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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 847

NICHOLAS DEB. KATZENBACH, AS ATTORNEY GENERAL OF THE UNITED STATES, AND THE UNITED STATES, APPELLANTS

v.

JOHN P. MORGAN AND CHRISTINE MORGAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (R. 79) is reported at 247 F. Supp. 196.

JURISDICTION

The judgment of the three-judge district court was entered on December 7, 1965 (R. 102).[1] Notices of appeal were filed in the district court on December 13 and 20, 1965 (R. 104, 108). Jurisdictional statements

[1] On December 21, 1965, the district court granted a stay of its injunction pending this appeal on condition that the New York City Board of Elections maintain a separate list of persons registered by reason of the operation of Section 4(e) of the Voting Rights Act of 1965 (R. 109). The condition having been accepted, Section 4(e) remains operative in New York City pending the decision here.

were filed here on December 23, 1965 and January 5, 1966, and probable jurisdiction was noted on January 24, 1966 (R. 110). The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253. *Katzenbach* v. *McClung,* 379 U.S. 294.

QUESTION PRESENTED

Whether Section 4(e) of the Voting Rights Act of 1965 is constitutional insofar as it prohibits the States from denying the right to vote to otherwise qualified Puerto Rican residents who are literate in Spanish, on account of their inability to read and write English.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3, clause 2, of the United States Constitution:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *

2. Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution:

> SECTION 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> * * * * *
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> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Section 4(e) of the Voting Rights Act of August 6, 1965, P.L. 89–110, 79 Stat. 437, 439:

> (e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
>
> (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

4. Article II, Section 1, of the New York Constitution (in pertinent part):

> Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to

vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

Section 150, McKinney's Consolidated Laws of New York Ann., Election Law (in pertinent part):

> * * * In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A "new voter," within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight.

5. Section 168, McKinney's Consolidated Laws of New York Ann., Election Law (in pertinent part):

> 1. The board of regents of the State of New York shall make provisions for the giving of literacy tests.
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> * * * * *
>
> 2. * * * But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private

school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance. But the genuineness of the certificate and the identity of the voter shall remain questions of fact to be established to the satisfaction of the election inspectors and subject to challenge, like any other fact relating to the qualification of a voter.

If, however, such certificate, diploma, matriculation card or letter of certification cannot be produced, the appropriate board shall register the applicant upon the execution of an affidavit in substantially the following form: [affidavit form omitted; 1965 Cum. Pocket Part].

STATEMENT

On August 6, 1965, the President of the United States signed into law the Voting Rights Act of 1965. On the same day, appellees, a husband and wife who are registered voters in Kings County, New York, filed their complaint in the district court seeking to enjoin the Attorney General from enforcing the provisions of Section 4(e) of the Act (R. 1).[2]

[2] The complaint was filed in the United States District Court for the District of Columbia in accordance with Section 14(b) of the Voting Rights Act of 1965 (P.L. 89–110, 79 Stat. 445), which provides that "[n]o court other than the District Court for the District of Columbia * * * shall have jurisdiction to issue * * * any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act * * *."

On September 8, 1965, plaintiffs were granted leave to file an amended complaint and to add as parties the New York City Board of Elections and its members (R. 11).

The amended complaint alleged that approximately fifty percent of the 700,000 migrants from Puerto Rico now living in New York City read and write only the Spanish language and many of these Spanish-speaking residents live in Kings County, New York, where plaintiffs are registered voters; that large numbers of Spanish-speaking persons who are unfamiliar with the English language would be entitled to vote in New York City and Kings County by operation of Section 4(e) of the Voting Rights Act of 1965 despite their inability to qualify under the English literacy requirements of New York law; that such persons would be unfamiliar with the information available on political issues in New York City, most of which is published in the English language, and that the exercise of the franchise by such persons will dilute the effect of plaintiffs' vote; that the New York City Board of Elections had announced its intention to comply with Section 4(e) and was actually registering persons unable to read and write English; and that the enactment of Section 4(e) is not authorized by the Fourteenth Amendment and therefore its enforcement deprives plaintiffs of their rights secured under the Fifth and Ninth Amendments to the Constitution (R. 13–16). The prayer was for a declaratory judgment declaring Section 4(e) unconstitutional and an injunction prohibiting the Attorney General and the New York City

Board of Elections from enforcing or complying with Section 4(e) (R. 16).

On September 20, 1965, the United States was granted leave to intervene as a defendant (R. 28),[3] and on September 21, 1965, a three-judge court was designated (R. 29). In their joint answer, the defendants Katzenbach and the United States admitted that Section 4(e) is in direct conflict with the English literacy requirement of the New York Election Law; that many Spanish-speaking persons not literate in English who live in Kings County would be qualified to vote by reason of Section 4(e); and that the Attorney General had taken action to enforce Section 4(e) (R. 37–39). All the defendants admitted that the New York City Board of Elections was actively registering persons under the provisions of Section 4(e) R. 35, 38).

On October 18, 1965, the case was argued and submitted for decision on cross-motions for summary judgment without the taking of oral testimony.

On November 15, 1965, the district court announced its decision that Section 4(e) is unconstitutional, Circuit Judge McGowan dissenting.[4] The court ruled that the plaintiffs had standing to correct any dilution of their vote accomplished by the registration and

[3] The United States is authorized by statute to intervene as a party in any action "wherein the consitutionality of any Act of Congress affecting the public interest is drawn in question." 28 U.S.C. 2403.

[4] An order declaring Section 4(e) unconstitutional and enjoining the Attorney General and the New York City Board of Elections from enforcing or complying with Section 4(e) was entered on December 7, 1965 (R. 102).

voting of persons "not legally entitled to vote" (R. 80). The majority opinion goes on to state that "the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate" (R. 84). The court reached this conclusion on the theory that "the right to vote is not a privilege derived from the United States, but is conferred by the State" (R. 85), and that only by constitutional amendment could limitations be imposed on the power of the States to prescribe voter qualifications. It cited the Fifteenth, Nineteenth, and Twenty-Fourth Amendments as establishing that "whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment" (R. 88). The opinion notes that, until passage of the Voting Rights Act of 1965, "it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment" (R. 88). This Court's decision in *Lassiter* v. *Northampton Board of Elections,* 360 U.S. 45, was invoked as foreclosing the argument that New York's English literary requirement as applied to migrants from Puerto Rico violates the Equal Protection Clause (R. 89). And, finally, the court rejected the contention that the territorial power conferred on Congress by Article IV, Section 3, of the Constitution authorizes the enactment of Section 4(e)—noting that Section 4(e) "is neither limited nor directed solely to Puerto Ricans" and adding that, in any event, "the power

of Congress to legislate for a territory does not embrace authority to confer additional rights on citizens of the territory when they migrate to other parts of the United States" (R. 90).

In dissent, Judge McGowan expressed his view that the Territorial Clause supports Section 4(e) insofar as it is challenged in this case, noting that "the complaint which plaintiffs make about Section 4(e) is confined to allegedly illegal voting by Puerto Ricans" (R. 93). He concluded that the territorial power comprehends "laws relating to the status and rights of the people who inhabit those territories and prescribing that such status and rights are to be recognized throughout the United States as well as in the territory itself" (R. 94). Judge McGowan referred to the evolving congressional policy of complete internal independence for Puerto Rico and equal status as American citizens for natives of Puerto Rico, and observed that Section 4(e) is a corollary to the congressional decision to permit Puerto Rico's Latin culture and Spanish language to prosper without mainland interference to the extent desired by the Puerto Ricans themselves (R. 95). An integral aspect of this policy has been the tolerance of the use of Spanish as the language of instruction in the public schools (R. 97–98). Against that background, Judge McGowan concluded that "[a]ssuring our Puerto Rican citizens a right to vote under the circumstances disclosed in this record could rationally have been deemed by Congress to be" included among the "relevant objects of national concern in our relationships with our territories" (R. 102).

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ARGUMENT

INTRODUCTION AND SUMMARY

We consider Section 4(e) of the Voting Rights Act of 1965 only insofar as it requires the States to admit to the vote otherwise qualified and literate American citizens educated in Spanish in Puerto Rico, notwithstanding their inability to read or write English. To be sure, the provision, in terms, sweeps more broadly—encompassing every "person" educated in any "American-flag" school in "any State or territory" where the classes were conducted in any language "other than English" (*supra,* p. 3). But there is no present occasion to examine other possible applications. Not only is the case before the Court confined to Puerto Rican residents of the continental United States, but no different controversy has arisen under Section 4(e).[5] Nor are there likely to be other applications of the provision; so far as we are aware, there are today no American flag elementary schools teaching primarily in a foreign language outside Puerto Rico.[6]

[5] The only other controversy that has reached the courts is *United States* v. *County Board of Elections of Monroe County, N.Y.*, 248 F. Supp. 316 (W.D. N.Y.), appeal pending, No. 1040, this Term—also a case involving the application of Section 4(e) to Puerto Ricans in New York State.

[6] At least, there appear to be no public or parochial schools of that character. The only partial exceptions, so far as we are advised, are one primary school near the Mexican border in Texas and one in Florida which conduct classes in both English and Spanish in the lowest grades, and a group of parochial schools in the New England States where French is the language of instruction in various minor subjects. We understand, however, that in none of these schools is the foreign language the "predominant" language of instruction and that the graduates of such schools in fact achieve substantial literacy

In any event, the legislative history of Section 4(e) is plain that Congress was focusing exclusively on the situation of Puerto Ricans on the mainland—primarily in New York City—and would have enacted the provision to remedy their problem alone, without regard to other beneficiaries of the legislation, if there be any. There is here no obstacle comparable to that encountered in the effort to sustain the Civil Rights Act of 1875 as applied only to public conveyances engaged in interstate commerce or operating within an area where the federal power is plenary. See *Civil Rights Cases,* 109 U.S. 3, 19; *Butts* v. *Merchants Transp'n Co.,* 230 U.S. 126. Compare, also, *Trade-Mark Cases,* 100 U.S. 82, 96–99. At the least, the application of the statute to Puerto Ricans presents a severable question.[7] Accordingly, the Court is free to pass on the constitutionality of Section 4(e) as applied to Puerto Rican residents of the United States without, at the same time, resolving all other hypothetical cases.

