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I. INTRODUCTION

Two significant events surround the holding of this Federalist Society symposium. First, we are approaching the nation's Bicentennial celebration of the Constitution. Second, we recently concluded the commemoration of the 100th anniversary of the Statue of Liberty. An issue that predates these two historical events and continually poses a moral and legal dilemma for Americans is that of race. The use of federal power in dealing with the dilemma of race has provoked past and contemporary debate.

This article will address the question of federal power as used to protect minority rights. For purposes of this discussion, the term "minority" will be narrowed to a single group: black Americans. It has been the struggle to validate black Americans' constitutional rights that fuels the remedial engine to which other "minority" groups have hitched their claims for equality. Thus, the focus of this article will be on the saga surrounding the application of federal power to vindicate legal rights of America's black population. Other groups may draw lessons from this discussion.

The history of the federal government's role in the protection of minority rights is extensive and varied. Ultimately, the Civil War was fought over the issue of slavery. President Lincoln's Emancipation Proclamation and the ratification of the thirteenth, fourteenth and fifteenth amendments to the United States Constitution were the basic federal efforts to ensure the

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continued vitality of the civil rights statutes previously enacted. Clearly, all this was done to protect the newly freed slaves and their descendants. During the Reconstruction Era, Congress established the Freedmen's Bureau and assigned it legal authority to undertake all remedial activities necessary for assistance to the former slaves.[1]

For over one hundred years our federal government has been a key player in either enforcing or attempting to remedy the vestiges of slavery. Our national history reveals that the federal government's role has shifted more than once. Now, in the present period, there is a concerted move to minimize federal involvement in the enforcement of civil rights and in the well-being of the descendants of slaves, and to transfer once again the superintendency of the condition of this group back to state and local government.[2] As this article will endeavor to demonstrate, the abandonment of responsibility by the federal government is hardly unprecedented. Rather, it is reflective of the popular casualness, almost cynicism, associated with references to slavery. This mood feeds the national amnesia about the country's most repulsive institution. It is at once a cause and effect of the current attempts to deny the existence of a caste system and refusal to acknowledge much, if any, of the federal obligation to deal with the modern manifestations of systemic, racially-based discrimination.

The Voting Rights Act of 1965[3] and other laws relating to civil rights for minorities are premised on the assumption that the President of the United States, the Attorney General and Assistant Attorney General of Civil Rights will all, as sworn, "take care that the laws be faithfully executed."[4]

While the problems of racial caste and disparate racial treatment emanating from color "differences" form a seamless web, this article will discuss the federal role in such areas as voting rights, housing, education, and employment. A discussion of these categories will by no means cover the entire canvas. One can, however, extrapolate from these examples an understanding of the systemic and institutional nature of racism, as well as a

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1. Amicus Curiae Brief, NAACP Legal Defense and Educational Fund, Inc. at 13-32, Board of Regents v. Bakke, 429 U.S. 953 (1977) (No. 76-811).

2. *See* R. WELKINS, STANDING FAST 221-46 (1982).

3. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

4. U.S. CONST. art. II, § 3.

sense of the history that justifies the continued use of federal power in the ongoing efforts to eradicate vestiges of an evil past.

II. Voting Rights

In a democratic society, access to the ballot is one of the most fundamental rights that a citizen can possess. This right gives citizens, among other things, the power to select their leaders. The power to select leaders is also the power to influence public policy. As long as citizens possess the right to vote, they have the ability to actively affect the manner in which they are governed. Take away that right and citizens' influence on their government is all but extinguished. But for blacks, the right to vote guaranteed by the fifteenth amendment was more an illusion than a reality for a significant period of our nation's history.

The attempt by blacks to gain the right to vote has been a long and difficult one. It remains a struggle affected in no small part by the federal government. A review of the role that federal power has played in this effort is both informative and disturbing. This review reveals quite clearly that, when so inclined, the federal government can validate the American promise that all people be treated equal. But just as clearly, when the federal government neglects its responsibility to protect the rights of all its citizens, its neglect can produce devastating results. To find an example of this neglect, one need look no further than to the period following Reconstruction, when the southern states actively sought to discourage black citizens from exercising their right to vote. By requiring literacy tests, imposing poll taxes, and using other tactics, the governments of the southern states, with federal acquiescence, succeeded in disfranchising the overwhelming majority of blacks.

The governments, however, are not the only entities capable of posing a threat to the right to vote. Private persons, using any number of tactics, have discouraged others from voting. The devastating impact that terrorist groups, such as the Ku Klux Klan, had on black voting in the decades following the Civil War provides powerful evidence that intimidation and outright violence discourages even the most persistent people from voting. But even these violent and obnoxious citizens' group bent on preventing certain people from voting would have little hope for success without, at the very least, the passive neglect of the government. Clearly, the government that conscientiously endeavors to protect the voting rights of all its citizens can easily over-

whelm even the most determined of those who seek to keep others from exercising this right.

In the end, then, the primary protector of the right to vote is the government. This is a federally guaranteed right. Its vitality for the nation's blacks has been directly correlated to the amount of effort put forth by the federal government to protect it. Proof of this can easily be found in the pages of history.

Prior to the Civil War, few blacks possessed the right to vote. In 1840, for example, only four states had equal black suffrage. In these four states—Massachusetts, Maine, New Hampshire and Vermont—the black population was very small.[5] A few other northern states did, at least theoretically, provide black suffrage. But the restrictions placed on blacks' right to vote served effectively to disfranchise that group. In New York, for example, a black could vote only if he owned $250 worth of real estate.[6] Needless to say, few blacks met this criterion.

Interestingly, in the forty years prior to the Civil War, none of the new states that joined the Union recognized black suffrage.[7] The majority of northern and western states denied blacks access to the ballot box during this pre-war period. In fact, by 1869, four years after the Civil War had ended, only six northern states had acted to allow blacks to vote.[8] None of these six states, however, had a large black population. In summary, no state with a large black population had accepted the notion of black suffrage[9]—obviously, prior to the Civil War none of the slave states allowed blacks to vote.[10]

The outcome of the Civil War changed this to some small degree. In the first years after the war, Congress began to exert its power in the direction of providing suffrage to blacks. On January 8, 1867, a bill was passed granting suffrage to those blacks living in the District of Columbia.[11] Three weeks later, Congress enacted another law forbidding the legislatures of the Territories from denying blacks access to the ballot box.[12] Congress next turned its attention to the South. This was in part

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5. B. QUARLES, THE NEGRO IN THE MAKING OF AMERICA 92 (1964).
6. *Id.*
7. *Id.*
8. Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York. L. FISHAL & B. QUARLES, THE NEGRO AMERICAN: A DOCUMENTARY HISTORY 261 (1967).
9. *Id.*
10. *Id.*
11. *Id.* at 132.
12. *Id.*

necessitated because in the first two years after the war most southern states appeared to believe that they would be able to continue to subjugate their former slaves. Although there was no denying that the institution of slavery was dead, most southerners were not inclined to allow the former slaves to participate in society in any meaningful manner. To this end, the southern states passed the Black Codes,[13] laws designed to physically control the former slaves. These codes were extremely harsh, and they raised a great deal of concern in the North.

Following the election of 1866, the Republican Party, which harbored strong anti-South sentiments, took control of Congress and reacted to Southern efforts to stymie blacks' rights. The politics of the period loomed large. The Republican-dominated Congress was determined to change the South. One of the first steps in this direction was the passage of the Reconstruction Act in March of 1867.[14] A key feature of this Act was its requirement that blacks be given the right to vote.[15] The southern states were also required to enact new constitutions. The delegates elected to the state constitutional conventions had to be chosen by an electorate that included blacks. Consequently, southern blacks were required to be active participants in the constitutional conventions.[16]

The constitutions drafted by these conventions included suffrage for blacks. Thus, former slaves were assured of the right to participate in the new southern governments. Following the ratification of these constitutions, a significant number of blacks were elected to both state and federal posts.[17] Surprisingly, at a time when most northern blacks were excluded from the political process, southern blacks, the majority of whom had been slaves only a few short years before, were active participants in

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13. B. QUARLES, *supra* note 5, at 129-31.

14. ch. 153, 14 Stat. 428; *see also* L. BENNETT, BEFORE THE MAYFLOWER 403 (1969).

15. ch. 153, 14 Stat. 428, 429; *see also* L. BENNETT, *supra* note 14, at 402.

16. ch. 153, 14 Stat. 428, 429; *see also* L. BENNETT, *supra* note 14, at 402 (Two-hundred sixty blacks served in this capacity.).

17. In South Carolina, a black, Jonathan J. Wright, served on the state supreme court as an associate justice for almost six years. Another, P.B.S. Pinchback, was elected lieutenant governor of Louisiana. Others were elected to positions as diverse as secretary of state, superintendent of education, prosecuting attorney, sheriff, and mayor. Several blacks were elected to state legislatures. The vast majority of black officeholders, however, were local officials. L. BENNETT, *supra* note 14, at 134-35.

A number of southern blacks were elected to Congress. Twenty black persons sat in the House of Representatives. Thirteen of them had been born into slavery. Two others, Hiram R. Revels and Blanche K. Bruce, served in the United States Senate. *Id.* at 135.

southern political life. Unquestionably, the primary reason that southern blacks were allowed to participate in southern politics was that the federal government had chosen to exercise its power in favor of protecting their right to vote. Only a display of federal power in the form of federal troops made possible the participation of blacks in the electoral process.

The apparent success of the Reconstruction Act was followed by the ratification of the fifteenth amendment in 1870.[18] The amendment was viewed by many as the high point of the struggle for black suffrage.[19] No longer could a state deter black access to the ballot box, or so it seemed.

In the years to come, it became painfully evident that the claims of victory were both premature and incorrect. It took blacks nearly one hundred years to regain all that had been won in those first five years after the Civil War. A look at the post-Civil War history of the South reveals this almost endless struggle for black suffrage.

The majority of white southerners were not pleased by the prospect of having blacks participate in governing the South. As long as the southern governments were controlled by Republicans and blacks, resisting whites had no legal means of stemming the tide of black participation. Not to be daunted by this inconvenience, these whites turned to extra-legal methods. Organizations such as the Ku Klux Klan, founded at Pulaski, Tennessee, in 1865, used violence and terror to keep blacks "in their place." Congress and state governments made half-hearted attempts to control these lawless groups. However, Congress failed to provide adequate funds to deal with the problem. By 1870, many white southerners were beginning to recapture political control of state governments. Once they reestablished control, one of the first things they did was undermine the black vote. A number of tactics were used: voting sites were kept secret from

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18. This amendment provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.

19. W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 162 (1965). One historian has noted that "[t]he war for Negro rights appeared to be won by placing the keystone of Reconstruction—the Fifteenth Amendment—into position." *Id.* Frederick Douglass expressed this same sentiment when, shortly after ratification of the amendment, he stated: "We have a future, everything is possible to us." B. QUARLES, *supra* note 5, at 138. This seemed to be an accurate statement, for within five short years after the Civil War many of the barriers to black suffrage appeared to have been removed.

black voters, ballot boxes were stuffed, election returns were doctored, and finally, state constitutions were amended to remove guarantees of equal rights. The southern governments did not stop there, however. As the federal government reduced its presence in the South, the southern governments became increasingly aggressive in their efforts to disfranchise blacks.

As long as the federal government maintained a presence in the South and enforced the Reconstruction laws, the rights of blacks were protected. But as the federal government began to reduce its military presence in the South, the blacks lost the only thing that stood between them and the white majority bent on reasserting their domination—the right to vote.

Of the many actors that combined to rescind Reconstruction gains, one of the most deadly was the resolution of the Hayes-Tilden deadlock over the presidency of the United States in 1876.[20] A southern filibuster was delaying resolution of the election. The political compromise that followed essentially sold out blacks and signaled that the newly-proclaimed federal rights of blacks would have to give way to "State's Rights." The Republican Party's acceptance of the compromise was unconditional:

> [W]e can assure you in the strongest possible manner of our great desire to have adopted such a policy as will give to the people of the states of South Carolina and Louisiana the right to control their own affairs in their own way; and to say further that we feel authorized, from an acquaintance with and knowledge of Governor Hayes and his views on this question, to pledge ourselves to you that such will be his policy.[21]

This "pledge" was successful. The filibuster was called off, resolution of Hayes' election was passed, and federal troops were withdrawn from the South. The fifteenth amendment was effectively nullified.

