

# Who Are to Be the Electors?

## A Reflection on the History of Voter Registration in the United States

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Who are to be the electors. . . ? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.<sup>1</sup>

The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.<sup>2</sup>

Inevitable tension exists between the professed democratic principle of universal suffrage and the Jeffersonian aspiration that the electorate be highly educated and informed. The conflict has played itself out repeatedly in our legal and political history in debates over the scope of voting rights. These debates reveal fundamental American ambivalence about a bedrock question of political values: are certain citizens more fit than others to be electors?

Beginning with the imposition of personal voter registration requirements in this country at the turn of the century, this question has been answered indirectly by reformers who seek to determine how people register and in so doing, to determine who registers and, ultimately, who votes. A powerful theme in these efforts at registration reform<sup>3</sup> has been a deep distrust and prejudice against illiterate, poor, and minority voters. As a result, the tension between universal suffrage principles and the notion that only the educated and informed should vote often has been resolved to the detriment of illiterate, poor, and minority voters. Successive waves of registration restrictions,

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1. THE FEDERALIST NO. 57, at 351 (James Madison) (1961).  
2. *Lassiter v. Northhampton Bd. of Elections*, 360 U.S. 45, 51-52 (1959).  
3. The term "reform" is used here loosely to refer to all efforts at changing registration requirements, whether progressive (that is, seeking to expand registration and participation) or conservative (seeking to preserve or further restrict existing registration requirements).

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brought about by political forces largely beyond the control of the individual voter, have shaped and reshaped the American electorate over time, often to the benefit of one or another group of cognizable interests. Two useful lessons emerge from this history. First, registration restrictions can have a discernable impact on the racial and socioeconomic character of the electorate.<sup>4</sup> Such restrictions can be, and at certain times in our history intentionally have been, tailored to limit the participation of particular groups. In short, “to a considerable extent, [electorates] can be *political artifacts*. Within limits, they can be constructed to a size and composition deemed desirable by those in power.”<sup>5</sup> Second, the government, at both state and federal levels, has played an active role in creating barriers to voter registration and, thus, to political participation. This history of government-sponsored electoral restrictions suggests that the government now should bear significant responsibility for expanding voter registration.

Whether or not “those in power” have an explicit vision of an ideal electorate, the question “who are to be the electors?” is implicit in much of the debate surrounding Congressional efforts at national voter registration reform in the last twenty-five years. These efforts have ranged from universal, census-based registration programs to limited registration mechanisms that rely on access to politically relevant private resources, such as automobiles, that are less available to minority, illiterate, and poor voters. Although even the limited mechanisms promise to increase overall voter registration levels, such mechanisms have the potential to create substantial disparities in registration rates among minorities and the poor.

While not necessarily motivated by bias against illiterate, minority, and poor voters, programs that tie voter registration to critical private resources are insensitive to the harsh effects that certain kinds of registration restrictions can have. To the extent that Congress has focused on such programs as a means to expand registration, it has been unable to fashion legislative initiatives to fully remove barriers for the persistently unregistered. Congressional efforts to broaden registration have been further stymied by some lawmakers for whom prevention of voter fraud is a greater priority than addressing the risk of growing disfranchisement among these groups.

Among Western democracies, only Switzerland has more depressed voter

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4. Walter D. Burnham, *A Political Scientist and Voting Rights Litigation: The Case of the 1966 Texas Registration Statute*, 1971 WASH. U. L.Q., 335, 337 (1971); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH* 45-82 (1974); Jerrold Rusk & John Stucker, *The Effect of the Southern System of Election Laws on Voting Participation: A Reply to V.O. Key, Jr.*, in *THE HISTORY OF AMERICAN ELECTORAL BEHAVIOR* 198 (Joel H. Silbey et al. eds., 1978).

5. Stanley Kelley et al., *Registration and Voting: Putting First Things First*, 61 AM. POL. SCI. REV. 359, 375 (1967); See also PAUL KLEPPNER, *WHO VOTED?: THE DYNAMICS OF ELECTORAL TURNOUT, 1870-1980*, at 60 (1982).

participation rates than the United States.<sup>6</sup> In the many countries with higher participation levels, the government, not the individual, is responsible for maintaining voter eligibility. The United States is unique in requiring personal registration that places the onus on the voter to maintain her eligibility to vote. Importantly, studies show that when voters in this country become registered, they turn out at about the same rate as voters in other Western countries.<sup>7</sup>

In the United States, people who register and vote tend to be more educated and wealthy than those who do not. Whites are more likely to be registered than minorities. In many other Western countries, there is no such class and race-skewed pattern.<sup>8</sup> Moreover, even in the United States, it has not always been true that those people with less education and income participate less in the political process. Around the turn of the century, before the introduction of personal registration laws in the United States, poor and working class men were active voters when mobilized along party lines.<sup>9</sup> Likewise, during the Depression, electoral participation did not decrease among the unemployed; rather, the unemployed were mobilized politically to express economic discontent.<sup>10</sup> Moreover, during Reconstruction, when the federal government affirmatively acted to register and protect the voting rights of millions of freedmen, participation rates among African-Americans were quite high.<sup>11</sup> These data suggest that the American notion that political abstention is a natural consequence of lower educational and economic status is wrong.<sup>12</sup>

In this Article, I argue that race and class disparities in rates of voter registration and participation in this country are not inevitable. Rather, they are the product of historical and continuing racial and socioeconomic bias in the operation of our registration laws. Part I of the Article traces the evolution

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6. FRANCIS PIVEN & RICHARD CLOWARD, *WHY AMERICANS DON'T VOTE* 5 (1988). While the United States measures turnout as a percentage of eligible voters, most European countries measure turnout as a percentage of *registered* voters. However, most European countries have universal suffrage systems in which the governing authority is responsible for maintaining voter registration. These countries therefore tend to have extremely high registration rates that approach 100% of the eligible population, *id.*, and thus a comparison of European and American turnout figures based on eligible population is a valid one.

7. *Id.* at 18.

8. See WALTER BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 82 (1970); David Glass et al., *Voter Turnout: An International Comparison*, 6 *PUB. OPINION*, Dec.-Jan. 1984, at 49; PIVEN & CLOWARD, *supra* note 6, at 4, 15, 115.

9. Kelley et al., *supra* note 5, at 374; BURNHAM, *supra* note 8, at 72-73; Burnham, *supra* note 4, at 337.

10. KLEPPNER, *supra* note 5, at 89.

11. See discussion *infra* pp. 6-7.

12. See, e.g., BERNARD R. BERELSON ET AL., *VOTING* 32 (1954) (Nonvoting is related to "persistent social conditions having little to do with the candidates or the issues of the moment."); ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* 476 (1960) (arguing that the less educated person, because of a lack of "sophistication of the concepts he employs to maintain a sense of order and meaning amid the flood of information" is prone to abstain from politics because of a sense that she cannot understand the intricacies of the process); RAYMOND WOLFINGER & STEVEN ROSENSTONE, *WHO VOTES?* 79 (1980) ("[T]he appeal of voting increases with education, and the costs of voting vary inversely with education. It is not surprising, then, that apparently trivial additions to the burden of registering raised the cost of voting above the threshold of many people.").

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of personal voter registration requirements in the South and the North to show how these requirements have functioned to limit the participation of certain groups of voters. Part II examines some of the dominant themes in current registration reform efforts. The modern voter registration debate no longer centers around the "intelligent use" of the ballot. Instead, efforts to restrict the franchise come largely under the rubric of ballot security and the need to protect against voter fraud. Many of these modern ballot security measures have the potential to perpetuate the historical, racial, and socioeconomic bias in registration and participation created by their turn-of-the-century antecedents. Part III explores criteria to evaluate voter registration reform based on the concept that the policies behind the Fourteenth Amendment and the Voting Rights Act impose a duty on the government to take affirmative steps to eradicate the lingering vestiges of past discrimination in voting.

### I. PERSONAL VOTER REGISTRATION: SHAPING THE 19TH CENTURY ELECTORATE

Prior to the late nineteenth century there were no personal voter registration requirements for white men in this country.<sup>13</sup> At the turn of the century, political movements in both the North and the South transformed the voting process by shifting the burden of maintaining voter eligibility from the government to the individual. The process, no longer based on a system of simple access for broad categories of eligible voters, became complicated by the imposition of a series of duties and requirements on the individual voter. Failure to comply often meant loss of the franchise. Ostensibly, the movements that culminated in widespread registration requirements in the North and the South had very different characters.<sup>14</sup> In the North, the "reform" movement assumed the mantle of combatting fraud and promoting political individualism against entrenched partisan interests.<sup>15</sup> In the South, the movement was an explicitly white supremacist drive to return the antebellum slavocracy to power.<sup>16</sup> However, the anti-machine forces of the North were motivated by fear of polyglot influence in machine politics as well,<sup>17</sup> and some disfran-

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13. JOSEPH P. HARRIS, *REGISTRATION OF VOTERS IN THE UNITED STATES* 65-66 (1929).

14. Personal voter registration requirements were one of many elements of the electoral restrictions that were enacted at this time. See BURNHAM, *supra* note 8, at 74-75, for a discussion of the nature and effect of other devices.

15. *Id.* at 74.

16. V.O. KEY, *SOUTHERN POLITICS IN STATE AND NATION* 540-41 (1949); KOUSSER, *supra* note 4, at 83-103.

17. Apparently, racism and fear of illiterate or ignorant voters became completely intertwined in the minds and motives of turn-of-the-century registration advocates: "So obvious is the evil of ignorant voting that more stringent naturalization laws are being demanded because too many of our foreign-born citizens vote ignorantly." KOUSSER, *supra* note 4, at 52 (quoting magazine editor George Gunton). Many of these advocates believed that the purpose of voting restrictions was to "eliminate the ignorant, illiterate voters." *Id.* Estimates suggest that at least 25% of white males in the United States during this period were born

chisers in the South also sought to remove illiterate Whites from the electorate.<sup>18</sup> In both regions the thrust of the movements was elitist, reactive to the threat of political insurgency, and apparently calculated to achieve political stabilization while restoring control by strongly conservative interests.<sup>19</sup> Regardless of their ideological underpinnings, these movements are instructive for the efficacy with which they used particular registration restrictions to shape the electorate. In this sense, the Southern movement may have been "only the most blatant aspect of a nationwide impulse."<sup>20</sup>

The fate of the Southern black voter after the Civil War exemplifies how political parties can use electoral restrictions to construct and reconstruct an electorate. The first section of this part discusses how African-Americans were enfranchised and mobilized to consolidate the Republican Party's political base during Radical Reconstruction. It then explores the resurgence of the Southern "Jim Crow" Democrats in the aftermath of the Hayes-Tilden Compromise and the particular methods used to disfranchise the Reconstruction electorate and to return control to antebellum political forces. Parallel events in the North during this period illustrate how, under the rubric of antifraud reform, registration requirements effectively were used to dismantle the white ethnic and working class electorates. An examination of the driving forces behind this movement helps to explain current reformers' concerns about widespread fraud despite the lack of evidence that it continues to be a significant threat on a national scale.

#### A. Voter Registration in the South

With the end of the Civil War and the defeat of the Democratic-led South, the Republican-dominated federal government faced the task of solidifying its political base. Registration and other voting requirements became a convenient and effective means of consolidating Republican control. Early in 1865, the Republicans moved to disfranchise all who had served in, or merely had given verbal support to, the Confederate army.<sup>21</sup> However, inability to forge a gov-

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abroad, two-thirds of these in non-English-speaking countries. Thus it is probable that large numbers of immigrants did not have sufficient grasp of the English language to be able to negotiate the complex maze of voting restrictions initiated during this period. *Id.* See also Burnham, *supra* note 4, at 336 ("There are certain broad themes which link the origins of all [registration] legislation together. To a very great degree it was motivated by racism—in the North, directed against the 'newer races' immigrating from Eastern and Southern Europe. . . .").

18. KOUSSER, *supra* note 4, at 53-62; KEY, *supra* note 16, at 543 & nn. 16 & 17.

19. BURNHAM, *supra* note 8, at 74.

20. KOUSSER, *supra* note 4, at 45.

21. Many in the Union camp were elitists who opposed universal suffrage for Whites or African-Americans. In the Georgia and Virginia secessionist conventions, these conservatives had supported moves to disfranchise poor Whites and create a "patriarchal republic" that was not accountable to the popular will. They believed that under universal suffrage, poor Whites would bring forth "reckless demagogues" and freedmen would merely vote their former owners' will. ERIC FONER, RECONSTRUCTION: AMERICA'S

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erning majority for a Reconstruction program caused the collapse of the Unionists' coalition. The Radical Reconstructionists took control of Congress. In 1867, the Radicals passed a comprehensive political, social, and economic program for the South—the Reconstruction Act of 1867.

