing a chief of police and the greater influence of the office in the power hierarchy argued against continuing the contempt proceedings. Given the Judge's reluctance to find intentionality and his manipulation of the "discriminatory in effect" concept, such pressure could

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202 Following this voting, the Board of Supervisors would add the additional ballots to the recorded tally and send the recompiled returns to the Secretary of State so that he could proclaim the winner and rescind any prior proclamation on the subject. Complaint at 2-3. For a discussion of the various bases of the purges, all of which were utilized by Registrar Bishop, see text and notes at notes 261-77 infra.

203 A May 8 hearing on the contempt motion was cancelled (attorneys involved do not remember why). Subsequently, counsel informed the court that defendants wished to abandon their as yet undocketed appeal of the decision and order in Post I. Information on file at the Lawyers Constitutional Defense Committee.

204 Letter from Richard Sobol, plaintiff's attorney, to The University of Chicago Law Review, Jan. 6, 1971. Although deferred from continuing the contempt proceeding, plaintiff's attorneys pressed Judge Dawkins to approve the bill of costs submitted following the January 4 opinion. After a year's delay, Judge Dawkins ordered Post to pay costs of $1,623.33 to the Lawyers Constitutional Defense Committee. This reimbursement has not yet been received. Information on file at the Lawyers Constitutional Defense Committee.

205 Similar difficulties with contempt actions have occurred in other district courts. See the history detailed in United States v. Lynd, 349 F.2d 790 (5th Cir. 1965).

206 See text and notes at notes 209-55 infra.
severely prejudice the second voiding case. This apprehension no doubt influenced plaintiffs' attorneys not to request Judge Dawkins to void the special election and contributed to the Department of Justice's decision not to invoke section 1973j of the Voting Rights Act, which would have permitted collection and tallying of illegally excluded votes\(^{207}\) and, additionally, would have provided a speedy resolution of the election challenge while still permitting the civil contempt proceeding to continue.

On September 3, Judge Dawkins granted the motion to vacate all injunctive relief, indicating that his general order not to engage in practices "discriminatory in fact" had been designed to cover only activities incident to the special election and not, as the plaintiffs had assumed, all future electoral conduct of defendants. Thus, after two years of litigation and a judicial determination that fifteenth amendment rights had been violated, no local official remained bound by court order not to discriminate and Fulton assumed Mrs. Provine's Ward 4 school board seat on the strength of a questioned 69-vote majority.

B. United States v. Post\(^{208}\) (Post II)

The conduct of local officials during the February 6, 1968 special election,\(^{209}\) in which Cox defeated Wyche for village marshal,\(^{210}\) demonstrates the complete failure of Post I to deter future acts of discrimination. Only three weeks after an injunction was issued against him,\(^{211}\) Clerk of Court Post helped institute last-minute changes in election procedures which again discriminated against black voters. In United States v. Post, moreover, the evidence of the defendants'\(^{212}\) intent to

\(^{207}\) 42 U.S.C. § 1973j(e) (Supp. V, 1965-69). It is arguable that when examiners are not present in the county, federal observers or Department of Justice attorneys could perform the function of receiving and substantiating complaints.

\(^{208}\) 297 F. Supp. 46 (W.D. La. 1969).

\(^{209}\) The death of the incumbent before his term expired necessitated special elections, which were joined with the Democratic primary of November 4, 1967 and the general election of February 6, 1968.

\(^{210}\) Wyche had defeated two white candidates in the special Democratic primary while Cox received the Republican nomination, after being appointed to fill the marshal's seat on a temporary basis. Cox won the election in question by a margin of 1,954 votes to Wyche's 1,659. Brief for Plaintiff Lawyers Constitutional Defense Committee at 14 [hereinafter cited as LCDC Brief].


\(^{212}\) Although Post was the principal defendant, suit was also brought against F.M. Magee, a voting machine mechanic; Douglas Fowler, State Custodian of Voting Machines; Wade Martin, Secretary of State; and Jack H. Folk, J.W. Huckabay, and Myrtis Bishop, members of the Board of Supervisors. On February 23 and 26, 1968, respectively, the Government and LCDC filed complaints under 42 U.S.C. §§ 1973, 1973a, 1971(a), 1971(c),
discriminate appears even stronger than in Post I. The fundamental significance of Post II, therefore, lies in the response of both the plaintiffs' attorneys and the trial judge to repeated infringement of voting rights. Despite convincing evidence that the defendants sought to defeat Wyche, the Department of Justice and LCDC chose not to press for a finding of intentional discrimination or to seek punitive measures that would deter future misconduct. Rather, the attorneys acknowledged Judge Dawkins' tendency to impose minimal sanctions and limited their requested relief to an order setting aside the election. Judge Dawkins, in turn, fashioned a politically adroit compromise, giving the plaintiffs the new election they clearly deserved while expressly exonerating the defendants.

1. Discrimination Through Adjustment of Voting Machines. The central issue in Post II is the decision to disconnect the master party lever from the marshal's race, thereby requiring Tallulah residents to pull the individual lever above the candidate's name in order to vote for town marshal.

Post convinced his superiors to adopt this procedure after the Secretary of State's office mistakenly listed the marshal's race on all Ward 4 ballots. The officials involved did not realize that Ward 4 is comprised of areas inside and outside Tallulah boundaries. As printed, the ballot would permit ineligible voters—those residing outside the village boundaries—to vote in the special election for village marshal. To remedy this situation, state officials considered several options but decided to disconnect the marshal's election from the master level in all Ward 4 voting machines. Election supervisors could prevent out-of-town voters from casting ballots in the marshal's race by using a "lockout" switch to freeze the individual levers in place. Accordingly, Tallulah voters could vote for marshal only by pulling the individual lever above the candidate's name.

and § 12(d) of the Voting Rights Act of 1965. These actions were subsequently consolidated for trial.

213 As Clerk of Court for the Sixth Judicial District of Louisiana, Post was ex officio custodian of parish voting machines.

214 Ward 4 contains seven precincts. Three precincts contain only Tallulah voters, while the remaining four contain voters living within and without the village limits.

215 The ballot indicated, moreover, that pulling the master lever would register a vote for all 24 offices, including village marshal, the last one listed.

216 See text at notes 228-29 infra.

217 Because of the mechanical limitations of the voting machines, however, the lockout switch could be used only on individual levers that were disconnected from the master party lever. 297 F Supp. at 48. In the special primary of November 4, the marshal's race appeared on all ballots in Ward 4. A primary, however, does not involve straight party voting or the use of the master party lever. It is always necessary to pull the individual candidate's lever in order to vote in a particular race. Hence, no problem arose
Post, however, did not announce the change in procedure, either to the
general public or to the candidates involved. On election day,
precinct officials under his supervision failed to inform several hundred
black voters of the need to pull the individual lever in the marshal's
race. Moreover, printed instructions inside the voting machines also
indicated that the master party lever would cast votes for all party
candidates. The election therefore proceeded in a state of confusion,
with an indeterminate number of voters mistakenly pulling the master
lever to vote for marshal.