Thus narrowed to a special situation, the statute in suit does not raise far-reaching questions concern-

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in English. We put to one side special schools catering to the children of foreign diplomats and other schools, if any, attended primarily by aliens; as a practical matter, Section 4(e) applies only to American citizens, since citizenship is a prerequisite to voting in all 50 States.

[7] The Voting Rights Act, of which Section 4(e) is a part, contains the following express severability clause (§ 19):

> If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

ing the power of the national legislature generally to fix voting qualifications, nor even the more limited inquiry whether Congress may implement the Equal Protection Clause (or the Privilege and Immunities Clause) of the Fourteenth Amendment by exempting citizens from discrimination in the exercise of the right to vote on account of their native language or—what often amounts to the same thing—on account of their national origin. In our view, the present case may be resolved on a much narrower basis, in light of the special relationship between the federal government and Puerto Rico, the unique circumstances applicable to Puerto Ricans in the continental United States, and the particular responsibilities of the Congress with respect to those citizens. Accordingly, we turn briefly to an examination of the background against which Section 4(e) was enacted.

We have set out at some length in an appendix (*infra,* pp. 49–64) the history of the relations between Puerto Rico and the continental United States, with particular emphasis of the language of instruction on the island during the last half century (*infra,* pp. 55–61) and the migration of Puerto Ricans to the mainland (*infra,* pp. 62–64). The most immediately revelant facts that emerge from that survey are these:

First, notwithstanding a consistent policy of granting increased autonomy to Puerto Rico, from the date of its acquisition in 1898 by the Treaty of Paris, 30 Stat. 1754, 1759—which expressly provided that "[t]he civil rights and political status of the native inhabitants * * * shall be determined by the Congress"—until 1952, governance of the island and the status of its residents have been subject to the

plenary power of Congress to "make all needful Rules and Regulations respecting the territory * * * belonging to the United States" (U.S. Constitution, Art. IV, Sec. 3, cl. 2; see *Downes* v. *Bidwell,* 182 U.S. 244; *Balzac* v. *Porto Rico,* 258 U.S. 298), and all that was done during that half-century with respect to Puerto Rico and its inhabitants, including the eventual achievement of commonwealth status, is ultimately attributable to the Congress.

Second, by the Jones Act of 1917, 39 Stat. 951, 953, the Congress conferred United States citizenship upon Puerto Ricans, thereby facilitating their uninhibited migration to the mainland; and they have, in fact, come here in large numbers since 1946 (averaging over 41,000 annually for the decade 1951–1960), so that there are today almost a million Puerto Ricans residing in the continental United States, about three-quarters of them concentrated in New York City.

Third, after the failure of early attempts to impose English on the inhabitants of the island, and despite continuing efforts to introduce English as a second language, the government of the United States in practice permitted teaching in Spanish through the fourth grade from 1916 on (with only a very brief partial exception), and, beginning in 1946, altogether abandoned English as the language of instruction in public schools—a policy which was consciously made irreversible, for practical purposes, in 1947 when Congress amended the Organic Act to permit the appointment of the Commissioner of Education by a popularly elected governor and again confirmed upon congres-

sional agreement to commonwealth status for Puerto Rico in 1952; the consequence is that, today—although the rate of literacy in Spanish is very high (more than 83%) [8]—almost two-thirds of the Puerto Rican population is unable to speak English,[9] much less read and write that language.

It was against this background that Congress, in 1965, enacted Section 4(e). The sponsors of the legislation—all New Yorkers (Senators Kennedy and Javits [10] and Representatives Ryan and Gilbert) [11]—stressed the congressional responsibility for the migration of Puerto Ricans to the American mainland and for their language handicap, and consequent disfranchisement in English-literacy States like New York. Thus, Representative Ryan thought it "unjust" that Puerto Rican citizens educated in Spanish should be barred from voting here when "we encourage migration between the island and the mainland." [12] Representative Gilbert termed it "an anomaly" that the Congress should "encourage the perpetuation of Puerto Rico's Spanish language and at the same time do nothing to protect the rights of citizenship of Puerto Ricans who move to other sections of the country." [13]

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[8] The literacy rate in Puerto Rico in 1960 was 83%. See R. 75. In light of the fact that the Commonwealth has recently expended one-third of its annual budget on education, it may be assumed that the literacy rate is now somewhat higher.

[9] See R. 75.

[10] See 111 Cong. Rec. 10643 (daily ed., May 19, 1965).

[11] See *id.*, at 15101 (July 6, 1965); *id.*, at 15665 (July 9, 1965).

[12] *Id.*, at 15667.

[13] *Id.*, at 15666. See, also, Congressman Gilbert's statement, Hearings on Voting Rights before Subcommittee No. 5 of the House Judiciary Committee, 89th Cong., 1st Sess., 362 (1965).

Senator Javits spoke in like vein, emphasizing the rightful "sense of injustice on the part of those in Puerto Rico who were educated in American flag schools" under a federal policy which "allows the instruction there to be in Spanish." [14] Perhaps Senator Kennedy summed up the congressional mind when he exhorted his colleagues to discharge their "responsibility and obligation" toward people who had come here because Congress had made them citizens, with a free right of entry to every State, yet with a language handicap that "is partly the result of a policy that we ourselves have fostered in Congress." [15]

The national legislature did not act precipitantly. As we have noted, the Puerto Rican migration to the continental United States—particularly New York State—has been substantial since the mid-1940's.[16] Congress abstained for two decades and intervened only after New York declined [17] to follow the example of other States with substantial multilingual populations—among them Louisiana, New Mexico, and Hawaii [18]—and after judicial proceedings had failed to

[14] *Id.*, at 10680.

[15] *Id.*, at 10688. See, also, Senator Kennedy's statement at *id.*, 10675.

[16] See App., *infra*, p. 62; R. 72.

[17] At least three proposals to amend the New York Constitution so as to permit voting by persons literate in Spanish were submitted to the State legislature in 1962. See Assembly Bills Nos. 121, 849 and 875, introduced at the session of the New York legislature beginning January 3, 1962.

[18] See *infra*, pp. 45–46.

achieve the franchise for Spanish-speaking Puerto Ricans.[19]

Nor did the Congress act intemperately or capriciously, legislating an unduly radical solution without regard to established local qualification procedures or the prerogative of the States to insist on an informed electorate. To be sure, Section 4(e) qualifies the English literacy requirement of a few States.[20] But the local decision to demand literacy is fully respected and every effort is made to reduce the impingement to the minimum. Moreover (as in this case), the law affects for the most part Spanish-speaking residents of New York City who have all the means of obtaining relevant information about electoral issues and candidates.[21] The federal legislation imposes no undue burden on the State electoral machinery. It does not require the formulation and administration of a Spanlish literacy test. On the contrary, the States are

[19] See *Camacho* v. *Doe*, 31 Misc. 2d 692, affirmed, 7 N.Y. 2d 762; *Camacho* v. *Rogers*, 199 F. Supp. 155 (S.D. N.Y.); *Cardona* v. *Power*, 16 N.Y. 2d 827, probable jurisdiction noted January 24, 1966, No. 673, this Term.

[20] The States requiring proof of literacy in English, expressly or by implication, are: Alabama, Alaska, Arizona, California, Connecticut, Delaware, Georgia, Hawaii (alternative to literacy in Hawaiian), Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, South Carolina (alternative to property qualification), Washington, Wyoming, and perhaps Virginia. The requirement is temporarily suspended in Alabama, Georgia, Mississippi, South Carolina and most of North Carolina by force of Section 4(a) of the Voting Rights Act of 1965, sustained in *South Carolina* v. *Katzenbach*, No. 22, Original, this Term, decided March 7, 1966. Of all the States affected, only four (New York, California, Connecticut and Massachusetts) have a Puerto Rican population exceeding 5,000. See R. 72.

[21] See *infra*, p. 44.

required to admit to the vote only those who have successfully completed six grades of school—remaining free to reject others who may have achieved literacy in their mother tongue without the benefit of formal schooling for the required period. In this respect, Section 4(e) accommodates itself to the voting registration procedures of New York, the most directly affected State.

In sum, Congress has acted out of a sense of moral obligation, only after long restraint, and the means ultimately chosen consciously avoid any unnecessary offense to State policy or dislocation of local procedures. The reasonableness of the solution is not seriously debatable. The only real question is whether the Congress wholly lacked constitutional power to provide any remedy in the circumstances. We submit the Constitution fully authorizes the legislation in suit.

We begin with the settled rule, enunciated by Chief Justice Marshall, a century and a half ago, that the constitutional powers of the national Congress are not "to be contracted by construction, into the narrowest possible compass" through "refined and metaphysical reasoning" that would render them "totally unfit for use" (*Gibbons* v. *Ogden,* 9 Wheat. 1, 222), and the corollary, that authority for congressional action may properly be sought in the Constitution as a whole, or in the combined force of several provisions, not alone in one or another of the specific grants of power. Perhaps the most explicit statement of this principle is in the *Legal Tender Cases,* 12 Wall. 457, 534:

> * * * it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. * * *

We do not, of course, suggest that such an approach is equally appropriate in testing the legitimacy of every federal legislative act. Doubtless, when legislation impinges on fundamental personal rights power should not be lighly inferred in the absence of an express grant—especially if the right involved is itself protected by a specific provision of the Constitution. See, *e.g., Lamont* v. *Postmaster General,* 381 U.S. 301. The rule is wholly applicable, however, when, as here, the only question is whether a seemingly necessary congressional remedy to a national problem trespasses on the prerogatives of another branch of government or those of the States. Specifically, a broad reading of the Constitution has been indulged with respect to federal legislation protecting the right of citizens to vote. See *Ex parte Siebold,* 100 U.S. 371; *United States* v. *Gale,* 109 U.S. 65; *Ex parte Yarbrough,* 110 U.S. 651, 665; *Burroughs and Cannon* v. *United States,* 290 U.S. 534; see *Smiley* v. *Holm,* 285 U.S. 355, 366–367; *United States* v. *Classic,* 313 U.S. 299, 315. And the Court has accorded like treatment to those measures in which Congress was attempting

to fulfill its responsibilities toward its wards, whether natives of this continent or the inhabitants of our newly acquired possessions. See *United States* v. *Kagama,* 118 U.S. 375; *De Lima* v. *Bidwell,* 182 U.S. 1; *Downes* v. *Bidwell,* 182 U.S. 244; *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 317. Thus, here, in sustaining legislation which—far from abridging the fundamental liberties of the people—seeks to facilitate the exercise of the franchise by former wards of the Congress, we are fully authorized to invoke a benevolent construction of the Constitution and freely to draw from several provisions as complementary sources of power.