With this abdication of responsibilities by the federal government, state legislatures and state constitutional conventions enthusiastically turned to the task of restoring governmental and political control exclusively to white persons. Among the imaginative tactics used to accomplish this goal, a favorite was the

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20. *See generally* P. HAYWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 (1906).

21. *Id.* at 271 (quoting an unsigned letter from legislative leaders to Representative Brown and Senator Gordon).

literacy test. Generally, this test required a voter to be able to read a part of the Constitution in order to register to vote.[22] Though facially neutral, the test was applied in a racially discriminatory fashion. For example, illiterate whites were passed if they owned property or were of good character.[23]

Most states also adopted "grandfather clauses" that excused from compliance with literacy testing requirements those individuals and their descendants who had been registered on or before January 1, 1866. Since most blacks were not allowed to vote prior to January 1, 1866, few, if any, of them could qualify to register under the grandfather clause.[24]

Another favorite disqualifying tactic was the poll tax. This was a tax that all citizens had to pay before they could vote.[25] The tax had a disproportionate impact on poor blacks.

Perhaps the most effective method of disfranchising blacks, though, was the use of "white primaries." In states dominated by one party, the winner of the primary usually won the general election. Blacks were barred from participating in the white primaries and were thus effectively denied participation in the electoral process. The white primaries were difficult to challenge since the political parties that created them were private organizations, and thus were beyond the reach of the fifteenth amendment, which was directed only at governments.[26]

The southern states were highly successful in these efforts to disfranchise blacks. Statistics from two states are illustrative. In 1896, Louisiana had 130,334 registered black voters; by 1900 there were only 5,320.[27] In Mississippi, seventy percent of eligible black voters were registered to vote in 1867; by 1899 this figure had dropped to nine percent.[28]

After the federal government's failure to enforce the civil rights laws, there followed a period during which blacks were effectively, though not legally, disfranchised. Had the federal government chosen to aggressively and conscientiously enforce the laws, the states would not have been able to subvert these laws so easily and effectively. However, the federal executive author-

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22. B. QUARLES, *supra* note 5, at 145.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 8 & n.46 (May 1968).

ity was not the only culprit. The federal courts, too, by giving extremely narrow interpretations to the laws, and declaring some unconstitutional, contributed to the undermining of black suffrage. For example, in *James v. Bowman*,[29] decided in 1903, the Court held that the fifteenth amendment applied only to state actions. Therefore, a private citizen who wished to prevent blacks from voting would find the fifteenth amendment to be no impediment.

Despite the Supreme Court's initial hostility towards black voting rights, it would eventually take steps to protect these rights. In 1915, in the case of *Guinn v. United States*,[30] the Court held that grandfather clauses were unconstitutional because their only purpose was to exclude blacks from voting in violation of the fifteenth amendment. However, in this same case the Court upheld the use of literacy tests for voting, because, according to the Court, the use of such tests was an "exercise by the State of a lawful power vested in it not subject to our supervision . . . ."[31]

Moreover, in 1927 the Supreme Court struck down a Texas law that prevented blacks from participation in Democratic party elections.[32] In *Nixon v. Condon*,[33] decided in 1932, the Court declared unconstitutional a Texas statute that authorized the state Democratic Party to fix qualifications for voting in primaries. Finally, in *Smith v. Allwright*,[34] decided in 1944, the Court concluded that a rule of the Texas Democratic Party that limited party membership to whites was unconstitutional because the right to vote could not "be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election."[35] The Court was saying, in effect, that blacks could no longer be prohibited from participating in party primary elections because of their race. The white primaries were thereby effectively destroyed as a means of excluding blacks from voting.

These cases had a significant effect on black voter participation. One scholar has noted that they made possible "the initial

29. 190 U.S. 127 (1903).
30. 238 U.S. 347 (1915).
31. *Id.* at 366.
32. Nixon v. Herndon, 273 U.S. 536 (1927).
33. 286 U.S. 73 (1932).
34. 321 U.S. 649 (1944).
35. *Id.* at 664.

political mobilization of Negroes" in the South.[36] At the time that the Supreme Court handed down its decision in *Smith v. Allwright* in 1944, "Black voter registration in the eleven southern states stood at a level not substantially higher than that to which it had been reduced by the disfranchising efforts of the late nineteenth and very early twentieth century."[37]

The downfall of the white primary, which some have concluded was the "most effective" means of disfranchising blacks, had a dramatic effect on black registration figures.[38] By 1952, it is believed that twenty percent of all voting-age blacks in the South were registered to vote.[39] Thus, thanks to the Supreme Court's decision to protect black voting rights, the number of registered black voters in the South increased almost sevenfold in eight years. Much remained to be done, however. The states of the Old Confederacy were not yielding without a struggle.

With the realization that white primaries could no longer be used came the resolution to erect new barriers to black voting. Several southern legislatures set about performing this task. Despite their efforts, nothing that they devised was as effective as the white primary—black registration totals continued to increase through the early 1950s. Some southern legislatures, however, were successful in limiting, if not blocking, the number of black registrants.[40]

Although the federal courts did succeed in removing some of the restricting devices, the continued use of violence and intimidation by private groups succeeded in limiting the number of blacks who sought to be added to the registration roles. During the period from 1877 to the mid-1950s, the federal executive

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36. D. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 6 (1978) (citing H. HALLOWAY, THE POLITICS OF THE SOUTHERN NEGRO 331 (1969)).

37. *Id.* at 6. In 1940, only three percent of the approximately five million eligible black voters in the South were registered to vote. *Id.* It is estimated that in each of the states of Alabama, Mississippi and Louisiana approximately only two thousand blacks were registered. *Id.*

38. Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 542 (1973).

39. *Id.*

40. D. GARROW, *supra* note 36, at 9. In Mississippi, for example, the state legislature added a literacy test. This test, in combination with intimidation tactics used by citizens' groups, was very effective in keeping blacks from registering. In 1955, fourteen rural Mississippi counties had no black registered voters. *Id.*

Louisiana also strongly resisted. Through a variety of tactics, including extremely close scrutiny of black registration applications, registration dropped in 46 of the state's 64 parishes between 1956 and 1959. *Id.* at 10.

and legislative authorities did very little to assist the blacks in their struggle. Again, the gains made by blacks came about largely due to the intervention of the federal courts. The courts, however, were obviously not equipped to deal effectively and comprehensively with all of the barriers devised and put in place.

Not until the late 1950s, under President Eisenhower, did the executive and legislative branches take some steps in the direction of protecting minority voting rights. The Civil Rights Act of 1957[41] included subsections that prohibited actual or attempted intimidation or coercion of potential registrants or voters, empowered the attorney general to institute civil actions seeking injunctive relief in voting rights cases, and granted jurisdiction over such suits to the federal district courts.[42]

Despite the passage of this law, the Eisenhower Administration rarely initiated litigation in voting rights cases. This was reflected in the nonaggressive policies adopted by the Justice Department. For the most part, these policies were reactive. One observer noted the following:

> Instead of seeking to learn of discriminatory registrars, the division authorized an FBI investigation of a particular county's registration system only upon receipt of a formal, written complaint from someone in the locale alleging violations of federal law. Given the extremely limited, in many cases simply nonexistent, legal knowledge and advice available to rural southern blacks in 1960, such formal complaints were few indeed.[43]

While the 1957 Civil Rights Act did succeed in returning to the voting rolls previously registered blacks who had been ousted as voters, it failed to benefit those blacks who had never been registered. One critic noted that "[n]ot a single Negro who had not been previously registered was enabled to register to vote by federal action during the three-year period" following passage of the Act.[44]

The 1957 Act was followed by the Civil Rights Act of 1960[45]

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41. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (current version at 42 U.S.C. §§ 1971, 1975 to 1975e, 1993, 1995 (1982 & Supp. 1986)).

42. *Id.* §§ 1971(b)-(d).

43. D. GARROW, *supra* note 36, at 13.

44. Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1051, 1060 (1965).

45. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (current version at 42 U.S.C. §§ 1971, 1974 to 1974e (Supp. 1986)).

which, among other things, granted the Justice Department the right to examine registration and voting records upon demand and gave the attorney general the power to request a judicial finding of a "pattern or practice" or discrimination from a federal district court.[46] The 1960 Act also provided for the appointment of referees by the judge after such a finding.[47] The referee would reexamine the applications of those rejected by local registrars and would recommend to the judge that those deemed to be qualified be registered.[48] The judge could then order the registration of these individuals.[49]

Although the Kennedy Administration was more aggressive than the Eisenhower Administration had been in prosecuting lawsuits under the 1957 and 1960 acts, the majority of voting age blacks still remained unregistered by 1964. Only approximately 43.1 percent of voting-age blacks were registered by 1964.[50]

The Civil Rights Act of 1964[51] attempted to cope with the problems posed by southern intransigence. The part of the Act dealing with voting rights provides that (1) three-judge district courts be used in voting right suits to insure expedited handling; (2) registration standards be applied uniformly; (3) only written literacy tests be used; (4) applications shall not be rejected because of minor errors; and (5) a sixth grade education is presumptive proof of literacy.[52] The events of 1965 assured that the effectiveness of the proposals of the 1964 Act would never be conclusively established.[53]

The lack of success of the earlier laws in breaking through southern resistance was due in part to the fact that these laws sought to remedy the exclusion of blacks through judicial methods. In other words, these laws allowed lawsuits to be brought against those obstructing voter registration. This was a rather time-consuming and ineffectual means of attacking the problem.[54]

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46. *Id.* § 1971(e).

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* P. WATERS & R. CLEGHORN, CLIMBING JACOB'S LADDER: THE ARRIVAL OF NEGROES IN SOUTHERN POLITICS 376 (1967).

51. Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1447, 1971, 1975a to 1975d, 2000a to 2000h-6 (1982)).

52. *Id.* § 1971(a), 1971(g).

53. *See infra* note 55 and accompanying text.

54. As Chief Justice Earl Warren noted in 1966:

The passage of the Voting Rights Act in 1965[55] marked a dramatic change in the federal government's role in protecting minority voting rights. The federal government forcefully assumed the role as the primary protector of these rights. The most significant parts of the Act suspended the use of "tests or devices" for determining eligibility to vote.[56] Tests or devices included literacy tests, educational requirements, and good character tests.[57] The jurisdictions covered by the suspension subsection were those that (1) had "any test or device" in place, and (2) had low voter registration or turnout—where fewer than fifty percent of the age-eligible people were registered or where fewer than fifty percent had turned out for a presidential election.[58]

Another provision of the Act required that certain covered jurisdictions gain approval or preclearance from federal authorities before making any changes in voting laws or procedures, in order to make certain that the changes did not have the purpose or effect of denying or abridging the right to vote on account of race or color.[59] This particular section was an attempt to deal

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> The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.

South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966) (footnotes omitted). The Chief Justice also stated:

> Despite the earnest efforts of the Justice Department and of the many federal judges, these new laws have done little to cure the problem of voting discrimination. According to the estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1964; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1965. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.

Id. at 313.

55. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (current version at 42 U.S.C. §§ 1971, 1973 (Supp. IV 1986)).

56. *Id.* § 1973a(b).

57. *Id.* § 1973b(c)

58. *Id.* § 1973b(b).

59. *Id.* § 1973(c).

with the constant efforts of the states to keep one step ahead of federal regulation by changing the voting rights of minorities. By requiring prior approval of any changes, the federal government took a major weapon away from the states. Perhaps even more importantly, this section placed the burden of proof on those who were seeking to change the law, rather than on those who might have been victimized by any such discriminatory changes.