Just as the Unionists had designed the disfranchisement of disloyal Whites to consolidate their control, the Radical Republicans' provision for enfranchising freedmen was a cornerstone of their strategy to create a political base in the South. The Reconstruction Act of 1867 established military rule of the former Confederate states by federal troops. The Republicans conditioned the reestablishment of state governments on passage of the Fourteenth Amendment and new state constitutions by delegates elected by all male citizens, regardless of race. The military governors were given the authority to register voters and hold elections in the former Confederate states.<sup>22</sup> Federal troops were deployed to execute this mandate. The troops assisted in bringing out the vote and in defending black voters against attempts to keep them from the polls. The Republicans used the Freedmen's Bureau, the Union League and other official and semi-official government agencies as "facilities for electoral agitation" to mobilize the new black vote.<sup>23</sup> They created election boards—often including Blacks—to oversee voter registration and conduct elections. Freedmen Bureau officials advised newly emancipated slaves about registration procedures and voting and counselled the slaves about fears of retaliation, particularly economic reprisals from their employers for voting.<sup>24</sup>

Radical Republican efforts to create an African-American electorate met with great success.<sup>25</sup> As a result of these efforts, by the end of 1867, black

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UNFINISHED REVOLUTION, 1863-1877, at 187 (1988).

22. Although there were no personal registration requirements, jurisdictions were required to maintain lists of eligible voters. *Id.* at 277; W. E. BURGHARDT DUBOIS, *BLACK RECONSTRUCTION IN AMERICA: 1860-1880*, at 371 (1935); KEY, *supra* note 16, at 536.

23. KEY, *supra* note 16, at 536.

24. DUBOIS, *supra* note 22, at 376.

25. During Reconstruction, political participation emerged as "a principle focus of black aspirations." Every African-American institution, particularly the church, became politicized. One black minister noted that "politics got in our midst and our revival or religious work for a while began to wane." Throughout the South, planters complained about Blacks so caught up in political activity that they neglected their labor. On August 1, 1867, Richmond's tobacco factories were forced to close because so many black laborers attended a political convention. FONER, *supra* note 21, at 282. One commentator observed of African-American turnout for an Alabama election:

In defiance of fatigue, hardship, hunger, and threats of employers, blacks had come en masse to the polls. Not one in fifty wore an unpatched garment, few possessed a pair of shoes, yet for hours they stood on line in a pitiless storm. Why? The hunger to have the same chances as the white men they feel and comprehend . . . that is what brings them here.

*Id.* at 291 (citing Cincinnati *COMMERCIAL*, in *AMERICAN FREEDMAN*, Feb. 1868).

This kind of political enthusiasm led frustrated white supremacists to complain that "only the shotgun keeps Negroes from the polls." STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969*, at 7 (1976). The freedmen's insatiable drive for political expression and mobilization during Reconstruction undermines the elitist notion that illiterate voters cannot be self-conscious and independent

registration rates in seven of the eleven former Confederate states equalled or exceeded that of Whites.<sup>26</sup> By some estimates, poor Whites also voted in large numbers for the first time during Reconstruction. "Democracy for the first time in a century succeeded oligarchy in the South. . . . [P]robably never before were such democratic elections held in the South and never since. . . ." <sup>27</sup> But, African-Americans in the North, who had no role to play in consolidating the Republican political base, remained disfranchised.<sup>28</sup> The withdrawal of federal troops under the Hayes-Tilden Compromise of 1877, however, signaled the end of Reconstruction and the first experiment with government-assisted, broad-based suffrage in this country.<sup>29</sup>

In the South, the Bourbon resurgence of the 1890s was accompanied by massive campaigns to disfranchise Blacks and to drive them back into a state of political complacency. At the outset, the disfranchisers feared that federal troops would intervene to defend African-Americans' Fourteenth and Fifteenth Amendment voting rights.<sup>30</sup> Therefore, they focused initially on laws and practices to increase their own strength without legally abridging African-American voting rights directly.

Early on, much of the Southern Democrats' disfranchisement effort was carried out by violence, intimidation,<sup>31</sup> and voting fraud by local election

political actors. In addition, the record of the Reconstruction legislatures, in enacting broad programs to reform and rebuild the South, suggests that illiterate voters can make wise choices of leaders to represent their interests. As one contemporary commentator observed of black voters:

They instituted a public school system in a realm where public schools had been unknown. They opened the ballot-box and jury box to thousands of white men who had been debarred from them by lack of earthly possessions. They introduced home rule in the South. They abolished the whipping post, and branding iron, the stocks and other barbarous forms of punishment which had up to that time prevailed. They reduced capital felonies from about twenty to two or three. In an age of extravagance they were extravagant in the sums appropriated for public works. In all that time, no man's rights of person were invaded under the forms of laws.

DUBOIS, *supra* note 22, at 621 (citing 15 AM. HIST. REV. 796 (1910)).

26. DUBOIS, *supra* note 22, at 371 (citing MCPHERSON, HISTORY OF THE UNITED STATES DURING RECONSTRUCTION 374).

27. *Id.* at 372.

28. KEY, *supra* note 16, at 536; FONER, *supra* note 21, at 277.

29. In the sharply contested election of 1876, Northern Republican candidate Rutherford B. Hayes barely defeated the South's Samuel Tilden by a one-vote electoral college plurality. In an attempt to avoid widespread political chaos, and to cement the electoral victory for Hayes, the Republicans entered into a series of negotiations with Democrats, the result of which was an agreement or "compromise," that the Hayes administration would treat the South with "kind consideration" in exchange for the support of enough Tilden Democrats to secure the Republican victory. ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 242-43 (1990).

30. KEY, *supra* note 16, at 536-39; LAWSON, *supra* note 25, at 9.

31. In many Southern states, the hated black codes, first introduced after emancipation to maintain quasi-slave status for African-Americans, were transformed into Jim Crow laws an entire scheme to enforce white hegemony and institutionalize the degradation of African-Americans into a separate and lesser position within Southern life. LAWSON, *supra* note 25, at 11. The anti-Klan laws that successfully had curtailed organized terror against African-Americans during Reconstruction were repealed, leading to a revival of terrorism as a bare political weapon against Blacks. *Id.*

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officials.<sup>32</sup> However, the disfranchisers soon adopted laws designed to curtail the African-American franchise. Between 1890 and 1910 all Southern states rewrote the constitutions passed by the heavily black Reconstruction electorate.<sup>33</sup> A wave of suffrage restrictions swept through the South starting with Mississippi, South Carolina, and Louisiana, the states with the largest African-American populations.<sup>34</sup> Mississippi pioneered the “Southern system” of suffrage restrictions that all of the other former Confederate states eventually adopted in varying degrees.

The Southern system had five salient features: burdensome residency requirements, periodic registration, imposition of poll taxes, literacy or “understanding” requirements, and stringent disqualification provisions.<sup>35</sup> Each of these features was aimed at disfranchising the freedmen without overt racial classifications. The residency provisions required that voters live in the state for two years and in the county for one year prior to registering.<sup>36</sup> This requirement eliminated from the electorate the many African-American migrant farmers who hired out their labor on a seasonal basis. Local registrars in South Carolina required voters to re-register each time they moved, and instituted purges of voters who moved.<sup>37</sup> In many states, the poll tax was made cumulative with retroactive liability, disproportionately burdening freedmen who, until emancipation, were completely excluded from electoral participation.<sup>38</sup> Additionally, voters were required to bring proof of payment of poll taxes and proof of registration to the polls with them. Freedmen, unaccustomed to keeping records, were far more likely to forget or lose their proof.<sup>39</sup> Often, poll tax payment and registration deadlines were set far enough in advance of the election to ensure that large numbers of freedmen would be disqualified. Freedmen were often not sophisticated in the habits of political participation

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32. KEY, *supra* note 16, at 536, 549; KOUSSER, *supra* note 4, at 46-47, 107. From 1874 to 1900, 16 of the 20 Virginia elections challenged in the House of Representatives were challenged on the basis of fraud. KEY, *supra* note 16, at 540. In Louisiana, Republicans lamented that “after the polls are closed the election really begins.” FONER, *supra* note 21, at 590. In the Tennessee elections of 1886 and 1888, Democratic election officials refused to open polling places in Republican strongholds or rejected ballots in these areas because of “irregularities”. KOUSSER, *supra* note 4, at 108. Contemporaries called the South Carolina presidential election of 1876 “one of the grandest farces ever seen,” as Democrats reduced massive Republican majorities in certain counties by voting repeatedly, barring African-Americans from the polls, and committing other frauds. FONER, *supra* note 29, at 241. The stuffing of Southern ballot boxes became a national scandal. KOUSSER, *supra* note 4, at 46. Moreover, throughout the South, election districts were gerrymandered to reduce Republican voting strength. FONER, *supra* note 21, at 590.

33. LAWSON, *supra* note 25, at 11.

34. KEY, *supra* note 16, at 537-38. In general, in these states the restrictions remained the most stringent. Rusk & Stucker, *supra* note 4, at 219 tbl. 6.4; DUBOIS, *supra* note 22, at 421-25.

35. KEY, *supra* note 16, at 537-38.

36. KOUSSER, *supra* note 4, at 48.

37. LAWSON, *supra* note 25, at 6.

38. Prior to 1877, Georgia had a poll tax, but it was neither cumulative nor mandatory. When the poll tax was made mandatory and cumulative in 1877, a 59-year old freedman would had to have paid almost \$50 in principal and interest before voting. Rusk & Stucker, *supra* note 4, at 212.

39. *Id.*; KOUSSER, *supra* note 4, at 49.



and might not be activated until the vigorous campaigning in the final weeks before election.<sup>40</sup> In Alabama, after 1892, farmers were allowed to register in May only, the busiest time of the year for farm workers.<sup>41</sup> The effects of these administrative requirements cannot be overlooked. In Louisiana, for example, without any other changes in the constitutional qualifications for voting, the imposition of periodic registration reduced the black electorate by 90% by 1898.<sup>42</sup>

Literacy tests were among the most ingenious of the "Southern system" innovations for their efficacy in disfranchising African-Americans and their flexibility of application to Whites.<sup>43</sup> For Blacks, education was illegal only twelve years before the first tests were implemented and illiteracy rates averaged about 90% for adult men. The disfranchising effects of the literacy tests were severe. In South Carolina, for example, the tests, along with other restrictive registration provisions, were estimated to have disfranchised 75% of the black voters.<sup>44</sup> The greatest support for suffrage restrictions in the South came from the farming counties in the lowland areas that had the largest African-American populations.<sup>45</sup> By contrast, in the majority white highland counties there was wide opposition to suffrage restrictions, arising out of fear that the restrictions would bar large numbers of illiterate Whites from voting.<sup>46</sup> Indeed, although the disfranchisers' articulated purpose was removal of Blacks from the electorate, the registration requirements passed during the Jim Crow conventions were often part of a package of voting restrictions that harshly impacted all illiterates.<sup>47</sup> The Australian or secret ballot was one such

40. Rusk & Stucker, *supra* note 4, at 212.

41. KOUSSER, *supra* note 4, at 48.

42. *Id.* at 49. The registration rate for Whites was reduced by 60% as a result of this measure. *Id.*

43. Speaking to the Redeemer's convention in Virginia in 1901-1902, a delegate proclaimed: "There stands out the uncontroverted fact that the article of suffrage which the convention will this day adopt does not necessarily deprive a single white man of the ballot, but will inevitably cut from the existing electorate four-fifths of the Negro voters." Later in the convention, speaking of the understanding clause, the chairman of the suffrage committee reportedly said: "I expect the examination with which the black man will be confronted to be inspired by the same spirit that inspires every man upon this floor in the convention. I do not expect an impartial administration of this clause." Rusk & Stucker, *supra* note 4, at 221 (footnote omitted).

44. KOUSSER, *supra* note 4, at 49.

45. KEY, *supra* note 16, at 545 tbl. 59 (showing that the 10 counties with the highest percentages of African-American population in Alabama were the counties that had the highest percentages of the popular vote in favor of the disfranchising constitution).

46. See KEY, *supra* note 16, at 542-50, for a thorough state-by-state description of white opposition to the suffrage restrictions of the Jim Crow constitutional conventions. Even if elitist views toward illiterate Whites were not shared by all of the disfranchisers, at minimum it appears that enough of the disfranchisers were unconcerned with the impact of the suffrage restrictions on poor and illiterate Whites, so great was their determination to drive Blacks from the electorate.