While the decision to adjust the machines does not by itself seem
racially motivated, a discriminatory purpose nevertheless appears from
the selection of a highly prejudicial procedure and from the unac-
countable failure to inform either the public or the candidates of the
major change. First, the requirement of separate voting in the marshal's
contest discriminated solely against Wyche, since he alone based his
entire campaign on urging voters to pull the Democratic master lever.

when election officials froze the marshal's levers as voters living outside Tallulah entered the
booth.

The only form of public notice was the posting of a revised sample ballot outside
the Clerk of Court's office indicating the need to pull the individual lever in the marshal's
race. The revised ballot replaced the first sample ballot, which did not indicate the need
to pull the individual lever. 297 F. Supp. at 49.

As the polls opened, commissioners in Precincts 2, 3, 4, 5, and 6 did not mention
the necessity of pulling the individual lever, according to the testimony of federal ob-
servers. Record at 114-15, 121, 132, 152-54, 162. No information in the record concerned
the remaining precincts 1 and 7, which were all-white. LCDC Brief at 13. At approximately
6:45 a.m., Wyche discovered that the master lever would not cast a vote in the marshal's
race. When Robert Moore, a Department of Justice attorney supervising federal ob-
servers, learned of this situation, he protested the failure of election commissioners to offer
the necessary information. Id. at 12. Thereafter, Jack Folk and Post went to all voting
precincts and instructed the commissioners to advise each voter to pull the individual lever
to vote for marshal. Accordingly, the correct information was generally offered, except in
Precinct 4 where four white commissioners still did not volunteer the instructions. Record
at 137-38. The plaintiffs estimated that more than three hundred black voters failed to
receive the proper information, and therefore did not cast a vote for marshal that actually
registered, although intending to do so. LCDC Brief at 13-14.

"To Vote STRAIGHT TICKET Turn Large Handle by Emblem to Right. This
Marks X's for all Party Candidates but NOT for AMENDMENTS. To Vote AMEND-
MENTS Turn Each Pointer SEPARATELY." LCDC Brief at 12.

Wyche distributed three thousand campaign cards with the slogan "PULL THE
LEVER WITH THE ROOSTER. Vote the Straight Democratic Ticket." (The Rooster is
the emblem of the Democratic Party in Louisiana and is pictured next to the master party
lever on the ballot.) On local radio, he made ninety announcements to promote the straight
ticket, while the Voters League distributed a standard Democratic Party campaign leaflet
which told people to "Vote [for] the straight MCKIETHEN-AYCOCK-PARKER TICKET
and for all other Democratic Nominees" by pulling the party lever next to the rooster.
Wyche's supporters also displayed 275 bumper stickers with his name printed beside a
prominent picture of the rooster. Other campaign materials included handbills and
leaflets, both of which emphasized the straight party ticket. Record at 15-25; LCDC Brief
at 4-5.
The comparatively large number of illiterate voters in Tallulah, the majority of whom are black, made such a strategy advisable. These individuals invariably have difficulty in operating a voting machine correctly.\textsuperscript{222} Hence Wyche's campaign slogan, "Pull the lever with the Rooster," gave his supporters a tangible symbol to associate with his name and reduced the possibility of pulling the wrong lever. The use of voting machines, moreover, constituted a relatively new experience for the black community as a whole. Turning the master lever would simplify the procedure of voting for Wyche, who was listed on the ballot beside 23 other Democrats.

Cox, in contrast, could not have been affected by the lockout. His campaign consisted simply of asking his supporters to pull the individual lever above his name.\textsuperscript{223} Since he was one of only two Republican candidates, he did not expect the traditionally Democratic voters of Madison Parish to pull the Republican master lever.\textsuperscript{224}

In addition to being discriminatory, the procedure used by the defendants was unnecessarily misleading. Electors accustomed to voting a straight party ticket had no reason to assume that the master lever would record votes for only 23 of the 24 candidates listed on the ticket.\textsuperscript{225} Louisiana law in fact requires that the voters be able to cast a straight party ticket in all general elections.\textsuperscript{226} Arguably, these provisions also apply to special elections that are joined to general elections.\textsuperscript{227}

\textsuperscript{222} Although illiterates are entitled to seek assistance in operating voting machines, many decline to do so, either out of pride, embarrassment, or unwillingness to let third persons witness their vote. See United States v. Louisiana, 265 F. Supp. 703, 715 (E.D. La. 1966), aff'd, 386 U.S. 270 (1967) (interpreting a Louisiana statute to require assistance to illiterate voters on request).

\textsuperscript{223} Brief for Plaintiff United States Department of Justice at 11. [hereinafter cited as Government Brief].

\textsuperscript{224} White Madison Parish residents ordinarily vote Democratic in state and local elections—as long as a black candidate has not won the primary. See, e.g., \textit{State of Louisiana, General Election Returns, November 5, 1968}, at 56 (1968).

\textsuperscript{225} See text at notes 226-41 infra.


\begin{quote}
Any voting machine may be leased, borrowed, or purchased and used which is so constructed as to fulfill the following requirements . . . . . .

(8) It shall permit the voter to vote for the candidates of one party as a unit at general elections.
\end{quote}

\textit{La. Const. art. VIII, § 15}, provides:

\begin{quote}
All elections by the people, except primary elections, . . . shall be by official ballot . . . [which shall have] a specific and separate device adopted by [a] political party . . . . . . . By stamping such device at the head of the list of the candidates of each political party, or nominating party, the voter may indicate that his vote is for the entire or straight ticket of the particular party. . . .
\end{quote}


\textsuperscript{227} The voting machine mechanic, however, believed that the special election did not require connection with the master lever. 297 F. Supp. at 48-49.
Significantly, the defendants rejected three administratively feasible alternatives which were nondiscriminatory and straightforward. New ballots could have been printed, listing the marshal's race separately from the 23 other offices. This procedure would have clarified the special nature of the election and apprised voters that the party lever would not operate in the marshal's race. Additionally, separate machines could have been set up for the different classes of residents since the marshal's race would be locked out on nonresidents' machines. Finally, new ballots could have been used in which the marshal's race would be listed for Tallulah voters only.