The Act also provided for the appointment of federal examiners to monitor elections and authorized the Attorney General to challenge the enforcement of any requirement of payment of a poll tax as a precondition to voting.[60]

The provisions of the 1965 Voting Rights Act were upheld by the Supreme Court in the case of *South Carolina v. Katzenbach*,[61] where Chief Justice Warren stated the following:

> After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil. . . . We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live.[62]

In 1970, the 1965 Act was extended for five years and literacy tests throughout the United States were suspended for five years.[63] In 1975, the Act was extended for another seven years.[64] In 1982, despite initial reluctance by the Reagan administration, the Act was again extended.[65]

While the 1965 Voting Rights Act has thus far failed to resolve all of the problems associated with minority voting rights, it has unquestionably been a step in the right direction. There can be little doubt that the Act has been the most significant piece of voting rights legislation in our nation's history. The Act represented the first bold effort by the federal government since

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60. *Id.* §§ 1973d, 1973h(b).

61. 383 U.S. 301 (1966).

62. *Id.* at 337.

63. Pub. L. No. 98-285, 84 Stat. 314 (codified at 42 U.S.C. §§ 1973 to 1973b, 1973c (1982)).

64. Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 42 U.S.C. §§ 1973, 1973d, 1973k, 1973l, 1973aa to 1973aa-5 (1982)).

65. 42 U.S.C. 1973b(7), 1973b(8) (Supp. 1986). *See also Without Justice: Leadership Conference on Civil Rights*, 8 BLACK L.J. 29, 50-51 (1983) [hereinafter *Without Justice*].

Reconstruction to attack the restrictions that states had placed on minority voting rights. By marshaling all of the resources at its disposal, the federal government succeeded in leveling many of the barriers to minority voting that had existed for decades.

An examination of black participation in politics, both in voting and running for office in the two decades since passage, provides strong proof of the Act's significant effect on minority voting rights.[66] In 1965, at the time the Act was passed, there were approximately two million black registered voters in the southern states. By 1984, this figure had risen to over 5.5 million.[67]

In 1965, there were few black public officials throughout the South. As of 1985, however, there were an estimated 3,500 such officials in that region. Among these officials are the mayors of such major southern cities as Atlanta, Georgia and Birmingham, Alabama.[68]

However, it would be naive to assume that all that can be done has been done or that the 1965 Act has been an unqualified success. The more overt methods of excluding blacks from the political process had been outlawed by federal action, but in their place more subtle methods arose. Through the use of at-large elections, multi-member districts, racial gerrymandering, and other tactics, southern states and some nothern communities have effectively continued to dilute the black vote. Thus, although blacks can no longer be prevented from voting, their votes can be made to count for less.

One political scientist has noted that:

> Numerous published studies have documented the fact that blacks are more likely to be underrepresented on, even totally excluded from, local legislative bodies when voting is at-large rather than within districts. Indeed, the tendency for at-large election systems to result in a greater underrepresentation of black people is one of the best confirmed generalizations in the literature of political science.[69]

The negative effect that at-large election systems have on the black vote should not be underestimated. At-large election

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66. D. GARROW, *supra* note 36, at 199.

67. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 257 (1986).

68. *Id.* at 252.

69. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How. L.J. 495, 496 (1985) (footnotes omitted).

systems are used in seventy-six percent of the black-majority municipalities which are within jurisdictions covered under the Voting Rights Act. No black representatives are found in the city councils in these municipalities. Of the municipalities within covered jurisdictions where blacks are in the minority, fifty-nine percent have at-large electoral systems and no black representation on local councils.[70] Blacks recently sued in federal court in Cincinnati, Ohio, to end the county-wide election of municipal court judges, which they claim is discriminatory.[71]

Such electoral systems can pose a serious challenge to minority voting rights. Combating this subtle danger to minority voting rights requires a determined federal effort. This is something that has been noticeably lacking in recent years. Although the 1982 extension of the Voting Rights Act was a positive step on the part of Congress to address the problems facing black voters,[72] many observers contend that hostility toward the rights of minorities persists and that the federal effort that is needed is not forthcoming.[73] They note that the executive branch's endorsement of the 1982 extension came only after a great public outcry.[74] Moreover, critics also argue that the Justice Department is less than enthusiastic in performing its duties under the 1965 Voting Rights Act.[75]

This section on voting has considered at length and in historical detail the attempts at using the federal power to protect the right to vote. The purpose for doing so is to make the point that, even in dealing with a constitutional right about which there can be no serious question, the roots of racial discrimination run deep indeed, and there is much yet to be done. One of the features of American democracy that distinguishes it from South Africa, for instance, is the access to the ballot that is guaranteed by the Constitution and the law. The protection for that access is a federal responsibility.

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70. *See Without Justice, supra* note 65, at 61; Ball, *The Perpetuation of Racial Vote Dilution: An Examination of Some Constraints on the Effective Administration of the 1965 Voting Rights Act, as Amended in 1982,* 28 How. L.J. 433, 436 (1985).

71. Mallory v. Eyrich, 666 F. Supp. 1060 (S.D. Ohio 1987).

72. 42 U.S.C. § 1973 (1982). Congress revised part of the Act to make it easier for individuals to challenge vote dilution.

73. *See Without Justice, supra* note 65, at 50-55.

74. *Id.*

75. *Id.*

III. Housing: Forty Acres and a Mule

The Supreme Court has declared that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[76] The same Congress that made slavery unconstitutional believed that the federal government would have to act affirmatively if those whom the Supreme Court had once declared to be property were now to become property owners. The Bureau of Refugees, Freedmen, and Abandoned Lands, created in 1865, contained three substantive provisions, one of which was the lease and sale of up to forty acres of abandoned land to any refugee or freedman.[77] In practice, freedmen were the only beneficiaries of the Bureau's programs for land distribution and adjustment of real estate disputes.

In 1866, the House and Senate passed the new Freedman's Bureau Bill.[78] The Bill included further benefits for freedmen to help them become property owners. It gave the President the power to reserve up to three million acres of "good" public land for rent and sale to freedmen and refugees.[79] The Bill also provided that blacks occupying certain lands south of Savannah could remain in possession for another three years; following that time, the Commissioner was authorized to provide them with other property. The supporters of the Bill pointed out that the special assistance provided to blacks did not constitute discrimination:

> [Congressman Marshall] says the bill provides one law for one class of men, and another for another class. The very object of the bill is to break down discrimination between whites and blacks. . . . Therefore I repeat that the true object of this bill is the amelioration of the condition of the colored people.[80]

Although President Johnson vetoed this Bill, and the subsequent bill passed in its stead did not include the provision for "good" land distribution, another act gave freedmen a priority in obtaining land. The Southern Homestead Act, enacted in

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76. Jones v. Mayer Co., 392 U.S. 409, 442-43 (1968).

77. H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 1 (1865).

78. Act of July 6, 1866, ch. 200, 14 Stat. 173. *See also* Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 762 (1985).

79. Schnapper, *supra* note 78, at 762.

80. Cong. Globe, 39th Cong., 1st Sess. 631, 632 (1866) (statement of Rep. Moulten).

1866, did not allow anyone who had "borne arms against the United States or given aid or comfort to its enemies" to lease or purchase public lands for six months.[81] This obviously excluded most southern whites from public land, while leaving it open to blacks. Clearly, those policy makers who were first faced with the problem of eradicating racial discrimination one-hundred twenty years ago realized that "color-blindness" could not erase the effects of centuries of slavery.

In these same years, 1865 and 1866, the thirteenth amendment was ratified and the Civil Rights Act of 1866 became law. Many authorities, including the Supreme Court,[82] have suggested that a major purpose of the thirteenth amendment was to confer upon Congress authority to pass sweeping legislation to secure the rights of blacks. Indeed, the Supreme Court held in the *Civil Rights Cases* that the enabling clause of that amendment clothed "Congress with power to pass all laws necessary and proper for abolishing all *badges* and *incidents* of slavery in the United States."[83] Pursuant to the goals of the amendment, Congress passed the Civil Rights Act of 1866. Pertinent to the discussion here is the language in that Act which guarantees to all citizens "the same right . . . as is enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property."[84] Thus, by 1866 Congress had made clear that discrimination in property rights was a badge of slavery and that it would take affirmative actions to eliminate such badge.

Despite the expressed intentions of the writers of the thirteenth amendment, the Hayes-Tilden Compromise of 1877[85] and the treatment of blacks following the *Plessy v. Ferguson*[86] decision in 1896 led to a half-century of virtually unchecked housing discrimination. Until the 1930s, the discrimination was not encouraged by affirmative government action, but rather, resulted from the government's failure to support the rights set forth in 1866. However, during the New Deal the government established the Federal Housing Administration,[87] the Federal Home Loan

81. Ch. 127, 14 Stat. 66, 67 (1866).

82. *See* Jones v. Mayer Co., 392 U.S. 409, 429-35 (1968).

83. 109 U.S. 3, 20 (1883) (emphasis added).

84. 42 U.S.C. § 1982 (1982).

85. *See supra* notes 20-21 and accompanying text.

86. 163 U.S. 537 (1896).

87. National Housing Act, ch. 847, 48 Stat. 1246 (1934) (codified in scattered sections of 12, 15, 18 U.S.C.).

Bank Board,[88] and the Homeowners' Loan Corporation,[89] which were designed to assist in financing housing.[90] In 1944, Congress created the Veteran's Administration loan guarantee program.[91] These programs affirmatively established racial discrimination in housing.

First, government housing programs were targeted at moderate and middle-income families,[92] and thus primarily benefited white families. Second, nearly all FHA and VA investments were in white neighborhoods.[93] Third, and most important, these programs encouraged keeping those neighborhoods white.[94] For instance, the FHA had a policy against allowing "the infiltration of . . . inharmonious racial groups" into neighborhoods since "a change in social or racial occupancy generally contributes to instability and a decline in values."[95] Furthermore, the FHA and VA encouraged racially restrictive covenants. These policies continued through 1950—a relatively recent time. Thus, nearly a century after the Civil War, the United States continued to create and enforce those "badges and incidents of slavery"[96] which the government had been empowered to eradicate in 1866.

The Supreme Court in 1948 began to reverse some of these discriminatory practices, holding in *Shelley v. Kraemer*[97] that a state court could not enforce a racially restrictive covenant without violating the equal protection clause of the fourteenth amendment. The Court noted that "freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment."[98] This decision indicated a recognition that housing discrimination effected by private individuals, by state government, and by national government, was

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88. Federal Home Loan Bank Act, ch. 522, 47 Stat. 725 (1932) (codified in scattered sections of 12, 18 U.S.C.).

89. Homeowners' Loan Act of 1933, ch. 64, 48 Stat. 128 (current version at 12 U.S.C. §§ 1461-1470 (1976)).

90. Note, *Is the U.S. Committed to Fair Housing? Enforcement of the Fair Housing Act Remains a Crucial Problem*, 29 CATH. U.L. REV. 641, 646 (1980).

91. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284, 291 (current version at 38 U.S.C. §§ 1801-1824 (1976)).

92. Note, *supra* note 90, at 646 n.35.

93. *Id.* at 647.

94. *Id.*

95. *Id.*

96. Civil Rights Cases, 109 U.S. 3, 20 (1883).

97. 334 U.S. 1 (1948).

98. *Id.* at 20.

contrary to the intent of the Framers of the thirteenth and fourteenth amendments. Nevertheless, by 1961 only seventeen states had fair housing laws, and in only eight of those states did the laws extend to private housing.[99] The federal government had no laws, other than those passed in 1866, to prevent housing discrimination. Thus, merely a quarter century ago, in at least thirty-three states, a white person could refuse to sell a house to a black person, and not even conceal the reason.

Only in 1968 did Congress use the power granted by the thirteenth amendment to declare that the policy of the United States is to provide fair housing throughout the United States. Title VIII of the Civil Rights Act of 1968[100] was preceded only by federal action prohibiting discrimination in government programs. Until the Fair Housing Act was passed in 1968, the "badges of slavery" resulting from *private* discrimination had not been addressed by Congress for over one hundred years. Interestingly, the Supreme Court interpreted the Civil Rights Act of 1866 as also prohibiting racial discrimination in housing by private individuals.[101] Title VIII is more comprehensive in both coverage and enforcement than the subsection at issue in *Jones v. Mayer Co.*[102]

Title VIII makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
> (b) To discriminate against any person in the terms, condition, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.
> (d) To represent to any person because of race, color, religion,

99. U.S. COMM'N ON CIVIL RIGHTS, DIRECTORY OF STATE AND LOCAL FAIR HOUSING AGENCIES 1-2 (1985).

100. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (current version at 42 U.S.C. §§ 3601-3619, 3631 (1982)).