47. In Tuscaloosa, Alabama, a local newspaper voiced the anxieties of many poor Whites:

Past history teaches us that the rule of the so called "virtuous and intelligent," the rule of the rich and the favored ones of the earth has ever been of the most tyrannical and despotic character. Under such rule but two classes exist, the master and the slave, but two kinds of homes, the splendid palace and the miserable hovel. True manhood's ambition is crushed out of the toiling

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restriction.<sup>48</sup> Hailed as an important safeguard against fraud,<sup>49</sup> this restriction eliminated the party ballot that at least guaranteed illiterates, who often were unable to negotiate the lengthy list of candidates on the publicly printed ballot, the right to vote.<sup>50</sup> The secret ballot meant that such voters would no longer be able to obtain assistance in completing their ballots.<sup>51</sup> These measures were certain to have harsh effects because in eight of the eleven former Confederate states at least 10% of the white population was classified as illiterate. It is probable that a far greater proportion were not literate enough to be able to complete a ballot accurately.<sup>52</sup>

Eventually, as a result of political compromise, Southern literacy tests were tailored to the region's unique need to exclude African-Americans while

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masses while the rich revel in vice and splendor. This is no fancy picture. A constitutional convention insures the disfranchisement of the great masses of the toiling people.

KEY, *supra* note 16, at 542.

An observer of the Alabama convention set forth the views of the disfranchisers:

How to get rid of the venal and ignorant among white men as voters was a far more serious and difficult problem than how to get rid of the undesirable among the negroes as voters. While it was generally wished by leaders in Alabama to disfranchise many unworthy white men, as a practical matter it was impossible to go further than was done and secure any relief at all. . . . To rid the state eventually, so far as could possibly be done by law, of the corrupt and the ignorant among its electorate, white as well as black, the poll tax and vagrancy clauses were put into the Constitution.

*Id.* at 543 n.17.

48. The secret ballot is the common form of ballot in use today. It is a nonpartisan, publicly printed ticket that contains the names of all of the candidates, arranged by office rather than by party. It requires voters to "scurry quickly through a maze of names of candidates running for everything from presidential elector to county court clerk." When first instituted, they were a marked change from the party ballots that carried the names of the party slate exclusively. KOUSSER, *supra* note 4, at 51-52.

49. Southern Democrats also charged corruption in the electorate, and the governments they elected, as the rallying cry in deposing the Republicans. Although it was less credible coming from those who had used fraud to launch their resurgence, the fraud theme may have had greater currency in some populist camps than the overt racism of Jim Crow Democrat rhetoric. In South Carolina, for example, the Democrats issued a lengthy report on fraud and corruption in the Reconstruction legislature immediately after the overthrow of the Republicans. Of this report, W.E.B. Dubois said:

It was the bounden duty of this legislature to prove that their action was justified. . . . The men who made the report had in their hands all of the governmental records and documents to sue or suppress as they wished. They gave accused persons no real or safe opportunity to reply. They could call as witnesses persons upon whom they were able to put the severest pressure. The unsupported testimony of these witnesses, so long as it was against the overturned government, was received as final authority. . . . There is nothing in their general conduct during this time to leave any doubt that men would go to any limit to prove that Negroes were not fit to vote and that all Northern men in the state were thieves.

DUBOIS, *supra* note 22, at 421-22.

50. KOUSSER, *supra* note 4, at 51.

51. See KOUSSER, *supra* note 4, at 54-56, for a more thorough discussion of the effects of the Australian ballot on turnout.

52. During this period, the census, which provided the only measure of adult literacy, considered literate anyone who had any schooling whatsoever. *Id.* at 54-55.

protecting illiterate Whites.<sup>53</sup> South Carolina invented the “understanding clause” as a loophole for Whites, and Louisiana adopted a “grandfather clause.”<sup>54</sup> Other Southern states instituted property qualifications and “character tests” as exemptions from the literacy test.<sup>55</sup>

Ultimately, the discretion granted to local officials to implement the various statutory requirements and exemptions became the South’s most powerful disfranchising tool.<sup>56</sup> There were no parameters on the “good character” and “understanding” clauses beyond the personal satisfaction of the registrar. The registrar could exclude African-Americans even if they met objective criteria or shared the same qualifications as Whites who were allowed to register.<sup>57</sup> When all else failed, local officials could delay black voters until after the polls closed by the use of arbitrary and perfunctory procedural challenges, often leaving lines of dismayed black voters standing outside the polls.<sup>58</sup> These combined systems of disfranchisement were so effective in states such as Louisiana that the percentage of African-American voters in the electorate shrunk from 85.2% to 4% in the two-year period from 1898 to 1900.<sup>59</sup> In Virginia, the black electorate was reduced from 147,000 to 21,000. In Mississippi, after adoption of the post-Reconstruction constitution, 6% of eligible Blacks were registered to vote. One percent of eligible African-Americans were registered to vote in Alabama by 1902, compared with 75% of Whites.<sup>60</sup>

### B. Voter Registration in the North

At the turn of the century, politics in the North may not have been as overtly polarized as in the South. A fierce power struggle erupted at that time,

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53. This was unlike the various educational or English language proficiency requirements for voting imposed in certain Northern cities, which, in many cases, targeted recent immigrants from Eastern and Southern European countries who were gaining political influence through the political machines in large cities. *Id.* at 57; PIVEN & CLOWARD, *supra* note 6, at 87, 105.

54. KEY, *supra* note 16, at 538.

55. KOUSSER, *supra* note 4, at 58. Unlike literacy test exemptions passed by Southern legislators, the poll tax laws remained universal in their application, suggesting that this restriction was aimed at poor Whites as well as freedmen. *Id.* at 68.

56. *Id.* at 48; HARRIS, *supra* note 13, at 158.

57. See KOUSSER, *supra* note 4, at 48-49, for a discussion of the ways in which discretion was exercised in the application of the character test and understanding, and their impact on registration rolls.

58. LAWSON, *supra* note 25, at 7.

59. Frederick D. Wright, *The History of Black Political Participation to 1965*, in BLACKS IN SOUTHERN POLITICS 9, 13 (1987).

60. KOUSSER, *supra* note 4, at 61 tbl. 2.3. Post-Reconstruction suffrage restrictions also had a critical impact on the white electorate, disfranchising as much as 50% of the eligible voters. *Id.* at 62; KEY, *supra* note 16, at 542. However, only the African-American electorate was virtually obliterated as a result of the defeat of Reconstruction. Whatever disadvantage poor Whites experienced in the political wrangling of the period, unlike African-Americans, ultimately enough poor and illiterate whites were able to form a coalition with other Whites to preserve their franchise. Although white supremacy was a shallow basis for unity that did not address the real needs of the poor Southern White, the majority of the white electorate in most Southern states at least retained the right to vote. KOUSSER, *supra* note 4, at 61 tbl. 2.3.

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however, over the direction of politics and the composition of the electorate. The battle lines were drawn between the working class political machines and the reformer elite. The political system of the North was strongly party-oriented during this period. Activists controlled party nominations and platforms through party conventions, and parties printed and distributed ballots to voters on Election Day. Large numbers of officials at all levels were elected, and partisan patronage strictly controlled appointive offices. The potential electorate was “extremely full[y]” mobilized, partly as a result of the rigidity and intensity of party competition.<sup>61</sup>

In the antebellum North, the Democrats forged an alliance with largely overlapping constituencies of immigrants and workers to create an urban political majority. This majority was mobilized and disciplined by the political machine, an invention unique to urban politics.<sup>62</sup> The machine was organized at the neighborhood or ward level where social and civic organizations such as gangs and fire companies were politicized and given a partisan role.<sup>63</sup> Northern Democrats’ political rhetoric was militantly pro-labor and ethnic, setting the party in direct opposition to the nativist reformer elite that increasingly came to oppose machine politics. Northern Democrats proclaimed themselves the party of “political equality warring against the spirit of exclusiveness and proscription.”<sup>64</sup>

The dominant political figure of the period was the party boss,<sup>65</sup> whose style of machine politics has been called “militarist.”<sup>66</sup> Elections were party affairs. Party ballots listing candidates printed on distinct and brightly colored paper were distributed on or before Election Day. These ballots identified the partisan preferences of the voters who carried them and virtually eliminated privacy of the ballot.<sup>67</sup> Party captains “drilled” voters on party slates and platforms, the partisan press trumpeted the party’s positions and an elaborate and well-staffed party structure mobilized the ranks on Election Day. During this period of intense partisanship there was little support in American political culture for the individualist who made independent decisions based on her

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61. BURNHAM, *supra* note 8, at 72.

62. AMY BRIDGES, *A CITY IN THE REPUBLIC: ANTEBELLUM NEW YORK AND THE ORIGINS OF MACHINE POLITICS* 146-48 (1987).

63. *Id.*

64. *Id.* at 149 (quoting Ira M. Leonard, *New York City Politics, 1841-1844* (1965) (unpublished Ph.D. dissertation, New York University (New York)) (quoting *EVENING POST*, Apr. 6, 1844)).

65. Part gangster and demagogue, part benevolent patrician in style, the boss deliberately eschewed “social honor” and affiliated himself with the “dangerous classes.” *Id.* at 149. He ran the machine, enforced machine discipline and dispensed machine spoils. To many, the boss became the “cultural symbol of the political triumph of the common man.” *Id.* at 153.

66. BURNHAM, *supra* note 8, at 72 (quoting Richard Jensen, *AMERICAN ELECTION CAMPAIGNS 2-10* (1968)).

67. KLEPPNER, *supra* note 5, at 58; Angus Campbell & Philip E. Converse, *Change in the American Electorate*, in *THE HUMAN MEANING OF SOCIAL CHANGE* 277 (1972).

conception of the common good.<sup>68</sup>

The boss's antagonist in the political culture of the day was the reformer who stood for the primacy of American interests and eschewed the elevation of class interests above all others.<sup>69</sup> Reformers saw the highly disciplined, organized, and class-based style of machine politics as inherently corrupt,<sup>70</sup> backward, and antithetical to the nascent "modernizing" technocratic and pro-corporate trends.<sup>71</sup> For many reformers, the sight of large numbers of poorly educated voters marching to the polls could only mean widespread manipulation and corruption. Their campaign to reform the electorate thus was framed expressly in terms of eliminating election fraud.

The dual nature of the machine—as an organ that thoroughly penetrated and mobilized the poor and working classes and as an institution whose culture of partisan loyalty created the conditions for corruption—is well accepted.<sup>72</sup> While most observers agree that abuses existed under the machine system, historical accounts sharply conflict as to the magnitude of election fraud that actually occurred during this period. Indeed, these accounts may tell more about the reporter's views about the proper composition of the electorate than about the actual political situation at the time.

Was the high level of electoral turnout a real phenomenon or merely a product of massive ballot stuffing and fraud? Some have concluded that fraud during this period was more episodic than routine; the most striking feature of the contemporary literature on fraud was the sparsity of actual cases it cited.<sup>73</sup> This view holds that the extraordinary levels of electoral mobilization during this period reflected the high level of antebellum political and social

68. See BURNHAM, *supra* note 8, at 73.

69. BRIDGES, *supra* note 62, at 154-55.

70. Kleppner has said that reformers did not simply mean bribery and vote repeating when they charged the party system with corruption.

They judged the electoral system to be "corrupt" because too many voters based their selections on narrow conceptions of their own (or their group's) material self-interest, rather than on a broader conception of the public interest. It was "corrupt" because too many voters blindly followed the dictates of [the] party . . . . It was "corrupt," perhaps above all, because "universal suffrage was but another name for a licensed mobocracy."

KLEPPNER, *supra* note 5, at 59 (citations omitted). See also KOUSSER, *supra* note 4, at 51 ("Upper-class reformers such as Henry Cabot Lodge and Richard Henry Dana III felt [the secret ballot] would decrease corruption, encourage independent voting, and bring more of the 'best men' into politics. With such backing, the new method of voting could be presented as an instrument of 'reform' both above and below the Mason-Dixon line.").

71. Walter D. Burnham, *The Appearance and Disappearance of the American Voter*, in *THE DISAPPEARANCE OF THE AMERICAN VOTER: A SYMPOSIUM ON DECLINING VOTER PARTICIPATION* 125, 138-39 (ABA Special Committee on Election Reform ed., 1978).

72. See Campbell & Converse, *supra* note 67, at 278; BURNHAM, *supra* note 8, at 72-73; KLEPPNER, *supra* note 5, at 58-59.

73. See, e.g., KLEPPNER, *supra* note 5, at 59-60. Campbell and Converse, who argue that fraud during this period was widespread, concede that estimates of fraud were based only on a few notorious cases and that widespread fraud never has been documented. Campbell & Converse, *supra* note 67, at 290-91.