But, there is, in fact, little occasion to stray beyond familiar boundaries. Indeed, at least two express provisions rather plainly authorize the legislation in suit. We consider first the so-called "Territorial Clause" of the original Constitution (Art. IV, Sec. 3, cl. 2), which empowers the Congress to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." It must be read together with the explicit stipulation of the treaty of cession that "the civil rights and political status" of Puerto Ricans should "be determined by the Congress." Whatever the force of those provisions with respect to the Commonwealth of Puerto Rico today, they were, after all, the predicate for the congressional policy which both permitted Puerto Ricans to retain their language and to freely migrate to the mainland as citizens, and we submit they yet authorize Congress to "wind up" the matter by providing a remedy for the resulting problem in some of the States.

Perhaps the Territorial Clause and the power to implement treaty obligations supply a sufficient basis for Section 4(e). Yet, it seems proper, also, to invoke—as did the draftsmen of the legislation—the Fifth Section of the Fourteenth Amendment, empowering the Congress to "enforce" by any "appropriate" means, the "privileges and immunities" of American citizens, the guarantee against arbitrary legislation that abridges "liberty" without "due process of law," and the right to "equal protection of the laws". It is, of course, too late to question the proposition that the Fourteenth Amendment qualifies the prerogative of the States to fix qualifications for voting in their own elections. The principle we assert here is that the Fifth Section of the Amendment authorizes the Congress to search out and remove unreasonable restrictions on the exercise of the franchise—at least for the benefit of American citizens to whom it owes a special obligation—and that its determination is entitled to deference, notwithstanding the courts might have hesitated to strike down the State barrier in the absence of the federal legislative finding.

Finally (although, as we have said, the point requires little argument once the existence of relevant power is established), we consider the objection that Section 4(e) constitutes an unreasonable intrusion on the State prerogative to fix voting qualifications and to conduct its own elections as it chooses.

We turn now to a more detailed examination of the sources of power and their relevance to the question presented. For convenience, we treat them sepa-

rately. But, at the outset, we stress once again our belief that the several constitutional provisions invoked should be viewed, in this context, as complementary predicates for the challenged legislation.

I. SECTION 4(E) IS APPROPRIATE LEGISLATION UNDER THE CONGRESSIONAL POWER TO IMPLEMENT THE TERRITORIAL CLAUSE AND THE TREATY OBLIGATIONS OF THE UNITED STATES

We have already sketched the evolving congressional policy toward Puerto Rico: United States citizenship was granted its inhabitants—carrying with it the privileges appertaining to that status, including the right to freely enter and establish residence in the several States; yet, Puerto Ricans were permitted to retain their Spanish culture and to educate their children in that language, and that decision was confirmed when the island was accorded a large measure of political autonomy, including the right to conduct its school system as it chooses. There can be no question of the power of the Congress to have determined these matters as it did. As Chief Justice Marshall suggested, at an early date, the authority to legislate for a new territory is both inherent—"the inevitable consequence of the right to acquire territory"—and expressly confirmed by the clause of Article IV, Section 3, of the Constitution which provides that "Congress shall have power to * * * make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." *American Insurance Co.* v. *Canter,* 1 Pet. 511, 542–543. See, also *De Lima* v. *Bidwell,* 182 U.S. 1, 196. The power has been called "plenary" (*Hornbuckle* v.

Toombs, 18 Wal. 648, 655), "full and complete" (*National Bank* v. *County of Yankton,* 101 U.S. 129, 133), "well-night absolute" (*Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 347) ; but, whatever its limitations, it was plainly sufficient to support the policies we have recited. There is, of course, no doubt concerning the status of Puerto Rico as a "territory" within the Territorial Clause during the period involved. See *De Lima* v. *Bidwell, supra; Downes* v. *Bidwell,* 182 U.S. 244; *Balzac* v. *Porto Rico,* 258 U.S. 298. See, also, *Kopel* v. *Bingham,* 211 U.S. 468. Moreover, with respect to Puerto Rico, the Congress possessed, if need be, an additional source of power by virtue of the treaty of cession which explicitly provided that the "civil rights and political status of the native inhabitants * * * shall be determined by Congress." Treaty of Paris (1898), Art. IX, 30 Stat. 1759.[22] No one can be heard to complain that the provision was later implemented by granting citizenship to the residents of the territory. See *Downes* v. *Bidwell, supra,* at 279–280; *Balzac* v. *Puerto Rico, supra,* at 307–308. The only question here is whether Congress is now powerless to effectuate its policy with respect to Puerto Ricans who have come to the mainland by providing a shield against hostile State laws.

[22] See, also, Article 55 of the United Nations Charter, ratified by Congress (59 Stat. 1045–1046), which provides that the subscribing nations "shall promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and Article 56 (*id.* at 1046), which binds the signatory nations to take action "in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

In our view, the answer is plain: unless the Constitution absolutely forbids it, Congress may do whatever is "necessary and proper for carrying into Execution" (U.S. Constitution, Art. I, Sec. 8, cl. 18) its legitimate policy with respect to Puerto Rico and its citizens, invoking the very sources of power which authorized the decisions already taken. As we have already noted, Section 4(e) of the Voting Rights Act of 1965 is an attempt to discharge a continuing obligation toward our Puerto Rican citizens established on the mainland by insuring that the preservation of their Spanish cultural heritage and language—which Congress itself imposed during its stewardship of the territory—does not become a serious legal handicap. That is a wholly proper concern. As this Court said in sustaining special legislation for the benefit of the Philippines, the power to govern a possession "carries with it great obligations * * *. Among these correlative duties is the moral obligation to protect, defend, and provide for the general welfare of the inhabitants." *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 314. There money was appropriated, but, certainly, the duty can be no less, nor the power more doubtful, when the purpose of the legislation is to assure equal access to the franchise. Indeed, this Court has noted that citizenship was granted the inhabitants of Puerto Rico in part "to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights." *Balzac* v. *Porto Rico,* 258 U.S. 298, 311. Thus, we submit that Section 4(e), enacted as it was to imple-

ment that promise, is fully authorized by the Territorial Clause and the power to implement treaty obligations.[23]

What answer can be made? Only three possible objections come to mind.[24] The first—articulated by the majority below (R. 90)—is the proposition that the Territorial Clause authorizes only legislation which expends itself within the boundaries of the territory concerned. Another like contention might be that the congressional power under that provision ended when Puerto Rico ceased to be a "dependent" territory and achieved commonwealth status. And, finally, it will doubtless be argued that, whatever the extent of the present applicability of the Territorial Clause to Puerto Rico or its citizens, it can never authorize an intrusion on the constitutionally recognized prerogative of the States to fix voting qualifications with respect to their own elections. We pretermit the last objection for the moment—deferring its considering to the last portion of the brief in which we discuss the reasonableness of the legislation insofar as it is said to impinge on States interests, a question common

[23] In relying on the Territorial Clause we do not mean to ignore recent developments affecting the status of the island which may bear on the present scope of that power. See *infra*, pp. 27–30. See, also, App., *infra*, pp. 52–55.

[24] We do not stop to consider the objection made below (see R. 90) that, in enacting Section 4(e), Congress expressly invoked only its power under the Fourteenth Amendment. We have already noticed the clear congressional purpose to reach Puerto Ricans, primarily, if not exclusively (*supra*, pp. 10–11). Accordingly, here Congress might properly draw on any number of complementary sources of power which suggest the same result. See *supra*, pp. 17–18.

to every aspect of congressional power invoked (*infra,* pp. 42–48)—and turn here to the first two claims which bear only on the assertion of the Territorial Clause.

1. The suggestion that the territorial power wholly ends at the shores of the mainland is rebutted by the decisions already cited. Thus, in *Downes* v. *Bidwell, supra,* this Court sustained under the Territorial Clause an otherwise unconstitutional special tariff enacted for the benefit of Puerto Rico but collected in the United States on imports from the island. And in *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, the payment to the Philippines of the proceeds of a domestic tax was upheld, at least alternatively, on the basis of the broad powers of the Congress with respect to the territories. See *id.* at 313–318, 320, 322–324. Nor is the rule limited to money matters. In the *Downes* case itself it was expressly asserted that "the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be * * *." 182 U.S. at 279. See, also, *Rabang* v. *Boyd,* 353 U.S. 427, 432–433. The status granted, of course, survives migration to the mainland. Indeed, the right freely to enter the United States was perhaps the most important attribute of citizenship.[25]

[25] The grant of citizenship in 1917 had little, if any, effect at home. In *Balzac* v. *Porto Rico*, *supra*, this Court held that, except as expressly stipulated by the Jones Act (see § 2), the guarantees of the Bill of Rights were not thereby extended to the residents of the island.

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That is expressly recognized in the passage already quoted from the *Balzac* case (*supra,* p. 23), in which the Court emphasized that one of the intended benefits of citizenship when it was conferred on the inhabitants of Puerto Rico was precisely to enable them to come to the mainland on a footing of "exact equality with citizens from the American homeland" and there "enjoy all political and other rights." 258 U.S. at 311.

Obviously, the consequences of granting citizenship to Puerto Ricans have been felt within the continental United States, in every State in which they reside. As the Court said in *Balzac,* "[i]t enabled them to * * * becom[e] residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political." 258 U.S. at 308. Whether because they are citizens and are therefore protected from State "law[s] which shall abridge the privileges and immunities of citizens of the United States" (Fourteenth Amendment, Sec. 1; see, *e.g., Ex parte Yarbrough,* 110 U.S. 651; *Oyama* v. *California,* 332 U.S. 633), or because, being citizens, they were enabled to migrate to the States and, as mere residents, are entitled to due process and equal protection (see, *e.g., Yick Wo* v. *Hopkins,* 118 U.S. 356; *Truax* v. *Raich,* 339 U.S. 33; *Takahaski* v. *Fish Comm'n.,* 334 U.S. 410), and the other rights enjoyed by all who abide here (see, *e.g., Edwards* v. *California,* 314 U.S. 160), the congressional decision responsible for their coming has necessarily affected the States where they chose to reside, overriding any contrary local policy.