101. Jones v. Mayer Co., 392 U.S. 409, 421 (1968).

102. *Id.* at 413-17.

> sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religions, sex, or national origin.[103]

Title VIII has three alternative enforcement mechanisms. An individual may file a complaint with the Department of Housing and Urban Development.[104] The most that HUD can do under this procedure is to privately encourage voluntary compliance with the law.[105] The second alternative is to file a suit in federal court, with relief limited to an injunction or $1,000 in punitive damages and court costs.[106] Attorney's fees are awarded to prevailing plaintiffs only on a "need" basis.[107] The third enforcement mechanism is a civil action by the Justice Department against any person who has engaged in a pattern or practice of discriminatory housing activities or against anyone who is responsible for denying a group of persons their rights under Title VIII when such denial raises an issue of general public importance.[108] Thus, the Congress of 1866 in the Civil Rights Act and the Congress of 1968 in Title VIII recognized the federal power under the thirteenth amendment to extricate discrimination in housing.

Nevertheless, housing discrimination in America is still prevalent today and occurs with disturbing frequency.[109] Recently, for example, the Columbus, Ohio, Urban League sued the operators of a large housing complex in that city.[110] This lawsuit was filed after an investigation by teams of "testers." Tester teams consisted of white and black persons who applied to rent or purchase the same property at different times. The black testers were generally rejected while the white testers were accommodated. These results led to the filing of discrimination complaints. The treatment demonstrated in these studies provides a

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103. 42 U.S.C. § 3604 (1982).
104. *Id.* § 3610(a).
105. *Id.*
106. *Id.* § 3612(c).
107. *Id.*
108. *Id.* § 3613.
109. T. CLARK, BLACKS IN SUBURBS 26 (1979) (exhibit 2).
110. Columbus Dispatch, Jan. 10, 1986, at 1D.

reason why, in that community, racial minorities continue to live apart from whites.[111]

A similarly disturbing picture emerges from the nation's capital. The *Washington Post* reported on a nine-month federally-funded study described as the most extensive testing for racial bias in rental housing ever conducted in the Washington D.C. metropolitan area.[112] The study showed that, overall, landlords gave preference to whites over blacks in fifty-four percent of the test cases.[113] "In some instances blacks were required by rental agents to give more details about their personal history and to pay higher application fees than whites."[114] Researchers also reported racial slurs and significant rudeness on the part of some rental agents.[115]

These results may explain the recent phenomenon of white suburbs and black concentration in inner cities. In 1977, in metropolitan areas of one million or more, blacks comprised 27.8 percent of the population of the inner cities and only 5.9 percent of the suburbs.[116] Even within the central city and within the suburbs blacks and whites tend to live in separate areas. Furthermore, in a study sponsored by HUD, a black person attempting to buy a home has a sixty-two percent chance of being rejected. Also, a black searching for rental housing is likely to be a victim of discrimination seventy-five percent of the time—even in federal and federal rent-subsidized housing.[117]

The continued segregation of black and white housing and the practices identified in Columbus and Washington can be attributed to many practices over which the federal government could and is required to exercise control. Little fear is instilled in sellers or renters by the weak enforcement mechanisms of Title VIII.[118] Even wealthy individuals have little time to pursue private legal remedies, and the Fair Housing Act's limited provisions for attorney's fees and punitive damages provide little incentive for such private action. Through its conciliation proce-

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111. *Id.*

112. Washington Post, Sept. 30, 1986, at A1, col. 1.

113. *Id.*

114. *Id.*

115. *See id.* at A9, col. 1.

116. G. ORFIELD, MUST WE BUS? 135-40 (1978).

117. Note, *supra* note 90, at 652 (citing U.S. DEP'T OF HOUSING AND URBAN DEV., DIVISION OF EVALUATION, OFFICE OF POLICY DEV. AND RESEARCH, HOUSING MARKET PRACTICES SURVEY (1978)).

118. *Id.*

dure "HUD has been able to resolve complaints of discriminatory practices in only approximately fifty percent of the cases in which it has found evidence of discrimination."[119] HUD has no power to compel these voluntary arrangements.[120] Finally, the commencement of "pattern and practice" suits by the Department of Justice is severely hampered by the limited government resources allocated to fair housing enforcement.[121] In the first ten years following the enactment of Title VIII only three hundred such suits were initiated.[122]

In addition to the private discrimination primarily addressed by Title VIII, exclusionary municipal zoning effectively segregates housing. Although such zoning can be attacked under both Title VIII and the fourteenth amendment, the Supreme Court has held that discriminatory intent must be shown in order to establish a claim under the fourteenth amendment.[123] Thus far the courts have required only a discriminatory effect to be demonstrated under Title VIII, and Title VIII has been broadly construed to prohibit not only discriminatory zoning practices but also mortgage redlining, homeowner's insurance redlining, and discriminatory appraisal techniques.[124] However, such broad coverage is rendered nugatory by the weak enforcement mechanisms of Title VIII.

Another way in which the federal government influences segregated housing patterns is through the funding of low-income housing. For many years such housing was built in areas where it increased already existing racial segregation. Although the policy is now to disperse such housing, the effort to do so has largely failed. Where housing has been created in white areas, it has not led to black families moving to those areas, but instead has led to disproportionately high white occupancy of those projects. Moreover, the present policy is to dramatically reduce federal spending for housing and to shift the emphasis of federal programs to subsidies for existing housing rather than for the

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119. *Id.* at 653; *see also* G. ORFIELD, *supra* note 116, at 112.

120. Note, *supra* note 90, at 653.

121. *Id.*

122. *Id.*

123. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

124. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Arlington Heights v. Metropolitan Hous. Dev. Corp., 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (previous Supreme Court decision at 429 U.S. 252 (1977)).

construction of new housing.[125] Such a policy perpetuates existing segregated housing patterns, and reduces the government's ability to locate housing projects in such a way that racial integration is enhanced.

The *Dallas Morning News* investigated the extent to which racial discrimination exists in federally assisted housing containing nearly ten million persons. In a fourteen-month investigation of the country's 60,000 federally subsidized rental developments, covering forty-seven cities across the nation, a broad picture of discrimination is projected. The *Dallas Morning News*, in its Pulitzer-Prize winning series entitled "Separate and Unequal," reported:

> Congressional laws, federal regulations and court decisions handed down over the last two decades have prohibited racial segregation and discrimination in federally funded housing. Yet the U.S. Department of Housing and Urban Development, responsible for more than 90 percent of the nation's federally subsidized rental housing, often has ignored the illegal operation of these housing programs by many local housing authorities and private developers.
>
> Numerous federal lawsuits and studies by government and the private sector have documented pervasive racial segregation and discrimination in public and private housing. But except in isolated instances that have had little national impact, five presidential administrations steadfastly have refused to invoke the strongest penalties and most effective tools provided under federal fair housing laws.[126]

The thirteenth amendment and Title VIII bestow the power to act and have been interpreted to cover a broad range of discriminatory activity. The federal government need only choose to make effective this grant of power. The issue in housing discrimination is not the government's *power* to eradicate it but rather the government's *desire* to eliminate it. The federal government's duty to act strongly against it is a long-standing one. The reminder from the Supreme Court in *Jones v. Mayer Co.*[127] is still timely:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom

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125. *See* Columbus v. Penick, 443 U.S. 449 (1979); Milliken v. Bradley, 418 U.S. 717 (1974); Reed v. Rhodes, 607 F.2d 714 (6th Cir.), *cert. denied*, 445 U.S. 935 (1980).

126. Dallas Morning News, Feb. 10, 1985, at A1, col. 2.

127. 392 U.S. 409 (1968).

> to buy whatever a white man can buy, the right to live wherever a white can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[128]

IV. EDUCATION

While federal remedial powers continue to be invoked to transform public schools from segregated to desegregated, few persons are aware that these efforts are but a continuation of a lengthy chapter of American history. A backward look at history informs us that a primary objective of the Reconstruction-era Freedmen's Bureau was the providing of education to the former slaves and their descendants.[129] Slavery as an institution had dehumanized those confined within it to the extent that they were regarded as nonpersons, and in fact, in *Dred Scott v. Sanford*,[130] slaves were held to be chattel, possessed of no rights of which society was to take account.

Yet, today education remains central to the social advancement of any group, especially a discrete minority group. For many generations, it was completely and intentionally withheld from the vast majority of black slaves in this country in a successful effort to keep the entire race in intellectual as well as legal peonage. In the words of Frederick Douglass:

> [t]o make a contented slave you must make a thoughtless one, . . . darken his moral and mental vision, and . . . annihilate his power of reason. He must be able to detect no inconsistencies in slavery. . . . It must not depend upon mere force; the slave must know no higher law than his master's will.[131]

The contemporary vestiges of this insidious and systematic deprivation cannot be ignored and must not be underestimated as public policy is shaped and remedies are validated. When this is done, the continuing necessity of the federal government's presence and participation in the remedial process cannot be gainsaid.

Education was a primary focus of the Freedmen's Bureau,

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128. *Id.* at 433.

129. *See* Abbot, *The Freedmen's Bureau and Negro Schooling in South Carolina*, 57 S.C. HIST. MAG. 65 (1965).

130. 60 U.S. 393 (1856).

131. G. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 133 (1983).

although its activities also included the regulation of labor, the distribution of land, the supervision of the civil and criminal justice systems through the special Freedmen's courts, the registration of marriages, and the provision of aid to orphans.[132] The Bureau was central to the blacks' first assumption of the attributes of citizenship. As Ebony writer-historian Lerone Bennett, Jr., has described it: This Bureau, the first federal welfare agency, did the work of Hercules in building bridges from slavery to freedom. During its short life (1865-72), the Freedmen's Bureau was an Urban League, CIO, WPA and Rosenwald Foundation all rolled up into an early NAACP.[133]

Professor Drew Days, of the Yale Law School, has chronicled events that spanned from the Reconstruction period to 1957, when Congress passed the next civil rights legislation. He wrote:

> In 1957, Congress enacted the first federal legislation since Reconstruction designed to vindicate the rights of blacks to vote. It passed increasingly more stringent provisions during the Eisenhower, Johnson, Nixon, and Ford Administrations in response to evidence of continued racial discrimination in the electoral process. . . . Underlying the efforts of Congress was the principle that blacks should be encouraged to pursue peaceful means in fighting racial bias.[134]

The Freedmen's Bureau was instrumental in creating the first real educational opportunities for the majority of blacks in this country. It established day schools, night schools, and industrial schools for former slaves and their children.[135] Indeed, some of the major Negro colleges such as Howard, Fisk, and Morehouse were either founded by or received substantial financial assistance from the Bureau.[136] Post-war federal supervision redounded directly, if only temporarily, to the enhancement of the black educational experience. Reconstruction governments established the first public school system for poor and rich, black and white, alike.[137] However, federal withdrawal following

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132. L. BENNETT, *supra* note 14, at 184.

133. *Id.*

134. Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 312 (1984) (footnotes omitted).

135. L. BENNETT, *supra* note 14, at 187.

136. *Id.*

137. Louisiana was most explicit in declaring: "There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana." *Id.* at 198.

the Hayes-Tilden compromise spawned a devastating erosion of black educational opportunity in the South.[138] After the 1896 *Plessy v. Ferguson*[139] decision, racially separate public schools were the rule rather than the exception, and in the old Confederacy, were actually mandated by state constitutions and statutes.

Plessy's separate-but-equal doctrine, once embedded in American jurisprudence, was the basic validation of the use of governmental power to deny to black Americans their full citizenship status. Racial discrimination was held to be constitutional. Many vowed that the constitutional imprimatur on racial discrimination would someday be removed.