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turmoil in this country and not simply a massive amount of corruption.<sup>74</sup> Indeed, some argue that voting fraud could not have accounted for a general inflation of the turnout rate by as much as the 5% to 8% reflected in the figures for this period.<sup>75</sup> The high level of political organization and competition among the parties acted as a safeguard against massive fraud because each party had both the means and the incentive to ensure that the other side did not steal the election.<sup>76</sup>

Others insist that widespread fraud accounts for the high levels of electoral participation recorded during this period. These analysts point to notorious cases—such as the Plaquemines Parish frauds in 1844, which helped Polk win the presidency, and the 1868 frauds in New York City in which turnout rates exceeded 100%—and suggest that such cases are illustrative of a national pattern.<sup>77</sup> They argue that the high level of illiteracy at the time, combined with the absence of an independent mass media and the use of the preprinted party ballot, indicates that the electorate was not particularly motivated and was easily manipulated.<sup>78</sup>

Two general areas of agreement exist between the camps. First, many agree that “large numbers of lesser involved people voted who probably would not have done so without the impetus of the party machine.”<sup>79</sup> Second, few deny the elitist and anti-immigrant tone of the reformers’ rhetoric.<sup>80</sup> Indeed, the literature of the reformers is astounding in its direct equation of illiterate, immigrant, or poor persons’ voting with corruption and voting fraud.<sup>81</sup> Railing against the “admitted evils of ‘tramp’ suffrage,” the more strident reformers warned that universal voting “is but another name for a licensed mobocracy” and urged that the vote be limited to “those who are fitted, by intelligence,

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74. Burnham notes that the high level of political mobilization during this period is not surprising because it was a period of momentous socioeconomic change during which the development of cities and concentrated industrialism brought about a “transformation in the foundations of human existence.” Burnham, *supra* note 71, at 134. He points out that the period culminated in the Civil War, the “most traumatic collective experience through which Americans have ever passed.” Given the magnitude of the trauma and the issues at stake, Burnham concludes that it is not surprising that the levels of party organization and effectiveness and the level of voter turnout reached such high levels. *Id.* at 134-35. *See also* KLEPPNER, *supra* note 5, at 59-60.

75. KLEPPNER, *supra* note 5, at 59-60. *See also* Campbell & Converse, *supra* note 67, at 290.

76. Burnham, *supra* note 71, at 134.

77. *Id.* at 133.

78. *See, e.g.*, Jerrold G. Rusk, Comment, *The American Electoral Universe: Speculation and Evidence*, 68 AM. POL. SCI. REV. 1028 (1974); HARRIS, *supra* note 13, at 65-66.

79. Rusk, *supra* note 78, at 1035. While acknowledging the effectiveness of party mobilization during this period, Rusk argues that high turnout from voters who would otherwise be less involved suggests a high level of deference voting. *Id.*

80. *Id.*; Campbell & Converse, *supra* note 67, at 297.

81. Harris classifies the wards into four groups, the first, “where fraud would most likely occur,” being the downtown “transient, machine controlled . . . and slum sections of the city.” HARRIS, *supra* note 13, at 334. The second group consists of the “better section of the city where fraud is less likely,” and the third and fourth groups are comprised of “the best sections of the city where fraud is quite unlikely.” *Id.* Harris argues that high registration levels in downtown wards, “even though less than 100 percent, indicate[ ] padded registration.” *Id.* at 334-35.

virtue and personal responsibility, to exercise that right with safety to the community.”<sup>82</sup> Reflecting these views, a 1929 Brookings Institution study of election practices suggested that fraud could be demonstrated by showing comparatively high levels of registration in the poorest, immigrant-dominated or machine-controlled wards of New York, Chicago, and Philadelphia. Thus, the study found registration rates of 89% and 93% in poor wards of Manhattan to be “suspiciously high” *per se*, whereas similar levels in Chicago’s middle class wards and Milwaukee’s “high class” wards passed without comment.<sup>83</sup>

Documented cases of voting fraud cited by the reformers, in fact, almost invariably involved organized efforts by *election officials*, and not by the voters against whom electoral restrictions were being advocated.<sup>84</sup> Thus, the Brookings Institution study concluded that in Chicago, one of three cities cited for its egregious history of fraud, nine-tenths of the election frauds were committed by the registration and election officials themselves or with their knowledge and consent.<sup>85</sup> Similarly, the study attributed widespread corruption in Louisville to election officials controlled by the Republican machine.<sup>86</sup>

In many states the earliest proposed personal registration legislation met with widespread opposition and ultimately was repealed.<sup>87</sup> Much of the opposition arose from concerns that personal registration requirements would impose too great a burden on the franchise or would be ineffective against fraud.<sup>88</sup> Indeed, although the ostensible purpose of personal registration laws passed in the North was to prevent perceived widespread fraud, reformers themselves admitted that many of these requirements were wholly ineffective against, or in certain instances actually facilitated, fraud.<sup>89</sup> Despite this skepticism, changes in voter registration requirements during this period became increasingly more restrictive. Where states once required that registration lists be maintained by election officials, they began to demand personal registration lists that required the individual to appear periodically before local officials to verify her eligibility. States began to impose periodic registration requirements, increasingly early registration deadlines before elections and increasingly centralized, and at times inaccessible, locations for registration. In some

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82. William L. Scruggs, *Citizenship and Suffrage*, 177 N. AM. REV. 844-45 (1903).

83. HARRIS, *supra* note 13, at 335-36, 339, 345.

84. *Id.* at 154 (suggesting that a major problem with election administration was the failure to exercise discipline over precinct officers, particularly where machines were strong); *id.* at 157 (asserting that most of the existing ills in the organization and personnel of election administration are caused by the “degradation of the service to spoils politics”).

85. *Id.* at 361.

86. *Id.* at 373.

87. Early personal registration laws suffered such fates in New York and Louisiana. *Id.* at 69-71.

88. *Id.* at 68, 70, 74. Many of the earliest personal registration laws were imposed on the cities while rural areas remained free of such requirements; thus, some lawmakers opposed personal registration as unfair discrimination against the cities. *See id.* at 68.

89. *Id.* at 373 (citing case of Louisville law that allowed corrupt election officials to compile a list of names of those who had died or moved away to be used by repeat voters).

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cases, personal registration requirements passed by reformers had nothing whatsoever to do with ballot security. For example, a 1911 Indiana law required registrants to identify the names of their landlords and nearest neighbors and the materials from which their houses were built.<sup>90</sup> The increased procedural complexity and costs to the individual voter effectively barred many voters from political participation.<sup>91</sup>

It is unclear whether personal registration laws enacted during this period actually succeeded in reducing election fraud.<sup>92</sup> Some analysts suggest that concurrent changes in laws governing the conduct of elections played a larger role in curtailing fraud—or at least the public perception of it. These changes struck at the heart of party domination of elections by eliminating party ballots and by instituting direct primaries in place of party nominating conventions.<sup>93</sup> Whether or not personal registration requirements succeeded in preventing fraud, they increased the individual voter's burden of participation and edged large numbers of marginal voters out of the process.<sup>94</sup> In this way, these requirements were very successful in demobilizing and shrinking the electorate.

### C. *The Legacy of Discrimination and Demobilization*

With a brief exception during the Depression and New Deal, the American electorate never has recovered from the turn-of-the-century demobilization of voters. In the last quarter-century, American voter participation has declined precipitously.<sup>95</sup> Not surprisingly, voter registration rates are depressed as well: today roughly 47% of eligible persons in the United States are not registered to vote.<sup>96</sup> For minority and poor voters, the percentage of unregistered persons is substantially higher.<sup>97</sup> The vestiges of discriminatory registration schemes, still in place in many parts of the country in the form of com-

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90. *Id.* at 87. See also PIVEN & CLOWARD, *supra* note 3, at 90 (“[A]s political insurgency spread in the late nineteenth century and the movement to reform the franchise gathered momentum, voter registration arrangements became not only more widespread, but also increasingly more restrictive.”).

91. PIVEN & CLOWARD, *supra* note 6, at 90. See Kelley et al., *supra* note 5 (discussing the costs to the voter associated with registering and voting).

92. See KLEPPNER, *supra* note 5, at 59-60.

93. Burnham has suggested that the notion that direct primaries were a more democratic means of nominating candidates is erroneous in light of the fact that the nonpartisan comprised between 5% and 35% of the eligible electorate. Burnham, *supra* note 71, at 141.

94. In the period from 1900 to 1920, turnout was consistently lower in communities with personal registration requirements. KLEPPNER, *supra* note 5, at 61.

95. Mark T. Quinlivan, Note, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361, 2362 (1989). See also Mary N. Stone, *Voter Registration: Context and Results*, 17 URBAN LAW. 519, 520 (1985).

96. Stone, *supra* note 95, at 520.

97. PIVEN & CLOWARD, *supra*, note 6, at 204 tbl. 6.2. The figures in this table are self-reported census figures. Piven and Cloward estimate that such figures are inflated by about 7% to 10%. Actual voter registration figures for African-Americans have been found to be as low as 29% below those reported in the census. See Mississippi State Chapter, *Operation PUSH v. Allain*, 674 F. Supp. 1245, 1254-55 (N.D. Miss. 1957).



plex, restrictive, and confusing webs of personal voter registration requirements, contribute significantly to this disparity.<sup>98</sup> The vast majority of states retain registration deadlines months before elections and authorize restrictive voter registration practices such as inconvenient hours and locations for voter registration.<sup>99</sup> Many states do not allow deputization of private citizens to assist with voter registration.<sup>100</sup> In many areas, particularly in the South, the unchecked exercise of discretion by local officials systematically results in discriminatory enforcement of registration requirements. Studies of the effects of the daunting maze of restrictions have led analysts to conclude that "registration requirements are a more effective deterrent to voting than anything that normally operates to deter citizens from voting once they have registered, at least in presidential elections."<sup>101</sup>

Other factors deter participation as well. The political culture that devalues participation by minority, poor, and uneducated voters is hegemonic in this country and to a great extent, this hegemony is accepted as a matter of course, even among the poor, minority, and uneducated voters themselves. Poor and minority voters internalize the values of the dominant culture and feel no motivation to participate, concluding instead that their participation is useless,<sup>102</sup> and thereby contributing to the disparities in registration. Another effective deterrent to voting that began with the vast demobilization of the electorate is the lack of political competition among the parties for the support of disadvantaged voters.<sup>103</sup>

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98. Some argue that low participation rates are caused by citizen apathy. See S. REP. NO. 140, 101st Cong., 1st Sess. 35-36 (1989) (minority views of Messrs. Stevens, McClure, Helms, Dole, Garn and McConnell) (discussing a CBS-*New York Times* poll indicating that 56% of nonvoters who were not registered could not give a reason or said they had no interest in the election). *But see* William Crotty, *The Franchise: Registration Changes and Voter Representation*, in *PATHS TO POLITICAL REFORM* 67, 524 (Crotty ed., 1980) ("By far, the reason given by the greatest number in explaining their nonvoting was registration. Taking the population of nonvoters as a whole, 82 percent said the reason that they did not vote was that they were not registered." The proportion failing to register, and thus unable to vote, was particularly high for Latinos—91% compared with 81% of Whites and Blacks.). See also Stone, *supra* note 95, at 522 (Stone describes the series of complex tasks required of would-be voters who desire to register and concludes that "[f]or even a motivated citizen, these requirements present administrative obstacles that are hard to overcome. For minorities, the poor, and other traditionally excluded groups, the requirements too often constitute an effective barrier to participation in voting.").

99. In some rural areas where only one site is used for voter registration, potential voters, many of whom may not have access to automobiles, must travel distances of over 100 miles to register. See *Voting Rights Act: Runoff Primaries and Registration Barriers: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 98th Cong., 2d Sess. 136 (1984) (testimony of C. Lani Guinier) (noting that in some rural counties one-third of African-American households do not have access to a car).

100. Quinlivan, *supra* note 95, at 2374.

101. Kelley et al., *supra* note 5, at 362.

102. Crotty, *supra* note 98, at 81-87. See *Voter Registration: Hearings Before the Subcomm. on Elections of the Comm. on House Administration*, 100th Cong., 2d Sess. 569, 571-72 (1988) (Glick Associates, Non-Registered and Non-Voting Citizens: What Can Reach Them) [*hereinafter* Glick Associates Report] (describing feelings of alienation from political process of African-American and Latino nonvoters).

