IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 22, Original

STATE OF SOUTH CAROLINA, *Plaintiff*

—VS.—

NICHOLAS DEB. KATZENBACH, Attorney General
of the United States, *Defendant.*

BRIEF FOR THE DEFENDANT

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STATE OF SOUTH CAROLINA, PLAINTIFF

v.

NICHOLAS DEB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

BRIEF FOR THE DEFENDANT

JURISDICTION

This is an action between a State and a citizen of another State.[1] The original jurisdiction of this Court is invoked under Article III, Section 2, Clauses 1 and 2 of the Constitution and 28 U.S.C. 1251(b)(3).

QUESTION PRESENTED

Whether the Voting Rights Act of 1965 is a constitutional exercise of congressional power under the Fifteenth Amendment.[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal constitutional provisions involved are Article I, Section 2, Clause 1, and Section 4, Clause 1, and the Fifteenth and Seventeenth Amendments,

[1] Attorney General Katzenbach is a citizen of New Jersey.

[2] See note 4, *infra*, p. 3.

which are set forth in the Appendix at p. 88. The federal statute involved is the Voting Rights Act of 1965 which is set forth in the Appendix at pp. 89–106 The South Carolina laws involved are Article II, Sections 3–6, of the South Carolina Constitution and 23 S.C. Code 62, which are set forth in the Appendix at pp. 106–109.

STATEMENT

A. PLEADINGS AND PROCEDURE

South Carolina commenced this original action against the Attorney General of the United States by filing the necessary motion (together with its proposed complaint and a supporting brief) on September 29, 1965. In a responsive memorandum we stated our belief that under Article III, Section 2, Clauses 1 and 2, of the Constitution, the Court had jurisdiction to entertain the action and might appropriately exercise that jurisdiction in this case.[3] By order dated No-

[3] In the memorandum for the defendant submitted in October 1965, it was suggested (at p. 2) that the constitutional issue might be prematurely presented by this action because, under Section 4(a) of the Act, South Carolina has an alternative remedy by seeking exemption from the substantive requirements of the Act in the United States District Court for the District of Columbia. In view of the Court's decision to grant plaintiff's motion for leave to file the complaint herein, we proceed to the merits in this brief. We recognize in this connection that plaintiff's challenge embraces the automatic character of the suspension of portions of its voting regulations effected by the Act, and the procedure and criteria provided for terminating that suspension by an action in the District of Columbia. Moreover, it may be that the suspended tests and devices have in fact been used in South Carolina for the purpose of denying the right to vote on account of race during the past five years, in which case the statutory remedy, for the time being, would be ineffective with respect to South Carolina.

vember 5, 1965, the Court granted plaintiff's motion for leave to file the complaint and directed the answer filed and the merits briefed on an expedited schedule. 382 U.S. 898. The defendant answered the complaint on November 19, 1965.

In its complaint South Carolina challenges the constitutionality of the Voting Rights Act of 1965, P.L. 89–110, 79 Stat. 437, and seeks a decree enjoining the enforcement of the principal provisions of the Act with respect to plaintiff, its political subdivisions, officials and inhabitants (Complaint, p. 16).[4] The Attorney General's answer admits the material factual allegations of the complaint but denies the legal conclusion that the statute overreaches the constitutional power of Congress.

B. THE STRUCTURE AND APPLICATION OF THE ACT

The Act's declared purpose is, primarily, "[t]o enforce the fifteenth amendment to the Constitution

[4] Several of the Act's operative provisions—inapplicable to South Carolina, for the present at least—have not been challenged by the complaint. Those are: Section 3 (authorizing, as part of the equitable relief which may be afforded in actions instituted by the Attorney General to enforce the guarantees of the Fifteenth Amendment, the appointment of examiners, the suspension of State literacy tests and similar prerequisites to voting, and judicial review of certain State voting procedures); Section 4(e) (securing voting rights of persons educated in American-flag schools in which the predominant classroom language was other than English); and Section 10 (authorizing the Attorney General to institute actions to enjoin the enforcement of poll taxes as a precondition to voting). In addition, we believe that it would be premature for the Court to consider the constitutionality of the criminal sanctions provided in Sections 11 and 12 (a), (b) and (c), none of which has been invoked.

of the United States * * *." Its principal thrust is aimed at literacy tests and similar "tests and devices" used to deny, on account of race or color, the right of citizens to vote in federal, State and local elections. The phrase "test or device" is defined to mean—

> * * * any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class [Section 4 (c)].

The Act has four key features: (1) a triggering mechanism which determines the applicability of the substantive provisions; (2) a temporary suspension of tests or devices (as defined); (3) a program for the use of federal examiners to qualify applicants for voter registration; and (4) a procedure for the review of substantive qualifications and practices and procedures relating to voting adopted after November 1, 1964.

1. THE TRIGGERING MECHANISM

The substantive provisions of the Act take effect, in the first instance, only following two factual determinations. Section 4(b) provides for initial applicability—

> * * * in any State or in any political subdivision of a State [separately considered] which (1) the Attorney General determines maintained on November 1, 1964, any test or

> device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

These determinations become effective upon publication in the Federal Register and are not reviewable in any court. Both determinations were made with respect to South Carolina on August 6, 1965 (30 Fed. Reg. 9897).[5]

Upon publication of these determinations, the Act becomes fully operative in the territory of the affected State or subdivision, unless, pursuant to Section 4(a),

> * * * the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no * * * test or device [as previously de-

[5] On the same day, the same determinations were made with respect to six other States (Alabama, Alaska, Georgia, Louisiana, Mississippi and Virginia), 26 counties in North Carolina and one county in Arizona. 30 Fed. Reg. 9897. The Director of the Census incorporated in the notice of his determination the statement that "Current studies of other political subdivisions will be completed as soon as the relevant data are obtained * * *" (*ibid.*). On November 18, 1965, the Director of the Census announced his determination that less than 50 percent of the persons of voting age residing in each of two counties in Arizona, one county in Hawaii, and one county in Idaho had voted in the presidential election of November 1964. 30 Fed. Reg. 14505. It had previously been determined by the Attorney General that tests or devices were maintained on November 1, 1964, by the three States embracing those four counties. 30 Fed. Reg. 9897.

> fined] has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *

Such actions for exemption are to be heard by a three-judge court under 28 U.S.C. 2284, with appeal lying directly to this Court. Section 4(a) directs the Attorney General to "consent to the entry of such [declaratory] judgment" if he determines that he has "no reason to believe" that any such test or device has been so used during the preceding five years, and Section 4(d) provides that

> * * * no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

On the other hand, a proviso to Section 4(a) prohibits the entry of a declaratory judgment terminating applicability

> * * * with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of

> such tests or devices have occurred anywhere in the territory of such plaintiff.

At the present time neither South Carolina nor any other affected State or subdivision has initiated proceedings for declaratory relief under Section 4(a). No judgments are outstanding which would, under the proviso to Section 4(a), preclude South Carolina from seeking such relief at this time.[6]

2. SUSPENSION OF TESTS AND DEVICES

As an immediate and automatic consequence of the publication of the two administrative determinations previously discussed, enforcement of tests or devices is suspended in the affected State or subdivision. Section 4(a) provides:

> To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit * * *.

[6] Such temporarily preclusive judgments have been entered with respect to Alabama (see, *e.g.*, *United States* v. *Logue*, C.A. 3081–63, S.D. Ala. (June 9, 1965)); Georgia (see, *e.g.*, *United States* v. *Raines*, 189 F. Supp. 121 (M.D. Ga.) (September 13, 1960)); Louisiana (see, *e.g.*, *United States* v. *Clement*, 231 F. Supp. 913 (W.D. La.) (July 14, 1964)); and Mississippi (see, *e.g.*, *United States* v. *Cox*, D–C–53–61, N.D. Miss. (June 24, 1964 and August 13, 1965)).

The suspension continues in effect until the terminating declaratory judgment described above is obtained. Accordingly, South Carolina is not at present free to enforce its requirement that to qualify for registration a person must, *inter alia,* be able to—

> * * * read and write any section of said [State] Constitution submitted to said elector by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more * * * [23 S.C. Code 62(4) (Supp. 1964)].[7]

All other voting qualifications maintained by South Carolina on November 1, 1964, are unaffected. Thus, so far as the Voting Rights Act is concerned, South Carolina remains free to refuse the franchise to those who do not satisfy existing citizenship, age and residence requirements, or who have been declared mental incompetents, have been convicted of specified crimes, are confined in prison, or are paupers supported at public expense. 23 S.C. Code 62 (1964 Supp.); S.C. Const., Art. 2, Secs. 3, 4, 6 (1964 Supp.).

3. REVIEW OF NEW VOTING STANDARDS AND PROCEDURES

During the period of time that the suspension of tests and devices is in effect in a State or subdivision, Section 5 precludes the State or subdivision from administering "any voting qualification or prerequisite to voting, or standard, practice, or procedure

[7] The Attorney General has interpreted the property test contained in 23 S.C. Code 62(4) to be inseparable from the literacy test (30 Fed. Reg. 14045–14046). Compare *Guinn* v. *United States*, 238 U.S. 347.

with respect to voting different from that in force or effect on November 1, 1964," without first obtaining either the acquiescence of the Attorney General or a declaratory judgment from a three-judge district court in the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

4. FEDERAL EXAMINERS

The Attorney General is authorized by Section 6 to request the Civil Service Commission to appoint examiners to serve in any political subdivision in which tests and devices are suspended when—

> * * * (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) * * * in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fifteenth amendment * * *.