The attempts at overturning the *Plessy* decision were initiated, in large part, by persons like Charles Hamilton Houston, the Harvard-educated lawyer who became the Howard University Law School Dean and Special Counsel to the NAACP.[140] The Houstonian strategy was bottomed on his view of the fourteenth amendment. Houston's biographer, Genna Rae McNeil, described his early game plan as follows:

> As Special Counsel his purpose was to carry out a planned legal campaign against discrimination in education and transportation. The "more acute" issue of discrimination in education received the greater portion of his time and attention. Although he had observed the evils resulting from discrimination in transportation and did not wish to minimize them, Houston had also seen the pressure of an economic depression lead to the sacrifice of black education in order to preserve white education. Houston insisted that black people could not let this continue. "*Since education is a preparation for the competition of life," he noted, a poor education handicaps black youth who with "all elements of American people are in economic competition.*"[141]

These efforts were carried forward by individuals and organizations with no assistance from the government. Public policy supported segregation. Not until after World War II did the federal government begin to respond to the attacks on racial discrimination. The essence of the Houston thesis came to be acknowl-

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138. P. HAYWORTH, *supra* note 20, at 271.

139. 163 U.S. 537 (1896).

140. G. MCNEIL, *supra* note 131, at 132.

141. *Id.* (emphasis added) (footnote omitted).

edged in the Supreme Court's landmark opinion in *Brown v. Board of Education* (*Brown I*) in 1954.[142]

Laying the groundwork, brick by brick, for the eventual direct challenge to "separate but equal," Houston and NAACP lawyers focused on one of three "glaring and typical discriminations" in education—inequality of access to graduate and professional education.[143] Four particular cases undertaken provided the precedential basis for the 1954 decision in *Brown I*: *Missouri ex rel. Gaines v. Canada*,[144] *Sipuel v. Board of Regents*,[145] *Sweatt v. Painter*,[146] and *McLaurin v. Oklahoma State Regents for Higher Education*.[147] Finally, on May 17, 1954, in *Brown I* the Supreme Court confronted the issue earlier raised by Houston when it unanimously answered the critical question:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.
>
> . . . .
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[148]

In *Brown II*,[149] decided the following Term, the Court addressed the timetable for the ultimate implementation of the *Brown I* principle. Sensitive to the need for the nation, and especially the Southern states, to adjust to change, the *Brown II* Court held that segregation in public education must be eliminated with "all deliberate speed."[150] At this juncture, after the constitutional policy on segregation was changed in *Brown*, implementa-

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142. 347 U.S. 483 (1954).

143. G. McNeil, *supra* note 131, at 136. The other two points of attack were differentials in teachers' pay between similarly qualified black and white teachers and inequalities in transportation facilities provided to black and white students, especially in rural communities. *Id.*

144. 305 U.S. 337 (1938).

145. 332 U.S. 631 (1948).

146. 334 U.S. 629 (1950).

147. 339 U.S. 637 (1950).

148. Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954).

149. Brown v. Board of Educ., 349 U.S. 294 (1955).

150. *Id.* at 301.

tion of that policy through the shaping of a remedy became all important—and it remains so. A right (even if declared by the Supreme Court) without a remedy is no right at all.

While the Supreme Court had no doubt anticipated some degree of resistance, it probably did not foresee outright defiance of its constitutional mandate or the violence with which its decree would be met. The memory of the constitutional crisis surrounding Central High School in Little Rock, Arkansas, has not yet dimmed, for it came to symbolize resistance to a court order. Arkansas Governor Orval Faubus, simply and publicly for a time, blocked the implementation of a federal court order that directed the admission of nine black students to the all-white Central High School. This confrontation precipitated a grave constitutional crisis. A rare special session of the United States Supreme Court was convened in 1957 and in *Cooper v. Aaron*,[151] the Court reaffirmed the federal constitutional supremacy principle of *Marbury v. Madison*.[152] Ultimately, the President of the United States was compelled to dispatch federal troops to Little Rock and to federalize the Arkansas National Guard to protect the children and carry out the Court's decree.

Other less violent but equally obstructive methods of circumventing the *Brown* mandate were devised. In 1968, the Court decided three cases that dealt with the adequacy of desegregation remedies. In *Monroe v. Board of Commissioners*[153] and *Raney v. Board of Education*,[154] the Court rejected voluntary transfer and freedom of choice plans as being in obvious violation of *Brown*. In *Green v. County School Board*,[155] the Court reaffirmed clearly and unambiguously its adherence to the principles of *Brown I*, and set forth a redefined standard against which all desegregation plans would be measured. Under this standard, once it has been shown that a dual system was in existence by force of state action, public officials have an "affirmative duty" to take all necessary steps to dismantle that dual system "root and branch."[156] Quite plainly, after *Green* it is the effectiveness of a remedy in eliminating school or system-wide

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151. 358 U.S. 1 (1958).

152. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

153. 391 U.S. 450 (1968).

154. 391 U.S. 443 (1968).

155. 391 U.S. 430 (1968).

156. *Id.* at 437-38.

segregation that is at issue under the Constitution. Two terms later, exasperated by state and local foot-dragging, and an obvious strategy of delay, the Court converted the *Brown II* "all deliberate speed" requirement into an "immediacy" rule in *Alexander v. Holmes County Board of Education.*[157] The Court also ruled in *United States v. Montgomery County Board of Education,*[158] that a desegregated system meant that both facilities and administrative staffs must be desegregated.

Again, as during Reconstruction, politics loomed large. This time the Republican Party played a different role than that played during Reconstruction. The change in administrations in 1968 from Democratic to Republican did nothing to advance the cause of desegregation in public schools. Instead, desegregation efforts were impeded. President Nixon, and later President Ford, made repeated attacks on the crucial desegregation remedy of transportation or "busing." The federal role was once again becoming confused. In a nationally televised address of March 16, 1972, Nixon announced the introduction of legislation to "call an immediate halt to all new busing orders by Federal courts . . . ."[159] Both Nixon, and later Ford, helped to feed the national unrest by derisive references to "forced busing." In May of 1976, Attorney General Edward Levi and Solicitor General Robert Bork announced that the Justice Department was prepared to intervene on behalf of the Boston School Committee in its case in the United States Supreme Court.[160] The Administration later backed off this position after angry protests by civil rights groups. Nevertheless, despite this obvious shift of the Justice Department's enforcement position in the late 1960s and early 1970s, the Supreme Court reaffirmed the *Brown I* and *Green* principles, and also addressed the important issues of neighborhood schools, quotas, and busing in *Swann v. Charlotte-Mecklenburg Board of Education.*[161] Chief Justice Burger, writing for the majority, stated:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it

157. 396 U.S. 19 (1969) (per curiam).

158. 395 U.S. 225 (1969).

159. New York Times, March 17, 1972, at 22. col. 1.

160. *See* Jones, *The Desegregation of Urban Schools Thirty Years After* Brown, 55 U. COLO. L. REV. 515, 525 (1984).

161. 402 U.S. 1 (1971).

> might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.[162]

A different problem that pointed up the alleged distinction between *de jure* and *de facto* segregation was faced by civil rights plaintiffs in the northern and western states—states whose constitutions and statutes for the most part did not mandate separate racially distinct schools. There were those who argued that the mandate of *Brown I* and its progeny reached no further than the states of the Old Confederacy. This position was bolstered by appellate decisions such as *Deal v. Cincinnati Board of Education*[163] and *Bell v. School City of Gary*.[164]

Eventually, successful theories were developed to overcome the *de facto/de jure* distinction that frustrated desegregation of northern schools. In both *Davis v. School District*[165] and *Spangler v. Pasadena City Board of Education*[166] unconstitutionally segregated schools were found and racially sensitive remedies were ordered. A three-judge panel of the federal district court in New York held unconstitutional a New York statute that prohibited school officials from assigning students in such a way as to enhance racial balances.[167] Soon thereafter, in 1973, the Supreme Court decided the landmark case of *Keyes v. School District No. 1*.[168] *Keyes* held that a presumption of system-wide segregative intent arises where proof of intentional segregation in a significant portion of the system is shown and is effectively

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162. *Id.* at 28.

163. 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 388 U.S. 847 (1967).

164. 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

165. 309 F. Supp. 734 (E.D. Mich.), *aff'd*, 443 F.2d 573 (6th Cir. 1970), *cert. denied*, 404 U.S. 913 (1971).

166. 311 F. Supp. 501 (C.D. Cal.), *aff'd*, 427 F.2d 1352 (9th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971).

167. Lee v. Nyquist, 318 F. Supp. 710, 720 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

168. 413 U.S. 189 (1973).

unrefuted.[169] This decision was used by plaintiffs challenging segregation in urban school districts.

The federal court challenges to northern and western school segregation[170] necessitated showings of intentional acts of segregation before judicial remedial power became available. The task was much more difficult and expensive in these sections of the country than the traditional southern challenge.[171] This litigation often proved far too burdensome financially for individual plaintiffs. With the Justice Department under both Presidents Nixon and Ford being somewhat unsympathetic to such cases, the task of carrying these cases forward was often left to lawyers of private institutional litigants such as the NAACP, the NAACP Legal Defense Fund, and the Lawyers' Committee for Civil Rights Under Law. While there were many significant victories during this period,[172] there were times when plaintiffs encountered setbacks in their attempts to win remedial court orders.[173] Those cases that were successful refined the nature of the proof of liability that must be offered and the scope of the permissible remedies that can be ordered by federal courts.

Plaintiffs in *Bradley v. Milliken*[174] presented comprehensive proof of the interrelationship between school segregation and racial discrimination in housing by state and local authorities in the Detroit metropolitan area. After forty-one days of trial, fed-

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169. *Id.* at 208.

170. *See supra* notes 163-64 and accompanying text.

171. For an example of the resources that the state defendants were prepared to expend on such litigation, see the tables outlining the State of Ohio's expenditures during the 1970s at Jones, *supra* note 160, at 543-44.

172. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Ohio State Bd. of Educ. v. Reed, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); Caulfield v. Board of Educ., 632 F.2d 999 (2d Cir. 1980); Tasby v. Estes, 517 F.2d 92 (5th Cir.), *cert. denied*, 423 U.S. 939 (1975); Hart v. Community School Bd., 512 F.2d 37 (2d Cir. 1975); Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Berry v. School Dist., 505 F.2d 238 (6th Cir. 1974); Pride v. Community School Bd., 482 F.2d 257 (2d Cir. 1973); Penick v. Columbus Bd. of Educ., 429 F. Supp. 229 (S.D. Ohio 1977), *aff'd*, 443 U.S. 449 (1979); Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976), *aff'd sub nom.* Ohio State Bd. of Educ. v. Reed, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); Arthur v. Nyquist, 415 F. Supp. 904 (W.D.N.Y. 1976); Oliver v. Kalamazoo Bd. of Educ., 346 F. Supp. 766 (W.D. Mich.) *aff'd*, 448 F.2d 635 (6th Cir. 1971).

173. *See, e.g.*, Bell v. Board of Educ., 683 F.2d 963 (6th Cir. 1982); Alexander v. Board of Educ., 675 F.2d 787 (6th Cir. 1982); Higgins v. Board of Educ., 395 F. Supp. 444 (W.D. Mich. 1973), *aff'd*, 508 F.2d 779 (6th Cir. 1974).

174. 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

eral District Judge Stephen Roth was sufficiently convinced that the latter was clearly tied to the former to find liability on the part of both the defendant Detroit Board of Education and the State of Michigan.[175] Judge Roth further found that due to the metropolitan nature of the discrimination and the City of Detroit's distorted racial demographics, the only effective desegregation remedy would have to reach into some of the suburban districts.[176] He directed the officials to explore the feasibility of bridging the artificial boundaries between the city and suburban school districts.[177]

The Sixth Circuit, sitting *en banc*, upheld Judge Roth's findings, concluding:

> This record contains a substantial volume of testimony concerning local and State action and policies which helped produce residential segregation in Detroit and in the metropolitan area of Detroit. In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation.[178]

With respect to the interdistrict relief, the appellate court noted that it was the only effective remedy to cure a constitutional violation committed by the state and the local school board that had led to metropolitan residential segregation.[179] The court stated that to "hold that school district boundaries are absolute barriers to a Detroit school desegregation plan . . . would be opening a way to nullify [*Brown*] . . . ."[180]

In a 5-4 decision, the United States Supreme Court upheld the lower court's finding as to the intradistrict segregation, but reversed the *inter*district remedy.[181] The majority opinion concluded that the district court-ordered relief "was based upon an erroneous standard and was unsupported by record evidence

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175. *Id.* at 584.