Thus, it is plain that the powers of Congress under

the Territorial Clause (like its authority to implement treaties, see *Missouri* v. *Holland,* 252 U.S. 416; *Baldwin* v. *Franks,* 120 U.S. 678, 683) may properly reach within the boundaries of a State. It need hardly be added that the legitimacy of congressional legislation affecting the rights of persons born in a territory does not depend on their location within or without the continental United States at the time of the enactment. We assume that some Puerto Ricans were on the mainland when the Jones Act was passed in 1917 (see R. 73) and that they, as well as the then inhabitants of the island, became citizens at that time.[26] Any doubt on this score, however, is resolved by the decision in *Rabang* v. *Boyd,* 353 U.S. 427, in which it was held that Filipinos lawfully admitted for permanent residence here lost their status as nationals and became aliens subject to deportation under legislation enacted pursuant to the territorial power when their country was proclaimed independent.

2. Equally untenable would be any contention that Congress lost all its powers under the Territorial Clause when Puerto Rico became a commonwealth. Doubtless, by agreeing to a new status for the island and ratifying the Puerto Rican Constitution (66 Stat. 327), the federal legislature relinquished a large measure of control over Puerto Rican affairs. There is no occasion to discuss here the varying views

[26] All residents of the island had been declared "citizens of Porto Rico" in Section 7 of the Foraker Act (31 Stat. 79), and all citizens of Puerto Rico were made citizens of the United States by Section 5 of the Jones Act without regard to their residence (39 Stat. 953).

which have been expressed concerning the revocable or irrevocable character of the grant of autonomy and the nature and extent of Congress' present powers over Puerto Rico. See the memorandum of Assistant Attorney General Kramer, in *Hearings on H.R. 9234 before a Special Subcommittee of the House Committee on Interior and Insular Affairs,* 56th Cong., 1st Sess. (1959). Nor need we mark the exact limits of the existing division of responsibility between the two governments.[27] The present legislation—which expends itself wholly within the United States—does not in the least encroach on the Commonwealth's right of self-government. For present purposes, it is enough to notice there is continuing congressional jurisdiction over some matters affecting Puerto Rico, including foreign relations,[28] defense,[29] immigration and naturalization,[30] postal,[31] and monetary affairs,[32] and those activities which are traditionally subject to interstate reguation.[33] See, also, 48 U.S.C. 734.[34] Indeed, in testing the applicability of the Territorial Clause in the present context, it is perhaps sufficient to say that Puerto Rico is not an independent nation

[27] Those questions are presently under consideration by the United States-Puerto Rico Commission on the Status of Puerto Rico. See Pub. L. 88–271, 78 Stat. 17.

[28] *E.g.*, 22 U.S.C. 284g.

[29] *E.g.*, 32 U.S.C. 109.

[30] See 8 U.S.C. 1101(a)(38).

[31] *E.g.*, 39 U.S.C. 705(e).

[32] *E.g.* 48 U.S.C. 741(a), 745.

[33] *E.g.*, 29 U.S.C. 213(f) (Fair Labor Standards Act).

[34] The cited provision of the Puerto Rican Federal Relations Act provides in pertinent part: "The statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Puerto Rico as in the United States * * *." See *Rios* v. *United States*, 256 F. 2d 68 (C.A. 1).

and that its natives are still citizens of the United States. That was, in effect, the ruling in the *Cincinnati Soap Co.* case with respect to the Philippines after those islands had achieved a comparable "commonwealth" status. The strikingly appropriate words of that decision bear repeating (301 U.S. at 319–320):

> * * * it is contended that the passage of the Philippine Independence Act of March 24, 1934, c. 84, 48 Stat. 456, and the adoption and approval of a constitution for the Commonwealth of the Philippine Islands have created a different situation; and that since then, whatever may have been the case before, the United States has been under no duty to make any financial contribution to the islands. Undoubtedly, these acts have brought about a profound change in the status of the islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be, finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory. By express provision of the Independence Act, we still retain powers with respect to our trade relations with the islands, with certain exceptions set forth particularly in the act. We retain powers with respect to their financial operations and their currency; and we continue to control their foreign relations. The power of review by this court over Philippine cases, as now provided by law, is not only continued, but is extended to all cases involving the Constitution of the Commonwealth of the Philippine Islands.

> Thus, while the power of the United States has been modified, it has not been abolished. Moral responsibilities well may accompany the process of separation from this country; and, indeed, they may have been intensified by the new and perplexing problems which the Philippine people now will be called upon to meet as one of its results. The existence and character of the consequent obligations and the extent of the relief, if any, which should be afforded by the United States in respect of them, are matters, not for judicial but for Congressional consideration and determination.

In short, whatever its present limits, there yet remains some power in the national Congress to legislate for the benefit of Puerto Ricans. At the least, it would seem, the federal legislature is authorized to carry out its old obligations toward the islanders it has invited here by providing a remedy that Puerto Rico is powerless to afford. Section 4(e) does no more.

II. SECTION 4(E) IS APPROPRIATE LEGISLATION UNDER THE FIFTH SECTION OF THE FOURTEENTH AMENDMENT

Strong arguments have been advanced to show that the Fourteenth Amendment, *ex proprio vigore,* outlaws State voting qualification rules (like those of New York) which discriminate against residents who, though literate in their native language, cannot read and write English—at least when the otherwise qualified applicants constitute a substantial minority who possess all the means of adequately informing themselves concerning the electoral issues and candidates. See Appellant's Brief in *Cardona* v. *Power,* No.

673, this Term, certiorari granted January 24, 1966. That contention is the more forceful when we recognize that the discrimination operates against persons whom Congress invited here an account of their education in what is, after all, on official American language—and therefore violates a long-standing policy of the United States. Even aliens might successfully claim exemption from hostile State legislation abridging fundamental rights under these circumstances. Cf. *Truax* v. *Raich,* 239 U.S. 33; *Takahashi* v. *Fish Comm'n.*, 334 U.S. 410. Citizens doubtless have a stronger right. But, in our view, those questions are not necessarily presented by the instant case. The issue here is, rather, whether the express congressional determination that it is impermissible, in the actual circumstances, to bar citizens from the vote on the sole ground of their literacy in a language other than English (albeit in an American language in law and in fact) is a proper exercise of the power to "enforce" the guarantees of the Fourteenth Amendment—notwithstanding the Amendment, of its force, may not annul the State rule affected by the legislation.

Underlying our statement of the question presented are two assumptions: that Section 5 of the Fourteenth Amendment invests the Congress with *some* authority to legislate with respect to State voting qualifications; and that the powers of the legislative branch of the national government, in this particular, are somewhat broader than those of the federal judiciary. We do not elaborate the first point, for it seems self-evident

that if Section 1 itself may restrict the State prerogative in this matter, as is now settled (*Carrington* v. *Rash,* 380 U.S. 89; *Louisiana* v. *United States,* 380 U.S. 145; *United States* v. *Texas* (E.D. Tex.), decided February 9, 1966),[35] Section 5—which applies to all the guarantees of the Amendment—authorizes Congress to legislate with respect to any matter within the purview of the first section. We turn immediately to our second premise.

It is, of course, a principle of general application that the Congress, when exercising its express powers, may paint with a broader brush than the courts. See *Everard's Breweries* v. *Day,* 265 U.S. 545; *Currin* v. *Wallace,* 306 U.S. 1; *United States* v. *Darby,* 312 U.S. 100. That is, in part, a necessary corollary of the regulatory function of legislation. But it implies also a recognition that the marking of constitutional boundaries often involves judgments which are best left to the legislative branch. See *South Carolina* v. *Katzenbach,* No. 22, Original, decided March 7, 1966, slip opinion, pp. 18–21. Invoking this principle, we suggest it is appropriate to concede a role to the Congress in delineating the content of "equal protection"—otherwise a guarantee of uncertain boundaries and varying applications—and in defining the "privileges and immunities of citizens as they bear on the exercise of the franchise—a peculiarly political matter.

1. Certainly nothing in the history of the adoption

[35] See, also, Brief for the United States as *amicus curiae* in *Harper* v. *Virginia Board of Elections*, No. 48, this Term, pp. 15–23.

of the Fourteenth Amendment opposes that suggestion. On the contrary, in the congressional debates leading to the adoption of the Amendment there was repeated emphasis on the importance of the grant of power to Congress under Section 5. Thus, speaking on behalf of the Joint Committee, Congressman Stevens said that the Amendment "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." Cong. Globe, 39th Cong., 1st Sess., p. 2459. Senator Poland stressed the same point:

> It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the states. [Cong. Globe, 39th Cong. 1st Sess., p. 2961.]

Although the debate did not focus on the exact extent of legislative authority under the enforcement clause, the principal exposition of the reach of the clause indicates an understanding that Congress would implement the broad protections against prohibited State action. When Senator Howard of Michigan reported to the Senate on May 23, 1866, for the Joint Committee, he explained that if rights were to be "effectuated and enforced" it was requisite that "additional power should be given to Congress to that end;" Section 5 met that need, in his view, because it was "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." The enforcement

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clause would empower the Congress "in case the States shall enact laws in conflict with the principles of the amendment to correct that legislation by a formal congressional enactment." Cong. Globe, 39th Cong., 1st Sess., p. 2765–2768. Though not expressly articulated, it seems clear that the power to enact corrective legislation included authority, to be shared with the courts, to determine when there was a departure from the principles expressed in Section 1.

This was undeniably the view taken by many who opposed the Amendment in the ratification debates. Thus, the Committee on Federal Relations of the Florida House of Representatives wrote that the Amendment

> vests in the General Government the power to annul the laws of a State affecting the life, liberty and property of its people, if Congress should deem them subject to the objections therein specified. [Florida House Journal, 76 (1866).]

And an opponent of ratification in the Pennsylvania House of Representatives argued that Section 5 "undoubtedly confers upon Congress the power to define what are the 'privileges and immunities' of citizens," Pa. Leg. Rec. at App. p. 111, while the Governor of North Carolina warned that

> Congress is hereafter to become * * * the guarantor of equal protection of the laws, and, by appropriate legislation, to declare a system of rights and remedies. [North Carolina House J. 29 (1866–1867).]