The function of the examiners is to examine applicants for voting and place on a list of eligible voters

the names of those found to have the qualifications prescribed by State law which are not suspended by the Voting Rights Act or inconsistent with the Constitution and laws of the United States. These lists are to be transmitted to appropriate State officials who are required to transfer the listed names to the official voting roll (Section 7). Pursuant to Section 6, the Attorney General certified on October 29, 1965, that the appointment of examiners was necessary to enforce the guarantees of the Fifteenth Amendment in Clarendon County and Dorchester County, South Carolina. 30 Fed. Reg. 13850. Examiners appointed by the Civil Service Commission have been serving in those two counties since November 8, 1965.[8]

Persons whose names have been listed and transmitted by an examiner are entitled to vote in the election district of their residence unless (1) the election occurs less than 45 days after the transmittal (Section 7(b)) or (2) they are subsequently determined to be ineligible under valid State law (Section 7(d)). Each examiner's list of eligible voters must be made available for public inspection. Under Section 9 any listing may be challenged before a hearing officer appointed by the Civil Service Commission, and the decision of the hearing officer may be reviewed for

[8] The regulations established for examiners in South Carolina by the Civil Service Commission appear at 30 Fed. Reg. 9859–9861, 14045–14046. As of this writing, certifications of necessity have also been issued by the Attorney General with respect to 10 counties in Alabama, 30 Fed. Reg. 9970, 9971, 10863, 12654, 13849; five counties in Louisiana, 30 Fed. Reg. 9971, 10863, 13849 and 19 counties in Mississippi, 30 Fed Reg. 9971, 10863, 12363, 13849, 13850, 15837.

clear error in the United States court of appeals for the circuit in which the person challenged resides.[9]

In any political subdivision in which an examiner is serving under Section 6 of the Act, the Civil Service Commission is also authorized to assign, at the request of the Attorney General, "observers" whose function it is

> * * * (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. * * * [Section 8].

Moreover, if, within forty-eight hours after an election, a claim is made by persons eligible to vote who are registered or listed that they have not been permitted to vote, the examiner is to notify the Attorney General if he believes the allegations to be well founded (Section 12(e)). Upon receiving such notification, the Attorney General is authorized to apply in the district court for an order providing for the marking, casting, and counting of the ballots of such persons and the inclusion of their votes in the total vote before the results of such election shall be deemed final (Section 12(e)). The procedures set forth in Sections 8 and 12(e) have not as yet been employed.

[9] For a review of the operation of the challenge procedure under Section 9, see United States Commission on Civil Rights, *The Voting Rights Act: The First Months* (Nov. 1965), pp. 19–20.

The use of examiners in any political subdivision ceases whenever the suspension of tests and devices is terminated by declaratory judgment under Section 4(a) or whenever the Attorney General requests such termination. The use of examiners may also be terminated, pursuant to Section 13,

> * * * whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision * * *.

A subdivision seeking such a declaratory judgment may petition the Attorney General to request the Director of the Census to determine whether 50 per cent of the nonwhite persons of voting age are registered to vote in the subdivision. If the district court finds that the Attorney General has arbitrarily or unreasonably refused to request the Director of the Census to make the necessary determination, the court is authorized to require the Director to make it (Section 13). In none of the subdivisions to which examiners have been assigned has such assignment been terminated at this time.

C. THE SOUTH CAROLINA ELECTION LAW

The South Carolina law directly affected by the Voting Rights Act of 1965 is that portion of Section 62 of Title 23 of the Code which requires every applicant for voting registration to show that he—

> Can both read and write any section of [the State] Constitution submitted to said elector by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more * * *.

* * * * *

This provision is drawn directly from Article 2, §4, of the South Carolina Constitution which, in pertinent part, provides:

> (d) *Qualification for registration after January, 1898.*—Any person who shall apply for registration after January 1st, 1898, if otherwise qualified, shall be registered: *Provided,* That he can both read and write any Section of this Constitution submitted to him by the registration officer, or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars ($300) or more.

That has been the law of South Carolina since the adoption of the State Constitution in 1895.[10]

[10] The principal amendments to the suffrage provisions of the Constitution of 1895 have been as follows:

1. An amendment ratified in 1931 eliminating, as a requirement for voting, proof of payment of taxes other than the poll tax. S.C. Stat. 1929, p. 693.

2. An amendment ratified in 1945 in response to the decision

The Constitution of 1895, however, represented a sharp break with the past—in its terms if not in its consequences. From 1810 until the end of the Civil War, South Carolina had enjoyed white manhood suffrage without significant property qualifications and no literacy qualifications.[11] The Constitution pre-

in *Smith* v. *Allwright*, 321 U.S. 649, eliminating the section requiring the General Assembly to regulate party primary elections. S.C. Stat. 1945, p. 10. In *Elmore* v. *Rice*, 72 F. Supp. 516 (E.D. S.C.), affirmed *sub nom. Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875, it was found that the amendment was adopted "with the avowed purpose of preventing voting by Negroes in the Democratic primaries of the state" 165 F. 2d at 388. In recommending the amendment to the State legislature, Governor (later Senator) Olin Johnston stated:

> After these statutes are repealed, in my opinion, we will have done everything within out power to guarantee white supremacy in our primaries of our State insofar as legislation is concerned. Should this prove inadequate, we South Carolinians will use the necessary methods to retain white supremacy in our primaries * * *.
>
> White Supremacy will be maintained in our primaries. Let the chips fall where they may. [Quoted in *Elmore* v. *Rice*, 72 F. Supp. at 520.]

Following repeal of all statutory and constitutional provisions for the regulation of primaries, the State Democratic Party reaffirmed its regulation limiting participation in primaries to white Democrats. When that limitation was invalidated by the *Elmore* decision, the party for the first time adopted a literacy qualification. See Key, *Southern Politics in State and Nation* (1949) 627–629.

3. An amendment ratified in 1949 eliminating the requirement for payment of the poll tax. S.C. Stat. 1949, p. 773.

4. An amendment ratified in 1962 lowering the State, county, and polling precinct residence requirements. S.C. Stat. 1962, p. 2314.

[11] See Thorpe, *American Charters, Constitutions, and Organic Laws* (1909) 3267. As an alternative to the property or tax-paying qualifications which had been specified by the constitu-

pared by the first post-Civil War convention, which was called on September 13, 1865, preserved the prior practice and "shunned all suggestions that suffrage be given the Negro in any form." [12]

A second post-war convention was called in 1868 to comply with congressional legislation.[13] Article VIII of the Constitution of 1868 established virtually universal manhood suffrage. Thorpe, *op. cit. supra,* 3297–3298. A proposal to impose a literacy test, to become effective in 1875, was voted down 107–2. *Proceedings of the Convention of 1868* at 826, 827–834. The vote was given to every male citizen of the United States at least twenty-one years of age, "without distinctions of race, color, or former condition," who had resided in the State "at the time of the adoption of this constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote, sixty days next preceding any elec-

tion of 1790 (*id.* at 3258–3259), the Constitution of 1810 allowed a free white man to vote if he had resided in the State for two years and in the election district for six months. Paupers and non-commissioned officers and soldiers in the United States Army were excluded.

[12] Simkins and Woody, *South Carolina During Reconstruction* (1932) 41. See Thorpe, *op. cit. supra* at 3276.

[13] See 14 Stat. 428–429 and 15 Stat. 2–4, 14–16, where Congress prescribed, as a condition for representation in that body, that a constitutional convention must be held in each of the unreconstructed States, consisting of delegates "elected by the male citizens . . . of whatever race, color, or previous condition", exclusive of those disfranchised by the Fourteenth Amendment, and that the Constitution framed by those bodies must grant suffrage to "the male citizens . . . of whatever race, color, or previous condition," and be ratified by the same electorate approved by Congress. Ratification of the Fourteenth Amendment was also required.

tion * * *." Persons disqualified by the Fourteenth Amendment from office-holding were to remain disfranchised until such disqualification should be removed by Congress. Persons kept in an almhouse or asylum, those of unsound mind, and those confined in public prison were also disqualified. The State legislature was forbidden to disfranchise anyone except those convicted of treason, murder, robbery, or dueling. Disfranchisement was not allowed for felony or other crime which had been committed by a person while he was a slave. It was also made "the duty of the general assembly to provide from time to time for the registration of all electors."

Within a decade, however, the guarantees of the Constitution of 1868 were being whittled away in practice. Among the devices used to limit the voice of the Negro in governing the affairs of the State were the expulsion from the legislature of seventeen Republican representatives from Charleston; the abolition, in 1878, of voting precincts in areas with large Republican majorities (16 S.C. Stat. 565–570); adoption of a gerrymandering scheme that concentrated 25,000 Negroes in one congressional district (17 S.C. Stat. 1169–1171); and mob violence.[14] The so-called "eight-box" system was adopted in 1882 (17 S.C. Stat. 1110–1126). It provided for separate ballot boxes for each of eight different classes of offices and required each voter, unassisted, to place a separate

[14] See, generally, Simkins and Woody, *op. cit. supra* at 499–504, 547–549; Simkins, *Pitchfork Ben Tillman* (1964) 75; W. W. Ball, *The State that Forgot: South Carolina's Surrender to Democracy* (1932) 169–170.

ballot in the correct box or have his ballot invalidated. A registration law, also adopted in 1882 (*ibid.*), empowered registration officials, appointed by the governor, to determine the legal qualifications of all applicants. It also excluded from future registration persons who were qualified to register in 1882 but who failed to do so. An 1888 statute (20 S.C. Stat. 10–12) required that primaries be conducted in accordance, *inter alia,* with the rules of the Democratic Party. In 1890 the South Carolina Democratic Party adopted a constitution which permitted only white Democrats to vote in party primaries, "except that Negroes who voted for General Hampton in 1876 and who have voted the Democratic ticket continuously since may be allowed to vote." Carlisle, *Party Loyalty* (1963) 13. The progress of affairs and the program for the future were summarized by Senator (formerly Governor) Benjamin Tillman in an address to the constitutional convention of 1895 (Journal of the South Carolina Constitutional Convention of 1895, p. 463 *et seq.*):

> How did we recover our liberty [in 1876]? By fraud and violence. We tried to overcome the thirty thousand [Negro] majority by honest methods, which was a mathematical impossibility. * * * By fraud and violence, if you please, we threw it off. In 1878 we had to resort to more fraud and violence, and so again in 1880. Then the Registration Law and eight-box system was evolved from the superior intelligence of the white man to check and control this surging, muddy stream of ignorance and to tell it to back, and since then we have

> carried our elections without resort to any illegal methods, simply because the whites were united. If we were to remain united it would still be desirable that we should guard against the possibility of this flood, which is now dammed up, breaking loose; or, like the viper that is asleep, only to be warmed into life again and sting us whenever some more white rascals, native or foreign, come here and mobilize the ignorant blacks. Therefore, the only thing we can do as patriots and as statesmen is to take from them every ballot that we can under the laws of our national government.