Although the defendants denied any discriminatory purpose, they could not convincingly explain their choice of the most confusing procedure. An administrative assistant to the Secretary of State made the final decision on the basis of a January 24 telephone discussion with Post, who claimed to have already instructed election commissioners in the use of the lockout. Post urged retention of that procedure because it would be difficult to get the commissioners to attend another meeting. However, the strength of this justification is undercut by the testimony that Post never informed commissioners of the need to pull the separate lever and by the subsequent failure of commissioners to instruct voters as to the proper means to cast a ballot for marshal. Furthermore, it appears that a voting machine mechanic disconnected the marshal's lever on his own decision prior to the meeting of commissioners. His superiors were not informed of this

228 This alternative, considered by officials, would have listed Wyche and Cox on rows C and D of the ballot, below the other candidates. On the final ballot, 24 Democratic candidates were listed horizontally on row A and two Republicans on row B. LCDC Brief at 8. Notice would still have been required for the candidates and the public.

229 LCDC Brief at 7. Robert Hughes, Administrative Assistant to the Secretary of State, preferred this procedure before speaking with Post. LCDC Brief at 8. Another procedure considered would have disconnected the marshal's lever only in the four precincts that contained both Tallulah and outside voters. In this way, at least the voters in the other three precincts could all use the straight party lever to vote for marshal. See note 214 supra.

230 LCDC Brief at 8.

231 Id.

232 Two election commissioners, Mary Veal and Emma Weston, claimed Post had not informed them that each voter had to pull the individual lever to vote for marshal. Government Brief at 28-34. Post and James Trichel, the voting machine supervisor, claimed, however, that the proper instructions were given. Government Brief at 27. Compare the court's opinion:

At the school [for commissioners] it was at least mentioned that the pulling of the master party levers would not affect the election of the Marshal for the Village of Tallulah, Louisiana. This condition of the machines, however, was not made clear to the persons in attendance.

297 F. Supp. at 49.

233 See note 219 supra.

234 Government Brief at 17-20.
fact until after the meeting was held, when Post could argue that a change in procedure would confuse the commissioners. 238

Even if one assumes the decision to use the lockout resulted from poor judgment, the defendants' failure to notify the candidates and voters remains highly suspect. Post in particular realized that Wyche was basing his campaign on straight ticket voting, but made no effort to inform him of the basic change in procedure. 238 Nor did the Secretary of State send Wyche a copy of the corrected sample ballot indicating the necessity of pulling the individual lever for marshal. 237 Most curious of all, no local official publicly announced that the marshal's race would be disconnected. 238 While commissioners should have explained this fact on election day, public notice would have minimized confusion. The defendants also failed to place the required demonstration voting machine in Ward 4 prior to the election, 239 failed to inform Wyche of the sealing of the actual machines, 240 and failed to replace the incorrect written instructions which had been inserted in the machines. 241

2. The Role of Compromise in Litigation. Despite the strong evidence of wrongdoing, the Department of Justice 242 and LCDC 243 made a conscious decision not to press the question of intentionality. First, the attorneys declined to initiate contempt proceedings against Post, even though he was under an injunction at the time of the election not to engage in any "practices and procedures which may be discriminatory in fact." 244 Since Judge Dawkins had avoided a finding of intentionality in Post I, it was assumed that he would not respond favorably to a request for sanctions directed at specific white officials.

235 Id.
236 Government Brief at 46-47. Post also knew that Wyche had inspected the incorrect sample ballot on January 19. LCDC Brief at 4.
237 297 F. Supp. at 49-50. Wyche had written to the Secretary of State requesting copies of the sample ballot for Ward 4. He received them on January 23, but never received any corrected samples. Id. at 48, 49.
238 Id. at 14, 47.
239 LCDC Brief at 17. LA. REV. STAT. ANN. § 18:1180 (1969) states in part that "at least one machine for demonstration purposes shall be placed in each ward not more than twenty five days and up to but not including the day of election." When the machines were set up on election day, however, they contained erroneous instructions.
240 Mrs. Grimes testified that she mailed notice of the time and place of sealing of the machines to Wyche in accordance with LA. REV. STAT. ANN. § 18-1176 (1969). Record at 239-40. Wyche testified that he did not receive notice. Id. at 25. Cox, moreover, was subpoenaed to produce all documents received from the Clerk's office relating to the election, and did not produce any such notice. Id. at 147.
242 Department of Justice Interviews, supra note 71.
243 LCDC Interviews, supra note 128.
244 Brown v. Post, 279 F. Supp. 60, 64 (W.D. La., 1968).
Second, plaintiffs’ attorneys recognized the lower standard of proof established in Post I and repeatedly emphasized the discriminatory effect of the defendants’ action without impugning their motives. The briefs meticulously documented the various failures of each official, while carefully withholding any conclusions of intent. Although the plaintiffs argued the discrimination was harmful precisely because it was subtle, the analysis did not characterize the subtlety itself as purposeful. The Department of Justice and LCDC thus honored Judge Dawkins’ gradualist approach by asking for a new election, their primary goal, at the expense of seeking sanctions for official misconduct.

The court’s decision embodies this compromise approach by finding discrimination in fact and ordering a new election, while characterizing the defendants’ actions as undertaken in “good faith.” Although the decision provided a remedy for the immediate wrong, failure to find intentionality cost the plaintiffs additional relief. Officials were not only spared considerable embarrassment and political repercussions but were also protected against possible prosecutions for voting fraud.

245 It is interesting to note that the plaintiffs’ briefs mention neither Post’s role in Brown nor the injunction issued against him. In contrast, the injunction was raised by the State in Post’s defense:

Mr. Post was under a restraining order as a result of a previous suit, Brown v. Post, 279 F. Supp. 60. Now the plaintiffs attack Mr. Post’s alleged inactivity whereas in the above suit his activity was attacked. Plaintiff would apparently condemn Mr. Post for either his activities or his inactivity.

Brief for Defendant at 13.

246 Repeated efforts to enforce the guarantees of the Fifteenth Amendment have made us aware of one indisputable fact; that as the prohibitions [on discrimination in voting] become more effective, the obstacles to Negro political participation become more ingenious. The instant case presents a classic example in subtle discrimination.

Government Brief at 51.

247 The phrase is that of Charles Hamilton, who has categorized Southern federal judges as “recalcitrant,” “gradualist,” and “aggressive.” Hamilton, supra note 124.

248 This action by defendant Post [failing to instruct the election commissioners properly] was not in bad faith. He and all other defendants at all times acted in good faith, never intending to deprive Negroes of their constitutional or statutory right to vote. . . . Where, as was done here, public officials, engaged in performing the duties of their offices, cause to be disseminated instructions to voters as to the manner of casting votes in a general election and, then, even though in good faith, without adequate notice to the voters, institute a new voting procedure contrary to the instructions previously disseminated, and a substantial number of Negro voters are induced to vote according to such erroneous instructions and are thereby prevented from casting effective votes, we conclude that Negroes have been discriminated against in the administration of the voting process . . . .