2. That the early Congresses so understood their mandate is amply shown by the legislation they enacted. While much of it was procedural or remedial, there were also definitional provisions that gave substance to the post-Civil War amendments. Thus, the Thirteenth Amendment—whose enforcement clause is identical to the Fourteenth's—was very soon implemented by the Civil Rights Act of 1866 (14 Stat. 27) which purported to confer specific rights on the former slaves as an incident of their emancipation (see *Civil Rights Cases,* 109 U.S. 3, 33). And, the next year, by the Peonage Abolition Act (14 Stat. 546, 18 U.S.C. 444), Congress defined "involuntary servitude" as including Mexican "peonage." See *Clyatt* v. *United States,* 197 U.S. 207; *Pollock* v. *Williams,* 322 U.S. 4. Ambitious attempts to "enforce" the Fifteenth Amendment under a comparable grant of power by the Enforcement Act of 1870 (16 Stat. 140) were struck down (see *United States* v. *Reese,* 92 U.S. 214; *James* v. *Bowman,* 190 U.S. 127), but there yet survives at least one provision of that statute which authoritatively defines the scope of the constitutional exemption from racial discrimination in voting as including "any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision." See 42 U.S.C. 1971(a). And so it was with respect to legislation implementing the Fourteenth Amendment.

The Enforcement Act of 1870, 42 U.S.C. 1981, already mentioned, reenacted the provisions of the Civil Rights Act of 1866 as appropriate legislation to enforce the

Equal Protection Clause. That guarantee was now declared applicable to the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefits of all laws and proceedings for the security of person and property," 14 Stat. 27; see 42 U.S.C. 1981, 1982; *Buchanan* v. *Warley,* 245 U.S. 60; *Shelley* v. *Kraemer,* 334 U.S. 1. Some efforts to extend equal protection were held excessive. See Section 2 of the Ku Klux Klan Act of April 20, 1871 (17 Stat. 13), invalidated in *United States* v. *Harris,* 106 U.S. 629, and *Baldwin* v. *Franks,* 120 U.S. 678; and Sections 1 and 2 of the Civil Rights Act of 1875 (18 Stat. 335, 336), declared unconstitutional in the *Civil Rights Cases,* 109 U.S. 3. But other definitional provisions have survived. Thus, Section 3 of the Act of 1871 legislatively determined that a State's inability to protect the constitutionally protected rights of "any portion or class" of its inhabitants in time of domestic violence "shall be deemed a denial by such State of the equal protection of the laws." 17 Stat. 14, 10 U.S.C. 333; see *Alabama* v. *United States,* 373 U.S. 545, and Brief for the United States in that case (No. 15, Original, October Term, 1962). And, finally, by Section 4 of the Civil Rights Act of 1875, *supra,* Congress gave specific content to the Equal Protection Clause by outlawing racial discrimination in the selection of juries. 18 Stat. 336, 18 U.S.C. 243. See *Strauder* v. *West Virginia,* 100 U.S. 303; *Ex parte Virginia,* 100 U.S. 339.

Plainly, the legislators of the post-war decade viewed Section 5 of the Fourteenth Amendment (and

the comparable enforcement clauses of the Thirteenth and Fifteenth Amendments) as authorizing more than procedural or remedial legislation; they deemed it to be their function to translate into concrete specifics the rather vague generalities of Section 1. Contemporaries, and many of them participants in the drafting of the Amendment,[36] their understanding of the enforcement clause is entitled to deference. To be sure, this Court found that they had sometimes overreached the boundaries; but there has been no repudiation of the basic approach followed by the first "enforcers" of the Fourteenth Amendment.

3. In its initial decisions construing the reach of the Reconstruction Amendments, this Court recognized the important role the Congress would play in vitalizing the broad guarantees. Thus, the *Slaughter House Cases,* 16 Wall. 36, although narrowly confining the reach of the Privileges and Immunities Clause, expressed the view that if the States did not conform their laws to the mandate of the Equal Protection Clause, "then by the fifth section of the article of the Amendment Congress was authorized to enforce it by suitable legislation." *Id.* at 81. Likewise, in the *Civil Rights Cases,* 109 U.S. 3—albeit the Court invalidated a measure enacted under Section 5 because it sought, quite unnecessarily in light of adequate State laws, to regulate conduct which the Court viewed as wholly private—there was an express recognition

[36] The government's brief in the pending case of *United States* v. *Guest*, No. 65, this Term, pp. 38–39, analyzes the record of those legislators who voted on the Fourteenth and Fifteenth Amendments and the Acts of 1870 and 1871.

of congressional power "to adopt appropriate legislation for correcting the effects of * * * prohibited State laws * * *." *Id.* at 11. But, more revealing are the jury discrimination cases decided in 1880, *Strauder* v. *West Virginia,* 100 U.S. 303, and *Ex parte Virginia,* 100 U.S 339. In *Strauder* the Court endorsed congressional legislation permitting removal of cases from State to federal court where a State by statute excluded all Negroes from jury service, and in *Ex parte Virginia* the Court upheld the provision of the Civil Rights Act of 1875 which penalized State officials guilty of excluding qualified citizens from jury service "on account of race, color, or previous condition of servitude."

The decisions are noteworthy because they seem to accord great respect to the congressional determination that racial discrimination in jury selection offends the Equal Protection Clause, a conclusion far from compelled by the historical evidence of the intent of the framers of the Amendment. See Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131, 145 (1950); Bickel, *The Original Understanding and the Segregation Decision,* 69 Harv. L. Rev. 1, 56, 64–65. That there was deference to the judgment of Congress is eloquently shown by the following passage from the opinion of the Court in *Ex parte Virginia,* (100 U.S., *supra,* at 345–346):

> All of the amendments derive much of their force from [the enforcement sections]. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immu-

> nities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to to prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

The Court has had little occasion to speak to the question since those early cases because, from 1875 until the present decade, no legislation was enacted implementing any of the Civil War Amendments. But, see, *United States* v. *Guest,* No. 65, and *South Carolina* v. *Katzenbach,* No. 22, Original, this Term. One recent opinion respecting the role of the Congress as pioneer in delimiting the Equal Protection Clause is worthy of note, however. In *Fay* v. *New York,* 332 U.S. 261, the Court rejected several challenges to the "blue ribbon" jury system of that State, emphasizing that Congress had not spoken with respect to any discrimination in jury selection except that based on race or color, which had been explicitly outlawed since 1875. Referring to that provision, the opinion continues (332 U.S. at 282–284):

> * * * For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination. This statute was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress. * * *
>
> * * * It is significant that this Court never has interfered with the composition of state court juries except in cases where this guidance of Congress was applicable. * * *
>
> * * * We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since Congress has considered the specific application of this Amendment to the state jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process.[37]

In sum, we submit that Senator Javits—one of the

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[37] In a note at this point in the opinion (332 U.S. at 284, n. 27), it is said:

"It is unnecessary to decide whether the equal protection clause of the Fourteenth Amendment might of its own force prohibit discrimination on account of race in the selection of jurors, so that such discrimination would violate the due process clause of the same Amendment. Nor need we decide whether the due process clause alone outlaws such discrimination. * * *"

co-sponsors of the legislation in suit—correctly stated the import of the enforcement section of the Amendment when he insisted that "it means that Congress may not only restrain States from violating the 14th Amendment, but may also use its judgment as to what is equal protection of the laws * * *." 111 Cong. Rec. 10680 (daily ed.). What is more, as *Fay* v. *New York* suggests, there are some occasions at least when it is wholly proper for Congress to take the initiative in marking the limits of permissible State action under the Fourteenth Amendment. Professor Freund, as quoted by Senator Kennedy in the legislative debates (*id.*, at 10677), has put it well:

> Just as Congress may give a lead to the courts under the commerce clause in prohibiting certain kinds of State regulation or taxation, and just as Congress may expressly prohibit certain forms of taxation of Federal instrumentalities, whether or not the courts have done so of their own accord, so in implementing the 14th and 15th amendments Congress may legislate through a declaration that certain forms of classification are unreasonable for purposes of the voting franchise.

The present instance, it seems to us, is a peculiarly appropriate exercise of that congressional responsibility. Not only does the matter in suit involve the electoral process—an area of special legislative competence, one may assume—but the congressional power is employed to effectuate a federal policy with respect to peoples who have a special claim to the protection of the Congress. See *United States* v. *County Board of Elections*, 248 F. Supp. 316 (W.D.N.Y.), appeal pending, No. 1040, this Term.

III. SECTION 4(e) DOES NOT UNREASONABLY IMPINGE ON THE RIGHT OF THE STATES TO FIX VOTING QUALIFICATIONS AND PROCEDURES

Thus far, we have examined the complementary sources of congressional power which seem to authorize the challenged legislation. But we have largely ignored the objection that, whatever the scope of those powers in other areas, their exercise in the premises unduly impinges on the State prerogative to fix voting qualifications and procedures with respect to its own elections. We now turn to that question, discussing it on the assumption that the same test of reasonableness applies whether Section 4(e) is predicated on the Territorial Clause, the power to implement treaties, or the enforcement section of the Fourteenth Amendment—albeit the limitations upon the Congress may be somewhat less if either of the first named powers is properly invoked and sufficient to sustain the provision.

At the outset, we suppose it now settled that Article I, Section 2, of the original Constitution and the Seventeenth Amendment, in referring to "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," do not confer on the States an absolute prerogative to grant or withhold the franchise on any conditions they choose. We have recently had occasion to discuss that question at some length in briefs now before the Court in two related cases [38] and will not burden the Court with a reiteration of that argumentation. For present purposes, it seems wholly sufficient to point to the recent decisions here in *Car-*

[38] See Brief for the Defendant, in *South Carolina* v. *Katzenbach*, No. 22, Original, pp. 33–38; Brief for the United States

rington v. *Rash,* 380 U.S. 89, and *Louisiana* v. *United States,* 380 U.S. 145. See, also, *United States* v. *Texas* (E.D. Tex.), decided February 9, 1966, and the concurring opinion of Johnson, J., in *United States* v. *Alabama* (M.D. Ala.), decided March 3, 1966. On the other hand, we freely concede the primary responsibilities of the States in this area and assert no general power in the national legislature to substitute its own mere preferences for the reasonable qualifications fixed by State law. The fact is that the legislation in suit does not remotely involve the attempted exercise of any such sweeping federal prerogative.