That further restriction of the right to vote was the principal objective of the convention of 1895 is clear. A leading South Carolina historian states:

> The elimination of the negro from politics as effectively as this could be accomplished by constitutional enactment was the one object that had sustained the agitation for a new constitution. The negro thus enjoys the distinction of having been the cause for the formation of the State's last two constitutions, the one having been brought into being for the especial purpose of giving him the largest political rights, the other for the especial purpose of taking these away. [D.D. Wallace, *The South Carolina Constitution of 1895* (1927) 30.]

Delegates to the convention were elected under a registration law adopted in 1894 (21 S.C. Stat. 804–805) which subjected those who had registered prior to 1882 and new applicants for registration to elabo-

rate requirements including affidavits and vouchers.[15] In addition, Governor Tillman

> * * * instructed election officials to refuse to issue registration blanks to Negro applicants. The attorney general explained that this was done because the election law did not provide for the printing of the blanks, but the Republican state chairman clearly demonstrated "a general conspiracy" to withhold the desired papers.[16]

The convention when assembled was composed of 6 Negroes and 156 whites, although Negroes constituted a majority of South Carolina's population.[17] The Temporary Chairman set the tone of the convention in his initial address:[18]

> That Constitution [of 1868] was made by aliens, negroes and natives without character, all the enemies of South Carolina, and was

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[15] When the registration laws were temporarily held to be violative of the Fourteenth and Fifteenth Amendments (*Mills* v. *Green*, 67 Fed. 818 (D.S.C.), *reversed*, 69 Fed. 852 (C.A. 4)), the governor, Benjamin Tillman, commented that "[I] do not know what the United States Supreme Court will do, but I do know this, the Constitutional Convention will be held. It will be composed of white men principally, who will take care of South Carolina, and see that white supremacy is maintained within her borders." (Charleston *News and Courier*, May 11, 1895, p. 2, col. 1.) Tillman later added: "The devil forgot that while the registration law may go and the eight-box law may amount to nothing, that the shotgun has gone nowhere, but we don't want to use it." (Charleston *News and Courier*, July 28, 1895, p. 1, col. 1.)

[16] Simkins, *Pitchfork Ben Tillman* (1964) 290.

[17] See Bureau of the Census, *Negro Population 1790–1915* (1918) 44–45, 840.

[18] *Journal of the South Carolina Constitutional Convention of 1895* at 2.

> designed to degrade our State, insult our people and overturn our civilization. It is a stain upon the reputation of South Carolina that she has voluntarily lived for 18 years under that instrument after she had acquired full control of every department of her government, but it is a lasting honor to the people of the State that when they took control of their own affairs they set to work to do away with this instrument of their humiliation, in their day of defeat, and in its place to have an organic law which shall be the work of their own hands.

Senator Tillman spoke in the same vein:[19]

> The negroes put the little pieces of paper in the box that gave the commission to these white scoundrels [prior to 1876] who were their leaders and the men who debauched them; and this must be our justification, our vindication and our excuse to the world that we are met in Convention openly, boldly, without any pretense of secrecy, to announce that it is our purpose, as far as we may, without coming into conflict with the United States Constitution, to put such safeguards around this ballot in future, to so restrict the suffrage and circumscribe it, that this infamy can never come about again.

Under Tillman's leadership, a Democratic Party conference prior to the convention had agreed upon a system of registration qualifications which would effectively disenfranchise Negroes but not whites.[20] The

[19] *Journal of the South Carolina Constitutional Convention of 1895* at 463.

[20] The text of the agreement is set forth in the Charleston *News and Courier*, March 2, 1895, p. 4, cols. 2–3.

keystone of that system was Section 4 (c) and (d) of Article 2 of the Constitution as adopted by the convention (Appendix, *infra,* p. 107). Under that system, until 1898 a person could register permanently if, in the judgment of a registration officer, he could "understand and explain" any section of the State constitution submitted to him, regardless of whether he could read or write. After January 1, 1898, no one could register unless he could read and write or owned and had paid taxes on property assessed at $300 or more. Approximately 73% of the Negroes and 18% of the whites in South Carolina were then illiterate.[21] Senator Tillman candidly explained to the convention the practical operation of the new tests;[22]

> * * * I dictated the terms on which we [at the conference] agreed, and the basic principle was that no white man should be disfranchised except for crime, because that was the guiding star which actuated my entire purpose and action.
>
> * * * * *
>
> * * * If you put in here that a man must understand, and you vest the right to judge whether he understands in an officer, it is a constitutional act. That officer is responsible to his conscience and his God, he is responsible to nobody else. There is no particle of fraud or illegality in it. It is just simply showing

[21] See Compendium of the Eleventh Census, Pt. III, p. 316 (1890); S. Rep. 162, 89th Cong., 1st Sess. (1965), Pt. 3, p. 4.

[22] *Journal of the South Carolina Constitutional Convention of 1895* at 467, 469, 471.

> partiality, perhaps, [laughter] or discriminating."
>
> * * * * *
>
> * * * By means of the $300 clause you simply reach out and take in some more white men and a few more colored men.

Reviewing the work of the convention, an historian writes:[23]

> This [the clause permitting registration prior to 1898 of those who could understand and explain a section read to them] was intended primarily to take care of the unlettered among the Confederate veterans. Those upon this list were to be registered for life; all others are required to register every ten years. Altho the "understanding" clause was inserted as an ironclad special protection of the existing white illiterates, it was tacitly assumed that the educational or property tests would not be applied against white men who became of age after the expiration of the "understanding" clause. As a matter of fact they never have been. But against the negro they are rigidly enforced. * * *

The Constitution adopted by the convention was not submitted to popular referendum and became operative by its terms after December 31, 1895. The literacy test which it included has not been altered in the ensuing 70 years. It is the suspension of that test by the Voting Rights Act of 1965 which South Carolina here challenges.

SUMMARY OF ARGUMENT

The Voting Rights Act of 1965 has two main pro-

[23] D. D. Wallace, *op. cit.*, *supra*, at 34.

visions relevant here. One relates to the suspension, under specified circumstances, of tests and devices often used to deny or abridge the right to vote on account of race or color. The test here involved is South Carolina's literacy test. The other principal provision relates to the appointment of federal examiners to conduct the registration of voters. Both rest upon the power granted to Congress by Section 2 of the Fifteenth Amendment to enforce the provisions of Section 1.

The constitutionality of the provisions relating to voting tests and devices is grounded upon four basic propositions:

First, Congress has comprehensive authority under the Fifteenth Amendment to enact laws reasonably adapted to the objective of preventing abridgement of the right to vote on the basis of race or color; State laws adopted pursuant to the reserved power to determine the qualifications of electors must of course yield to such measures.

Second, Congress, acting pursuant to its power "to enforce" the constitutional prohibition against denial of the right to vote on account of race or color, may prohibit the use of any test or device, including a literacy test, under circumstances where it carries substantial danger of racial discrimination, even though the test, used under other circumstances in a nondiscriminatory fashion, might be a qualification for voting that a State could constitutionally impose. The decision in *Louisiana* v. *United States,* 380 U.S. 145, establishes the core of this proposition. We urge no more than the application of the rationale of that decision to legislative as well as judicial power.

Third, Congress had ample basis for concluding that, where less than half the adult population participated in a Presidential election in a State or political subdivision which maintained one of the tests or devices often used to deny the right to vote on account of race, there was so substantial a probability of abuse of the test as to warrant suspending it unless and until freedom from abuse could be proved. There was urgent need for a general and immediate remedy addressed to the widespread use of tests and devices as instruments of racial discrimination. It was essential that the remedy, at least in the initial phase, be substantially self-executing. The juxtaposition of the two facts whose determination triggers the suspension of all tests and devices—the participation of less than fifty percent of the adult population in the last election plus the maintenance of a test or device of a kind often used as an instrument of racial discrimination—itself demonstrates substantial danger that the device has been and will be thus abused. The gravity of the danger becomes even more apparent when it is observed, as Congress noticed, that the critical facts coexist chiefly in areas which have long enforced segregation as a State policy and resorted to sundry devices to maintain white supremacy at the polls. While these conditions demonstrate a danger of violation of the Fifteenth Amendment that would surely have warranted outright proscription of any test or device, Congress chose to minimize any risk of outlawing tests where there was no significant danger of abuse by allowing a State (or political subdivision) to terminate the

suspension by proof that it had not engaged in denying Negroes equal voting rights in violation of the Fifteenth Amendment.

Fourth, the procedure established by Section 4(a) affords any State or political subdivision affected by the triggering device a fair and reasonable opportunity of demonstrating that the apparently substantial danger that its test or device is used for the purpose of violating the Fifteenth Amendment has not in fact been realized. Shifting the burden of proof to the State or political subdivision is justified not only by the strength of the inference to be drawn from the facts determined by the Attorney General and the Director of the Census but also by the fact that the State officials are the ones who know how they have administered the test and presumably have the records demonstrating its use. It must be remembered, moreover, that Congress can deal with substantial dangers of violation as well as actual infractions. Finally, trial of the issue in the federal courts at the Nation's capitol ensures a convenient location and fair determination.

The provision for the appointment of federal examiners to determine the qualifications of voters is equally a proper exercise of the power conferred by Section 2 of the Fifteenth Amendment. So, also, is the provision requiring screening of new voting standards and procedures. In both instances Congress was appropriately dealing with attempts at circumvention which, experience shows, are to be feared in at least some of the areas where discrimination against the Negro franchise has persisted for almost a century.

ARGUMENT

I

CONGRESS HAS COMPREHENSIVE AUTHORITY TO PROTECT AND ENFORCE THE CITIZEN'S RIGHT TO VOTE FREE OF RACIAL DISCRIMINATION AND TO ADOPT THE MEASURES APPROPRIATE TO THAT END

In enacting the Voting Rights Act of 1965, Congress was unmistakably invoking its powers under the Fifteenth Amendment. Whether it exceeded those powers and invaded rights reserved to the States, as South Carolina contends, must be determined from an analysis of the scope of the grant and the nature of the reservation.