176. *Id.* at 594-95.

177. *Id.*

178. Bradley v. Milliken, 484 F.2d 215, 242 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

179. *Id.* at 249.

180. *Id.*

181. Milliken v. Bradley, 418 U.S. 717, 752-53 (1974).

that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit."[182]

Justice Stewart, who provided the fifth and deciding vote, acknowledged in his concurring opinion that an interdistrict remedy would be appropriate in a situation where state officials had contributed to racial residential segregation through racially discriminatory use of housing and/or zoning laws.[183] Of course, this is exactly the type of evidence that the appellate court had stated was contained in the trial record in "substantial volume."[184] Inexplicably, Justice Stewart stated that the segregation of black children in Detroit was caused by "unknown and perhaps unknowable factors."[185] Clearly, after forty-one days of trial, District Judge Roth did not consider the causative factors "unknowable." Nor did the Sixth Circuit Court of Appeals.

Three years later, the case returned to the Supreme Court as *Milliken II*.[186] This time, the issue was whether the State of Michigan, having been found partially liable for maintaining the intradistrict segregation, was immune under the eleventh amendment from financially contributing to the cost of the remedy.[187] The Court held that the state was not immune and upheld the trial court's order that the state pay one-half of the $56 million cost of such ancillary relief as in-service training, reading, guidance, counseling, and community relations programs.[188]

Dayton Board of Education v. Brinkman (Dayton II),[189] and *Columbus Board of Education v. Penick*,[190] were significant cases because they clarified the permissible scope of an intradistrict remedy. *Reed v. Rhodes*,[191] a Cleveland case, and *Morgan v. Kerrigan*,[192] a Boston case, are noteworthy both for the scope of the ancillary relief ordered by the court and because they demonstrated the power and duty of the federal courts to supplant local school officials and appoint receivers where the local

182. *Id.* at 752.

183. *Id.* at 755 (Stewart, J., concurring).

184. *See supra* note 178 and accompanying text.

185. 418 U.S. at 756 n.2 (Stewart, J., concurring).

186. Milliken v. Bradley, 433 U.S. 267 (1977).

187. *Id.* at 269.

188. *Id.* at 288-90.

189. 443 U.S. 526 (1979).

190. 443 U.S. 449 (1979).

191. 422 F. Supp. 708 (N.D. Ohio 1976), *aff'd*, 662 F.2d 1219 (6th Cir.), *cert. denied*, 445 U.S. 1018 (1981).

192. 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

officials are either unable or unwilling to comply with the court's orders.

Perhaps more than anything, however, these northern cases[193] drove home the reality that urban school desegregation litigation is an undertaking of such enormous complexity and expense that if the important principles of *Brown* are to be enforced, it must be done by well-funded institutional litigants. The hurdles are too high and the opposition too entrenched for all but the most experienced and monied challenger to overcome. Few, if any, state governmental officials were shown in these cases to act affirmatively to remedy the effects of long standing federal constitutional violations. It fell to the federal government and private litigants to compel them to do so. Private groups have carried the bulk of the burden during a significant period. But the Constitution and federal statutes impose on the president and the attorney general the duty to "take care that the laws be faithfully executed."[194]

The government's current position seems to be that the effects of racial segregation and discrimination in education have been substantially eliminated. Critics suggest that such a position is pure folly—indeed, dangerous folly. They argue that it cannot be asserted seriously that the majority of the black children in this country are receiving a quality education in substandard, racially segregated urban schools. In addition, they suggest that these schools are underfunded and understaffed, and that that condition is *directly* related to obvious and prevalent educational policies that combine with past discriminatory acts of residential discrimination by local, state, and federal VA and FHA officials. There is now some basis for concluding that the day is long past for the argument that the causes of racial containment are "unknown and perhaps unknowable."[195] These causes are in fact known and have been proven in a number of cases. Candor compels agreement with the conclusion that our nation cannot seek absolution for past sins by feigning bewilderment over the origins of evil.

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193. For the full flavor of the significant litigation in Detroit, Dayton, and Columbus, the reader is urged to see P. DIMOND, BEYOND BUSING (1985). The author, Paul R. Dimond, was one of a host of skilled plaintiffs' counsel that conducted these trials. His rendition of the cases and the conditions that spawned them is the most detailed and insightful to date. The book offers an insider's view into the realities of school desegregation litigation and its impact on the lives of those affected by it.

194. U.S. CONST. art. II, § 3.

195. *See supra* note 185 and accompanying text.

To say flatly that public education is not a fundamental right guaranteed by our Constitution is not a sufficient answer.[196] *Brown* held education to be indispensable to success in life.[197] Where, as here, the present constitutional deprivation is due to the continuing effects of past racial segregation and discrimination by federal, state and local officials, such officials have an affirmative obligation under *Green v. New Kent County*[198] to eliminate the effects of that segregative system "root and branch." Moreover, where state and federal officials are found partially liable for constitutional deprivation due to the continuing effects of past acts, they can and should be required to contribute to the cost of the remedy. Such remedies need not be limited simply to "busing," but other ancillary relief such as that implemented in *Milliken II, Reed v. Rhodes,* and *Morgan v. Kerrigan*[199] may be ordered. The power and duty of the federal executive and judicial branches to effect these results are well-defined, arising from the Constitution and federal laws. They are obligated, both legally and morally, to exercise those powers. The adverse consequences of ignoring this duty extend far beyond the loss to black children, whose constitutional rights cannot be vindicated without the use of a court's equitable powers in a way that eliminate, "root and branch," the segregated condition.

The Constitution is not the sole tool for desegregating public schools and state institutions of higher learning. Another tool was provided with the passage of Title VI of the 1964 Civil Rights Act which makes it impermissible for recipients of federal funding to pursue racially discriminatory practices.[200] Thus, numerous institutions are required to maintain non-discriminatory policies and procedures in order to be eligible for the federal funds. When complaints are filed with the funding agencies, the enforcement machinery is activated. School districts and other institutional recipients not in compliance can be required to adopt remedial plans.

By means of Title VI, the former Department of Health, Education, and Welfare (HEW) through its Office of Civil Rights, with supporting orders from the Fifth Circuit, was able

196. *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
197. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954).
198. 391 U.S. 430, 437-38 (1968).
199. 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).
200. 42 U.S.C. § 2000d (1982).

to effect a sweeping desegregation of thirty-three Mississippi school districts in *Alexander v. Holmes Cty. Bd. of Educ.*.[201] This, however, resulted only after the Supreme Court set aside an order, sought by the Justice Department and the Office of Civil Rights, staying the desegregation plan.[202] The national administration that had control of the Title VI enforcement machinery was equivocating over its use as a school desegregation tool.

The stern tone used by the Supreme Court in *Holmes* left no doubt as to what was expected of school authorities. The court wrote: [C]ontinued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.[203]

In the face of this clear command the Justice Department and Office of Civil Rights (OCR) continued to equivocate under the policy promulgated by the Secretary of HEW, Robert Finch, and the Attorney General John Mitchell.[204] This remained the case until after 1976 when a new Secretary of HEW, Joseph Califano, and Attorney General Griffin Bell, with Drew S. Days III as his deputy, undertook fresh Title VI implementation initiatives.[205] These matters were generally pursued through complaints, investigation, negotiations, and, finally, the filing of a formal court complaint and consent decree setting forth terms of settlement. Upon approval by the court, plans for desegregation were put in place. With the Justice Department and the OCR taking these initiatives, the intent of Congress to have the Attorney General enforce civil rights statutes was being obeyed; moreover, the constitutional duty imposed on the President to "take care that the laws be faithfully executed was being fulfilled."[206] These initiatives continued up through 1980, when one of the last major urban school cases was filed by the Justice Department and OCR against the Chicago Board of Education.[207] The

201. 396 U.S. 19 (1969).
202. *See id.* at 20.
203. *Id.*
204. *See* Jones, *supra* note 160, at 525.
205. *Id.*
206. U.S. CONST. art. II, § 3.
207. *See* Jones, *supra* note 160, at 546.

consent decree entered in this case has now been converted into a "freedom of choice" plan.[208]

A factor that impeded administratively-motivated school desegregation during this period was the congressional effort to curb busing as a desegregative technique, as required under Title VI of the 1964 Civil Rights Act. Congress encumbered numerous appropriations bills with "riders" that drastically limited or entirely precluded the ability of HEW's Office of Civil Rights to use pupil transportation as a method of desegregating. The Mansfield-Scott, Byrd, and Eagleton-Biden amendments proved inhibiting.[209] This legislative backlash even affected some of the states. California, for example, for years a trailblazer in school desegregation, amended its state constitution by initiative to require state courts to apply the federal *intent* standard rather than the established *effects* test as a predicate for a remedial order.[210] Plaintiffs nevertheless continued to press for an end to school segregation through the courts under the fourteenth amendment.

While national policy on education was recast with the Brown decision, its relevance for the historic victims of discrimination has ebbed and flowed according to the inclination of the administration in power. Disagreement over one or more of the remedies deemed necessary to effectuate the command of *Brown* has blocked the achievement of meaningful desegregation. Though the Supreme Court has approved of busing as a legitimate tool of desegregation, the executive branch has eschewed its use. Busing has been depicted as the devil incarnate even though, for example, over ninety-seven percent of public school children are bused for purposes unrelated to desegregation.[211]

The national policy, in constitutional terms, requires the use of federal power in a way that will "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[212] It has been consistently demonstrated over time that the segregation present in the school systems of the nation represents current manifestations of policies that violated the Constitution's equal protection clause as interpreted by *Brown*. To eliminate this condition,

208. *Id.* at 547.
209. *Id.* at 530 n.55.
210. *Id.* at 530 n.56.
211. Milliken v. Bradley, 418 U.S. 717, 746 (1974).
212. *Id.*

courts are directed to use the breadth and flexibility inherent in equitable remedies to remove all vestiges of the violation, "root and branch." The language on restoration of status used in *Milliken*[213] was never intended to mean that persons receiving preferential remedial treatment had to show individual discriminatory victimization. As the Supreme Court explained in *University of California Regents v. Bakke*: "It is enough that each recipient is within a general class of persons likely to have been the victims of discrimination" for the simple reason that the discriminatory treatment was directed at the group of which they were a part.[214]

V. EMPLOYMENT

During World War II, America's defense industries hummed with activity. A manpower shortage was precipitated by the military draft. This problem arose at the very time the defense needs of the nation and the war effort required the maximum utilization of every able-bodied person. Yet, discrimination in employment based on race—so prevalent during the pre-World War II period—persisted. As was true of other forms of racial discrimination, its roots reached back into slavery.

The federal government sought to facilitate the training of blacks and other minority group persons for the utilization of their skills in the war effort. Bitter resistance arose. For example, in Philadelphia the United States Army had to be pressed into the transportation business due to a wildcat strike by white street car operators who were resisting the employment of blacks. This action was taken by President Roosevelt under the President's war powers.[215] In the further exercise of that power, President Roosevelt on February 25, 1941, issued Executive Order 8802 which established a national Fair Employment Practice Committee.[216] Under the Executive Order, the Committee had broad jurisdiction over any industries connected to the war effort which were engaging in national defense work with respect to complaints of racial, religious, or national origin discrimina-

213. *See supra* note 211 and accompanying text.
214. 438 U.S. 267, 367 (1978).
215. U.S. CONST. art. II, § 2, cl. 1.
216. 3 C.F.R. 957 (1938-1943).

tion in employment.[217] This authority also extended to claims of discrimination directed against federal agencies.[218]

The Committee's work represented the first federal attempts since the Reconstruction era to eliminate discrimination in employment. As the War ended, a number of Congressmen argued that the Committee could no longer legally operate without statutory authorization. With the conclusion of the war, they insisted, came an end to the President's war powers.