297 F. Supp. at 50, 51.

249 White parish residents have expressed increased dissatisfaction with the necessity of voting again for the same offices. Interviews with local residents, in Tallulah, La., Oct. 28, 1970.

250 Admittedly, it is not likely that state prosecutions under LA. REV. STAT. ANN. §§ 18:369, 18:1194, or 18:221 (1969) would have followed a finding of intentional discrimination since one of Post’s attorneys was Thompson Clarke, District Attorney for the Sixth Judicial District of Louisiana.
More important, however, the finding of good faith undercut any deterrent effect the litigation might have on future conduct. First, the decree did no more than order the defendants to obey the law: "The defendants . . . shall administer the voting process in compliance with the applicable Louisiana and Federal law in such a manner that will afford equal opportunities to vote to all qualified voters regardless of race or color."\(^{251}\) Second, the Judge warned the officials not to repeat the same mistakes: "Defendants are specifically enjoined from engaging in the practices which were found to be discriminatory in the February 6, 1968, election and any other practices and procedures which may be discriminatory in fact."\(^{252}\)

Finally, the defendants' exculpation reduced the plaintiffs' ability to improve their position in future lawsuits. Recent voting rights cases have established that a documented history of purposeful discrimination casts a strong presumption of illegality over continuing attempts to manipulate the electoral process.\(^{253}\) By specifically emphasizing Post's "good faith" efforts on two separate occasions, Judge Dawkins implicitly declined to recognize that a conscious pattern of discrimination existed in Madison Parish. In fact, the Judge's decision makes no mention of Ward or Post I, as though Post II were sui generis rather than one instance of a historical continuum.

In sum, Judge Dawkins imposed almost the same injunction in Post II as in Post I. In the second case, it is true, the injunction remained in effect, placing some element of deterrence on the principal defendant. But on the whole, Judge Dawkins did not increase the threat of sanctions on election officials. On the contrary, he showed a willingness to give the defendants every benefit of the doubt in their administration of the electoral process. The chance of punishment for discrimination—whether by the criminal law, the civil law, or the contempt power—remained remote.

Arguably, the Judge felt that after three government-supported suits, local officials would recognize the futility of further denying black citizens the right to participate fully in community politics.\(^{254}\) But sub-
sequent events proved otherwise, as the final resolution of \textit{Post II} indicates. In the new election, held on May 20, 1969, Wyche did in fact defeat Cox, by a margin of 1,949 to 1,796.\footnote{Madison Journal (La.), June 11, 1970, at 1.} Nevertheless, Wyche failed to receive his commission within the usual time. Apparently the thought of a black police chief still created consternation. On June 7, 1969, LCDC filed a motion for an injunction requiring the Governor and the Secretary of State to deliver the commission in question. Eventually the Governor complied, issuing Wyche the necessary document on June 23. LCDC subsequently withdrew its motion, but Wyche by this time had received the message. After winning one primary, one suit, and a second election, he still had to contend with white officials before he could take office.

C. \textit{Toney v. White}^{256}

In April, 1970, the focus of Madison Parish litigation shifted from official interference with the process of general elections to a discretionary purge of voters prior to the Democratic primary. The black community had attempted to gain political control of Tallulah for the first time by nominating a full slate of eight candidates to run for town and party offices.\footnote{Toney v. White, Civil No. 15,641 (W.D. La., filed May 4, 1970).} Only Johnnie Crockett and Wyche, however, survived opposition in their respective races for the Democratic Executive Committee and for village marshal. LCDC then filed suit against the Registrar, alleging the purge of 159 black voters and eleven white voters to be illegal and discriminatory.\footnote{The action was brought on behalf of the six losing candidates, three black voters, and their class under 42 U.S.C. §§ 1971(a)(2), 1973, and 1983 (Supp. V, 1965-69). Civil No. 15,641 (W.D. La.).} The complaint requested that every election be set aside, except the village marshal’s, because Wyche was the only winning candidate who still faced an opponent in the general election.\footnote{The complaint did not actually state this reason, which is mentioned in Post-Trial Brief for Plaintiff at 2.} One month later, the Department of Justice brought a similar suit but extended its prayer for relief to invalidation of the

\footnote{255 Madison Journal (La.), June 11, 1970, at 1.}
\footnote{256 Compare the local reaction to this strategy: Now I have never heard of anything more ludicrous than a “black ticket.” Yet, that’s what we have in Tallulah right now—a black ticket. . . . How they run for office is their business, except that they have turned the election into a race issue, which I feel is significant and deserving of the comment I have given it. Madison Journal (La.), Mar. 26, 1970, at 1 (editorial by Carroll Reagan, a prominent Tallulah citizen).}
\footnote{257 The action was brought on behalf of the six losing candidates, three black voters, and their class under 42 U.S.C. §§ 1971(a)(2), 1973, and 1983 (Supp. V, 1965-69). Civil No. 15,641 (W.D. La.).}
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entire April 4 primary. Wyche subsequently secured his post as village marshal by defeating Cox in the general election held on June 9.

Rather than argue the merits of *Toney v. White* prior to decision, the following discussion focuses on two problems of relief generated by the factual situation. First, the voiding remedy is analyzed to determine whether its conceptual underpinnings permit only part of an election suit to be set aside. Second, the appropriateness of additional relief is considered in the light of past Madison Parish litigation.

1. *The "Selective" Purges*. The key factual issue in *Toney* involves the Registrar’s allegedly illegal and discriminatory application of state voter eligibility statutes. Louisiana law requires registrars to purge from the rolls any elector who has not voted in the past four years and permits removal of individuals believed to be illegally registered. In either instance citizens must be given personal and published notice of the challenges and be provided an opportunity to reinstate themselves within a specified period. If they fail to seek reinstatement they may reregister by meeting standard state requirements. However, registration books are closed thirty days prior to any general or primary election, thereby foreclosing the opportunity for reregistration before the election for failure to meet the reinstatement deadlines.

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260 United States v. Bishop, Civil No. 15,747 (W.D. La., filed June 8, 1970). Private and government suits were consolidated for the purposes of trial, held on January 18-19, 1971 after an initial postponement.


264 The registrant is given ten days from the date of the letter, and three days from the date of newspaper publication, to appear at the registrar’s office. While a registrant who appears under § 18:240 must be reinstated upon satisfactorily identifying himself to the registrar, a person seeking reinstatement pursuant to § 18:132 must present affidavits of three bona fide registered voters of the parish that he is legally entitled to remain on the rolls.