103. When political mobilization ebbs, the independent effect of registration restrictions diminishes. When political stimuli increase, such restrictions have larger depressive consequences. The real losses in

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This absence of partisan competition in the twentieth century also may explain the lack of legislative will to expand the electorate to include the persistently unregistered. Given the relatively low levels of mobilization in this country, neither the Democrats nor the Republicans has seen the need in this century to solidify their political base by expanding the electorate.<sup>104</sup> Rather, incumbents on both sides of the aisle, who have been chosen by the existing electorate, have become entrenched in their positions as professional politicians. Many of these professional politicians are loathe to broaden the electorate beyond the groups with whom they are most familiar.<sup>105</sup> Instead, it appears that many in both parties are growing content with their roughly equal share of the shrinking electoral pie.<sup>106</sup>

In the last twenty years, Congress has been unable to forge a consensus to rid the voter registration system of the maze of requirements that unfairly burden those who are most vulnerable to electoral restrictions because of their poverty, high rates of mobility, greater level of illiteracy, and greater alienation from the political process.<sup>107</sup> Despite broad public and congressional recognition of the crisis of declining registration in the last twenty years,<sup>108</sup> at least forty-four voter registration reform bills have been introduced unsuccessfully in Congress. Most of the proposed legislation contained some combination of agency-based, mail-based, census-based, or same-day voter registration systems which were aimed at increased access to voter registration. Many contained mechanisms for updating registration lists as well. In some cases, the bills proposed schemes to shift the responsibility for maintaining current

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participation are not amongst those who already are active voters. Rather, the restrictions inhibit the mobilization of inactive and coming-of-age voters. KLEPPNER, *supra* note 5, at 87. Personal registration requirements were one aspect of the movement that resulted in electoral demobilization. Transformation of other electoral rules contributed significantly to the end of partisan competition in American politics. See *supra* note 15 and accompanying text.

104. Winner-take-all election rules, which stifle the growth of opposition movements, contribute to this absence of political competition and contribute to the complacency of the mainstream political parties. See LUCIUS J. BARKER, *OUR TIME HAS COME 107-08* (1988), for an anecdotal discussion of the winner-take-all rules within the Democratic Party and in elections generally that were criticized by Rev. Jesse Jackson as stifling the ability of African-Americans and other minorities to become an active force in electoral politics.

105. See Quinlivan, *supra* note 95, at 2383-84, and Crotty, *supra* note 98, at 78, for discussions of the legislative self-interest in resisting electoral reform.

106. Burnham, *supra* note 71, at 156; PIVEN & CLOWARD, *supra* note 6, at 181-82 (noting that in the 1980s, the Democratic and Republican Parties were not the main competitors for new voters, but that activists within both parties mounted registration drives in an effort to bring new voters into the parties to gain influence over party policies). See WASH. POST, Sept. 16, 1988, at A27 (quoting Rev. Jesse Jackson's observation that established politicians, particularly state elected officials, have little incentive to register persistently unregistered voters because mobilization of such voters "expand[s] the base and create[s] a new equation that is threatening to those who favor the status quo").

107. Glick Associates Report, *supra* note 102.

108. See, e.g., REPORT OF THE PRESIDENT'S COMMISSION ON REGISTRATION AND VOTING PARTICIPATION (1963); WASHINGTON RESEARCH PROJECT, *THE SHAMEFUL BLIGHT* (1972); *The Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 1 (1984); *Voter Registration: Hearings Before the Subcomm. on Elections of the Comm. on House Administration*, 100th Cong., 2d Sess. 8 (1988).

registration lists to the government.<sup>109</sup> Other proposed reforms have focused on driver's license possession or have relied on access to other politically relevant private resources.

## II. VOTER REGISTRATION REFORM: BALLOT ACCESS VERSUS BALLOT SECURITY IN THE 20TH CENTURY.

In recent years, the debate over voter registration has shifted away from the "intelligent use" of the ballot and advocates of registration restrictions have focused more directly on ballot security and the prevention of voter fraud. The suspension of literacy tests in certain jurisdictions with the passage of the Voting Rights Act of 1965 (Act), and the ultimate widening of the ban to create a permanent, nationwide prohibition against literacy tests in 1975, undoubtedly played an important role in this change.<sup>110</sup> Both Congress and the courts made extensive findings during this ten-year period that decisively established the links between unequal educational opportunities for minorities and the discriminatory application and operation of literacy tests.<sup>111</sup> Arguably, the permanent nationwide ban on literacy tests represented an implicit Congressional judgement that in the context of a history of discriminatory application of the tests, a state's purported interest in the intelligent exercise of the ballot could not outweigh the voting rights of illiterate citizens.<sup>112</sup>

Indeed, following the passage of the Act, many thousands of illiterate and semi-literate voters were registered with the assistance of federal examiners. Prior to 1965, African-American voter registration rates hovered at a low 29% on average, compared with 73% for Whites. By 1981, in many states covered by section 5 of the Act over 50% of eligible African-Americans were registered to vote.<sup>113</sup> Not unexpectedly, however, from its inception the Act's

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109. See Quinlivan, *supra* note 95, at 2387 n.169, 2388 n.171, for a comprehensive listing of voter registration reform legislation in the last 20 years.

110. See Pub. L. No. 89-110 (1965); Pub. L. No. 94-73 (1975).

111. See, e.g., H. Rep. No. 196, 94th Cong., 1st Sess. 16-18 (1975); H. REP. NO. 397, 91st Cong., (1970), reprinted in 1970 U.S.C.C.A.N. 3282; *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (Faced with evidence of a long history of the discriminatory use of literacy tests as well as the country's history of discrimination in educational opportunities, "Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War Amendments."); *Gaston County v. United States*, 395 U.S. 285, 289 (1969) (The legislative history of the 1965 Voting Rights Act discloses that Congress was "fully cognizant of the potential effect of unequal educational opportunities upon the exercise of the franchise. This causal relationship was, indeed, one of the principal arguments made in support of the Act's test-suspension provisions."); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (congressional determination that literacy tests are a discriminatory barrier to voting is appropriate).

112. Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 653-54 (In enacting § 4(e) of the Voting Rights Act, outlawing English literacy requirements for voting, Congress could have determined that prejudice played a prominent part in the enactment of such requirements and promoting the intelligent use of the franchise was not the actual interest being served. In the alternative, Congress may have questioned whether denial of the right to vote was a necessary or appropriate means of furthering the goal of an intelligent exercise of the franchise.).

113. H. Rep. No. 227, 97th Cong., 1st Sess. 7 (1981).

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goal of greatly expanding voter registration encountered resistance from quarters in which ballot security and fraud prevention enjoyed the highest priority.<sup>114</sup> Thus, in the last twenty-five years, voter registration reform has been driven by the tension between the Voting Rights Act mandate to broaden electoral opportunity and the demand for ballot security in the face of more expansive registration provisions. This part first analyzes the dilemma of modern registration reformers seeking to create expansive registration programs that rely on voter access to critical private resources. It then addresses the likely impact of ballot security mechanisms, such as voter list cleaning programs, on minority, poor, and illiterate voters.

The clearest indication of how reformers answer the question “who are to be the electors?” is the vehicle they choose for affirmative voter registration programs. Registration programs that focus on agencies with broad ties to the population, particularly the Social Security Administration and the Census Bureau,<sup>115</sup> are likely to realize the greatest increase in voter registration. Reform proposals that rely on motor vehicle departments and other agencies with more restricted clientele will not have as expansive an effect on voter rolls, because they reach a narrower segment of the eligible population.

Analysts project that motor vehicle-based and mail registration programs could realize a maximum 9% increase in voter registration nationwide.<sup>116</sup> Under motor vehicle agency-based (“motor voter”) programs, African-Americans, other minorities, and the poor are unlikely to experience the same level of increase in voter registration levels as Whites.<sup>117</sup> According to driver’s license information from four of the six states that currently maintain motor vehicle statistics by race, significant disparities exist between African-Americans and Whites in rates of driver’s license possession, ranging from ten

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114. See, e.g., H. Rep. No. 439, 89th Cong., 1st Sess. 43 (1965). This report cited projected increases in African-American voter registration that were likely to result from the Act as a basis for enacting stringent antifraud provisions in an alternative Republican voting rights bill. While the announced purpose of such provisions was the protection of the African-American voter, the proponents of the ballot security measures opposed such voting safeguards as provisions outlawing voter intimidation or coercion by private citizens.

115. See, e.g., S. 214, 101st Cong., 1st Sess. (1989) (mandating the Department of Health and Human Services to establish counterfeit-free Social Security cards that eventually could be used as voter registration cards); H.R. 3023, 100th Cong., 1st Sess. (1987) (Voter Participation Act) (establishing election day and mail registration for federal elections); S. 1177, 94th Cong., 1st Sess. (1975) (Voter Registration Act) (amending Title 13 of the United States Code to establish voter registration administration within the Census Bureau); H.R. 4093, 94th Cong., 1st Sess. (1975) (Voter Registration Act) (same); S. 472, 93rd Cong., 1st Sess. (1973) (Voter Registration Assistance Act) (amending Title 13 of the United States Code to establish a voter registration administration within the Census Bureau to administer financial assistance to the states to encourage voter registration).

116. COMMITTEE FOR THE STUDY OF THE AMERICAN ELECTORATE, CREATING THE OPPORTUNITY 5 (citing STEVEN ROSENSTONE & RAYMOND WOLFINGER, WHO VOTES? (1980)).

117. For example, 1980 United States census data show that in eastern Arkansas, 42% of African-Americans, compared with 9% of Whites, do not have access to a motor vehicle. BUREAU OF CENSUS, DEP’T OF COMMERCE, 1980 REPORT.

percentage points to eighteen percentage points.<sup>118</sup> In fact, motor voter registration would not adequately reach low-income voters of any race.<sup>119</sup> In short, a significant potential gap in voter registration rates among minorities and the poor is *built into* any reform package that is based on driver's license possession.

The most effective way to broaden access to voter registration for minorities and the poor is to shift the burden of registration to government agencies that have universal contacts within the eligible electorate or to those whose services are specifically targeted to minority and poor people.<sup>120</sup> This is particularly important where minorities with long histories of electoral exclusion are concerned. If you consider that the ultimate goal of voter registration is increased voting strength and political empowerment, concern with motor voter registration programs has a uniquely racial dimension. In this society, where race is a crucial determinant of voting behavior<sup>121</sup> and political contests tend to be highly racially polarized,<sup>122</sup> the determining factor in political contests will be minority voting strength relative to Whites, not absolute numbers of minority voters. Where programs that have the potential to realize absolute numerical increases in minority registration register Whites in greater proportion than minorities, the programs actually may perpetuate the unfair political advantage enjoyed by Whites as a result of historic electoral exclusion of minorities. However, even where affirmative registration provisions are broadly inclusive, when combined with onerous or "punitive"<sup>123</sup> ballot secu-

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118. In Maryland, 1990 figures show that 90.6% of eligible Whites have driver's licenses while only 80.1% of eligible African-Americans have them. Telephone interview with Michel Letre, Assistant Director of the Maryland Office of Planning, Data Planning Services. In Louisiana, 87% of eligible Whites, as compared with 69% of eligible African-Americans have driver's licenses. Telephone interview with Karen Paterson, State Demographer, Louisiana Division of Administration, Office of Planning and Budget. Ninety-five percent of eligible Whites in North Carolina as compared with 83% of eligible African-Americans have driver's licenses. Telephone interview with Francine Stevenson, Manager, North Carolina State Data Center, Office of Budget and Management. In Alabama, whereas 90% of eligible whites have driver's licenses, 74.4% of eligible African-Americans have them. Telephone interview with Mary Holt, Assistant Manager for Data Information, Alabama Department of Public Safety.

119. Analysts estimate that between 87% and 91% of the eligible electorate overall has driver licenses while only 62.5% of the lowest economic fifth of the adult population—a group that is disproportionately comprised of minorities and women—has them. Put another way, almost 50% of persons who have annual incomes of less than \$10,000 do not have a driver's license. National Highway Traffic Safety Administration, United States Department of Transportation. According to Census Bureau figures, 43% of African-American men, and 58.9% of African-American women have annual incomes under \$10,000. In contrast, only 25.2% of white males and 53.0% of white females have incomes of under \$10,000. BUREAU OF CENSUS, DEP'T OF COMMERCE, 1980 REPORT.

120. See PIVEN & CLOWARD, *supra* note 6, at 222.

121. Richard L. Engstrom, *Definitions, Measurements, and Statistics: Weeding Wildgen's Thicket*, 20 Urb. Law. 175, 187-88 (1988).

122. See *Thornburg v. Gingles*, 478 U.S. 30, 52-61 (discussing operation of racially polarized voting in context of vote dilution claims under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended 1982).

123. The term *punitive* is used here to describe the feature of the system that imposes a duty on the state to affirmatively remove voters who do not respond to address verification inquiries from the active voter lists. It is quite possible to enact a system that, while requiring voters to update their addresses, would not mandate loss of the right to vote for failure to do so. For example, in most states, drivers have a legal

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rity provisions, such registration reform packages effectively can wipe out many of the registration gains realized.