When the life of the FEPC ended after four years of functioning, a major national campaign was launched to have President Truman create a federal mechanism to continue efforts to eliminate employment discrimination. In connection with these efforts, and to take a comprehensive look at the problem of discrimination, President Truman appointed the President's Committee on Civil Rights.[219] This committee, in 1947, issued the highly significant report, "To Secure These Rights."[220] The report contained a number of recommendations which set forth steps that the federal government could take to protect the civil rights of America's racial and ethnic minorities. One of the recommendations called for the enactment of a federal Fair Employment Practice Act.[221]

The legislative difficulties inherent in the process of winning enactment of this and the other recommendations led President Truman to issue on July 26, 1948, his famous Executive Order 9980, which prohibited racial discrimination based on race, color, religion, or national origin in federal agencies.[222] This order created the Fair Employment Board in the Civil Service Commission. It was followed on December 3, 1951, by Executive Order 10,308, forbidding discrimination by government contractors.[223] In this connection, there was established an eleven-member Committee on Government Contract Compliance, charged with studying "rules, procedures and practices of contracting agencies of government" with the objective of winning compli-

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217. *Id.*

218. *Id.*

219. Executive Order No. 9808, 3 C.F.R. 590 (1943-1948).

220. The recommendations contained in the Report formed the basis for a number of legislative proposals of President Truman.

221. *See* Title VII of 1964 Civil Rights Act, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -6 (1982)).

222. 3 C.F.R. 720 (1943-1948). *See also* Mitchell, *An Advocate's View of the 1972 Amendments to Title VII*, 5 COLUM. HUM. RTS. L. REV. 311, 313 n.7 (1973).

223. 3 C.F.R. 837 (1949-1953); *see also* Mitchell, *supra* note 222, at 314.

ance with the nondiscrimination clause that was inserted into government contracts.[224]

The direction and vigor of the early executive orders and policy guidelines that remained were renewed through the successive administrations of Presidents Eisenhower, Kennedy, Johnson, Nixon, Ford and Carter. For instance, on August 13, 1953, President Eisenhower issued Executive Order 10,479,[225] and Executive Order 10,925[226] was signed by President Kennedy on March 6, 1961. These administrative prohibitions against discrimination found additional support when Congress enacted the 1964 Civil Rights Act[227] and its 1972 amendments.[228] However, during the past year the efficacy of those orders, as currently embodied in Executive Order 11246,[229] has been called into question by several members of the United States Commission on Civil Rights and some officials in the Reagan Administration.[230]

Throughout the period during which efforts were made to enact into law a statute creating a fair employment practice commission, a number of proposals were considered by Congress. President Kennedy's comprehensive package of proposals foundered on legislative shoals. Ironically, it was his assassination in November of 1963 that revived the move to pass these civil rights proposals. Among them was one that became Title VII of the 1964 Civil Rights Act.[231] It prohibited discrimination in employment by private employers and labor unions.[232] Excluded were the federal, state, and local governments.[233] The legislation created the long-sought Equal Employment Opportunity Commission.[234]

At first, the EEOC's authority was severely limited. The effort to gain enforcement powers for the Commission itself and to

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224. Mitchell, *supra* note 222, at 318.

225. 3 C.F.R. 448 (1959-1963).

226. 3 C.F.R. 961 (1949-1953); Mitchell, *supra* note 222, at 314 n.8.

227. 42 U.S.C. § 2000 (1982); *see generally*, Mitchell, *supra* note 222.

228. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. §§ 1971, 1973bb-1 (1976)); 42 U.S.C. § 2000 (1982); *see also* Mitchell, *supra* note 222.

229. 3 C.F.R. 339 (1964-1965).

230. *Without Justice, supra* note 65; *see also* Jones, *Civil Rights in the 1980's*, 2 ANTIOCH L.J. 7, 12-19 (1982).

231. 42 U.S.C. § 2000e-4 (1982).

232. *Id.* § 2000e-4(f).

233. *Id.*

234. 42 U.S.C. § 2000e(b) (1982).

broaden its jurisdiction continued in each Congress until 1972.[235] Among the amendments adopted was one that expanded jurisdiction to include public agencies. The major dispute in the Senate with respect to the 1972 amendments concerned enforcement means. Senator Harrison Williams led those in the Senate who argued on behalf of granting cease and desist powers to the Commission.[236] He pointed out that at the time Title VII was originally enacted in 1964 supporters did not anticipate that such powers would be necessary:

> Many believed that compulsory enforcement powers would only be necessary in those rare instances where recalcitrant and persistent violations were encountered. . . .
>
> We did not anticipate the extent of discrimination which existed at the time we enacted the legislation, nor did we fully understand its nature. We permitted a fatal flaw to be passed into law. . . .
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> . . . .
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> In closing Mr. President, I would like to emphasize that the transfer of the pattern-or-practice jurisdiction to the EEOC is an integral part of the basic goal . . . [the] giving of additional meaning to the Civil Rights Act. . . . Employment discrimination robs the Nation of its full potential and undermines the goals of social equality and economic stability. To make the mistake in 1964 was understandable. To continue to make the same mistakes in 1972, in my judgment, is unforgivable.[237]

Emerging from the legislative compromises was an enforcement provision and a process that is still in effect, refined by those courts called upon to engage in statutory construction. The law charges the EEOC with the responsibility of determining, so far as practicable, upon receipt of a complaint, whether reasonable cause exists to believe the charge of discrimination. This must be done within 120 days from the filing of the charge or the date on which the EEOC was authorized to act on the charge.[238] Through a congressional compromise, the EEOC was empowered to bring suit in federal district court when unable to effect a conciliation of the discrimination charge.

EEOC conciliation efforts, aided by enforcement attempts

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235. Mitchell, *supra* note 222, at 314.
236. *Id.* at 315-16.
237. 118 CONG. REC. 4080-81 (1972).
238. 42 U.S.C. § 2000 (1982).

of some states and the resort to courts, have been the means by which the anti-discrimination provisions of Title VII have been enforced. The impact on the dockets of federal courts caused by the case-by-case approach has been considerable.[239] Had Congress seen fit to entrust cease and desist powers to the EEOC, as it has done with such agencies as the National Labor Relations Board, Securities and Exchange Commission, and other federal agencies, it is likely that the burden the courts carry would be lessened. Even so, through federal class action suits and consent decrees, large numbers of minorities have had their employment opportunities enhanced.

Without cease and desist power available to the EEOC, the federal courts have had to grapple with individual claims of discrimination filed by aggrieved persons as well as class-wide discrimination suits. A body of jurisprudence has evolved as a result of this litigation. It is useful to consider the process engaged in by federal courts in deciding these cases.

The standard analysis for weighing individual claims of discrimination, "disparate treatment," as the law describes it, was approved by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[240] Under this analysis, one who complains of being treated in a discriminatory manner must produce evidence of membership in a minority group, who applied for a position, who was qualified, and who was rejected in spite of those qualifications.[241] The complainant must also show that even after his or her rejection the position remained open and the employer continued to seek applicants.[242] If this proof is shown, the burden of coming forward to "articulate some legitimate, nondiscriminatory reason for the employee's rejection" shifts to the other party.[243] Once satisfied, the complainant is afforded an opportunity to demonstrate that such explanation is merely a "pretext" for discrimination.[244] Questions over burden shifting have led to considerable litigation at the appellate level. The same is true of class-wide claims of disparate treatment which

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239. *See generally*, ADMINISTRATIVE OFFICES OF U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS (1985).

240. 411 U.S. 792 (1973).

241. *Id.* at 802.

242. *Id.*

243. *Id.*

244. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

often require proof through statistics, buttressed by evidence of an anecdotal nature relating to discriminatory treatment.

With respect to class claims of disparate impact or discriminatory effects, one looks to the case of *Griggs v. Duke Power Co.*[245] In that significant decision, the Supreme Court held that Title VII does not require proof of intentional discrimination. A complainant can recover by proving that a particular employment practice has a disparate or discriminatory impact on persons of a particular race, national origin, sex, or religion.[246] Once proven, the burden shifts to the defendant to prove that the practice complained of is justified by "business necessity," or is somehow "related to job performance."[247] Where this burden is met, the complainant must come forward and prove that the justification is a pretext for discrimination.[248] Litigation arising out of the application of principles set forth in these cases has provided heavy dockets for the federal judiciary.

This litigation has helped to persuade an increasing number of employers of the inevitability of being ordered to fashion programs of equal opportunity in employment. To forestall costly litigation resulting from claims of discrimination, countless numbers of employers—private and public, have begun voluntarily moving in the direction of affirmative action. Thus, the initiatives to integrate work forces without waiting for complaints and court orders. Such programs have had an impact on the employment status quo,[249] to the extent that sometimes lend to them being characterized as having a "reverse discriminatory" effect on white male employees. A series of court challenges have been mounted relying on the fourteenth amendment's equal protection clause and Title VII's language that prohibits discrimination in employment based on race.[250] The Supreme Court has passed on the appropriateness of race-based remedies in a series of significant cases beginning with *Regents of University of California v. Bakke*,[251] and *United Steelworkers of America v. Weber*.[252] The next section of this article examines three defini-

245. 401 U.S. 424 (1971).
246. *Id.* at 436.
247. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
248. *Burdine*, 450 U.S. at 256.
249. Days, *supra* note 134, at 313-19.
250. *Id.*
251. 438 U.S. 265 (1978).
252. 443 U.S. 193 (1979).

tive pronouncements on affirmative action by the Supreme Court during its 1986 term.

VI. Affirmative Action as a Remedy

What we saw in the wake of *Brown* in 1954 was the construction of a framework of remedial statutes, executive orders, and federal administrative regulations that would affirmatively be used as tools for remedying racial and other forms of discrimination.[253] A direct action strategy emerged in the fifties and sixties that took protests over segregation into the streets of the South. Intense confrontations occurred between those challenging the discrimination vestiges of the past and a variety of institutions, public and private. President Lyndon B. Johnson, in 1965, following the Selma March, pleaded for a transfer of the struggle "from the streets to the courtroom."[254] Three years later, the Kerner Commission, following a sweeping analysis of the causes of the social tensions that precipitated urban riots of the period, warned that America was drifting away from the ideal of a single society.[255] It was contended that the knitting together of America was not occurring, and as a consequence, the nation was becoming two societies, black and white, separate and unequal.

The antidote prescribed for this condition was to quicken the pace of converting from a segregated society to one that accorded equal opportunity across the board. It was in this context that affirmative group-based remedies began to evolve. Affirmative action notions took root in the late 1960s and early 1970s with the Philadelphia Plan.[256] This was a program championed by former Assistant Secretary of Labor, Arthur A. Fletcher.[257] Its purpose was to increase the hiring and use of blacks and other minorities in federal or federally assisted construction in the greater Philadelphia area. Complaints received by Herbert Hill, National Labor Secretary of the NAACP, pointed to wide-

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253. *See generally*, Jones, *supra* note 230; Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 Iowa L. Rev. 901 (1985) [hereinafter *Affirmative Action*].

254. For a discussion of President Johnson's reactions to the Selma March, see D. Garrow, *supra* note 36, at 100-10.

255. *See Affirmative Action*, *supra* note 253, at 910 (citing National Advisory Comm'n on Civil Disorders, Report (1968)).

256. For a discussion of the Philadelphia Plan, see *id.* at 912-14.

257. Days, *supra* note 134, at 316 n.42.

spread discrimination by contractors and labor unions in the five-county area surrounding Philadelphia. Hill, on behalf of these complainants, filed grievances with the Labor Department. Protracted negotiations were entered into between the Contract Compliance Staff of the Labor Department and the contractors and unions. After years of fruitless negotiations, the governmental officials concluded that the contractors would not go beyond the so-called "best efforts" and "good faith" requirements of the law. Thereafter, the Labor Department issued rulings that

> required, among other things, that bidders for construction contracts submit affirmative action plans that included specific goals to utilize minority workers in six skilled crafts. After hearings on this question in September the Department established specific ranges for minority workers, in percentages, for a period of four years. No bidder would be considered unless its affirmative action plan fell within the range established by the Department.[258]

With the 1972 amendments to Title VII of the 1964 Civil Rights Act, the use of numerical goals and timetables took on even greater significance as governmental units were pressed to deal with employment discrimination.[259]

The United States Supreme Court approved affirmative action plans that included racial ratios, goals and timetables in several significant cases. Supporting opinions include *Regents of the University of California v. Bakke*,[260] *United Steelworkers of America v. Weber*,[261] and *Fullilove v. Klutznick*.[262]

In three cases during the 1986 term, the United States Su-

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258. *Id.* at 316 n.43; *see generally, Affirmative Action, supra* note 253.