The issue here is very narrow.[39] New York and the other States affected by Section 4(e) have decided to demand literacy of their electorate. We do not quarrel with that choice. The sole effect of Section 4(e) is to require the States involved to admit to the vote literate citizens who speak another language. And that liberalization of the local law, Congress could reasonably conclude, would not destroy the only legitimate purposes of conditioning the right to vote on literacy. Indeed, it is a proper assumption that the quality of the electorate in terms of education, political judgment, and moral character is not materially affected by providing that literacy shall be in

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as *Amicus Curiae*, in *Harper* v. *Virginia Board of Elections*, No. 48, pp. 15–23.

[39] We agree with the view of Judge McGowan, dissenting below: "The challenge here made to Section 4(e) goes mainly to the existence of Congressional power, and not to the propriety, in terms of reasonableness, of this particular exercise of it. This emphasis is tactically well-advised, since there would appear to be little doubt on the latter score" (R. 100, n. 6).

either English or Spanish, rather than exclusively in English. And it is likewise reasonable to suppose that whenever there is a substantial body of voters who are illiterate in English, but literate in another language, public officials, political candidates, and the news media quickly and easily adapt to provide such voters substantially the same information on the issues and the candidates as is available to other voters.

The soundness of those conclusions is demonstrated by the availability of Spanish language newspapers and radio and television broadcasts in many parts of New York State [40]—as the sponsors of the legislation informed their colleagues.[41] Also instructive is the fact that political candidates in New York have adjusted to their bilingual constituencies.[42] We have a

[40] The record in this case includes affidavits of the managers of New York's two major Spanish-language newspapers and its three full-time Spanish-language radio stations (R. 50–59). It is shown that complete national and local news coverage is available to the Spanish speaking citizen. The statement of Stanley Ross, editor of "El Tiempo," typifies the extent of this coverage (R. 50):

> The paper subscribes to the United Press International wire service from which we receive reports in both Spanish and English. We also subscribe to several non-wire minor news services whose items we receive by mail in both Spanish and English. The English news service reports and items and any press releases or information we receive in English from local and state political leaders and office holders are translated into Spanish for publication.

[41] See, *e.g.*, statements of Senator Kennedy, 111 Cong. Rec. 10675 (daily ed. May 20, 1965) and Representatives Gilbert, *id.* at 15666 (daily ed. July 6, 1965) and Ryan, *id.* at 15102 (daily ed. July 6, 1965).

[42] See the affidavits of Bronx Borough President Badillo (R. 58), State Assemblymen Ramos-Lopez (R. 61) and Rios (R. 63), and State Senate candidate Cecilia (R. 59).

further indication in the policy of other States which have made accommodations for persons whose major language is other than English. Thus, Hawaii allows persons literate in either English or Hawaiian to vote (Rev. Laws of Hawaii (1955), Sec. 11–8; see, also, Sec. 11–38, requiring the printing of candidates' names in both languages), and Louisiana provides that an applicant must be able to read and write in the English language *or* his mother tongue. Louisiana Constitution, Article 8, Sec. 1.[43] So, also, in New Mexico, which has a large Spanish-speaking population, there is no English literacy requirement and ballots and instructions to applicants for registration are printed in both English and Spanish. New Mexico Statutes (1953) Sec. 3–3–7; 3–3–12; 3–2–41.[44] Indeed, New York itself requires that certain notices displayed in the New York City Criminal Court be printed in Spanish, as well as in Italian, Yiddish, and

[43] Although today Louisiana law provides for statutes to be printed in English only, La. Rev. Stat. (1950) 43:18, 43:19, the State Constitutions of 1845 (Art. 132) and 1852 (Art. 129) provided that the Constitutions and statutes should be promulgated in both English and French. The 1845 Constitution also expressly required that the Secretary be conversant in English and French; and members were permitted to address the legislature in either language (Constitution of 1845, Art. 104).

[44] See, also, the remarks of Senators Kennedy, Long, and Holland, 111 Cong. Rec. 10676–10678 (daily ed. May 20, 1965), and the affidavits in the record from office-holders in Louisiana [Rep. Edwin Willis (R. 67)], Texas [State Reps. Johnson (R. 64) and Alaniz (R. 66)], and New Mexico [Attorney General Witt (R. 69)].

English. McKinney's New York Laws, Bk. 29A, Pt. III, N.Y. Criminal Court Act, Art. 5, Sec. 50.[45]

Against these examples of accommodation, it is difficult to appreciate that New York's decision to exclude Spanish-speaking citizens from the franchise is dictated by governmental necessity. There is no suggestion that States which permit non-English speaking persons to vote have suffered thereby; nor, indeed, is there any indication that problems peculiar to New York may explain its policy. Conversely, it cannot be said that Congress has imposed upon the State an uneducated or uninformed electorate.

Finally, there is no basis for a claim that a substantial administrative burden has been imposed on the affected States—even assuming that such a consideration could outweigh an otherwise unjustified restriction of the franchise. See *Carrington* v. *Rash,* 380 U.S. 89, 96. Section 4(e) requires no State to devise and administer a Spanish literacy test. Under the statute, the only acceptable evidence of literacy in a language other than English is completion of six grades in an approved school (or a higher educational achievement if the State requires it of its English

[45] Other examples of State accommodation to non-English speaking minorities include the New Mexico requirement that certain official notices be printed in Spanish as well as in English. (*E.g.*, New Mexico Statutes (1953) 73–8–25; 75–21–3; 75–22–3; 75–23–4; 75–28–3; 10–2–11); the Hawaii requirement that notices of auctions of public lands be printed in both Hawaiian and English (Rev. Laws of Hawaii (1955) Sec. 99–40); and California's statute authorizing certain welfare informational material to be printed in Spanish only, or in Spanish and English (West's Anno. Calif. Code, Welfare and Institutions Section 10607).

speaking voters).[46] In this respect, the federal legislation adopts one of New York's modes of demonstrating literacy—the least burdensome for the State.[47] While Section 4(e) does not specify the manner of "demonstrating" the requisite educational achievement, it has been construed in practice—we think correctly—as following the local procedure. Thus, even here, the accommodation is complete. That the federal law, in fact, creates no difficult administrative problems is attested by the ease with which election officials in several Connecticut cities (R. 45–49), and New York City itself (R. 44), have adjusted to the new requirement.

We conclude, in light of the important policies served and the clear power to effectuate them, that the challenged legislation does not unduly trespass on the legitimate prerogatives of any State and imposes no substantial administrative burden. Accordingly, it should be upheld.

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[46] Until July 1965, New York required satisfactory completion of *eight* grades as an alternative to submitting to the literacy test, and a similar achievement would have been required of Spanish-speaking residents of the State. While the Voting Rights Act was pending in Congress, however, New York lowered its educational requirement to six grades satisfactorily completed. McKinney's 1965 Session Laws of New York, c. 797, § 1.

[47] In order to spare the affected States the burden of administering a foreign language test, Section 4(e) does not require them to register Puerto Ricans who, though literate in their own language and able to successfully complete a test, have not attended a formal school for the required period. In this respect, full parity is not demanded out of deference for State administrative problems.

CONCLUSION

For the foregoing reasons, the constitutional challenge to Section 4(e) of the Voting Rights Act of 1965 should be rejected and the judgment below reversed.

Respectfully submitted.

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APPENDIX

A. THE TREATY OF PARIS AND FEDERAL REGULATORY LEGISLATION

At the termination of the Spanish American War, Spain ceded Puerto Rico to the United States by Article II of the Treaty of Paris of 1898, 30 Stat. 1754, 1755. Prior to 1898 Puerto Rico, as a Spanish province, had experienced varying degrees of political autonomy from the Spanish crown,[1] but in 1897, just a year before the Spanish American War, a comprehensive charter of self-rule regarding internal affairs was granted by the royal crown.[2] Upon cession to the United States, the people of Puerto Rico anticipated that the political autonomy achieved by the decree of 1897 would be preserved, indeed enlarged, by severance of the old ties with a monarchial government and the new association with a republican democracy.[3] These expectations were not immediately realized.

Article IX of the Treaty of Paris provided (30 Stat. 1759): "The civil rights and political status of

[1] See Fernos-Isern, *From Colony to Commonwealth*, 285 Annals 16–17 (1953).

[2] Royal Decree of November 25, 1897, Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897, Documents on the Constitutional History of Puerto Rico 31–46 (1964).

[3] Fernos-Isern, *supra* note 1, at 18. The expectation regarding the 1897 decree may have been exaggerated in view of the authority retained by the crown through the appointed Governor General. See Magruder, *The Commonwealth Status of Puerto Rico*, 15 Pitt. L. Rev. 1, 2 (1953).

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the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." The treaty made no further reference to the future form or source of government for the Island. Following two years of temporary military rule,[4] Congress, in the first Organic Act of Puerto Rico (commonly known as the Foraker Act, 31 Stat. 77) established a territorial government for the Island controlled almost entirely by appointees of the President of the United States. Its principal features were a strong executive authority vested in a governor appointed by the President; executive department heads appointed by the President; an eleven-member upper legislative assembly (known as the Executive Council), all appointed by the President; a lower legislative assembly chosen by an electorate whose qualifications were to be established by the presidentially appointed Executive Council; a Supreme Court of judges appointed by the President, and lower courts administered by appointees of the governor (31 Stat. 81–84). The inhabitants were given their choice of remaining Spanish subjects or becoming "citizens of Puerto Rico"; they were not made American citizens (31 Stat. 79).

Discontent among Puerto Ricans with their lack of political autonomy under the Foraker Act and a developing sense in Congress of the advisability of modifying the relationship between the United States and Puerto Rico to reduce tensions between the two[5] led to passage of the Jones Act in 1917. 39 Stat. 951, 48 U.S.C. 731 *et seq.* Most significantly, Amer-

[4] Fernos-Isern, *supra*, note 1, at 18.