The timing of purges by Registrar Bishop has been questioned because she did not mail letters of challenge to 130 blacks and eleven whites until March 4, effectively forcing the persons in question to appear at her office within ten days or forego voting in the April 4 primary. The newspaper announcement, however, did not contain the required notice of reinstatement rights. Nor did Mrs. Bishop keep her office open for more than five of the mandatory ten days, although she added three days to the reinstatement period without informing affected individuals.

While the above conduct is of questionable legality and affected a disproportionately high number of black voters, the principal evidence of discrimination appears from the selective purge of 29 black citizens for residing at addresses different than those listed on their registration records. The Registrar failed to challenge 141 whites who had moved or changed addresses prior to March 23 and failed to review the eligibility, as required, of 62 white voters who had voted by absentee ballot during the previous two year phase. Although it cannot be estimated how many of these white registrants would have been removed if challenged, it is known that 93 voted in the primary and

267 According to the Louisiana Attorney General, no purge under § 18:240 can be made in good faith if the registrar waits until thirty days before an election. If, however, a registrant is called to appear within the thirty-day period when the books are closed, he must be reinstated and allowed to vote in the forthcoming election upon identifying himself to the registrar’s satisfaction. [1956-1958] LA. ATT’Y GEN. REP. & OP. 210-11.

268 Brief for Plaintiff Lawyers Constitutional Defense Committee at 3 [hereinafter cited as LCDC Brief]. This purge was conducted under § 18:240 exactly thirty days before the April 4 primary, violating the requirements of good faith indicated by the Attorney General. See note 267 supra.

269 Four persons did appear at the Registrar’s office after the ten-day period and were denied registration for this reason. Brief for Plaintiff United States Department of Justice at 37 [hereinafter cited as Government Brief].

270 The notice simply indicated the individuals would be removed from the registration rolls, although § 18:240 states that the publication must inform voters of reinstatement procedures. Government Brief at 12. This omission was of particular importance to 65 registrants whose letters were returned as undeliverable. The published list provided them notice of the purge but incorrectly implied they could not be reinstated.

271 Government Brief at 16.

272 Government Brief at 23. According to the Registrar, this purge was conducted under § 18:132, although she received notice of the registration defects from two white voters, including a candidate for alderman. LCDC Brief at 8.


274 Id. at 31-32. LA. REV. STAT. ANN. § 18:1080 (1969) provides that registrars must cancel an individual’s registration if continued absentee balloting is unjustified. The failure to purge absentee voters might well have been the decisive factor in the primary. All eight black candidates out-polled their white opponents on the voting machines in every race; however, absentee ballots provided the winning margins for white candidates in six races. LCDC Brief at 6.

275 Government Brief at App. B.
that 97 were stricken from the rolls afterward for failure to justify continued registration. In contrast, only three of the 159 challenged blacks voted in the primary, although eighty would have been eligible to do so had the purge not been effected. In short, the plaintiffs charge Mrs. Bishop with selectively purging black voters, providing misleading notice, and allowing insufficient reinstatement time, while neglecting to challenge white voters with equally defective registration.

2. Refining Voiding Relief. If Judge Dawkins makes a finding of discrimination in these circumstances, he should be prepared to grant immediate relief which will eliminate the effects of discrimination, and to impose remedies that will reduce the possibility of another unfair election. Previous cases suggest that manipulation of the electoral process will continue unless he increases the the severity of sanctions. Hence, his first option is to overturn only those elections lost by black candidates, thereby implementing the voiding remedy without rewarding those who engaged in discrimination. This solution could be reached by tailoring general equitable principles of voiding elections to fit the particular circumstances of Madison Parish. In Bell v. Southwell, as previously mentioned, the Fifth Circuit authorized setting aside an election tainted by discrimination regardless of whether the discrimination affected the outcome. The court based its decision on the belief that discrimination caused "the body politic as a whole, both Negro and white," to suffer. Voiding relief was therefore ordered to protect the right of voters to participate in an election conducted free of impermissible racial distinctions.

If rigidly applied, this doctrine would require overturning every April 4 primary contest. However, the underlying rationale of Bell is that voiding relief provides one appropriate means of remedying discrimination—not that all tainted elections must be overturned. Since Wyche gained victory despite discrimination against his race, the necessity of setting aside his election disappears. New elections would not eliminate, but would perpetuate, the harm flowing from the initial dis-

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276 Id. at 30, 35. After the April primary, 72 of the 141 persons were removed following a challenge made by black voters under La. Rev. Stat. Ann. § 18:123 (1969), which authorizes third parties to present affidavits to registrars indicating that named individuals are illegally registered. LCDC Brief at 8-9. The Registrar also removed 25 persons for failure to justify continued absentee voting after the filing of the complaint made her aware of the applicable provisions. Government Brief at 35.

277 Government Brief at App. B. Assuming no purge had occurred, 79 black voters removed from the rolls were not eligible to vote in the primary because they resided outside Tallulah or were members of the States Rights or Republican Parties. Id. The briefs do not indicate, however, how many black voters were discouraged from seeking reinstatement because of the deficient notice or limited office hours.

278 376 F.2d 659 (5th Cir. 1967).

279 Id. at 662.
crimination. The black incumbent would be forced to campaign again, even though he had nothing to gain and everything to lose in a second primary. Wyche would thus be penalized for the Registrar's purge while his two defeated opponents reaped the benefits of discrimination by obtaining a second chance to beat the black candidate. Cox particularly does not deserve such a "windfall," because he was defeated by Wyche in an election that no one disputed.

Admittedly, the court cannot presume that Wyche would have won the primary had no discrimination occurred. On the other hand, Judge Dawkins must not blind himself to the reality that a racial power struggle exists in Madison Parish. The dilution of black voting strength could not conceivably help the black candidate or hurt the white one. Retaining Wyche's election would therefore recognize the plain fact that he overcame the discrimination.

A recent Fifth Circuit decision, *Thompson v. Brown*, provides a second reason for preserving Wyche's election. The court held that two white candidates could not wait until after the general election to contest the primary victories of their black opponents. The critical error was the failure to file a timely suit seeking to enjoin certification of the election results. The Fifth Circuit therefore found

280 Wyche's position must first be distinguished from that of the six black losers, who can claim that the purge may have deprived them of victory, and who can therefore benefit from the new election. See note 274 supra.

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challenge mooted because the aldermen in question had been serving in office for more than a year after the uncontested general election. Despite the obverse factual situation, this reasoning applies convincingly to Toney. Since neither the Department of Justice nor Cox sought to enjoin the general election or prevent certification of its outcome, both should be estopped from challenging Wyche’s continued tenure as marshal. Such an approach would again serve to limit the adverse effects of the initial discrimination.

3. Increased Judicial Intervention. Previous Madison Parish cases demonstrate that new elections for losing candidates provide only minimal relief. In the absence of strict judicial enforcement, local officials persist in using questionable discretionary procedures. Given a history of electoral misconduct and the necessity for intervention following a finding of discrimination, the judiciary should be prepared to impose sanctions with the potential to deter continuing discrimination.