A. SECTION 2 OF THE FIFTEENTH AMENDMENT CONFERS UPON CONGRESS POWER TO ENACT ALL LEGISLATION REASONABLY ADAPTED TO THE OBJECTIVE OF PREVENTING ABRIDGMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR

The command of the Fifteenth Amendment is clear and the grant of power explicit:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

The Act accordingly is founded upon powers expressly delegated by the people and by the States to the national legislature. Congress did not here rely upon some inherent but unexpressed power. No process of inference or deduction is needed to discover the source of its authority. As the Court wrote in 1875, "the

amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'" *United States* v. *Reese,* 92 U.S. 214, 218. It follows that Chief Justice Marshall's statement in *Gibbons* v. *Ogden,* 9 Wheat. 1, 196, with respect to another express power—the power to regulate interstate commerce—is equally applicable here:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than one prescribed in the constitution.[24] * * *

What is more, the power invoked is directly related to the object of the legislation. In no sense is the Fifteenth Amendment here used as a pretext to further different ends. The provisions of the Voting Rights Act now in suit are plainly designed to secure compliance with the command of the Fifteenth Amendment. Congressional action was prompted by the President's appeal for an act "eliminat[ing] illegal barriers to the right to vote." 111 Cong. Rec. 4924 (March 15, 1965). Nothing in the Congressional hearings, reports or debates remotely suggests any

[24] That doctrine was reiterated only last Term in *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 255, where the Court unanimously sustained Title II of the Civil Rights Act of 1964.

purpose other than the enforcement of the Fifteenth Amendment. The central provision of the Act asserts that it is intended "[t]o assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color" (Section 4(a)). The operation of the principal provisions is terminated as soon as it is judicially determined that no test or device has been used during the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" (Section 4(a)). Congress was unmistakably striking at the evil condemned by the Fifteenth Amendment.

Nor can there be any doubt that Congress was fulfilling its constitutional role in the Voting Rights Act. It is the national legislature—rather than the Executive or the Judiciary—that has principal responsibility for fashioning the means of protecting the right created by the Fifteenth Amendment. Not only did the draftsmen of the amendment expressly provide for Congressional action: it is clear that they placed greatest reliance on the legislative branch to enforce the right to vote without racial discrimination wherever that right was not freely recognized. See Mathews, *Legislative and Judicial History of the Fifteenth Amendment* (1909), pp. 76–79. As stated in *Ex Parte Virginia,* 100 U.S. 339, 345:

> All of the [Civil War] amendments derive much of their force from [the provisions empowering Congress to enact "appropriate legislation"]. It is not said the *judicial power* of the general government shall extend to enforc-

> ing the prohibitions and to protecting the rights and immunities 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. * * *

Both the appropriateness of legislative action, and the limited capacity of the judiciary to cope with massive efforts to evade the command of the Fifteenth Amendment, have long been evident. Writing for the Court in *Giles* v. *Harris,* 189 U.S. 475, 488, Mr. Justice Holmes stated:

> The bill [in equity] imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.

Indeed, from the beginning it has been clear that the right granted by the Fifteenth Amendment "should

be kept free and pure by congressional enactments whenever that is necessary." *Ex Parte Yarbrough,* 110 U.S. 651, 665. See, also, *Terry* v. *Adams,* 345 U.S. 461, 467–468.

The choice of means is largely a question for Congress itself. Chief Justice Marshall stated the breadth of legislative discretion in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are consitutional." The same rule applies here. Speaking of the Civil War amendments the Court stated in *Ex Parte Virginia,* 100 U.S. at 345–346:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the 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.

In short, "Congress is not limited to such measures as are indispensably necessary to give effect to its express powers." *Everard's Breweries* v. *Day,* 265 U.S. 545, 558–559. On the contrary, it has broad and exclusive discretion in fashioning the legislative remedy—a discretion subject to "only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 262.

In the exercise of its power to protect the right to vote without racial discrimination Congress, in times past, has enacted quite sweeping statutes. See the very comprehensive Act of May 31, 1870, 16 Stat. 140, amended by the Act of February 28, 1871, 16 Stat. 433, repealed in part by the Act of February 8, 1894, 28 Stat. 36; and the voting rights provisions of the Civil Rights Acts of 1957 (71 Stat. 634), of 1960 (74 Stat. 86, 90), and of 1964 (78 Stat. 241), now codified in 42 U.S.C. 1971–1975. While *United States* v. *Reese,* 92 U.S. 214, and *James* v. *Bowman,* 190 U.S. 127, invalidated certain criminal sanctions in the early statutes on the ground that they were not restricted to racial discrimination (in *Reese*) or to State action (in *Bowman*), the power of Congress to deal fully with all aspects of racial discrimination in voting has never been doubted.[25] See *Reese,* 92 U.S. at 218; *Bowman,* 190 U.S. at 138–139. In the area of Congressional elections, the Court early sustained detailed systems of federal supervision of State registration and voting procedures in many ways similar to the provisions for examiners and observers in the present Act. See *Ex Parte Siebold,* 100 U.S. 371; *United States* v. *Gale,* 109 U.S. 65. See, also, *Smiley* v. *Holm,* 285 U.S. 355, 366–367; *United States* v. *Classic,* 313 U.S. 299, 315; *United States* v. *Scarborough,* 348 F. 2d 168 (C.A. 5).

[25] The unnecessary and premature character of the constitutional ruling in *Reese* was recognized by the Court in *United States* v. *Raines*, 362 U.S. 17, 24, which upheld against constitutional attack the validity of portions of the Civil Rights Act of 1957.

Constitutional assaults on the more recent voting rights legislation have been uniformly rejected. In *United States* v. *Raines,* 362 U.S. 17, the Court upheld the authority of the Attorney General under the Civil Rights Act of 1957, 42 U.S.C. 1971(c), to maintain an action for injunctive relief against State registrars alleged to have "delayed handling of Negro applications for registration, arbitrarily refused to register Negroes who demonstrated their qualification to vote, and for purposes of discrimination, applied more difficult and stringent registration standards to Negro applicants than to white applicants." 172 F. Supp. 552, 555 (M.D. Ga.). See, also, *United States* v. *Thomas,* 362 U.S. 58, affirming *per curiam,* 180 F. Supp. 10 (E.D. La.).

In *Hannah* v. *Larche,* 363 U.S. 420, the Court sustained the procedure of the United States Commission of Civil Rights in conducting hearings concerning racial discrimination in voting in Louisiana (42 U.S.C. 1975(c)) and broadly held the Act to be appropriate legislation under the Fifteenth Amendment.

In *Alabama* v. *United States,* 371 U.S. 37, the Court affirmed, *per curiam,* an injunction issued under the Civil Rights Act of 1960, which affirmatively ordered that registration certificates be issued to 64 specified Negro applicants; that registration applications be received on at least two days a month; that not fewer than six applications be processed simultaneously; that writing tests used not exceed fifty consecutive words from the Constitution; that rejected applicants be informed of the precise reasons therefor;

and that detailed monthly reports be submitted to the court and the United States Attorney (192 F. Supp. 677 (M.D. Ala.)). And in *Louisiana* v. *United States,* 380 U.S. 145, involving the same statute, the Court affirmed a decision (225 F. Supp. 353 (E.D. La.)) which enjoined enforcement of the Louisiana "interpretation" test, forbade registrars in twenty-one parishes from employing a new "citizenship" test until a complete re-registration was undertaken, and required detailed monthly reports from the registrars in the twenty-one parishes. See, also, *United States* v. *Mississippi,* 380 U.S. 128.

The conclusion is inescapable that, where necessary to protect the right to vote without racial discrimination, Congress has authorized and the courts have sustained "a most detailed supervision of the day-to-day operation of voter registration." *Alabama* v. *United States,* 304 F. 2d 583, 585 (C.A. 5). The present Act goes no further and, as we demonstrate in Point II of this brief, it is "reasonably adapted to the end permitted by the Constitution."

B. STATE LAWS ENACTED PURSUANT TO THE RESERVED POWER TO DETERMINE THE QUALIFICATIONS OF ELECTORS ARE SUBJECT TO THE SUPREMACY OF LAWS OF THE UNITED STATES ENACTED PURSUANT TO THE POWERS GRANTED TO CONGRESS TO ENFORCE THE FIFTEENTH AMENDMENT

There is no merit to the argument that the power of Congress to enforce the Fifteenth Amendment cannot be exercised so as to impinge upon the reserved powers of the States to fix voting qualifications and conduct their own elections. To thus constrict an enforcement power granted in one of the Civil War

amendments would be wholly inconsistent with the spirit of the times and the specific purpose to provide for Congressional protection of the rights of the new Negro citizens. It would be at war with our entire constitutional history. Congressional legislation pursuant to a granted power often blocks the exercise of powers otherwise reserved to the States, as illustrated by innumerable cases of federal preemption. This is the simple consequence of the Supremacy Clause of the Constitution.

So saying, we are not unmindful that "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 50. See, also, *Minor* v. *Happersett*, 21 Wall. 162; *Pope* v. *Williams*, 193 U.S. 621. But those powers are not without limits. There is no absolute right in the States to determine voting eligibility.

The only provision of the Constitution that expressly grants the States powers with respect to elections is Article I, Section 4, authorizing the State legislatures to prescribe "[t]he Times, Places and Manner of holding Elections for [national] Senators and Representatives," and it, in the next breath, empowers the Congress to "make or alter such Regulations." [26] To

[26] Article 1, Section 4, Clause 1, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

be sure, Article I, Section 2,[27] and the Seventeenth Amendment,[28] which specify that those who elect the members of the national legislature "shall have the qualifications requisite for electors of the most numerous branch of the State legislature," have always been read as implying a right in the respective States to fix voter qualifications. But this is far from an explicit grant of exclusive power over elections. Moreover, even here, there is an implied condition: that the qualifications for voting shall not be so high as to defeat the requirement of elections "by the People"—which Madison boasted meant "the great body of the people," "rich" and "poor," "learned" and "ignorant." See *The Federalist,* No. 57, p. 385 (Cooke ed. 1961), quoted in *Wesberry* v. *Sanders,* 376 U.S. 1, 18.