[5] See Magruder, *The Commonwealth States of Puerto Rico*, 15 Pitt. L. Rev. 1, 6 (1953); Hanson, *Transformation: The Story of Modern Puerto Rico*, 50–51 (1955) (hereinafter cited as Hanson.)

ican citizenship was conferred on all native Puerto Ricans (39 Stat. 953) and certain constitutional guarantees were specifically extended to the new citizens (39 Stat. 951). An elective senate replaced the presidentially appointed Executive Council as the upper legislative assembly (39 Stat. 958), and four of the six department heads were to be appointed by the governor rather than the President of the United States. *Id.* at 956. The Resident Commissioner to the United States—an elective office created by the Foraker Act—was granted certain privileges in the House of Representatives but not the right to a vote. *Id.* at 963, 48 U.S.C. 891–894.

Puerto Rico's agrarian economy experienced significant growth and change during the first three decades of American control, although a skepticism prevailed regarding the degree to which Puerto Ricans themselves benefited from this growth.[6] The decade of the 1930's, however, was a disaster for Puerto Rico. Poverty, disease and complete economic collapse were endemic to the entire island.[7] The widespread frustration sometimes found political expression in anti-Americanism and demands for complete independence.[8] The period produced the formation and growth of the Popular Democratic Party under the leadership of Luis Munoz-Marin, later to become the first popularly elected Governor of Puerto Rico.[9] Munoz developed a consensus among Puerto Ricans in favor of a special political status for the island vis-à-vis the United States which

[6] See Hanson at 29–35; Perloff, *Transforming the Economy*, 285 Annals 48 (1953).

[7] Hanson, Ch. IV; Tugwell, *The Stricken Land*, 33–34 (1947); Moscoso, *Industrial Development in Puerto Rico*, 285 Annals 60 (1953).

[8] Hanson at 77–93.

[9] Hanson at 172–189.

took into account the fiscal and economic dependence of the island and, at the same time, allowed for maximum political dignity and self-respect.[10] The people of Puerto Rico came to reject independence as a solution, partly for economic reasons, but, also, as Governor Munoz has expressed it, because of the "mutual respect which had developed between the peoples of Puerto Rico and the United States within our common citizenship." [11]

B. COMMONWEALTH STATUS

Further progress toward internal political autonomy and mutual good will was achieved in the 1940's when President Truman appointed Puerto Rico's first native-born Governor, Jesus T. Pinero,[12] and when Congress in 1947 amended the Jones Act to provide for the popular election of Governor. 61 Stat. 770.

The development toward a new and different relationship between the United States and Puerto Rico—which had its genesis in the growth of the Popular Democratic Party in the late 1930's—culminated in Congressional action in 1950 providing for the organization of a constitutional government by the people of Puerto Rico. 64 Stat. 319, 48 U.S.C. 731 *et seq.* (known as Public Law 600).

The debates over Public Law 600 and the subsequent debates over Congressional ratification of the Constitution of Puerto Rico reflect a Congressional desire to promulgate self-government and self-determination in Puerto Rico. Congress hoped that Puerto Rico

[10] See Hanson at 188–189; Tugwell, *The Stricken Land*, 83 (1947).

[11] Munoz-Marin, *Development Through Democracy*, 285 Annals 1, 5 (1953).

[12] Hanson at 208.

would serve as a example to other Latin American countries. Thus, the Report of the Senate Committee on Interior and Insular Affairs on the bill to provide for the adoption of a Puerto Rican Constitution declared [S. Rept. No. 1779, 81st Cong., 2d Sess. (vol. 3) 2 (1950)]:

> This measure is designed to complete the full measure of local self-government in the island by enabling the 2¼ million American citizens there to express their will and create their own territorial government * * *
>
> Thus, in the only Latin-American area under the American flag, which is a focal point of inter-American relations, the present measure would give further concrete expression to our fundamental principles of government of, by, and for the people. It is a logical step in the process of political freedom and economic development that was begun even in the days of our military occupation of the island at the end of the last century.

The Report included a letter from Assistant Secretary of State McFall, who wrote to the Senate Committee on behalf of the Secretary of State that:

> It is believed that, with their own constitution, the high degree of internal self-government which the Puerto Ricans today enjoy in their voluntary association with the United States, will assume for them an added significance. Moreover, such action by our government would be in keeping with the democratic principles of the United States and with our obligations under the Charter of the United Nations to take due account of the political aspirations of the people in our Territories and to develop self-government in them.
>
> In view of the importance of "colonialism" and "imperialism" in anti-American propaganda, the Department of State feels that S. 3336 would have great value as a symbol of

> the basic freedom enjoyed by Puerto Rico, within the larger framework of the United States of America.[13]

The Senate approved the bill without debate or opposition. 96 Cong. Rec. 83221 (1950).

The House Committee on Public Lands also held hearings[14] on the Senate bill and reported it with minor amendments. The House Report stated (H. Rep. No. 2275, 81st Cong., 2d Sess. 2):

> By permitting the people of Puerto Rico to formulate and by their own initiative and choice adopt a Constitution, S. 3336 would further implement the self-government principle established by the Congress as the cornerstone and fundamental policy governing the relationship of the United States toward territories over which it has jurisdiction.

The House Committee emphasized the preparedness of Puerto Ricans for the exercise of political responsibilities (*id.* at 4):

> In conclusion, it is the feeling of this committee that the people of Puerto Rico have demonstrated by their intelligent administration of local governmental activities, by their extensive use of the franchise, and by their

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[13] See letter of the Secretary of the Interior, Hon. Oscar Chapman printed in the Report; see, also, Hearings on Puerto Rico Constitution before the Senate Committee on Interior and Insular Affairs, 81st Cong. 2d Sess. (vol. 1) 2 1950), testimony of Resident Commissioner Fernos-Isern, 4–5; Asst. Secretary of State Miller, 15, and Justice Snyder of the Supreme Court of Puerto Rico, 22, 25.

[14] See Hearings on the Puerto Rico Constitution before the House Committee on Public Lands, 81st Cong. 2d Sess. (vol. 3), testimony of Gov. Munoz-Marin, 27; Rep. Lynch, 38; Asst. Sec. of State Miller, 46; Justice Snyder, 52, 55–56; Commissioner Fernos-Isern, 64–65; Rep. Howell, 113; and remarks of Rep. Barrett, 27.

> high degree of political consciousness, that they are eminently qualified to assume greater responsibilities of local self-government.

Following the adoption of the Puerto Rican Constitution, the United States notified the United Nations that Puerto Rico was no longer a non-self-governing area. Filed with the letter from Ambassador Lodge was a memorandum from the United States Government recognizing "the full measure of self-government which has been achieved by the people of Puerto Rico" and stating that it was no longer appropriate for the United States to transmit information on Puerto Rico to the United Nations as it was required to do for "non-self-governing nations" under Article 73(e) of the United Nations Charter. The memorandum states (28 State Dept. Bulletin 587):

> By the various actions taken by the Congress and the people of Puerto Rico, Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provision of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision.[15]

C. SPANISH AS THE LANGUAGE OF INSTRUCTION IN THE SCHOOLS OF PUERTO RICO

Today Spanish is the language of instruction in Puerto Rican schools, but it has not always been so. Under the Organic Acts the authority to formulate the policies and curricula of Puerto Rican schools was delegated to a Commissioner of Education appointed by the President. 31 Stat. 81 (Foraker Act); 39

[15] This Court has also noted that "orderly development of the government of Puerto Rico as an integral part of our govern-

Stat. 956 (Jones Act).[16] Early policy strongly favored the predominant or exclusive use of English in the schools in the belief that such a course would facilitate the development of a dual American-Spanish culture on the island. This policy came to be rejected, with Congressional approval, because of the imposing difficulties in teaching young children in a language unknown to them outside of their classroom experience and because instruction in Spanish was the universal desire of the Puerto Rican people.

The policy of the first Commissioner of Education, Dr. Martin G. Brumbaugh, was "the conservation of the Spanish language and culture and the acquisition of the English language with all the cultural characteristics which such acquisition implies."[17] Initially English was merely a subject of instruction in the elementary grades but was not used as the language of instruction in teaching other subjects. In the high schools, however, it was used as the lan-

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mental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the island." *Bonet* v. *Yabucoa Sugar Co.*, 306 U.S. 505, 510. See, also, *Bonet* v. *Texas Co.*, 308 U.S. 463, 470–471; *De Castro* v. *Board of Commissioners*, 322 U.S. 451, 455–456; *Diaz* v. *Gonzales*, 261 U.S. 102, 105–106.

[16] The desire of Congress to maintain control over education in Puerto Rico was emphasized in the Jones Act of 1917 by the retention of Presidential power to appoint the Commissioner of Education while the power to appoint other executive department heads (except the Attorney General) was transferred to the Governor of the Island. The appointment of Commissioner required senatorial confirmation. 39 Stat. 956.

[17] Osuna, *A History of Education in Puerto Rico* (1949) at 342 (hereinafter cited as Osuna).

guage of instruction.[18] By 1903, the difficulties inherent in this half-way policy were manifest and it was decided to make English the language of instruction in all grades.[19] The school system struggled through a conversion period for a decade in which many American teachers were imported and an extensive English training program for native teachers was undertaken.[20] The program had been launched with an emotional fervor unaccompanied by pedagogical analysis. Under a new Commissioner in 1915, Dr. Paul G. Miller, the policy was re-examined. His Department issued a report in 1916 which identified and summarized the failure of the English language policy as follows:[21]

> * * * The evidence examined shows that the probable cause of this failure lies in a misconception of the method and material best suited to teach English to non-English speaking children who are studying at the same time their mother-tongue. This misconception is revealed in the attempt to teach English to the Puerto Rican children as if it were their mother-tongue, without regard to the fact that they live in a non-English environment, and without utilizing the advantages which accrue to the children from linguistic training in their native language.

The report recommended a modification of the all-English policy and the modification was put into operation by the Commission. Spanish became the

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[18] *Id.* at 343.

[19] *Id.* at 344.

[20] *Id.* at 345.