259. Days, *supra* note 134, at 317.

> Following the Labor Department's lead, the Department of Justice during the Nixon Administration also filed a number of employment discrimination suits under Title VII which sought and obtained remedies that included affirmative hiring plans. When Congress amended Title VII in 1972 to include public employees—municipal, state and federal—it considered and expressed its approval of the courts' use of goals and timetables in certain cases to remedy employment discrimination. Both the Ford and Carter Administrations also acknowledged the importance of goals and timetables to achieve equal employment.

Id.

260. 438 U.S. 265 (1978) (with respect to medical schools' admission policies).

261. 443 U.S. 193 (1979) (involving a voluntary affirmative action plan under Title VII of the 1964 Civil Rights Act).

262. 448 U.S. 448 (1980) (involving the ten percent minority business requirement of the Public Works Employment Act of 1977).

preme Court squarely considered and reaffirmed the use of racial ratios and numerical goals as remedies for racial discrimination in hiring and promotions. In *Wygant v. Jackson Board of Education*,[263] the Supreme Court upheld the principle of race remedies, but struck down the layoff plan as not being sufficiently narrowly tailored or based on a factual finding of discrimination. In *Local No. 93, v. City of Cleveland*[264] and *Local 28 of Sheet Metal Workers v. EEOC*,[265] the Court reaffirmed the use of racial ratios in hiring and promotions—on both a court-ordered and a voluntary basis.

The practical effect of these decisions was to uphold the EEOC requirement that federal agencies initiate affirmative action plans that redress past discrimination against minorities and women; to reaffirm the legality of requirement of goals and timetables in Executive Order 11,246;[266] and to establish the propriety of the existing fifty-six affirmative action decrees with goals and timetables that the Justice Department endeavored to reopen.

This trilogy of decisions is important because, among other things, it frees employers from the problems associated with opposition to affirmative action. As Justice Blackmun stated in *United Steelworkers*, prohibiting employers from addressing discrimination on a voluntary basis exposes them to lawsuits and sweeping remedial orders imposed by federal courts.[267] It was just such a Hobson's choice that confronted the City of Cleveland in the *Local No. 93* case. The Supreme Court described the dilemma in the following way:

> By the time the Vanguards filed their complaint, then, the City had already unsuccessfully contested many of the basic factual issues in other lawsuits. Naturally, this influenced the City's view of Vanguard's case. As expressed by counsel for the City at oral argument in this Court:
>
> "[W]hen this case was filed in 1980, the City of Cleveland had eight years at that point of litigating these types of cases, and eight years of having judges rule against the City of Cleveland.
>
> "You don't have to beat us on the head. We finally learned

263. 476 U.S. 267 (1986).
264. 106 S. Ct. 3063 (1986).
265. 474 U.S. 815 (1985).
266. 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (1982).
267. 443 U.S. 193, 209 (1979) (Blackmun, J., concurring).

> what we had to do and what we had to try to do to comply with the law, and it was the intent of the city to comply with the law fully. . . ."
>
> Thus, rather than commence another round of futile litigation, the City entered into "serious settlement negotiations" with the Vanguards.[268]

The Court in *Local No. 93* recognized the predicament of those who voluntarily undertake to purge the effects of a discriminatory past from their current policies. It placed its blessings on voluntary efforts in this language:

> We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII. . . . [and its] sanctions intended to cause employers to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible the last vestige of an unfortunate and ignominious page in this country's history' "[269]

One of the principal arguments against affirmative action race-conscious remedies is that "innocent" persons are subjected to "reverse discrimination" and further, that some beneficiaries of these remedies were not actual victims. Such contentions were specifically advanced in the *Sheet Metal Workers, Local 93* and *Wygant* cases. These issues have been definitively resolved by the Supreme Court.

The Court in *Wygant* held: "We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."[270]

In *Sheet Metal Workers*, the Supreme Court decided that courts may "in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices."[271]

The *Local No. 93* decision drew upon the Supreme Court's earlier precedent in the *Weber* case where the Court concluded that:

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268. 106 S. Ct. at 3067 (citations omitted).
269. *Id.* at 3072 (citations omitted).
270. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986).
271. Sheet Metal Workers v. EEOC, 474 U.S. 815 (1985).

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregative and hierarchy.[272]

The foregoing clearly indicates that the Supreme Court was recognizing the underlying and overriding justifications for affirmative remedies. The Court does not willy-nilly impose or approve these approaches. With respect to the remedies ordered by courts, several cases draw into focus the reality of the knotty intractable problem posed by race discrimination.

An article by Professor Drew Days makes the point most vividly.[273] Citing the case of *Morrow v. Crisler*,[274] as an example of how courts are compelled to fashion a remedy that includes goals and timetables, Professor Days wrote:

> There, the district court in 1971 had found the Mississippi state police guilty of racial discrimination in employment. The state police had *never* hired a black as a trooper. The district court ordered the state police to refrain from discriminatory hiring practices, but did not impose an affirmative hiring program. During three years of "good faith" hiring efforts, the Mississippi state police hired only six blacks out of ninety-one new hirees. Only after these inadequate efforts did the court of appeals finally order the state police to establish an affirmative hiring program and remand the case to the district court for implementation. In doing so, it recommended the temporary adoption of a one black/one white or a one black/two white hiring quota until the percentage of blacks in the state police equaled the percentage of blacks in the state. The court of appeals concluded that Mississippi would never comply with the law without the imposition of such a strict requirement.[275]

A similar order was affirmed by the United States Court of Appeals for the Second Circuit in *Vulcan Society v. Civil Service Commission*.[276] There the district court set a three-to-one white-to-minority hiring quota.

No case more clearly illuminates the appropriateness of nu-

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272. 106 S. Ct. at 3072-73 (quoting Steelworkers v. Weber, 443 U.S. 193, 204 (1979)).
273. Days, *supra* note 134, at 314.
274. 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974).
275. Days, *supra* note 134, at 314 (footnotes omitted).
276. 490 F.2d 387 (1973).

merical goals and timetables and justifies affirmative action than the Detroit police case, *Bratton v. Detroit*.[277] Though it had been challenged by the Justice Department, the United States Supreme Court denied certiorari without a dissent, in spite of *Bratton's* racially based remedies.

This article will not cite the statistics which were found by the trial court in *Bratton,* but they were extreme. The accuracy of the inference of intentional discrimination which arose from the severe statistical disparity set out in the record is generally accepted, based on the evidence credited by the trial judge, the Honorable Damon J. Keith.[278]

The history of discrimination was corroborated by numerous independent studies and carefully documented in the trial record. Included are reports of the Michigan Civil Rights Commission, the 1969 Report of the National Advisory Commission on Civil Disorders, and the 1967 Report of the President's Crime Commission.[279] The record justified Judge Keith's finding that while the police department was discriminating against blacks in employment, a white police department was also discriminating against black citizens on the street.[280] Two massive uprisings,[281] one in 1943 and another in 1967, resulted directly from discriminatory treatment of black citizens by white police officers. Justice Thurgood Marshall in his report on the 1943 Detroit uprisings, written while NAACP general counsel, indicates that the "anti-Negro attitude of many members of the force helped to make the riot inevitable."[282] This and Justice Marshall's other findings are manifest in the mass of evidence presented at the trial. In the 1967 uprising, large sections of the city were burned and many deaths resulted, injuries and arrests were reported—all affecting blacks and black areas in a significantly

277. 704 F.2d 878 (6th Cir. 1983).

278. For example, prior to the 1960s, squad cars and patrol beats were clearly segregated. Blacks and whites were not assigned to ride together, nor were blacks ever assigned to patrol white areas. When initial tentative efforts were made to integrate some squad cars, the white officers struck and the prior policy was reinstituted in full force. Numerous instances of discriminatory practices in hiring, promotion, the ability to transfer from a patrol position to plain clothes, and the day-to-day treatment of black officers, evidenced the systematic exclusion of blacks from any meaningful role on the Detroit police force. *Id.* at 889.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

disproportionate manner.[283] The record in *Bratton* and the efforts to deal with it are powerful arguments for affirmative action.

One of the most unrelenting challenges to affirmative action is that it is contrary to the Constitution's color blind imperative. This argument on color blindness has become a serious factor in the formulation of the government's current civil rights enforcement policies. Upon close examination, however, it is not as formidable an argument as its adherents make it appear. Those who raise "color blindness" hark back to Justice John Marshall Harlan's famous dissent in *Plessy v. Ferguson*.[284] They overlook some very fundamental facts, such as, for instance, nearly one hundred years of history that have intervened since 1896. Furthermore, Justice Harlan was voting *against* segregation, *against* racial caste, and his views were in dissent, rejected by the majority of his Supreme Court colleagues. The majority of Americans likewise rejected Justice Harlan's argument for they promptly and enthusiastically rushed headlong into adopting and deeply rooting into all of America's institutions, the segregation rationale of the majority opinion, i.e., that blacks were inferior beings and must be kept separate and that this could be done consistent with the fourteenth amendment. That rationale pervaded all American institutions with effects, in varying degrees, lingering to this day. Had the views of Justice Harlan prevailed in 1896, it is unlikely that affirmative action plans would be required today.

To now insist, as some do, that the fourteenth amendment, which became a part of the Constitution for the explicit purpose of protecting the newly freed slaves, and Title VII of the 1964 Civil Rights Act, enacted to further those purposes, now bar the use of race-sensitive remedies aimed at redressing the effects of past discriminatory practices against minorities and their forebearers, is to be at war with history, reality and the Constitution itself.

For America now to be struck color-blind would be to freeze permanently into place the present effects of those horrible, despicable past practices referred to by the Supreme Court. This is borne out by a reference to the findings of facts by courts in recent cases involving school desegregation, employment dis-

283. *Id.*

284. 163 U.S. 537, 559 (1896).

crimination, housing discrimination, and tampering with voting rights. For these reasons, as former Chief Justice Burger concluded in *Swann v. Charlotte-Mecklenburg Board of Education*, America has not reached the point where it can be color-blind.[285]

VII. Recent Developments

Events have occurred since this article was commenced that further illustrate the connection between current problems and the nation's racial past. For one, the Attorney General in an address at Tulane University's law school was reported in the press to have questioned the effect to be given to Supreme Court pronouncements.[286] Specifically, the Attorney General cited the case of *Cooper v. Aaron*,[287] decided in 1958, in which the Supreme Court reaffirmed the *Marbury v. Madison*[288] holding of 1803, with respect to the court being the expositor of constitutional law. That speech stirred a strong response from the American Bar Association and a number of academicians and other commentators. Spokespersons for civil rights organization have been equally vociferous in their challenge to the Attorney General's remarks.

Under article II, section 3 of the Constitution, the President of the United States is charged to "take care that the laws be faithfully executed." The Attorney General of the United States is the principal officer for carrying out that responsibility. Included in the laws to be executed are those enacted by Congress and the Constitution as interpreted by the Supreme Court. When it appears that officials charged with enforcing and executing the law are equivocal, or seek to redefine their obligations, controversy rages, and the nation is troubled. In any event the pace and direction the nation pursues on civil rights is clearly tied to the tempo set by the federal government with respect to the use of federal power.

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285. 402 U.S. 1, 19 (1971).

286. E. Meese, III, Address at the Tulane University Citizens' Forum on the Bicentennial of the Constitution (Oct. 21, 1986) (essentially reprinted in Meese, *The Law on the Constitution*, 61 Tul. L. Rev. 979 (1987)).

287. 358 U.S. 1 (1958).

288. 5 U.S. 137 (1803).