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Freezing Concept and Voter Qualifications

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must be left open to judicial inquiry based on reasonableness. Such an approach has been outlined by the Supreme Court in its *McLaughlin* opinion.

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THE FREEZING CONCEPT AND VOTER QUALIFICATIONS

Freezing is a new concept, with origins in time-proven legal doctrines. It extends beyond the narrow realm of voter registration into other areas where states have made unconstitutional racial classifications that must now be rectified. Nevertheless this discussion is limited to its application in the voter registration field. Freezing has two different and very distinct meanings. In one sense freezing is used to describe the effect of past discrimination coupled with new burdensome registration requirements in voter registration. In the other sense the term is used to depict the legal remedy applied to undo the results of past discrimination in voter registration.

The first meaning of freezing is exemplified where Negroes have been discriminated against in voter registration, so that in a given area most whites and very few Negroes are registered. The courts put an end to such discrimination, but before the Negroes can register the state adopts a new, though nondiscriminatory, registration requirement. In effect the new requirement freezes the privileged status of the whites, gained during a discriminatory period, and freezes out the group discriminated against.[1] This first type of freezing will be called discriminatory freezing.

The second and more important meaning of freezing, which will be called remedial freezing, is "the keeping in effect, at least temporarily, those requirements for qualification to vote, which were in effect, to the benefit of others, at the time the Negroes were being discriminated against."[2] In other words, it is the freezing of registration standards that were actually in effect when the great majority of white citizens were registered. A simple illustration of how this concept works is a situation where there are certain statutory requirements for voter qualification, such as reading a section of the state constitution and filling out a detailed application. Whenever white citizens appear to register the registrar disregards the statutory requirements of literacy and merely asks for the applicants' name, age, and address. When Negroes come to register, the registrar gives them a difficult section of the state constitution to read, and frequently finds technical errors in their answers so as to disqualify them. Invoking remedial freezing, the court would determine the actual standards as applied to whites, *i.e.*, name, age, and address, and would order the registrar, at least temporarily, to apply the same standards to Negroes regardless of what the statutory

[1] United States v. Ramsey, 331 F.2d 824, 837 (5th Cir. 1964).
[2] United States v. Duke, 332 F.2d 759, 769 (5th Cir. 1964).

requirements prescribed.[3] Remedial freezing has also been applied in recent cases to enjoin the enforcement of any new burdensome statutory registration requirements that have been adopted since the discriminatory period during which most whites were registered.[4] The adoption of a new burdensome, though constitutional, requirement which most whites did not have to face is an example of discriminatory freezing. Since remedial freezing is the application of actual white standards to the Negro, the application of remedial freezing necessarily requires enjoining the enforcement of any new burdensome requirements as well as of any old requirements not previously applied to whites.

The Growth of the Freezing Concept

Freezing has its basis in two famous and closely related cases extensively quoted and cited in all recent cases dealing with the concept. In *Guinn v. United States*[5] the Supreme Court held invalid an amendment to the Oklahoma constitution which established literacy requirements for electors and which also contained a grandfather clause. The grandfather clause exempted from the literacy test all lineal descendants of persons entitled to vote on or before January 1, 1866, under any form of government, or residing in a foreign nation at that time. The Court held that since the Negroes had no eligibility before that date, the amendment was invalid "as it necessarily recreates and perpetuates the very conditions which the Fifteenth Amendment was intended to destroy."[6] After this decision, Oklahoma passed another statute in 1916 requiring all citizens then qualified to vote to register within a twelve-day period or be forever disenfranchised.

In *Lane v. Wilson*,[7] the Supreme Court concluded that in effect this new requirement gave the Negroes only twelve days to re-assert constitutional rights which had been denied them twenty-five years before. The Court decided that twelve days was inadequate and held the statute invalid under the fifteenth amendment.

Obviously the *Lane* case is an example of an extreme attempt by the Oklahoma legislature to discriminatorily freeze the privileged status the whites gained during the period of discrimination prior to *Guinn* by the imposition of another burdensome statute before the disadvantaged Negroes had a chance to enjoy the rights secured by *Guinn*. Since the new statute was unconstitutional and the grandfather clause under *Guinn* was also void, the Court achieved the same end as recent decisions which have invoked remedial freezing.

Cases Invoking the Freezing Concept

The cases invoking the concept of freezing since 1960 have done so in part in reliance on the 1960 Civil Rights Act.[8] This is a result of the interpretation of that act in *Alabama v. United States*.[9]

[3] See *Id.*

[4] *Id.*

[5] 238 U.S. 347 (1915).

[6] *Id.* at 360.

[7] 307 U.S. 268 (1939).