The fact is that State power with respect to elections is circumscribed. We have already noticed the overriding force of Congressional regulation of federal elections. *United States* v. *Classic,* 313 U.S. 299, 315. See, also, *Ex Parte Yarbrough,* 110 U.S. 651; *United States* v. *Mosley,* 238 U.S. 383; *Ex Parte Sie-*

[27] Article 1, Section 2, Clause 1, provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[28] The Seventeenth Amendment provides in relevant part:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

bold, 100 U.S. 371. A further restraint is the Twenty-fourth Amendment. See *Harman* v. *Forssenius,* 380 U.S. 528. But State elections, also, are subject to restrictions imposed by the Constitution. The Nineteenth Amendment forbids disqualification on account of sex. The Fourteenth Amendment inhibits the imposition of requirements for registration which are unrelated to a legitimate State interest. *Carrington* v. *Rash,* 380 U.S. 89; *United States* v. *Louisiana, supra,* 225 F. Supp. at 386; see, also, *Reynolds* v. *Sims,* 377 U.S. 533; *Gray* v. *Sanders,* 372 U.S. 368.[29] And, of course, the Fifteenth Amendment bars voting standards that discriminate on account of race or color.

The inference to be drawn from the constitutional provisions relating to the franchise and from their history is that there is an overriding national interest in the right to vote—an interest so great as to warrant the conclusion that the enforcement powers of Congress are not confined by any implied reserved powers of the States but extend, like all other Congressional power, to the enactment of legislation reasonably adapted to the permissible end of preventing violations by proscribing, at least temporarily, State activities which carry that danger. This is particularly clear in the case of the Fifteenth Amendment. Its provisions cannot be read as merely prohibitory—as doing no more than condemning State laws which are plainly unconstitutional. As stressed above, Section 2 of the Amendment conferred the power to

[29] And see the government's brief in *Harper* v. *Virginia State Board of Elections*, No. 48, this Term.

"enforce" the guarantee declared in Section 1—a grant which surely embraces the authority to prescribe detailed regulations designed to guard against the inroads of discrimination in any form.

The true rule was stated more than three-quarters of a century ago (*Ex Parte Yarbrough,* 110 U.S. at 664):

> the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States. * * *

Indeed, far from enjoying an unfettered right to erect barriers to the franchise, it may properly be said that every State which substantially curtails the right to vote bears a heavy burden of justifying the qualifications it has established—at least when it is charged that they operate discriminatorily against one race. The reason is a fundamental one: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims,* 377 U.S. 533, 555; and see *Wesberry* v. *Sanders,* 376 U.S. 1, 17; *United States* v. *Classic,* 313 U.S. 299. Moreover, "restrictions upon the right to vote," like "restraints upon the dissemination of information," "interferences with political organizations," and "prohibition of peaceable assembly," constitute a type of State action "which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152–153, n. 4. And, here, as with First Amendment rights, the burden

of piecemeal litigation testing the boundaries of permissible restraint, when cast upon the citizen, may by "unduly onerous" and thus have a "chilling effect" on the exercise of the protected right. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479, 487, 491; *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432–433; *Freedman* v. *Maryland,* 380 U.S. 51, 57–59; *Speiser* v. *Randall,* 357 U.S. 513, 526; *Thornhill* v. *Alabama,* 310 U.S. 88, 97–98. Accordingly, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reyolds* v. *Sims,* 377 U.S. 533, 562. For the same reasons, Congress may put the States to the test of demonstrating that inhibitory voting practices do not offend the command of the Fifteenth Amendment.

II

THE PROVISIONS OF THE VOTING RIGHTS ACT OF 1965 RELATING TO THE SUSPENSION OF LITERACY TESTS AND OTHER "TESTS AND DEVICES" DETERMINING ELIGIBILITY TO VOTE ARE A PROPER EXERCISE OF CONGRESSIONAL POWER TO ENFORCE THE FIFTEENTH AMENDMENT

The principles just stated establish that the right of the States to regulate their own elections is subject to constitutional limitations and that the Fifteenth Amendment, in particular, authorizes Congress to intervene in appropriate circumstances. It remains to show that the Voting Rights Act, insofar as it suspends literacy tests and comparable prerequisites to voting in some States, does not overreach the boundaries of congressional power or operate arbitrarily. We turn first to the substantive question of power.

A. CONGRESS MAY SUSPEND STATE USE OF A LITERACY TEST OR COMPARABLE REQUIREMENT AS A QUALIFICATION FOR VOTING WHERE APPROPRIATE TO PREVENT ABRIDGMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR

The Fifteenth Amendment outlaws voting discrimination, whether accomplished by procedural or substantive means. "It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson,* 307 U.S. 268, 275. See, also, *Gomillion* v. *Lightfoot,* 364 U.S. 339; *Alabama* v. *United States,* 371 U.S. 37. And it likewise condemns discriminatory "qualifications." Thus, the restriction of the franchise to whites in the Delaware Constitution had to bow before the Fifteenth Amendment. See *Neal* v. *Delaware,* 103 U.S. 370. So did the "grandfather clauses" of the Oklahoma and Maryland Constitutions, also substantive qualifications. *Guinn* v. *United States,* 238 U.S. 347; *Myers* v. *Anderson,* 238 U.S. 368. Nor are only the most obvious devices reached. As the Court said in *Lane* v. *Wilson, supra,* "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." There is no basis for the claim that present literacy tests and similar requirements are any more insulated when they are used as engines for discrimination.

1. A literacy test may operate as an engine of racial discrimination

To be sure, in *Lassiter* v. *Northampton Election Board,* 360 U.S. 45, the Court found no fault with a literacy qualification, as such, but it recognized that

even "a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.* at 53. See, also, *Gray* v. *Sanders,* 372 U.S. 368, 379. Indeed, as the opinion in *Lassiter* notes, the Court had earlier affirmed a decision annulling Alabama's educational qualification on the ground that it was "merely a device to make racial discrimination easy." 360 U.S. at 53. See *Schnell* v. *Davis,* 336 U.S. 933, affirming 81 F. Supp. 872. And, only last Term, the Court voided one of Louisiana's educational tests. *Louisiana* v. *United States,* 380 U.S. 145. See, also, *United States* v. *Mississippi,* 380 U.S. 128.

In light of the decided cases, it need hardly be demonstrated that literacy tests open the door to discrimination by local registrars. The vague "interpretation" or "understanding" tests recently in vogue in Louisiana and Mississippi offer perhaps the easiest opportunity for discrimination. But many of the same abuses are obviously possible under tests that require the applicant to complete an application form (as in Virginia, Alabama, Mississippi and Louisiana today) or to read and write a section of the State constitution (as in North and South Carolina today). As a matter of history, the various forms of literacy test adopted by the Southern States were all considered effective engines of discrimination against the Negro franchise. Indeed, the so-called "constitutional interpretation test" was sometimes viewed as a convenient opening for the qualification of illiterate whites, rather than an obstacle to the Negro applicant—against whom a

reading and writing test or application form requirement was deemed a more effective barrier. That seems to have been the approach of the South Carolina constitutional convention of 1895 (see the Statement, *supra,* pp. 20–22). At all events, it is clear that those who wrote the South Carolina literacy tests now in effect understood its potential as an engine of racial discrimination (*supra,* pp. 18–22).

Discrimination through the abuse of literacy tests and comparable devices is no mere theoretical possibility. It is an indisputable historical fact that these tests were conceived and used in the South to bar Negroes from the franchise.[30] Until 1890, all the States of the old Confederacy enjoyed virtually universal manhood suffrage—albeit crude forms of intimidation were attempted to keep the Negro from voting. But in that year Mississippi led the way with its "understanding" test, adopted for the avowed purpose of discriminating against the Negro. See *United States* v. *Mississippi*, 380 U.S. 128, 144. And as the other States with substantial Negro popula-

[30] That was foreseen by the Congress as early as 1866 when Section 2 of the Fourteenth Amendment was submitted. The central purpose of that provision—which assessed an apportionment penalty against States denying the vote on grounds other than alienage, minority or conviction—was to discourage disfranchisement of the new freedmen; the penalty was not confined to outright racial disqualifications in recognition of the possibility that the Negro might be as effectively barred from voting by more indirect means, including literacy tests. See Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93, 94–103.

tions—including South Carolina in 1895—followed suit,[31] they were usually no less candid about their purpose. See, *e.g.*, Virginia Constitutional Convention (Proceedings and Debates, 1901–1902) 18, 2972, 3076–3071, and the excerpts from the proceedings of the South Carolina Constitutional Convention of 1895 reproduced in the Statement, pp. 17–22.

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[31] The basic chronology of literacy tests and similar requirements in the Southern States is as follows:

1. *Reading and/or writing:* Mississippi (1890), South Carolina (1895), North Carolina (1900), Alabama (1901), Virginia (1902), Georgia (1908), Louisiana (1921). And see Oklahoma (1910).

2. *Completion of an application form:* Louisiana (1898), Virginia (1902), Louisiana (1921), Mississippi (1954).

3. *Oral constitutional "understanding" and "interpretation" tests:* Mississippi (1890), South Carolina (1895), Virginia (1902), Louisiana (1921).

4. *Understanding of the duties and obligations of citizenship:* Alabama (1901), Georgia (1908), Louisiana (1921), Mississippi (1954).

5. *Good moral character requirement* (other than nonconviction of a crime): Alabama (1901), Georgia (1908), Louisiana (1921), Mississippi (1960).