To avoid future resentment and confusion, Judge Dawkins could insist that election officials regain the voters’ confidence by adhering to higher standards of care than the law requires. Judge Pittman, who recognized that local practices contributed to racial friction, adopted this position in Gray v. Main. Although he did not find discrimination requiring relief, the Judge ordered a board of registrars to carry out its duties under full public scrutiny and warned officials to improve their conduct:

This law suit probably could have been avoided, and similar law suits in the future can be avoided, if the defendants and all officials who occupy similar positions will take pains not only to observe the legal requirements with reference to racial discrimination, but also to avoid participating in and creating (and offer leadership to the electorate to avoid) situations which easily and quite naturally arouse suspicion of racial discrimination.

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286 The Government filed suit on June 8 to void the whole primary, but did not seek to enjoin the conduct or certification of the general election, held on June 9. The distinction may be a technical one, since the Department of Justice took some action before the general election, in contrast to the white candidates in Thompson.


288 Id.

289 Id.

290 Id. at 226. Judge Pittman’s assessment of the historical context offers an instructive comparison with Madison Parish:

As for the defendants and white population of Bullock County, the transition from dominant political control of their elected officials to the prospect of sharing or losing this control to the Negro population, with a great number of those
Despite repeated violations of electoral integrity, Judge Dawkins has never specifically indicated to officials their increased responsibility.

Should the Judge recognize the necessity of an additional sanction but reject imposition of a higher standard of care, he could institute a reporting system. This procedure would require the defendants to inform the court and counsel of all contemplated purges and changes in electoral procedure. The importance of such a remedy lies in making public officials accountable for their conduct in advance, thus eliminating the last-minute surprises which have characterized past elections. The reporting device also places the initial burden of justification on the defendants, where it appropriately belongs. Once the plaintiffs demonstrate irregularities which might taint the election, the questionable procedure would be scrapped—for example, the purged voter would be returned to the rolls or the dead elector removed. While requiring diligent activity by the plaintiffs, such an order would in fact only formalize efforts currently made to ascertain how local officials intend to sabotage key election campaigns.

Finally, Judge Dawkins could tighten the language of his injunctions to establish unambiguous foundations for contempt proceedings. Admittedly, this sanction has been used only in exceptional circumstances since it depends on judicial willingness to expose local officials to public obliquy. But contempt can be effective if the court makes explicit its intention to invoke the power when necessary.

While Judge Dawkins has shunned forceful measures in the past, he may now have recognized the need for higher standards and additional relief. In fact, a statement made during an interlude at the Toney trial suggests that he may be considering a procedure which will increase the defendants' accountability:

> The handwriting is on the wall and the entire country has to start working as a team and start pulling together—black and white—realizing that we need the best qualified persons of both races as our leaders, we must eliminate this polarization.

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292 See In re Herndon, Criminal No. CR 12,421-N (M.D. Ala., Jan. 7, 1971) (criminal contempt), and Hadnott v. Amos, Civil No. 2757-N (M.D. Ala., Jan. 7, 1971) (civil contempt), in which a county probate judge was held in contempt of court for failing to follow an order requiring him to place black candidates' names on an election ballot. But cf. United States v. Barnett, 346 F.2d 99 (5th Cir. 1965), in which the Fifth Circuit had refused to hold former Governor Ross Barnett in contempt of court.
of the races if this country is to survive. If we don’t pull to-
gether as a team we’re lost.293

IV. VOTING RIGHTS LITIGATION: AN EVALUATION

The effectiveness of voting rights litigation must be measured in
terms of its immediate objective—securing the right to vote free from
discrimination—and its ultimate goal—insuring black political partic-
ipation.294 The foregoing discussion indicates that litigation did achieve
minimal success by providing relief from specific discriminatory proce-
dures, but that the sanctions invoked proved insufficient to deter re-
peated violations of electoral integrity. Consequently, judicial enforce-
ment of voting rights has not brought direct political gains.295 White
officials still control the parish by neutralizing the potential voting
strength of the black majority.296 More important, the present admin-

293 Madison Journal (La.), Jan. 21, 1971, at 1. This shortened tolerance of subtle
forms of discrimination reflects a gradual change in the Judge's attitude toward racial
hostility. Judge Dawkins, who had enjoined the holding of a 1959 Civil Rights Commis-

294 It might be argued that the sole purpose of voting rights litigation is to guarantee
the right to vote. Government attorneys involved in Madison Parish cases have expressed
this view, stating that local leaders must develop their own political organization.
Compare Attorney General Katzenbach's statement, quoted in P, WATTERS & R. CLEGHORN,

295 Only five black persons presently hold office in Madison Parish—two members of
the school board, one member of the Democratic Executive Committee of Tallulah, the
town marshal, and the town constable. All of these individuals have been elected by
virtue of the black voting strength in Tallulah and none hold parishwide offices. The
Voters League has not extended influence beyond the city limits, principally because
those blacks who live on white-owned plantations face threats of eviction for political
activity. See, e.g., POLITICAL PARTICIPATION, supra note 122, at 117. Self-employed farmers,
moreover, are not easily organized because they are located throughout the parish.

296 Another contributing factor to white electoral success is the difficulty of achieving
full black registration for the reasons stated in note 295 supra. Approximately 1,300
persons or 25% of the black voting-age population remain unregistered despite intensive
registration drives in 1966, 1968, and 1969. In contrast, virtually 100% of the white voting-
age population is on the rolls, giving whites a numerical superiority in parishwide
registration as of 1970. Figures, based on the 1960 census, available from Voter Education
istration has ignored black interests in accelerating school desegregation, securing urban renewal funds, attracting new industry, and regulating the hours of liquor establishments.

Nevertheless, it would be inaccurate to infer that litigation has made no impact on local politics. Resort to the federal court has provided blacks with the means to build organizational strength and to pressure local government. Initially, the private suit of Wyche v. Ward performed the function of solidifying black leadership at a time when no individual alone could hazard challenging the white power structure. The plaintiffs' resolve to unify at all cost created a viable nucleus which stimulated future registration efforts. Additionally, the litigants who suffered defeat in court gained the experience of confronting white officials.