A typical voter purge program would require each state to implement a voter list-cleaning procedure consisting of a system of address-check mailings requiring a timely response to ensure that the voter's name remain on the active rolls. The provisions could differ as to the trigger for address verification, the number of and manner in which the address check inquiries are sent, and the time allowed for the voter's response. To the extent that such programs provided that failure to respond to the address verification inquiries could result in the voter's removal from the rolls, they would be punitive. Address verification provisions might require states to conduct programs that make a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of the death, or a change of residence. Even where language mandated that address verification programs not result in removal of voters for failure to vote, if removal could result from a combination of failure to respond to a letter and failure either to appear at the polls to vote or to actually vote, the result would be the same.

Address checks could be triggered by change of address information from the post office or other agency. Once alerted to an address change, the state would send a return card on which the registrant could state his or her current address. If the card were not returned within a specified period, the voter could be required to verify her address by written or oral attestation<sup>124</sup> before being permitted to vote in subsequent federal elections. Procedures to allow persons who move within voting jurisdictions to vote notwithstanding failure to notify the registrar of the change of address could be used to ameliorate the harsh effects of punitive address checks on poor and minority voters, who tend to move within voting jurisdictions.<sup>125</sup> Provisions requiring voting registrars automatically to correct the official voter lists in accordance with change of residence information obtained through the address verification program would improve the likelihood that more voters would stay on the rolls.

Many states verify eligibility within a voting jurisdiction by purging voters who have not voted in a given period of time. This practice assumes that those individuals have moved out of the jurisdiction. At best, this is an inaccurate proxy for determining eligibility. Moreover, the purge for nonvoting burdens the right of those who abstain, for political reasons or otherwise, from the election process. The ostensible purpose of address check provisions is to

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duty to update their licenses when they move; however, they are not penalized with loss of driving privileges for failure to do so.

124. Without a clearly specified procedure for address confirmation at the polls, procedures could be formulated and applied in an arbitrary and discriminatory manner. Provision for oral attestation responds to concerns that illiterate voters would be prevented from voting by their inability to complete a written attestation of eligibility.

125. See *infra* note 133.

enable local officials to verify voter eligibility within particular jurisdictions without the threat of purging for failure to vote. However, while solving one problem, such provisions could create a potentially larger problem with particularly harsh consequences for disadvantaged voters. The problem stems from the fact that the voters most often purged are those who lose their eligibility by moving, not those who deliberately abstain from voting.<sup>126</sup>

For voters with high local mobility, the effect of punitive address verification procedures is to impose the functional equivalent of a periodic registration requirement.<sup>127</sup> The disfranchising effect of periodic registration on highly mobile voters was demonstrated dramatically in 1898 by the shrinking of Louisiana's African-American electorate, many members of which were transient tenant farmers.<sup>128</sup> The attractiveness of address check mechanisms despite their harsh effects on highly mobile voters, may be attributable to the fear that people who are highly mobile, who are presumed to have neither political roots nor a stake in a community, are unreliable and easily manipulated voters.<sup>129</sup> This concern may very well have its roots in turn-of-the-century crusades in northern urban areas against the political mobilization of transients by the partisan machines.<sup>130</sup>

The focus of purging on address verification rather than on voter activity imposes an especially heavy burden on the most disadvantaged voters,<sup>131</sup> an anomalous outcome for reforms aimed at expanding electoral access.<sup>132</sup> Cen-

126. Letter from Raymond Wolfinger to Judy Crockett 1 (July 10, 1989) (on file with author).

127. Voters who move within a precinct and do not receive an address verification card could lose their right to vote. Such voters, even if they continue to vote, would not be presumed to be registered, nor would they receive automatic protection from purging. They would be required to prove their continued eligibility to vote at the next election after their names were removed from the official list for failure to return the address card. Such a program would inevitably burden poor and minority voters disproportionately, as such voters have much higher local mobility rates.

128. See *supra* note 42 and accompanying text.

129. See *supra* note 81 and accompanying text. See also *Pitts v. Black*, 608 F. Supp. 696, 700-02 (S.D. N.Y. 1984) (testimony of election official positing that state protects compelling interest in ensuring that voters have an interest in elections by requiring fixed residences). *But see* *Voter Registration of Homeless Persons*, Formal Op. N.J. Att'y Gen. No. 2 (Apr. 17, 1991) (A state's interest in voter residency is satisfied by homeless voters' presence in a "preserve within the election district which may fairly be regarded as what the applicant for registration calls or thinks of as home.").

130. See *supra* notes 80-83, and accompanying text.

131. Studies show that when minorities are registered to vote they are "very likely" to vote, in roughly the same numbers as white voters. Steve Barber, et. al., Comment, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. CIV.R.-C.L. L. REV. 483, 491 & n.38 (1988). The irony of address purge provisions is that they would subject to the risk of purging conscientious voters who continue to participate at the polls and who have not changed jurisdictions but who merely become caught up in the confusing verification procedures created by the provisions.

132. This is a particularly harsh result because local mobility does not affect the voter's eligibility. Even the most enthusiastic and persistent voters who, though not lacking political will, are frequently rendered ineligible to vote because economic circumstances force them to relocate, will tire of the endless circle of purging and reinstatement and choose simply not to participate in the political process. Political scientists have noted the large number of elections in which Americans are asked to participate in comparison to other western democracies. The sheer repetitiveness of the process may discourage some voters or diminish the value of participation. When onerous reinstatement requirements are superimposed on this process it is not difficult to imagine the alienating effect on voters. S. Rep. No. 101-140, 101st Cong.,

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sus data demonstrate that the lower a person's income, the more likely she is to relocate within the geographical voting unit. Moreover, minorities have a much higher rate of local mobility within counties than do Whites. Latinos have the highest local mobility rates of all population groups.<sup>133</sup> Because of the high rates of local mobility among minorities and the poor, often the result of inferior housing stock in their neighborhoods, purge provisions that permit removal of persons making moves within a jurisdiction inevitably affect minorities and the poor disproportionately.

Concerns about the disproportionate impact of address verification procedures on minority and poor voters are heightened by the fact that the procedures rely on a series of eligibility inquiries mailed to individual voters. The problem of lower mail delivery and response rates in minority and poor neighborhoods has been documented. Responses to Internal Revenue and Census forms, documents that are mailed by the government and to which replies are mandatory, provide useful models for estimating possible outcomes of voter address verification requests. Both Internal Revenue data<sup>134</sup> and preliminary survey data regarding the 1990 census<sup>135</sup> suggest that a major contributor to low response rates in minority communities may be ineffective mail delivery.<sup>136</sup> Preliminary data from census district offices corroborates

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1st Sess. 36-37 (1989) (minority views) (citing Richard W. Boyd, *Decline of U.S. Voter Turnout, Structural Explanations*, 9 AM. POL. Q. 133 (1981)).

133. The data indicate that between 1986 and 1987, local mobility rates were 17.6% for Latinos, 13.9% for African-Americans and 10.5% for Whites. It is important for the purposes of voter registration to isolate *local* mobility rates as opposed to mobility overall for minorities. Overall mobility appears to be about the same for Whites and minorities, according to 1987 census data. Whites, however, are much more likely to move across counties while African-Americans and other minorities are more likely to remain within the same voting jurisdiction. *Geographical Mobility: March 1986 to March 1987*, CENSUS BUREAU CURRENT POPULATION REP. 5 (1989).

134. In a 1988 poll conducted jointly by Louis Harris and Associates and the Internal Revenue Service, 59% of people with annual income of less than \$15,000 reported that they received federal income tax forms as compared with 73% of people making over \$25,000 per year. Telephone interview with Kevin Sharp, Operations Research Analyst, Internal Revenue Service, Research Division. Census data for 1980 showed that 68% of African-Americans have annual incomes under \$15,000. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1980 REPORT tbl. 95 at 1-59.

135. *New York Times* surveys taken in early 1990 indicated that 54% of those who said they had not received the census forms had annual family incomes of under \$30,000. Felicity Barringer, *Neglect and Acceptance Greet Census, Poll Finds*, N.Y. TIMES, Apr. 26, 1990, at B13. Calculations based on the survey data demonstrate that those reporting that they did not receive a census form were almost three times as likely to be African-American as the population as a whole. Eleven percent of Whites did not receive forms compared with 30% of African-Americans surveyed. NEW YORK TIMES CENSUS SURVEY REPORT, April 18-22, 1990 (on file with author). These surveys were conducted principally in downtown business areas where better educated and higher income groups tend to be overrepresented. Data from minority communities tend to show higher rates of nondelivery. Census data also reveal a pattern of lower response rates in minority communities where government requests for information are actually received. The *New York Times* survey revealed that while 79% of Whites interviewed reported returning the census forms, only 50% of African-Americans reported returning the forms. *Id.*

136. The available data reveal that other major reasons for lower census response rates among minorities may have relevance in the context of voter address check programs. These reasons include distrust of government, discomfort with reporting personal information, fear that information will not be kept confidential, and lack of confidence that the requested information will be used in meaningful ways. For example, in a 1979 study of privacy and confidentiality concerns of survey respondents prepared for



the survey data showing dramatic differences in response rates for African-American and white communities—generally a difference of fifteen percentage points.<sup>137</sup>

Additionally, functional illiteracy in poor and minority communities seriously increases the risk that voters in these communities will be purged for failing to respond to address verification requests. For example, in *Williams v. Osser*,<sup>138</sup> the plaintiffs produced a study showing that 58.5% of the voters stricken from the rolls for change of residence had not moved.<sup>139</sup> Testimony indicated that some people removed from the rolls for address changes still resided in the voting precinct but were unable to comprehend or respond to purge notices because they were illiterate.<sup>140</sup>

Under voter address-check provisions, in order to maintain their eligibility, voters ostensibly need only fill in the verification request with a current address and drop the postage-paid envelope in the mail. However, when this process is broken down into a series of basic literacy tasks, the challenge to the functionally illiterate voter becomes clear. In order to avoid being purged, a voter must read the address verification form, recognize the request for updated address information, comprehend the time limit for providing that information, comprehend the warning that failure to provide the information will result in a purge from the voting rolls, correctly address the attached card if the return address is not printed there, and mail the card within the time limit. Each of these tasks is a potential hurdle that disproportionately burdens voters with limited functional literacy.

There are many ways to measure adult literacy. Recent studies have attempted to measure American literacy levels in terms of the literacy tasks required in adult daily living, for example, proficiency in filling out forms and responding to written instructions of varying degrees of complexity. A 1986 study by the Educational Testing Service of basic literacy proficiency among

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the Bureau of the Census, African-Americans were more likely than Whites to report a lack of trust that the government would keep information confidential. NATIONAL RESEARCH COUNCIL, *PRIVACY AND CONFIDENTIALITY AS FACTORS IN SURVEY RESPONSE* (1979) (conducted by the NRC to assist the Census Bureau in improving census response rates).

137. In Los Angeles, California, the response rates for the majority African-American and Latino South Central area was about 48% compared with a response rate of 63% in predominantly white San Pedro. Eric Malnic, *State's 57% Census Return Rate Proves Disappointing*, L.A. TIMES, Apr. 17, 1990, at A25. Similarly, in Atlanta, census district office 2905, whose territory comprised a majority African-American area of the city, reported "check in" rates of 49% compared with "check in" rates in predominantly white District Office 2906 of 64%. "Check in" rates refer to the percentage of census questionnaires returned relative to the number sent out. Similar patterns occurred in Chicago. The predominantly African-American Near South Chicago neighborhood reported "check-in" rates of 43% compared with the predominantly white Northwest Chicago area, which reported "check-in" rates of 67%. Printout of census district office "check in" rates prepared by Jim Dinwiddie, Chief, Program Design Staff, Decennial Planning Division, Bureau of the Census (on file with author).

138. 326 F. Supp. 1139, 1142 (E.D. Pa. 1970).

139. This information was contained in the record of the subsequent trial on remand from the Third Circuit, *Williams v. Osser*, 350 F. Supp 646, 649 (E.D. Pa. 1972).

140. 326 F. Supp. at 1144.