At the same time alternative provisions for qualifying to vote were adopted to assure that illiterate whites were not disfranchised. Thus, in Louisiana, North Carolina, and Oklahoma, white voters were exempted from the literacy test by a "'voting' grandfather clause." La. Const. 1898, Art. 197, Sec. 5; N.C. Const. 1876, Art. VI, Sec. 4, as amended in 1900; Okla. Const. 1907, Art. III, Sec. 4a, as amended in 1910. The same result was accomplished in Alabama, Georgia, and Virginia by the so-called "'fighting' grandfather clause." See Ala. Const. 1901, Sec. 180; Ga. Const. 1877, Art. II, Sec. 1, para. IV (1–2), as amended in 1908; Va. Const. 1902, Sec. 19. Several of these States provided a separate exemption from the literacy requirement for property holders. See La. Const. 1898, Art. 197, Sec. 4; Ala. Const. 1901, Sec. 181, Second; Va. Const. 1902, Sec. 19, third; Ga. Const. 1877, Art. II, Sec. 1,

Nor was the expectation of those who devised these tests disappointed in subsequent experience. To be sure, for a time, literacy and comparable qualification tests remained dormant while cruder expedients—like the "grandfather clause" and the "white primary"—barred the Negro from effectively exercising the franchise. But when those devices were outlawed, the literacy tests were revived. See, *e.g., Louisiana* v. *United States,* 380 U.S. 145, 148–149. And now—perhaps more than originally had been thought necessary [32]—they were applied "with an evil eye and an unequal hand." The cases decided in this Court alone sufficiently attest the fact. See *Schnell* v. *Davis,* 336 U.S. 933; *United States* v. *Thomas,* 362 U.S. 58;

Para. IV(5). And Alabama and Georgia additionally exempted persons of "good [moral] character" who understood "the duties and obligations of citizenship under a republican form of government." Ala. Const. 1901, Sec. 180, Third; Ga. Const. 1877, Art. II, Sec. 1, Para. IV(3), as amended in 1908. Another device, invented by Mississippi, and followed, for a time, by South Carolina and Virginia (and later Louisiana) offered white illiterates an opportunity to qualify by satisfying the registrar that they could "understand" and "interpret" a constitutional text when it was read to them. Miss. Const. 1890, Sec. 244; S.C. Const. 1895, Art. II, Sec. 4(c); Va. Const. 1902, Sec. 19, Fourth; La. Const. 1921, Art. VIII, Sec. 1(d). For later registrants, South Carolina substituted a property alternative. S.C. Const. 1895, Art. II, Sec. 4(d).

[32] The Negro illiteracy rate in 1890 in the seven Southern States which adopted these tests was as follows: Alabama, 78%; Louisiana, 77%; Georgia, 75%; Missisippi, 74%; South Carolina, 73%; North Carolina, 70%; Virginia, 69%. These percentages were much higher than comparable figures for white illiteracy: Alabama, 19%; Louisiana, 19%; Georgia, 17%; Mississippi, 13%; South Carolina, 18%; North Carolina, 25%; Virginia, 15%. See Compendium of the Eleventh Census, Part III, p. 316.

Alabama v. *United States,* 371 U.S. 37; *Louisiana* v. *United States, supra.* See, also, *United States* v. *Mississippi, supra.* Moreover, in each of the 32 voting suits initiated by the Department of Justice since 1957 which have come to final judgment, the district court or the court of appeals has found discrimination in the use of those tests.[33] The same conclusion has been reached by all those who have investigated the problem (see *infra,* pp. 56–60).

[33] Alabama: *United States* v. *Alabama* (Macon Co.), 192 F. Supp. 677 (M.D. Ala.), affirmed, 304 F. 2d 583 (C.A. 5), affirmed, 371 U.S. 37; *United States* v. *Alabama* (Bullock Co.), 7 Race Rel. L. Rep. 1146, 1152 (M.D. Ala.); *United States* v. *Atkins*, 323 F. 2d 733 (C.A. 5) and supplemental decree on remand, 10 Race Rel. L. Rep. 209 (S.D. Ala.); *United States* v. *Penton*, 212 F. Supp. 193 (M.D. Ala.), supplemental decree *sub nom. United States* v. *Parker*, 236 F. Supp. 511 (M.D. Ala.); *United States* v. *Mayton*, 7 Race Rel. L. Rep. 1136, supplemental decree, 9 Race Rel. L. Rep. 1337 (S.D. Ala.); *United States* v. *Logue*, 344 F. 2d 290 (C.A. 5); *United States* v. *Cartwright*, 230 F. Supp. 873 (M.D. Ala.), supplemental decree *sub nom. United States* v. *Strong*, 10 Race Rel. L. Rep. 710; *United States* v. *Hines*, 9 Race Rel. L. Rep. 1332 (N.D. Ala.); *United States* v. *Ford* (C.A. 2829), 9 Race Rel. L. Rep. 1330 (S.D. Ala.), decided April 13, 1964, supplemental order, June 18, 1965.

Georgia: *United States* v. *Raines*, 189 F. Supp. 121 (M.D. Ga.).

Louisiana: *United States* v. *McElveen*, 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States* v. *Thomas*, 362 U.S. 58; *United States* v. *Ass'n of Citizens Councils*, 196 F. Supp. 908 (W.D. La.); *United States* v. *Manning*, 206 F. Supp. 623 (W.D. La.); *United States* v. *Fox*, 211 F. Supp. 25 (E.D. La.), affirmed, 334 F. 2d 449 (C.A. 5); *United States* v. *Wilder*, 222 F. Supp. 749 (W.D. La.); *United States* v. *Clement*, 231 F. Supp. 913 (W.D. La.); *United States* v. *Crawford*, 229 F. Supp. 898 (W.D. La.); *United States* v. *Louisiana*, 225 F. Supp. 353 (E.D. La.), affirmed, 380 U.S. 145. See also, *United States* v. *Ward*, 349 F. 2d 795 (C.A. 5).

Mississippi: *United States* v. *Mathis*, C.A. 6429, decided May

In the light of the overwhelming evidence that they were designed and used as engines for racial discrimination, it would be extraordinary if literacy tests and comparable requirements were somehow immune from legislative scrutiny under the Fifteenth Amendment because they seem innocuous on their face. The fact is, as the cases make plain, that a literacy test which is "used as a cloak to discriminate" (*Gray* v. *Sanders,* 372 U.S. 368, 379) stands on no different footing from any other test or device employed to the same purpose.

2. Where a literacy test or other test or device carries substantial danger of racial discrimination, Congress may prohibit its use entirely, as a means of enforcing the Fifteenth Amendment, for the period necessary to remedy, and prevent revival of, the unconstitutional practice

The appropriateness of outlawing literacy tests which have been abused is largely settled by *Louisiana*

11, 1965 (N.D. Miss.); *United States* v. *Allen*, C.A. 6451, decided May 27, 1965 (N.D. Miss.); *United States* v. *Ramsey*, 331 F. 2d 824 (C.A. 5); *United States* v. *Lynd*, 301 F. 2d 818, 321 F. 2d 26 (C.A. 5), and decree on remand, July 16, 1965 (S.D. Miss.); *United States* v. *Ward*, 345 F. 2d 857 (C.A. 5), and decree on remand, May 25, 1965 (S.D. Miss.); *United States* v. *McClellan*, C.A. 3607, decided September 24, 1965 (S.D. Miss.); *United States* v. *Hosey*, C.A. 1248(E), decided July 31, 1965 (S.D. Miss.); *United States* v. *Clayton*, C.A. 6420, decided June 16, 1965 (N.D. Miss.); *United States* v. *Mikell*, C.A. 1922, decided March 16, 1965 (S.D. Miss.); *United States* v. *Duke*, 332 F. 2d 759 (C.A. 5), and decree on remand, May 29, 1964 (N.D. Miss.); *United States* v. *Campbell*, C.A. 633, decided April 8, 1965 (N.D. Miss.); *United States* v. *Cox*, No. D.C. 53–61, decided June 24, 1964 (N.D. Miss.) and decree of civil contempt entered August 13, 1965; *United States* v. *Mississippi*, 339 F. 2d 679 (C.A. 5), and decree on remand, C.A. 1656, decided March 16, 1965 (S.D. Miss.).

v. *United States,* 380 U.S. 145. That decision squarely sustains the propriety of enjoining all use of a test or device which was intended and has operated as an engine of racial discrimination. The basis for the prohibition is, of course, the danger of future abuse. Congress, with its broader legislative power to frame the remedy for an evil within its power to obviate, may certainly choose relief that would be within the power of a court.

It is not a sound objection that some of the suspended qualifications are susceptible of constitutional application and may sometimes have been constitutionally applied. It is a settled legal principle of general application that when important rights have been violated, the remedy may go beyond restraining the plainly unlawful conduct and prohibit associated acts which would be permissible at the hands of others or even the defendant if they had not been used to perpetrate the wrong. "Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole." *United States* v. *Bausch & Lomb Co.,* 321 U.S. 707, 724. "Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act." *May Department Stores Co.* v. *Labor Board,* 326 U.S. 376, 391. See, also, *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 188; *United States* v. *United Gypsum Co.,* 340 U.S. 76, 88, 89; *Swift & Co.* v. *United States,* 276 U.S. 311. And see *Terry* v. *Adams,* 345 U.S. 461, 475–476 (opinion of Mr. Justice Frankfurter). The principle runs

through the whole body of our law. *E.g., Warner & Co.,* v. *Lilly & Co.,* 265 U.S. 526, 532.

If the judiciary has that power, it is also possessed by Congress under its power to enforce. The legislature may paint with a broader brush than the courts. See *Currin* v. *Wallace,* 306 U.S. 1; *United States* v. *Darby,* 312 U.S. 100, 121. It may take into account the practical problems of enforcement in drawing the boundaries of regulation even though it reaches conduct unobjectionable *per se.* As Mr. Justice Brandeis said for the Court in the *Assigned Car Cases,* 274 U.S. 564, 583, with respect to a legislative rule promulgated by the Interstate Commerce Commission:

> * * * in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.

The same principle was approved with reference to Congressional legislation under the enforcement clause of the Eighteenth Amendment in *Everard's Breweries* v. *Day,* 265 U.S. 545. The Court there sustained against constitutional attack a general ban on traffic in malt liquors prescribed for "medicinal purposes," because it was appropriate legislation to enforce the Amendment's prohibition on intoxicating liquors "for beverage purposes"—even though there would obviously be *bona fide* prescriptions as well as efforts to circumvent the Amendment by nominally

"medicinal" transactions. See also, *Purity Extract Co.* v. *Lynch,* 226 U.S. 192.

Thus, in enforcing the Fifteenth Amendment Congress may forbid the use of voter qualification laws where necessary to meet the risk of violations of constitutional rights even though, in the absence of a danger of illegal conduct predicated upon the use of such tests, the same laws might be an exercise of powers reserved to the States. In the actual circumstances, disestablishment of such tests for a period of five years is a wholly appropriate remedy.