*United States v. Ward* generated a second stage of development, the formation of a distinct political organization. Black leaders founded the Madison Parish Voters League to encourage registration by providing the extensive coaching needed to pass the citizenship and literacy test. Once the Voting Rights Act eliminated these obstacles, the League began massive registration drives. The utility of establishing a working organization prior to August, 1965 can best be appre-
ciated by comparing Madison with East Carroll Parish. One month after the passage of the Voting Rights Act, the Registrar enrolled 1,800 of the 5,181 eligible blacks in Madison Parish;\(^{304}\) registration did not exceed that figure in East Carroll, where federal examiners\(^{305}\) were appointed, until February, 1966. The difference, according to Attorney General Katzenbach, could be explained in terms of the Voters League campaign.\(^{306}\)

Subsequent voting rights litigation continued to unify the black community. Candidates explained their losses by arguing that no black had ever received a fair election,\(^{307}\) while leaders pointed to the favorable court decisions as proof that the white administration could not be trusted.\(^{308}\) Moreover, the increasing presence of federal observers,\(^{309}\)

\(^{304}\) While complying, local officials did not process applications with dispatch when mass registration began:

This was the wonderful part about the people in Madison Parish. They were so patient standing in line for days, weeks, and months, until finally we had more people registered on the books in Madison Parish than the whites and were able in the end of 1965 to enter the political arena.

Wyche Interview, supra note 41. Moreover, the Registrar originally listed some 283 black voters on the rolls of the State Rights and Republican Parties, thus rendering them ineligible for at least six months to vote in the Democratic primary, Madison Parish's most important local election. Field Reports on file at Voter Education Project (copies on file at The University of Chicago Law Review).

\(^{305}\) In deciding which of these neighboring parishes should initially receive examiners, the Government probably selected East Carroll rather than Madison because the Fifth Circuit's decision in United States v. Ward, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965), had not issued by August 6, 1965.

\(^{306}\) P. Watters & R. Cleghorn, supra note 141, at 265-67, quoting Attorney General Katzenbach. Parish blacks appear to agree. Rather than give credit for increased registration to federal presence, residents cite their own organizing efforts as the controlling variable in achieving political participation. Interviews with local residents, in Tallulah, La., Oct. 26-28, 1970.

\(^{307}\) Compare Wyche's contention that white officials "rigged" the voting machines in the February 6, 1968 general election. Sanders, supra note 21, at 59.

\(^{308}\) Note the April 4, 1970 primary campaign in which black candidates pledged to keep "the voters of Tallulah properly informed of all coming elections and any and all changes in election procedures." Madison Journal (La.), Mar. 26, 1970, at 4A (advertisement).

\(^{309}\) The cost of sending federal observers to Madison Parish gives some idea of the heavy expense involved in monitoring elections:

<table>
<thead>
<tr>
<th>Date</th>
<th>Election</th>
<th>Number of Observers</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug., 1966</td>
<td>Primary</td>
<td>30</td>
<td>$11,500*</td>
</tr>
<tr>
<td>Nov., 1966</td>
<td>General Election</td>
<td>20</td>
<td>7,700*</td>
</tr>
<tr>
<td>Nov., 1967</td>
<td>Primary</td>
<td>32</td>
<td>12,300*</td>
</tr>
<tr>
<td>Dec., 1967</td>
<td>Primary</td>
<td>34</td>
<td>13,000*</td>
</tr>
<tr>
<td>Feb., 1968</td>
<td>Municipal Election</td>
<td>23</td>
<td>8,500*</td>
</tr>
<tr>
<td>Apr., 1968</td>
<td>Brown-Fulton Special Election</td>
<td>18</td>
<td>6,500*</td>
</tr>
<tr>
<td>Aug., 1968</td>
<td>Municipal Election</td>
<td>22</td>
<td>8,000</td>
</tr>
<tr>
<td>Nov., 1968</td>
<td>Municipal Election</td>
<td>19</td>
<td>6,275</td>
</tr>
<tr>
<td>May, 1969</td>
<td>Wyche-Cox Special Election</td>
<td>20</td>
<td>8,150</td>
</tr>
<tr>
<td>Apr., 1970</td>
<td>Primary</td>
<td>18</td>
<td>7,440</td>
</tr>
<tr>
<td>June, 1970</td>
<td>Municipal Runoff</td>
<td>18</td>
<td>7,440</td>
</tr>
<tr>
<td>Totals</td>
<td></td>
<td>254</td>
<td>$97,605</td>
</tr>
</tbody>
</table>

* Estimated.
attorneys, and agents,\textsuperscript{310} who monitored parish elections, gave credence to both points of view. \textit{Post I} and \textit{II}, therefore, strengthened the resolve to run a black ticket that would gain control of local government. Concurrently, the Voters League assumed the role of a black Democratic Party, organizing Tallulah by street, block, and precinct. The racial polarization\textsuperscript{311} and bloc voting\textsuperscript{312} that characterized past elections made such a strategy advisable.

By providing the Voters League with an effective bargaining instrument, voting rights litigation facilitated the development of black political organization in a second way. The white community realized that should blacks bring suit to assert their rights, the success of voiding suits could be repeated in other areas. Local officials, therefore, chose to compromise on certain issues that did not directly challenge their political control. The integration of businesses and public accommodations demonstrates this phenomenon. When the Voters League first attempted to negotiate the hiring of black employees on a fifty-fifty basis, local merchants refused to cooperate. In response, black leaders organized an economic boycott of the town which forced seventeen establishments to close before businessmen capitulated.\textsuperscript{313} The boy-


\textsuperscript{310} The Federal Bureau of Investigation periodically inspects the Registrar's records and generally observes parish elections. Department of Justice Interviews, supra note 71.

\textsuperscript{311} Editorials in the \textit{Madison Journal} suggest the underlying bitterness of recent elections:

The Journal prints many checks for Negro societies, churches and other organizations, and everyone of them must have a check book printed so that three people can sign the checks. This shows that they cannot trust one another—even brother and sister church members. If a Negro cannot be trusted with a small amount of church or society funds, how could he be trusted with thousands—even hundreds of thousands of public money?

When one Negro sees a so called leader driving around in a big car with a cigar in his mouth, telling others what to do, it is only natural for them to think they are underdogs and the one doing the ordering is the one who is getting the gravy. The Negro sooner or later will come to realize that when he needs help or wants a favor it is to the white man that he will have to appeal.

\textit{Madison Journal} (La.), Sept. 1, 1967, at 2. Compare a recent editorial which reprinted an 1880 "To Our Colored Voters" policy statement and then warned, under the title "To Our Colored Voters—1969":

\begin{quote}
Just as the \textit{Madison Journal} warned you of 'political tricksters' nearly 90 years ago, we are today cautioning you against voting for Zelma C. Wyche for marshal of this community.
\end{quote}

\textit{Madison Journal} (La.), May 15, 1969, at 1.

\textsuperscript{312} The two most recent elections indicate the extent to which voting follows racial lines. In the August 15, 1970 Democratic primary for town constable, white candidate D'Elmer Williamson received 536 votes in all-white Precinct 1 but only twelve votes in all-black Precinct 5. His opponent Huey Daily received six and 577 votes in the respective precincts. Similarly, Cox recorded 750 and nineteen votes in the two precincts while Wyche obtained 28 and 685 votes. \textit{Madison Journal} (La.), Aug. 29, 1970, at 1.