[21] *The Problem of Teaching English to the People of Puerto Rico*, Bulletin No. 1, Government of Puerto Rico, Dept. of Education, San Juan (1916), pp. 25–26.

language of instruction in the first four grades with English retained for the remaining grades. [22]

A 1926 survey of the schools in Puerto Rico sponsored by Columbia University concluded that using English as the language of instruction prior to the seventh grade was futile because of cultural and environmental barriers, and advised that the time and effort be turned to subjects relevant to the present and future lives of the students. [23] The proposals in the Columbia survey were rejected [24] and English remained the language of instruction for the fifth grade and above until 1934. In that year Commissioner José Padin, the author of the 1916 report on the failure of English instruction, ordered the use of Spanish as the language of instruction in the first eight grades.[25] The change did not connote abandonment of prior policies designed to achieve English literacy, but instead was described by Dr. Padin as a realistic adjustment intended to improve English facility without an inordinate sacrifice of other educational objectives.[26] The new policy, however was short-lived. The time was one of intense political turmoil in Puerto Rico and Congressional disenchantment with a variety of local programs and political ideas coalesced on the English language issue. Commissioner Padin was forced to resign [27] and his successor, Dr. José Gallardo, was di-

[22] Osuna at 350.

[23] *Survey of the Public Educational System of Porto Rico;* Studies of the International Institute of the Teachers College, Columbia University, No. 8, 1926, p. 29–31.

[24] *Annual Report of the Commissioner of Education of Puerto Rico*, 1925–1926, p. 25; see Clark, *Porto Rico and Its Problems* (1930) at 81.

[25] Osuna at 366.

[26] *Annual Report of the Commissioner of Education of Puerto Rico*, 1934–1935, pp. 1–2; Osuna at 366–368.

[27] Hanson at 53–56.

rected by President Roosevelt to intensify the teaching of English in order to achieve a bilingual population.[28]

The Gallardo period was one of great confusion in language policy. Its chief characteristic was the splitting of instruction time from the third grade forward in varying ratios between Spanish and English with Spanish predominating.[29] In 1942, Commissioner Gallardo joined his predecessors in forsaking English, as the language of instruction in the first six grades.[30] He testified before a Senate Sub-Committee in 1943 as follows:[31]

> We make efforts to teach English. We teach it through the elementary schools and in the high schools. However, the only opportunities for the use of English afforded to a child in Puerto Rico are exclusively those of the school. Teaching English is seriously handicapped by the environment, which is Spanish. The biggest mistake made by anyone is to think that we can achieve true bilingualism. In Puerto Rico it is impossible to obtain a situation where our people will master both languages equally well.

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[28] Letter of Appointment from President Roosevelt to Dr. Gallardo dated April 18, 1937, *The Public Papers and Addresses of Franklin Delano Roosevelt*, 1937 Volume, pp. 160–161 (1941). The letter was the first public expression from either a President or Congress on the language question in Puerto Rican schools. See Cebollero, *A School Language Policy for Puerto Rico* (1945), p. 27.

[29] Osuna at 377–381.

[30] *Annual Report of the Commissioner of Education of Puerto Rico*, 1941–1942, pp. 44–45.

[31] Hearings on Economic and Social Conditions in Puerto Rico Before a Subcommittee of the Senate Committee on Territories and Insular Affairs, 78th Cong., 1st Sess. at 230 (1943).

His testimony evoked Congressional and administration criticism.[32] Dr. Gallardo resigned in 1945 and, because none of the acceptable candidates to succeed him would commit themselves to an aggressive English language policy, the office remained vacant for two years.[33]

In 1946 the Legislature of Puerto Rico passed a bill providing for the use of Spanish as the language of instruction in the public schools,[34] but it was vetoed by President Truman. The President's veto message expressed no position on the merits of the language policy dispute, but tied solution of the language problem to the still unsettled question of political status for the Island. The President said:[35]

> Important as the language question may be, I regard the reaching of a permanent and satisfactory solution to political status as of greater importance, and I cannot permit a measure to stand which, in my opinion, would jeopardize that solution.

A permanent turn toward the use of Spanish as the exclusive language of instruction in the schools of Puerto Rico came in December 1946 with the interim appointment of Mariano Villaronga as Commissioner. Villaronga recognized that "English should be considered one of the most important studies in our edu-

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[32] Letters from Secretary of Interior Ickes to Dr. Gallardo dated March 31 and April 15, 1943 reprinted in Osuna at 387–389; See also Hanson at 56–57.

[33] Hanson at 319; Osuna at 412.

[34] Senate Bill No. 51, Legislature of Puerto Rico, 1946 regular session.

[35] *Public Papers of the Presidents—Harry S. Truman, 1946*, pp. 466–467 (1962).

cation program" but should be treated "as a school subject and not as the medium for teaching all other subjects." [36] Although the Senate never confirmed Dr. Villaronga's appointment [37] his program received ultimate Congressional approval. In 1947 Congress amended the Organic Act to provide for the popular election of Governor and the appointment of department heads, including the Commissioner of Education, by the elected Governor. 61 Stat. 770. The House Committee on Public Lands in reporting out the bill observed that the federal policy of local autonomy "recently has been advanced by the appointment of residents of Puerto Rico to high government positions," including the Commissioner of Education, and that "[T]hese appointments have met with widespread approval in Puerto Rico." [38] The ensuing election of Governor Munoz led to Dr. Villaronga's reappointment as Commissioner,[39] and the permanent adoption of Spanish as the language of instruction in the public schools. In 1949, Dr. Villaronga outlined for Congress his program designed "to intensify the teaching of English * * * as a special subject rather than * * * as a medium of instruction for content subjects." [40] Passage of Public Law 600 in 1950 and the adoption of the Puerto Rican Constitution by the people in 1952 [41] concluded the political-pedagogical struggle in favor of Spanish over English, a resolu-

[36] Speech of Dr. Villaronga quoted in Osuna at 413–414.

[37] Osuna at 412.

[38] H. Rep. No. 455, 80th Cong., 1st Sess. 3 (1947).

[39] Hanson at 319.

[40] Hearings on Minimum Wages and Education in Puerto Rico before a Subcommittee of the House Committee on Education and Labor, 81st Cong., 1st Sess. (vol. 3) 194 (1949).

[41] *Supra*, pp. 52–55.

tion which could not have occurred in the absence of deliberate Congressional approval.[42]

D. MIGRATION FROM PUERTO RICO TO THE MAINLAND

Puerto Ricans have enjoyed the right to move freely between the island and the mainland since 1917 when, by operation of section 5 of the Jones Act, they became American citizens (39 Stat. 953). Significant migration, however, did not begin until 1946 when almost 40,000 Puerto Ricans came to the mainland.[43] For the next fifteen years migration continued at a high level, but since 1960 has abated to token numbers, as shown in the following tables:[44]

Puerto Rican migration to the continental United States

Annual averages:		Each year, 1946–62—Con.	
1909–1930	1,986	1953	69,124
1931–1940	904	1954	21,531
1941–1950	18,794	1955	45,464
1951–1960	41,212	1956	52,315
1961–1964	1,234	1957	37,704
Each year, 1946–62:		1958	27,690
1946	39,911	1959	29,989
1947	24,551	1960	16,298
1948	32,775	1961	*—1,754
1949	25,698	1962	10,800
1950	34,703	1963	*—5,479
1951	52,899	1964	1,370
1952	59,103		

*The minus figure represents a net outflow.

[42] English remains a vital concern of public school administrators in Puerto Rico and elaborate programs are pursued in all grades to insure substantial familiarity with English, if not complete English literacy. See Hull, *The "English Problem,"* San Juan Review, June 1965, p. 30 and interview with Secretary of Education Quintero at p. 13 of the same publication.

[43] Migration Division, Puerto Rico Dept. of Labor, *A Summary of Facts and Figures, Puerto Rican Migration* (1964–1965 ed.) p. 15. See Hanson at 368.

[44] *A Summary of Facts and Figures, supra*, note p. 15. An earlier version of these tables was introduced in the court below (R. 73).

Puerto Rico experienced spectacular economic growth in the years following World War II, but its growing prosperity was seriously threatened by overpopulation until the effects of migration to the mainland alleviated some of the population pressure.[45] For a period, migration reduced Puerto Rico's natural population increase by as much as fifty percent.[46] Orderly migration was facilitated by the work of the Migration Division of the Department of Labor of Puerto Rico.[47] A working arrangement between the federal Department of Labor and the Puerto Rican government regarding orderly migration, at least of farm workers, was made known to Congress prior to its approval of commonwealth status for the island.[48] Although by no means planned or promoted, the migration of hundreds of thousands of Puerto Ricans

[45] See Davis, *Puerto Rico: A Crowded Island*, 285 Annals 116 (1953). Davis comments (*id.* at 119–120): "Had this outward movement not occurred, Puerto Rico's plight would have been even more difficult than it was. Emigration has helped the island not only demographically but economically, because the emigrants earn more than those who stay at home, and they send money back to the island. Furthermore, the net figures do not tell the whole story. It is well known that there is a substantial *seasonal* migration of farm labor to the mainland. In short, the island has been alleviating its demographic impasse, not at home but on the mainland." (Emphasis in the original.)

[46] *Id.* at 119.

[47] Hanson at 370–371.

[48] Testimony of Governor Munoz, Hearings on H.R. 7674 and S. 3336 before the House Committee on Public Lands, 81st Cong., 2d Sess. (vol. 3) 11 (1950).

to the mainland was a contributing factor to the achievement of economic stability on the island, a goal ardently sought by the people of Puerto Rico and one which Congressional policy was intended to facilitate.[49]

[49] Migrants from Puerto Rico to the mainland have met with artificial barriers to economic and social advancement significantly more burdensome than those which confronted European migrants of earlier generations. See Handlin, *The Newcomers* (1959 Anchor ed.), chs. 3 and 4. Handlin attributes slowness in overcoming these barriers to a lack of communal organization unavoidable under the circumstances and to its by-product, individual apathy. He concludes, however:

> What has transformed apathy into involvement is the realization, or hope, that politics can be a means of effecting a fundamental improvement in their own situation. Earlier, even the Puerto Ricans who were familiar with American governmental processes were hesitant and skeptical about taking a personal part in politics. * * * Now increasingly they are persuaded that they can influence the election of office holders and that the choices they make can have genuine significance in their lives. If these people are not disillusioned by successive frustrations, this may prove a significant incentive toward organization, particularly since government plays so important a part in their daily existence. [*Id.* at 116.]

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