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young Americans revealed that African-Americans and Latinos were significantly less likely to attain average proficiency in these areas of literacy.<sup>141</sup> These differentials can be explained by a number of factors. African-Americans and Latinos are nearly twice as likely to have terminated their schooling without receiving a high school diploma and white Americans are nearly twice as likely as African-Americans and Latinos to have completed two or more years of college.<sup>142</sup>

The study showed that basic reading is not the core problem of functional illiteracy. The problem is in complex information processing, precisely what is required by address check list cleaning provisions.<sup>143</sup> For example, only 40% of African-American respondents in one report could perform above the level of proficiency needed to execute tasks such as completing an address on an order form.<sup>144</sup> Moreover, 13% of the total research sample in a 1977 study did not address an envelope accurately enough to ensure that it would reach its final destination.<sup>145</sup>

Despite the obstacles that address verification procedures present to functionally illiterate and highly mobile voters—many of whom are minorities or poor—some insist that such provisions are critical to the prevention of voting fraud. For example, the Department of Justice has opposed such list cleaning provisions on the ground that they do not go far enough to ensure ballot security.<sup>146</sup> These positions reflect the view that any added ballot security from restrictive registration requirements outweighs the risk of losses in political participation among disadvantaged groups.<sup>147</sup> Opponents of expanded

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141. CENTER FOR THE ASSESSMENT OF EDUCATIONAL PROGRESS, EDUC. TESTING SERVICE, THE SUBTLE DANGER: REFLECTIONS ON THE LITERACY ABILITIES OF AMERICA'S YOUNG ADULTS 31 tbl. 3 (1987). The study analyzed four categories of literacy proficiency: reading, prose, document, and quantitative literacy. While the mean scores of white respondents in each of the literacy categories averaged in the sixtieth percentile, mean scores for African-Americans averaged in the low twentieth percentile. Mean scores for Latinos averaged in the mid-to-high thirtieth percentile.

142. *Id.* at 31-32.

143. Minority and white respondents alike had no trouble responding to forms requiring a single type of information, for example, a phone number. However, forms requiring entries plus an additional operation, for example, filling in a phone number on a message form and writing an appropriate message to accompany the number, posed serious challenges for the literacy impaired. *Id.* at 23. Literacy proficiency decreased with each additional processing demand. *Id.* at 25.

144. NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, LITERACY PROFILES OF AMERICA'S YOUNG ADULTS at tbls. 3, 5 (1986).

145. ADULT PERFORMANCE LEVEL STUDY, FINAL REPORT 28 (1977) (The Department of Education commissioned the Education Department of the University of Texas at Austin to conduct this study.) The fact that African-Americans lag some 20 percentage points behind Whites in literacy skills, *id.* at 38, suggests that as many as 43% of African-Americans would have difficulty in ensuring that their response to voter address information requests would safely be received by the proper authorities.

146. S. Rep. No. 60, 102d Cong., 1st Sess. 47 (1990) (departmental views of the Department of Justice, Office of Legislative Affairs).

147. Campbell & Converse, *supra* note 67, at 289 (“[R]esults in all cases show the immediate emergence of turnout differentials running in the expected direction. . . . The typical effect after strict controls are levied is for turnout in transient city center districts to fall from original figures in the 80 and 100 percent range to figures in the 30 to 50 percent range, with turnout in the better residential district staying in the 75 to 85 percent range.”). *Id.* at 299 (“It is true that more stringent controls on the voting

voter registration cite findings in voter fraud investigations, such as the recent reports of grand juries in Chicago and New York, in an attempt to demonstrate that the threat of voter fraud has not subsided.<sup>148</sup> Such narrow focus on fraud prevention is undergirded by two critical assumptions that seem better suited to the reform movement of the nineteenth century.

The first assumption is that there is a direct relationship between unrestricted voter registration laws and the existence of voter fraud.<sup>149</sup> No such relationship has been proven on the national level. For example, North Dakota, which does not have personal registration requirements, has conducted fraud-free elections for years, whereas Illinois and Louisiana, which historically have had restrictive personal registration requirements, have a history of periodic fraud in certain jurisdictions.<sup>150</sup> The absence of a correlation between liberal registration laws and voter fraud probably is the result of many independent factors, among them the values in the local political culture that make electoral fraud more or less acceptable.<sup>151</sup> Often this may reflect the community standards of conduct for local election officials as voting fraud is most likely to be committed by corrupt election officials rather than by individual voters.<sup>152</sup>

The role of election officials in election fraud has been well-documented. In testimony before Congress in 1983, the United States Attorney for the Northern District of Illinois, summarizing the findings of a large-scale investigation of voter fraud in that district, reported that the vast majority of indictments handed down as a result of the investigation were against election officials and precinct captains.<sup>153</sup> He noted that "[t]he reason is very simple. . . . We have discovered that those are the most culpable people in connection with the vote fraud that occurs on election day."<sup>154</sup> The Chicago and New York grand jury reports also demonstrate that election officials often

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process had the side effect of 'desocializing' a margin of the electorate from habitual political participation, and thus had retrograde consequences. . . . But it is worth keeping in mind the hidden ills, probably a good deal more serious, of the voting system in the decades prior to 1900.").

148. See S. Rep. No. 60, *supra* note 146, at 62-63 (citing Confidential Investigation R84-11 (N.Y. Sup.Ct. 1984) and Report of the Special 1982 Grand Jury, No. 82 GJ 1900, at 3-6 (N.D.Ill.)).

149. Richard Smolka, *Voter Registration and Vote Fraud: A Brief Description of Methods*, in THE APPEARANCE AND DISAPPEARANCE OF THE AMERICAN VOTER 191, app. D (1978).

150. *Id.*

151. *Id.*

152. See *Hearings on S. 1199, S. 2445, S. 2457 and S. 2574 Before the Senate Comm. on Post Office and Civil Service*, 92d Cong., 1st Sess. 78 (1971) (testimony of Sen. Kennedy); *id.* at 205-07 (testimony of Prof. Lloyd B. Omdahl, University of North Dakota) (In a survey of North Dakota election inspectors, many of whom had served for the 20 years since personal voter registration requirements had been repealed, not one of 79 inspectors reported requesting legal action against a voter for illegal voting. Eighty-five reported that they had never been advised, even informally, of illegal voting. In a survey of states attorneys, only one of 42 could recall an instance of prosecution, probably the only such instance in 20 years without personal registration requirements.); Harris, *supra* note 13, at 21-22. See also *supra* note 85 and accompanying text.

153. *Voting Rights Act: Criminal Violations: Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 98th Cong., 1st Sess. 4 (1983).

154. *Id.*

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play a critical role in voting fraud. The Chicago grand jury reviewing allegations of systemic voting fraud concluded that “there is an unmistakable link between the patronage system and vote fraud.”<sup>155</sup> The report explained that

the Chicago patronage system creates the incentive for precinct captains to steal votes on Election Day. The patronage system and the rewards and benefits it promises can be used by the precinct captain as an effective tool by obtaining cooperation from election judges and in carrying out illegal fraud activities.<sup>156</sup>

The New York grand jury commented extensively on the role of corrupt election officials in facilitating the organized fraud committed there.<sup>157</sup>

Indeed, whether or not corrupt poll officials are the major source of election fraud, concerns about pervasive election fraud of the kind cited in the Chicago and New York grand jury reports probably are outmoded. A 1974 study issued by the Office of Federal Elections reported that since 1963, only 3% of 6,233 election boards surveyed reported any complaints of fraud.<sup>158</sup> Moreover, it is true that historically the most vulnerable voters, particularly poor, uneducated, and transient voters, have been manipulated in corruption schemes. Thus, by enacting registration limits with a bias against these voters, the opportunity for corruption may be curtailed. However, to suggest that the only way to protect the most vulnerable voters and the public at large from these abuses is by denying these voters the right to vote is roughly equivalent to the suggestion that the patient be killed to cure the disease. More effective security checks that are less burdensome to the individual voter are available and are discussed in part III.

The second assumption of the antifraud activists is that racially discriminatory abuse of discretion by local officials, particularly in the South, to bar African-Americans and other minorities from voting is *not* voting fraud.<sup>159</sup> In fact, this assumption fails to include within the definition of fraud one of the most prevalent and well-documented forms of election fraud. Part I above discussed in some detail the racially discriminatory use of discretion during the Jim Crow era to keep Blacks from the polls. Incidents of fraud, particularly in the South, involving the racially discriminatory use of literacy and comprehension tests, denial of assistance to African-American applicants for voter

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155. Report of the Special 1982 Grand Jury, No. 82 GJ 1900, at 2 (N.D. Ill.) (on file with author).

156. *Id.* at 14.

157. See Confidential Investigation R84-11, at 9-10 (N.Y. Sup. Ct. 1984) (on file with author) (noting that a common method of voting fraud involved the creation of bogus registration cards with the help of inspectors from the Board of Elections who arranged the false cards among the legitimate ones to make the false cards “virtually undetectable”).

158. *Voter Registration By Mail: Hearings Before the Comm. on Post Office and Civil Service*, 94th Cong., 1st Sess. 639, 646 (1975) (statement of the Bar Association of the District of Columbia, Young Lawyers Section).

159. See, e.g., S. 921, 102d Cong., 1st Sess. § 201 (1991) (defining voting fraud to include buying and selling of votes and falsification of ballots or voter registration applications or election campaign reports required by state law, where the object of the fraud is to “secure the election of an official who, if elected, would have some authority over the administration of funds derived from an Act of Congress totaling \$10,000 or more” but making no mention of racially-motivated denial of access to registration or voting).

registration, and purging of African-Americans from voting rolls for mistakes on registration forms that Whites were allowed to make are well-documented.<sup>160</sup> These kinds of abuses still persist. For example, in *Jeffers v. Clinton*,<sup>161</sup> the court cited the following voting rights abuses in rural eastern Arkansas: interference of black poll watchers by local law enforcement officials and election officials, the tampering of ballot boxes, and the harassment and intimidation of black voters.<sup>162</sup> Additionally, the court noted incidents involving physical intimidation of voter activists—a white poll official pulling a knife on an African-American voter activist, and a throng of Whites, including election officials, preventing African-American activists from assisting African-American voters at the polls.<sup>163</sup> Congressional testimony in 1984 cited instances of deliberate refusal by white registrars to register African-Americans. In one case, a group of African-Americans waited in line while the chief registrar took personal phone calls and then accepted applications from Whites who came to register after the Blacks had formed the line.<sup>164</sup> The United States Commission on Civil Rights, in its 1981 report, detailed incidents throughout the South involving racially motivated denial of access to registration by local election officials.<sup>165</sup> Not all clear abuses of discretion by local officials reach the level of conscious fraud. However, in the context of historical race-based denial of black voting rights by local officials, clear infractions of local policy and practice, specifically aimed at denying African-Americans the opportunity to register, constitutes an egregious abuse of the public trust by such officials and is legally equivalent to fraud.<sup>166</sup>

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160. For example, in *United States v. Crawford*, 229 F. Supp. 898 (W.D.La. 1964), African-American voters were purged from voting rolls for mistakes in registration applications made by white voters who were not purged. African-American voters who later sought reinstatement were subjected to comprehension tests not administered to white applicants. See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *United States v. Duke*, 332 F. 2d 759, 763-65 (5th Cir. 1964); *Gray v. Main*, 291 F. Supp. 998 (M.D. Ala. 1966); *United States v. Dallas County Comm'n*, 229 F. Supp. 1014 (S.D. Ala. 1964).

161. 740 F. Supp. 585 (E.D. Ark. 1990).

162. *Id.* at 596.

163. *Id.* at 598-99.

164. See SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 98TH CONG., 2D SESS., AFTER THE VOTING RIGHTS ACT: REGISTRATION BARRIERS 3 (Comm. Print 1984).

165. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 54-59 (1981)

166. Fraud is defined as "intentional and successful employment of any cunning, deception, or artifice used to circumvent or cheat another." BLACK'S LAW DICTIONARY 337 (Abridged 5th ed. 1979). Sheer refusal to accept registration applications from African-Americans only, or closing registration offices during particular hours to thwart registration drives by African-Americans arguably fits within this definition of fraud as such practices clearly are cunning and deceptive and they cheat eligible applicants of their right to register. Constructive fraud is defined as "any act of commission or omission contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience and operates to the injury of another." *Id.* Where officials charged with the duty to register voters deliberately refuse to register Blacks, and thus violate the public trust, such conduct falls within the definition of constructive fraud. The ultimate harm to the public and to the integrity of the election system in such instances arguably is not very different from the harm caused by padding election totals with false ballots. In both cases, the election is corrupted by unfair and illegal enhancement of one side's chances for victory.

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Indeed the risk of fraud, whether by corrupt machines or racial supremacists, exists whenever local authorities enjoy unlimited discretion to administer elections. Reliance on onerous purging requirements and limits on individual access to registration to prevent corruption and fraud is misplaced when little attention is given to the most direct means of discouraging fraud—limiting the discretion of local officials.