The underlying justification for this period of disestablishment was recognized in *Louisiana* v. *United States, supra,* 380 U.S. at 154–155. Where in the past the tests and devices have been applied with less rigor or have not been applied at all to whites, even-handed application to future registrants would leave the ballot available to less qualified whites than Negroes. That result would perpetuate abridgment of the right to vote on account of race.[34] Doubtless,

[34] The principle is well settled that, where there is no legitimate basis for distinguishing between classes, a condition which has been waived for one class must be waived for all. See, *e.g., Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239. Cf. *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U.S. 362; *Ethyl Gasoline Corp.* v. *United States,* 309 U.S. 436, 461. Nor is there any novelty in applying the rule to correct violations of the Fifteenth Amendment. See *Lane* v. *Wilson, supra,* 307 U.S. at 275–276. Indeed, in *Lassiter* v. *Northampton Election Board,* 360 U.S. at 50, while upholding North Carolina's literacy test on its face, the Court was at pains to note that it was not condoning the application of the test to new applicants if persons exempted by the grandfather clauses were still voting:

"* * * If they were allowed to vote without taking a literacy test and if appellant were denied the right to vote unless

also, the survival in any form of a test or device long used as a method of denying constitutional rights would in itself tend to deny equal voting opportunities by discouraging Negro applications.

What is more, after generations of following a hardened policy of discrimination against the Negro franchise, it would be exceedingly difficult for the most well-intentioned State administration to see that potential engines of racial discrimination were now administered fairly and equitably on a local level. The use of literacy tests and comparable devices to disenfranchise Negroes in areas where they constitute a substantial proportion of the voting age population is so ingrained as to make it impossible to assume that the practices of a century will be suddenly abandoned. Cf. *Eubanks* v. *Louisiana,* 356 U.S. 584. History teaches that habits of long standing are not so easily discarded. That is particularly true in the area of racial discrimination. Indeed, the history of the Fifteenth Amendment litigation in this Court alone indicates the durability of the policy of barring the Negro from the franchise by one means or another.[35] Moreover, whatever the appearances, so long

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she passed it, members of the white race would receive preferential privileges of the ballot contrary to the command of the Fifteenth Amendment."

[35] That history includes violence (*United States* v. *Reese*, 92 U.S. 214; *Ex Parte Yarborough*, 110 U.S. 651), use of the "grandfather clause" (*Guinn*, *supra; Myers* v. *Anderson*, 238 U.S. 368), and the "white primary" (*Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461), resort to procedural hurdles (*Lane* v. *Wilson*, 307 U.S. 268), racial gerrymandering (*Gomillion* v. *Lightfoot*, 364 U.S. 339), improper

as the test involved is susceptible to manipulation, it is proper to take account of the "pressures" which a "politically dominant white community" can exert on local officials. *NAACP* v. *Alabama,* 357 U.S. 449, 463; *Bates* v. *Little Rock,* 361 U.S. 516, 524; *Louisiana* v. *NAACP,* 366 U.S. 293, 296; *NAACP* v. *Button,* 371 U.S. 415, 435–436; *Gibson* v. *Florida,* 372 U.S. 539, 548, at n. 3; *Anderson* v. *Martin,* 375 U.S. 399, 403; cf. *Shelton* v. *Tucker,* 364 U.S. 479, 487.

In sum, the principal reasons justifying a legislative period of suspension under continuing supervision are much the same as those which justify a court in taking comparable measures: in order to determine "whether the old discriminatory practices really [have] been abandoned in good faith * * * to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices shown to be so deeply engrained in the laws, policies and traditions of the State * * *." *Louisiana* v. *United States, supra,* 380 U.S. at 156.

There were, moreover, additional subsidiary reasons for the five-year rule. First, some of the qualifications included among the tests and devices are simply not susceptible of non-discriminatory application, at least at the present time. Clearly this is true of the requirement that registered voters must vouch for new applicants as applied in areas where practically

challenges (*United States* v. *Thomas,* 362 U.S. 58), and, finally, the discriminatory use of tests (*Schnell* v. *Davis,* 336 U.S. 933; *Alabama* v. *United States,* 371 U.S. 37; *Louisiana* v. *United States, supra*).

no Negroes are qualified and no whites will serve as vouchers for Negroes. Second, in light of educational differences between whites and Negroes attributable to the public policies of the States involved, even a nondiscriminatory application of the tests would abridge Fifteenth Amendment rights. Third, Congress believed that it was inequitable to apply to Negroes tests and devices adopted while large numbers of Negroes were illegally disenfranchised, and that reinstatement of such tests should be permitted only after Negroes had been admitted to the franchise on the same terms as whites and had an appropriate opportunity to determine, with their fellow citizens, what qualifications should be imposed. S. Rep. No. 162, 89th Cong., 1st Sess. (1965), Pt. 3 16.

In all the circumstances, the disestablishment of literacy tests and comparable devices for five years was warranted. At least, the remedy is plainly within the bounds of the broad legislative discretion to select appropriate means to execute the command of the Fifteenth Amendment. No more is required than that the means be reasonably adapted to achieving the permissible end. (See p. 30 *supra*.)

B. THE VOTING RIGHTS ACT OF 1965 ESTABLISHES A FAIR AND REASONABLE PROCEDURE FOR DETERMINING WHEN AND WHETHER USE OF A LITERACY TEST OR SIMILAR TEST OR DEVICE SHOULD BE PROHIBITED BECAUSE OF THE DANGER OF ABRIDGEMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR

Literacy tests (and also the other tests and devices described in Section 4(c)) are susceptible of constitutional use in fixing the qualifications of voters, but they also lend themselves to abuse as instruments of

racial discrimination violating the Fifteenth Amendment. Where that danger exists, Congress, as we have seen, has ample power to proscribe further use of the test as an enforcement measure. Given the ambivalent character of the tests, the legislative problem was to provide a swift, efficient and equitable procedure for suspending all use of the tests where they carried a substantial danger of discriminatory use while permitting their continuance in other instances.

Congress solved the problem by establishing two related phases in an essentially unitary procedure. First, under Section 4(a) the use of any test or device (including a literacy test) must be suspended whenever it is determined by the Attorney General and Director of the Census (1) that the State or a political subdivision maintained a test or device on November 1, 1964, and (2) that in the November 1964 Presidential election less than half the adult population participated. This initial step provides a simple and expeditious method of separating those States and political subdivisions where the use of a test or device carries substantial danger of violations of the Fifteenth Amendment from those in which the danger, if any, is significantly less serious. But the first phase is only temporary. Recognizing that the determinations triggering suspension might be imperfect guides to the actual danger, Congress, in Section 4 (a) and (d), offered any State or subdivision as to which the determinations had been made the opportunity to submit the issue of past abuse and consequent danger of future violation to judicial examination: it provided that the suspension should cease

if the United States District Court for the District of Columbia should find that the test or device had not been used in a discriminatory fashion during the preceding five years except in limited and speedily corrected instances. In this second phase of the procedure, therefore, there is a full judicial inquiry into the critical question whether the test or device operates only as a legitimate test of voter qualifications or carries a significant danger of continued violation of the Fifteenth Amendment. Each phase of the procedure, understood in its context, not only bears a reasonable relation to the prevention of violations but operates in a fair and rational manner.

1. Congress had ample basis for concluding that where the maintenance of a test or device coincided with the participation of only half the population in a Presidential election, there was sufficient danger that the test was being used as an instrument of racial discrimination to warrant suspending it unless and until freedom from abuse could be proved.

The power of Congress to suspend a test or device which may be a vehicle of racial discrimination is not dependent upon proof that the test is actually being used to defeat the Fifteenth Amendment. Congress may deal with dangers—with tendencies and probabilities—at least where the restriction is not wholly disproportionate to the danger to be met. This principle is an established part of our constitutional law. In *North American Co.* v. *SEC,* 327 U.S. 686, 710–711, the Court held that the reorganization of a holding company, under the Public Utility Holding Company Act of 1935, was properly required

even though it had engaged in none of the evil practices which Congress sought to forestall since Congress could remove "what Congress considered to be potential if not actual sources of evil." "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." *Id.,* 710–711. In the National Labor Relations Act Congress outlawed labor practices "which provoke or *tend to provoke* strikes" and "[lead] or *tend to lead* to labor disputes." *Labor Board* v. *Fainblatt,* 306 U.S. 601, 607, 608. Compare *Katzenbach* v. *McClung,* 379 U.S. 294, 301. In *United States* v. *Darby,* 312 U.S. 100, 121, the Court cited with approval the earlier decision in *Thornton* v. *United States,* 271 U.S. 414, upholding a law requiring the dipping of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle which might be infected. In *Board of Governors* v. *Agnew,* 329 U.S. 441, 449, the Court affirmed the enforcement of Section 32 of the Banking Act of 1933 as a "preventive or prophylactic measure" not requiring proof that a director had or would actually violate his fiduciary duties because Congress could act "to remove tempting opportunities." Compare *De Veau* v. *Braisted,* 363 U.S. 144, 157–160, 160–161. The principle we invoke, which was applied in all these cases, is, of course, only a particular corollary of the broader proposition that legislation which offends no specific constitutional guaranty is valid if reason-

ably adapted to a permissible objective. See p. 30, *supra.*

Here the danger was continued racial deprivation of voting rights in urgent circumstances demanding immediate remedy. The triggering mechanism provided by Section 4(b) and the resulting automatic suspension of tests and devices pending judicial determination, if requested, are suited to that end.

(a) Low voter participation in a State maintaining a "test or device" for determining voting qualifications is a suitable interim guide to the danger of discrimination

The two determinations which trigger suspension under Section 4(b), while by no means conclusive, go far to show that the "test or device" maintained by the State is being used as an instrument of racial discrimination.

The "test or device."—The very existence of a "test or device" of the kind defined in Section 4(c) is evidence of substantial danger of violation of the Fifteenth Amendment in areas where officials may be disposed to deny Negroes the right to vote, for history shows that in States whose policy has been one of racial segregation all such tests and devices have repeatedly been adopted and used for the purpose of circumventing constitutional guarantees. We have already noted the consistent finding of the courts that such tests were used as engines of discrimination in the South (*supra,* pp. 44–45, n. 33). The records in these cases and other voluminous evidence of the abuse of a variety of tests and devices was before Congress when it considered the Voting Rights Act in 1965.