[8] 74 Stat. 86 (1960) (codified in scattered sections of 18, 20, 42 (U.S.C.), amending, 18 U.S.C. §§ 837, 1074, 1509; 20 U.S.C. §§ 241, 640; 42 U.S.C. §§ 1971, 1974(a)-(e), 1975(d) (Supp. V, 1964).

[9] 304 F.2d 583 (5th Cir. 1962).

The 1960 Civil Rights Act set up the voting referee procedure,[10] whereby referees appointed by the court determine whether Negroes discriminated against pursuant to a pattern or practice are "qualified under state law."[11] If qualified, they are issued a certificate allowing them to vote. Accordingly, the court in *Alabama* ordered registration of sixty-four qualified Negroes.[12] In interpreting the act, the court held that Congress had expanded the federal courts' power in this area by allowing the courts to use the traditional tools of equity. Thus a step toward remedial freezing was taken by providing the power to enjoin the use of voting requirements which tended to discriminatorily freeze the preferred status of the whites, but which were not violative of the fourteenth or fifteenth amendments.

The first decision to actually invoke remedial freezing was *United States v. Penton*.[13] The Federal District Court found that the board of registrars had discriminated against Negroes by following certain procedures which had the effect of setting stricter requirements for Negro registration than for white registration. For example, the registrars would flunk Negro applicants for minor and technical errors in filling out their questionnaires, while white applicants were passed after making the same errors. Also, the registrars helped white applicants fill out the more obscure parts of the questionnaire, while Negroes were given no aid at all. The court concluded that such discrimination was obviously illegal under the fourteenth and fifteenth amendments. Consequently, in an effort to do equity, the court used the equitable powers given it by the 1960 Civil Rights Act and directed that certain qualified Negroes be registered, enjoined any further discriminatory practices, and ordered the same standard which had actually been applied to whites in the past to be applied to all future applicants. The court found none of the statutory requirements for voter registration unconstitutional.

The clearest illustration of freezing in both its aspects is *United States v. Duke*.[14] Evidence supported the court's finding of a pattern and practice of discrimination against Negroes in voter registration which existed in 1955 and subsequently. As a result of this discrimination most qualified whites in Panola County, Mississippi, were registered voters, while only two Negroes were registered in a county whose population is about equally divided between the two races. In 1960 and 1962 the legislature added new requirements such as "good moral character" and a "challenge procedure" which allowed a registered voter to challenge the good moral character of any applicant. Prior to these new re-

[10] 74 Stat. 90 (1960) (Title VI), 42 U.S.C. § 1971(e) (Supp. V, 1964).

[11] "Qualified under state law shall mean qualified according to the laws, customs, or usages of the state, and shall not, in any event, imply qualifications more stringent than those used . . . in qualifying persons, other than those of the race or color against which the pattern or practice of discrimination was found to exist." 74 Stat. 92 (1960) (Title VI), 42 U.S.C. § 1971(e) (Supp. V, 1964).

[12] The freezing cases have not followed the exact referee procedure. Rather than appoint a referee, the courts have ordered the county registrars to register Negroes previously discriminated against, using the same standards applied to whites during the discriminatory period. In other words, the courts used the test set forth in the 1960 Civil Rights Act for "qualified under state law."

[13] 212 F. Supp. 193 (M.D. Ala. 1962).

[14] 332 F.2d 759 (5th Cir. 1964).

quirements, the Mississippi statutory requirements for registration entailed being able to read, write, and interpret reasonably any section of the Mississippi constitution.[15] The actual standards applied to whites were far less stringent than called for by the statutes—practically nothing more than signing the list. Negroes were held to strict compliance with the statutes and almost always failed to pass. Since Negroes had been discriminated against under the old standards prior to 1962, the court concluded that the adding of the new registration requirements in 1960 and 1962, even though further discrimination had been enjoined and hopefully eliminated, had had the effect of discriminatorily freezing the whites' status. The court enjoined the further use of the new requirements. It decided that an appropriate remedy should undo the results of past discrimination as well as prevent future discrimination. Therefore it applied remedial freezing and ordered the Panola County registrar to apply to Negroes eligible to vote before 1962 the same standards as were actually applied to whites during the discriminatory period. Consequently the court also enjoined use of the interpretation test.

In 1965 the Supreme Court stated that "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[16] With these words the Court, in *Louisiana v. United States*, [17] affirmed the decision of the Federal District Court which applied remedial freezing.[18] There the court had struck down as unconstitutional Louisiana's law which required an "understanding and interpretation" of a clause of the state or federal constitution. The court also enjoined the use of a new citizenship test as a requirement for voter registration without declaring it unconstitutional.[19] The court concluded that the understanding and interpretation requirement was unconstitutional because it gave arbitrary powers to the registrar and was too subjective. Eliminating the unconstitutional requirements was not enough. The court held that use of the new citizenship test must be enjoined in order to minimize the discriminatory freezing effect. Thus the court retained for the Negroes the same standards as had actually been applied to the whites.