### III. SOME PARAMETERS FOR MEASURING MEANINGFUL REGISTRATION REFORM

Part I of this Article explored the historic origins of restrictive registration requirements in this country and their continuing effects. Part II analyzed the ways in which registration reform that includes punitive voter list cleaning provisions can perpetuate racial and economic disparities in voter registration levels. This part explores the standards by which meaningful reform may be measured. It suggests that any standard must be tied to the broad principles of electoral inclusion inherent in the Voting Rights Act.<sup>167</sup> More specifically, I argue that the Voting Rights Act, coupled with the Fourteenth Amendment command that the lingering effects of past discrimination affirmatively be remedied, suggests that federal government intervention in the field of voter registration must guarantee meaningful ballot access to all groups of persistently unregistered voters in this country. Registration reforms that do not effectively reach these groups, in which minorities are overrepresented, may not meet this standard.

At least in theory, the passage of the Voting Rights Act of 1965 signaled a fundamental change in the historical debate surrounding voter registration. Congress, finding itself faced with an “insidious and pervasive evil which had been perpetrated . . . through unremitting and ingenious defiance” of the Fourteenth and Fifteenth Amendments,<sup>168</sup> determined that the federal government and the states had an affirmative duty to end discrimination in voting.<sup>169</sup> Congress’s emphasis on eradicating all voting barriers represented a clear repudiation of elitist definitions of the electorate and a commitment to provid-

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167. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. (forthcoming 1991) (noting that the statute’s “broad political equality norm” grants protected voters the right to challenge government attempts to disadvantage voters through the use of “voting practices, standards and procedures,” and that “[a]s originally enacted in 1965, the Voting Rights Act was designed to ‘free [minority voters] from the near-tyranny of nonrepresentation’ and to make state and local government more ‘responsive’”). (unpublished manuscript at 7-9) (quoting H. R. No. 439, 89th Cong., 1st Sess. 1 (1965)).

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

169. *Id.* at 308 (“The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting that has infected the electoral process in parts of our country for nearly a century.”). See also Steven L. Lapidus, Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 FORDHAM L. REV. 93, 105-06 (1983).

ing the broadest possible access to the ballot.<sup>170</sup> Lawmakers at the time spoke of “legislative renewal of [the] basic faith” in government by and for the people.<sup>171</sup> While the Voting Rights Act was enacted specifically to address historic racial discrimination in voting, its vision of inclusiveness clearly should be applicable to all disadvantaged members of the electorate.

The legislative history of the Act and its amendments makes clear Congress’ intent to include voter registration within the Act’s policy of electoral inclusiveness. In 1965, Congressional fact-finding, on which provisions of the Act were predicated, focused on historic registration barriers for minorities. In eighteen full days of hearings in the Senate and House Judiciary Committees, Congress explored the rampant violations of constitutional voting guarantees committed by local jurisdictions.<sup>172</sup> One of the first witnesses to testify was Nicholas Katzenbach, then United States Attorney General, who played a critical role in the drafting and passage of the statute.<sup>173</sup> He expressly stated that continuing barriers to voter registration were one of the two “principal means of frustrating the 15th Amendment” that the Act was designed to address. At the close of the hearings, “Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.”<sup>174</sup>

The clear purpose of the 1965 Act was to greatly expand registration opportunities for disadvantaged voters by suspending literacy tests, poll taxes, and other discriminatory “practices, standards, and procedures” that barred the participation of African-Americans and other protected voters. Additionally, sections 6(b), 7, 9, and 13(a) provided for federal examiners in certain jurisdictions to assist affirmatively in registration by compiling lists of all qualified voters.<sup>175</sup> Depressed levels of voter registration became a critical trigger for coverage under section 5, the provision requiring federal preapproval before implementation of any voting changes in covered jurisdictions.<sup>176</sup>

170. See, e.g., 111 Cong. Rec. S8292 (daily ed., Apr. 22, 1965) (statement of Sen. Dirksen) (citing Declaration of Independence language that the just powers of government are derived from the consent of the governed and noting that because of the failure to enforce the Fifteenth Amendment, “[t]he final fulfillment of the basic concept set forth in the Declaration of Independence has not been achieved”).

171. H.R. Rep. No. 439, 89th Cong., 1st Sess. 37 (1965) (republican views of McCulloch, Poff, Cramer, Moore, MacGregor, King, Hutchinson and McClory).

172. See *South Carolina v. Katzenbach*, 383 U.S. at 310.

173. The Supreme Court has held that Katzenbach’s contemporaneous interpretation of the statute, “especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress,” is entitled to great deference. *United States v. Sheffield Bd. of Comm’rs*, 435 U.S. 110, 131 (1978).

174. *Katzenbach*, 383 U.S. at 309.

175. 42 U.S.C. §§ 1973d-1973f, 1973k (1982).

176. Under § 4(b) which set out the criteria for determining § 5 coverage, jurisdictions that maintained literacy tests and had less than 50% of voting age persons registered on the triggering date, would be covered by the preclearance provisions. 42 U.S.C. § 1973b (1982). Twenty-one states, including most of the former Confederacy, are covered in whole or in part by § 5.

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The preclearance provisions of the Act demonstrated Congress's recognition of the direct link between the history of exclusive registration practices and depressed registration rates, and its acknowledgement of an affirmative responsibility on the part of the federal government to eradicate past electoral exclusion through the mechanism of oversight by the Attorney General.

In 1970, in amending the statute to extend the temporary ban on literacy tests nationwide,<sup>177</sup> Congress focused on the "significant disparities . . . between white and nonwhite registration in areas covered by the Act."<sup>178</sup> In 1975, when preclearance was extended for another seven years, "burdensome, inadequate, and inconvenient registration procedures" were identified as practices that could deny minorities the right to vote. As noted in part II, in 1975, Congress also made the ban on literacy tests permanent.<sup>179</sup> Congress again amended the Voting Rights Act in 1982, this time to clarify that the "results" standard applied to voting rights violations. The 1982 amendments were enacted in response to *Mobile v. Bolden*,<sup>180</sup> the 1980 Supreme Court decision that created an "intent" standard for the Act.

The liability and remedy standards of amended section 2 provide useful guidelines for assessing the necessity for and scope of a federal remedy for persistent underregistration of minorities, the poor, and the illiterate. Under section 2 of the amended Act, the duty to remedy voting discrimination is triggered when, under the "totality of the circumstances," protected minorities have less opportunity than Whites to participate in the political process and elect candidates of choice.<sup>181</sup> Diminished political opportunity sufficient to impose remedial responsibility is established where plaintiffs can prove the existence of a history of official discrimination touching on the right to vote, an ongoing pattern of racially polarized voting, systemic features that tend to enhance the discriminatory effects of exclusive electoral mechanisms and lingering effects of historical socioeconomic discrimination, including lower levels of political participation.<sup>182</sup>

The Senate Report accompanying the amendments to section 2 instructs that the Act was intended to "create a set of mechanisms for dealing with continued voting discrimination, not step by step, but comprehensively and finally."<sup>183</sup> Thus, once unequal political opportunity is proved, the Act imposes stringent standards for the remedy. The offending jurisdiction bears the burden of

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

178. H. R. Rep. No. 397, 91st Cong., 2nd. Sess. 3 (1970).

179. *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong., 1st Sess. 74* (1975).

180. 446 U.S. 55 (1980).

181. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).

182. *Id.* at 70.

183. S. Rep. No. 417, 97th Cong., 2d Sess. 5 (1982).



coming forward with a plan that “promises realistically to work and promises realistically to work now.”<sup>184</sup> The proposed remedy must not itself violate section 2 by diluting minority voting strength either in its purpose or results.<sup>185</sup> Any proposed remedy must “completely remed[y] the prior dilution of minority voting strength and fully provide[ ] equal opportunity for minority citizens to participate” in the political process.<sup>186</sup>

For example, when legislative district lines are found to dilute minority voting strength in violation of section 2, it is not sufficient to redraw the lines to create a mathematical majority for the previously disfranchised voters.<sup>187</sup> Under section 2, the remedy for vote dilution must provide protected voters with “a *realistic opportunity* to elect officials of their choice.”<sup>188</sup> The notion of a “realistic opportunity to elect” requires courts assessing the adequacy of a proposed remedy to consider socioeconomic and demographic factors that affect voting strength. Under this standard, courts have required increments of minority population above 50% within remedial districts to account for lower voting age population, voter registration rates, and voter turnout in minority communities. In short, the command of the Voting Rights Act is that the remedy for unequal political opportunity be grounded in political reality, and that it address all aspects of that reality that thwart equal opportunity.<sup>189</sup>

In the context of voter registration, the history of official discrimination—in the North and in the South, by local officials and by state governments—is well documented. Likewise, the nationwide pattern of racial polarization in elections—the maze of registration restrictions that enhance the basic exclusive features of personal registration requirements and the harmful effects of those requirements, particularly on minority and other disadvantaged voters—has been established. Low rates of political participation in this country in the last twenty-five years are, at least in part, attributable to complex registration requirements that particularly burden would-be voters who suffer from the ongoing effects of socioeconomic discrimination. The combined presence of these factors point to the urgent need for a comprehensive remedy that will provide real opportunities for minority and poor voters to participate equally with Whites in the political process.

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184. See *id.* at 31 n.121 (citing *Green v. School Bd. of New Kent County*, 391 U.S. 430, 439 (1968)).

185. *Edge v. Sumpter County School Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985).

186. S. Rep. No. 417, *supra* note 183, at 31.

187. Minority votes may be diluted by, among other things, submerging concentrations of politically cohesive minority communities, which are sufficiently compact and contiguous to constitute a majority in a single-member district, into a district in which a larger, bloc-voting white population systematically outvotes the minority community. See *Thornburg v. Gingles* 478 U.S. 30, 46-48 (1986).

188. *Ketchum v. Byrne*, 740 F.2d 1398, 1410 (7th Cir. 1984) (quoting *Kirksey v. Board of Supervisors of Hinds County*, 402 F. Supp. 658, 676 (S.D. Miss. 1975)) (emphasis added).

189. Cf. *Gingles*, 478 U.S. at 79 (requiring that courts undertake a “searching practical evaluation of the ‘past and present reality’ . . . to determine whether the political process is equally open to minority voters” and noting that such an inquiry demands an “intensely local appraisal of the design and impact’ of the contested electoral mechanisms” (citations omitted)).

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Under these conditions the remedial principles of the Voting Rights Act demand the implementation of federal voter registration programs that fully eradicate historic disparities in registration levels of minorities and the poor. To the extent that such programs fail to take into account the particular vulnerabilities of this country's most disadvantaged voters, registration reform efforts will not fulfil the Voting Rights Act's promise of full electoral opportunity and real working remedies for political exclusion. Ideally, registration reformers would heed this promise and again explore the possibility of creating federal programs to set up permanent registration systems utilizing social security cards or programs that place upon the Census Bureau the responsibility of maintaining accurate nationwide registration lists. Same-day voter registration must also be explored. Given the sophisticated level of information processing systems in this country today, concerns about inability to verify the identity of potential voters are outmoded and should not be seen as an obstacle to broadening the electoral base.<sup>190</sup> At a bare minimum, passive address verification systems such as the National Change of Address System available through the United States Postal Service and now in use in several states should be implemented to obviate the need for less accurate systems that are susceptible to abuses of discretion. Finally, in order to effectively combat election fraud, guidelines must be given to the states to limit the plenary discretion of local officials in administering elections.

## IV. CONCLUSION

Since their inception, personal registration laws have shaped and defined this country's electorate. Often, groups with political power have seized on the laws to exclude from the electorate groups that they consider unreliable or undesirable voters. The fate of African-American voters in the South before and after Reconstruction, and that of the white working classes in the North, clearly demonstrate this pattern of official discrimination in voter registration. The legacy of this history is seen today in the complex maze of confusing registration restrictions in the states and the growing numbers of persistently unregistered and politically disenfranchised citizens.

The Voting Rights Act promotes the value of full political inclusion. When there is a history of official discrimination coupled with persistent disparities in registration and participation rates among protected voters, the policies of the Act require a solution that removes the disparities and provides full political opportunity. The Act's political inclusiveness values should apply equally to all groups of disadvantaged voters—minorities, the poor, and the uneducat-

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190. See *Voter Registration: Hearing Before the House Comm. on House Administration*, 101st Cong., 1st Sess. 138-40 (1989) (testimony of Rev. Jesse Jackson).

ed. With the growing crisis in electoral nonparticipation, it is incumbent upon the federal government to take full responsibility for opening access to the political process. To do otherwise is to take the risk that successive generations of minority, poor, and uneducated voters, who have persistently been unregistered, will never be politically socialized and will become ever more susceptible to demagogic and antidemocratic movements. Only if the federal government fulfills its responsibility for ensuring equal opportunity for electoral participation can we be assured that the electors will be *all* the people of the United States.