\textsuperscript{313} See Sanders, \textit{supra} note 21, at 58.
cobb's effectiveness turned partly on the knowledge that blacks could rely on the federal government for legal assistance. Store owners recognized that continued resistance could only bring economic disaster and a possible lawsuit as well.

The boycott, in turn, established a pattern of self help in which litigation plays a supporting role. Rather than wait for local government to act, blacks have built a public housing project, contracted for a rural development program, and lobbied for anti-poverty funds.

It should be noted, however, that the threat of litigation has no effect where the white community sees its political control challenged. While the voting rights cases illustrate this point, reapportionment and desegregation suits demonstrate further the difficulty of effecting meaningful change. Despite general acknowledgment that the configuration of ward boundaries caused extensive dilution of black voting strength, the local administration refused to reapportion. When black leaders filed suit, the police jury and the school board passed resolutions which further diluted the black vote and made the election of a nonwhite candidate virtually impossible. Under the aegis of the district court, however, the parties have accepted a temporary compromise until 1970 census figures become available in full detail. The

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314 *See* Wyche v. Louisiana, 394 F.2d 927 (5th Cir. 1967), and Wyche v. Hester, 273 F. Supp. 131 (W.D. La. 1967), rev'd, 431 F.2d 791 (5th Cir. 1970), arising out of attempts to integrate a truck stop. In the first case, Wyche was charged with aggravated burglary for "unauthorized entry" into the premises. The Fifth Circuit ruled that he was entitled to an evidentiary hearing on his petition to remove the state prosecution to federal court, remanding for a determination whether Wyche's entry was in the exercise of his rights to enjoy equal access to a place of public accommodation. In the second case, Wyche was convicted of simple battery, but the court held that he was entitled to an evidentiary hearing in a habeas corpus proceeding brought to test the validity of the state conviction.

315 *See* note 299 *supra*.

316 Wyche Interview, *supra* note 25.

317 The Voters League was instrumental in establishing the Delta Community Action Project, funded by the Office of Economic Opportunity, to run social welfare programs. The project initially had difficulty in attracting sufficient white interest. A Head Start pre-school program was terminated by the Department of Health, Education and Welfare because it did not meet in the white part of town and did not enroll a proportion of black and white children equal to the racial composition of Madison Parish.

318 Wyche v. Madison Parish Police Jury, Civil No. 14,503 (W.D. La., filed Apr. 7, 1969). Ward 1, for example, had one police juror and school board member for 348 inhabitants while Ward 4, where most of the parish's blacks live, had three representatives for 11,754 people. *Id.* Reapportionment problems are quickly replacing registration denials as the most litigated area in voting rights discrimination. *See* 39 U.S.L.W. 2535 (June 3, 1971).

319 Exhibits A, B. The resolutions called for representatives to run on an at-large basis throughout the parish. Since white voters constitute a majority of the voters registered in the parish, *see* note 296, *supra*, the plan would effectively undercut the black power base in Tallulah.
reapportionment case therefore remains unresolved, three years after its commencement.

Litigation has also proved necessary to implement and structure school desegregation. Stated simply, the school board has refused to take any steps toward integration, unless unequivocally required to do so by court order.\(^3\) Despite years of judicial enforcement,\(^2\) moreover, integration has progressed gradually, without dismantling of the dual school system.\(^2\) This situation is not likely to change in the near future unless blacks gain control of the school board. However, blacks cannot obtain that position unless reapportionment and fair elections come first.

Litigation thus provides the essential means of pressuring whites to compromise on basic issues of voting, reapportionment, and desegregation. While it is clear that blacks have not made dramatic gains this way, they have nevertheless compelled white officials to effect a minimum degree of change that would not have been undertaken otherwise. Yet the continued reliance on private and government suits points to the very weakness of the black position—for litigation is the tool of the politically powerless.\(^3\)

Burke Marshall has observed that

\[\text{[O]nly political power—not court orders or other federal law—will insure the election of fair men as sheriffs, school}\]

\(^3\) Moreover, the school board would not sign a voluntary compliance agreement, required by the Government for the grant of federal funds, until the district court ordered integration.


\(^2\) As of January 1, 1970, only 183 black students had entered formerly all-white schools under the freedom-of-choice plan. Madison Journal (La.), Oct. 18, 1970, at 1. After the February 1, 1970 court order implemented a zoning scheme, 764 white students and eighteen teachers left the school system. A private school, Tallulah Academy, was formed to accommodate this exodus of pupils. By September, 1970, however, more than three hundred white students returned, bringing the total white enrollment to 20%. Nevertheless, the majority of black students still attended all-black schools while white students predominate at formerly all-white institutions. Id.

\(^3\) See Matthews, Political Science Research on Race Relations, in I. KATZ & P. GURIN, RACE AND SOCIAL SCIENCES 113, 118 (1969).
board members, police chiefs, mayors, county commissioners, and state officials. It is they who control the institutions which grant or deny federally guaranteed rights.\textsuperscript{324} Madison Parish's experience supports Marshall's conclusion with bitter irony.\textsuperscript{325} Three successful lawsuits have not brought fair elections. But in the absence of fair elections, blacks cannot use their votes to gain political power or to force recognition of black interests. Hence they have no choice but to continue litigation.

The Voting Rights Act did not eradicate the need for litigation. It was not intended to. Rather, this legislation was designed as the watershed between denial of the right to vote and participation in the electoral process. Registration is an accomplished fact. But the Act's potential has been lessened by reluctance to use enforcement provisions and to invoke available judicial remedies. Arguably, it is still too early to evaluate the impact of the Voting Rights Act by examining the effects of litigation in Madison Parish. The dark realities of the past continue to haunt the present. To paraphrase Judge Wisdom, even though the stranglehold of racial discrimination may be broken, the paralyzing effects remain.\textsuperscript{326}

\textsuperscript{324} B. MARSHALL, FEDERALISM AND CIVIL RIGHTS 12 (1964).
\textsuperscript{325} Indeed, in light of the Madison Parish experience it must be asked: Is the only affirmative obligation protection against discrimination at the threshold of the electoral process, or does the fifteenth amendment include a duty to insure that deprivation of the right to vote does not continue once individuals are in a position to influence political life? The corollary to that question is, of course: Who must accept the responsibility for protecting participation in the political process—the executive, the legislature, the judiciary, or the people themselves?
\textsuperscript{326} Mississippi Freedom Democratic Party v. Democratic Party, 362 F.2d 60, 63 (5th Cir. 1966).