The new citizenship test has not been held unconstitutional and was not considered so in *Louisiana*.[20] Therefore it appears that the application of remedial freezing in *Louisiana*, as in other freezing cases, is in effect an alteration of

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[15] In *Duke* the court treated the interpretation test as being constitutional. But in a subsequent decision the Supreme Court held this same type of interpretation test unconstitutional under the fifteenth amendment. The Supreme Court also affirmed the lower court's application of remedial freezing in regard to other registration requirements. The Court enjoined the further use of a citizenship test until Negroes previously discriminated against had a chance to register under the same standards as applied to whites. Louisiana v. United States, CCH SUP. CT. BULL. 1101 (March 8, 1965), *affirming*, United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963).

[16] *Id.* at 1108.

[17] *Id.*

[18] United States v. La., 225 F. Supp. 353 (E.D. La. 1963).

[19] Louisiana v. United States, CCH SUP. CT. BULL. 1101, 1109 n.17 (March 8, 1965).

[20] *Ibid.*

constitutional state standards regarding voter qualifications. This raises a grave constitutional question not considered in the Supreme Court's decision.

Violation of States' Rights to Prescribe Voting Requirements

The power of the states to define the qualifications of voters is practically unlimited,[21] subject only to the restrictions in the United States Constitution.[22] This power applies not only to local elections,[23] but also to presidential elections.[24] The basic right of suffrage is not conferred by the United States Constitution, but, generally speaking, is derived from the states under state constitutions.[25] Although the right to vote for congressmen and senators is indirectly derived from the Constitution,[26] the Constitution gives Congress no power to prescribe the qualifications of electors in the states.[27]

The application of remedial freezing would appear to be violative of this state right to prescribe voter qualifications. Enjoining the application of valid state statutes and requiring the application of standards less stringent is surely an alteration of voter qualifications. The voting procedure under the 1960 Civil Rights Act, as applied, also appears to be an alteration of voting requirements as set out by the state legislature. Nevertheless, this procedure has been held constitutional several times by Federal District Courts.[28] One court stated that the referee plan was proper legislation regarding the manner of holding elections and did not affect voter qualifications, but rather was concerned only with those who were denied the right to vote though "qualified under state law."[29] This argument would seem to ignore the definition that Congress has given to the term "qualified under state law."[30] If the Negro applicant meets the qualifications which were previously applied to whites, the referee is directed to issue a voting certificate to him. Since this procedure directs registration of persons whose qualifications are below those now prescribed by state statute, it appears to be an alteration of voter qualifications.

Thus, although the Supreme Court has now approved of the use of freezing

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[21] *Accord,* Breedlove v. Suttles, 302 U.S. 277, 283 (1937); Guinn v. United States, 238 U.S. 347, 362 (1915); Pope v. Williams, 193 U.S. 621, 623 (1904); United States, v. Cruikshank, 92 U.S. 542, 555-556 (1875).

[22] See U.S. CONST. art. I, § 2; U.S. CONST. amend. XV.

[23] See State *ex rel.* Lamar v. Dillon, 32 Fla. 545, 14 So. 383 (1893).

[24] See *In re* Opinion of Justices, 118 Me. 544, 107 A. 705 (1919).

[25] See Pope v. Williams, 193 U.S. 621, 632 (1904); Mason v. Mo. 179 U.S. 328, 335 (1900); United States v. Cruikshank, 92 U.S. 542, 556 (1875).

[26] See United States v. Classic, 313 U.S. 299, 314-315 (1941); Pope v. Williams, *supra* note 24 at 633.

[27] See Newberry v. United States, 256 U.S. 232 (1921); Smith v. Blackwell, 34 F. Supp. 989, 993-94 (E.D. S.C.), *affirmed,* 115 F.2d 186 (4th Cir. 1940). See generally RITZ, CONGRESSIONAL POWER OVER VOTER QUALIFICATIONS, 49 A.B.A.J. 949 (1963).

[28] See United States v. Manning, 215 F. Supp. 272 (W.D. La. 1963); United States v. Manning, 206 F. Supp. 623 (W.D. La. 1962); United States v. Alabama, 188 F. Supp. 759, 762 (M.D. Ala. 1960).

[29] See United States v. Manning, 215 F. Supp. 272, 284-87 (W.D. La. 1963). See generally Note, 72 YALE L.J. 770 (1963).

[30] See note 11 *supra.*