Literacy tests are no better than others. The Chairman of the United States Civil Rights Commission testified that the tests and devices defined in Section 4(c) of the Act "have been the most widely used and most widely abused." He added: "* * * [W]e have found that literacy tests are the one great universal device used for denying Negroes the right to vote." (Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (1965) 266. See, also *id.* at 125–127, 259, 267). Similarly, the Attorney General, on the basis of experience in the administration of the Civil Rights Acts of 1957 and 1960, testified (*id.* at 119–120)—

> I know that in some of these instances, some of these States, * * * the literacy tests have not been applied to white applicants who are presently on the books but they have been applied, not merely applied but applied in an improper manner, to Negro applicants, to keep them off the register.

It was also noted that these voting qualifications had first been adopted in the southern States in the 1890's,[36] when at least 69% of the adult Negroes but at most 25% of the adult whites were illiterate.[37] Had they been applied even-handedly to all persons desiring to vote, there might be room for argument that the purpose was not enough to invalidate a qualification required of all voters. But there was no intention to apply literacy tests even-handedly. This is shown, first, by the declarations of their sponsors

[36] See note 31, *supra*, p. 42.

[37] See note 32, *supra*, p. 43.

explaining how the programs embracing literacy tests would operate. In South Carolina, for example, Senator Tillman described the constitutional requirement that an applicant for registration show that "he can both read and write any Section of this Constitution submitted to him by the registration officer" as one which would operate to disenfranchise Negroes and explained the opportunities opened by the related understanding test:

> * * * If you put in here that a man must understand, and you vest the right to judge whether he understands in an officer, it is a constitutional act. That officer is responsible to his conscience and his God, he is responsible to nobody else. There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps [laughter], or discriminating.[38]

The Virginia convention was given a like explanation of the understanding test (Virginia Constitutional Convention of 1901–1902, *Proceedings* 2972):

> I do not expect an understanding clause to be administered with any degree of friendship by the white man to the suffrage of the black man* * *; I would not expect an impartial administration of the clause.

Bearing in mind the use of trivial mistakes in application blanks to bar Negro applicants (see Brief for the United States in *United States* v. *Mississippi,* No. 73, October Term, 1964, at 30–31), there can be no doubt that the closely related literacy tests were also

[38] *Journal of the South Carolina Constitutional Convention of 1895* at 469.

believed to present "tempting opportunities" for discrimination.

The discriminatory purpose and operation of literacy tests is further evidenced by the use of exceptions designed to permit the registration of white illiterates. The cruder versions contained "voting grandfather" or "fighting grandfather" clauses. Other devices exempted persons of "good moral character" who understood "the duties and obligations of citizenship" or persons who could understand a constitutional text when it was read to them. Another form of exception, still carried forward by South Carolina, permits illiterates to vote who meet a property qualifications.[39]

A wealth of evidence was presented at the hearings or otherwise available to Congress showing specific instances in which tests of literacy (although often called by other names) were used as engines of racial discrimination. For example, the House Judiciary Committee Report noted that in Selma, Alabama, after most whites but few Negroes had been registered under lax standards, subsequent Negro applicants for registration "were required to spell such difficult and technical words as 'emolument,' 'impeachment,' 'apportionment,' and 'despotism.'" H. Rep. No. 439, 89th Cong., 1st Sess. (1965) at 11. And the Senate Report found that (S. Rep. No. 162, Pt. 3, 89th Cong., 1st Sess. (1965) at 10):

> * * * the application form has often been used as a test which only Negroes must "pass" in order to qualify. In *United States* v. *Alabama*,

[39] See *infra*, p. 107.

> * * * the court of appeals found that the requirement of filling out a lengthy application form 'became the engine of discrimination' because whites 'were given frequent assistance in determining the correct answers' whereas 'Negroes not only failed to receive assistance, [but] their applications were rejected for slight and technical errors' (304 F. 2d 587). Similarly, in Panola County, Miss., the court of appeals found the application form 'was treated largely as an information form when submitted by a white person' but as 'a test of skill for the Negro' (*United States* v. *Duke*, 332 F. 2d 759, 767 (C.A. 5)).

In *United States* v. *Alabama*, 192 F. Supp. 677 (M.D. Ala.), 304 F. 2d 583 (C.A. 5), *affirmed*, 371 U.S. 37, quoted in the same Senate Report quoted, the Court found the Alabama requirement that an applicant "demonstrate that he can read and write any Article of" the United States Constitution to be an "engine of discrimination" (304 F. 2d at 586). The district court also described how this literacy test was racially manipulated (192 F. Supp. at 680):

> Aside from the 1954–1955 period when no applicants were required to write provisions of the Constitution, Negroes were invariably required to copy a provision of the United States Constitution, and more often than not that provision was Article II. On the other hand, white applicants were often permitted to to prove their ability to read and write by writing a shorter passage of the Constitution or by completing the application form without a writing test at all. Appendix "B" to this

> opinion sets out a list of 48 applications of white persons who were not required to take any writing test whatever; this appendix also sets out 17 applications of Negroes all of whom had to write an article of the Constitution and many of whom had to write Article II.

See, also, H. Rep. 439 at 12; S. Rep. 162, Pt. 3, at 10–12; House Hearings at 7; Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st. Sess. (1965), at 11 (testimony of the Attorney General). This is the same kind of literacy test prescribed by South Carolina Code § 23–68.

Professor Key, after a careful study concluded (*Southern Politics* (1949) 576):

> No matter from what direction one looks at it, the southern literacy test is a fraud and nothing more. The simple fact seems to be that the constitutionally prescribed test of ability to read and write a section of the constitution is rarely administered to whites. It is applied chiefly to Negroes and not always to them. When Negroes are tested on their ability to read and write, only in exceptional instances is the test administered fairly. * * *

It follows that the first fact required to be found before Section 4(a) was set in motion—the existence of a test or device applicable in the State or a subdivision—itself demonstrates a substantial risk of violations of the Fifteenth Amendment.

Low voter participation.—The second fact—low participation in the Presidential election of 1964—points in the same direction. There were only nine States in which less than half the adult population voted in the Presidential election. Other explana-

tions may be equally likely when one considers this fact alone, but such low participation at least suggests that in those States a large class (or classes) of citizens was barred from the polls. Three other aspects of the data indicate a strong probability that much of the low participation resulted from the discriminatory use of tests or devices. Of the nine States seven maintained a test or device within the definition in Section 4(c)—Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia. While this might be taken to suggest only a correlation between any use of a test or device and low participation in the electoral process, the explanation is disproved by the fact that of the twenty-one States maintaining a test or device only the seven named had less than half their adult population participating in the 1964 Presidential election. In the other 14 the ratio of participation was higher than the national average. Some further explanation is therefore required. The likelihood that the cause is discriminatory use of the test or devices in States with less than 50% adult participation is strongly suggested by the fact that in six of the seven States 63% of the adult whites but only 25% of the adult Negroes were registered in 1964 (by computation from statistics in Senate Hearings 1472).

It is possible, of course, that tests and devices, even though fairly administered, bore harder upon Negroes than whites in the six Southern States. But Congress in choosing between the two conflicting inferences was not required to blind itself to familiar history. All six States had long maintained official policies of racial segregation extending from the

school house to the graveyard.[40] All six had long resorted to other discriminatory devices for denying Negroes equal voting rights.[41] Public officials and political leaders had repeatedly evidenced their pur-

[40] See Appendix J, Senate Report 162 (Part 3), p. 49, setting out statutes in, *inter alia*, Alabama, Georgia, Louisiana, Mississippi and South Carolina requiring segregation in transportation, and travel facilities, recreational facilities, schools and hospitals. See also, Supplemental Brief for the United States as Amicus Curiae in *Griffin* v. *State of Maryland*, *Barr* v. *City of Columbia*, *Bouie* v. *City of Columbia*, *Bell* v. *Maryland and Robinson* v. *Florida*, Nos. 6, 9, 10, 12, and 60, October Term, 1963. Note especially pp. 45–63 which set out in detail State statutes and local ordinances throughout the South directed at curtailing the Negro's participation in the life of the community by limiting his legal rights, his freedom to engage in the trade or business of his choice, his access to various kinds of buildings and public accommodations, in short, the whole range of Black Codes and Jim Crow laws.

[41] For a discussion of the "white primary" in Alabama, Georgia, North Carolina, South Carolina and Virginia and the attempt by these States to maintain white supremacy in their Democratic primaries following the decision in *Smith* v. *Allwright*, *supra*, see *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875; *Brown* v. *Baskin*, 78 F. Supp. 933, 80 F. Supp. 1017 (E.D.S.C.), affirmed *sub nom Baskin* v. *Brown*, 174 F. 2d 391 (C.A. 4); *West* v. *Bliley*, 33 F. 2d 177 (E.D. Va.), 42 F. 2d 101 (C.A. 4); Key, *Southern Politics* (1949) 619–643; Weeks, *The White Primary*, 8 Mississippi Law Journal 135–153; Weeks, *The White Primary: 1944–1948*, 42 *American Political Science Review* 500–510 (1948).

The history of Louisiana's efforts to disfranchise Negroes at the polls is described fully by Judge Wisdom in *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La.) affirmed, 380 U.S. 145. Mississippi's efforts are detailed by Judge Brown in his dissent in *United States* v. *Mississippi*, 229 F. Supp. 925, 974 (S.D. Miss.), reversed, 380 U.S. 128.

Various other methods used to circumvent the Fifteenth

pose to maintain white supremacy at the polls. The tests and devices, moreover, had been adopted, and were readily and often used, as engines of discrimination. Under such circumstances, it was certainly permissible for Congress to infer that the low voter participation probably resulted from racial discrimination in the use of the tests.

The inference is confirmed by the available direct evidence. Despite its limited resources for so huge a task and the difficulties of investigation and proof, in five of the six States the Department of Justice had found evidence of racial discrimination in voting. Litigation had been initiated in four States, and in each of the 32 actions which has gone to final judgment, there have been findings of discriminatory use of tests and devices.[42] Senate Hearings, 1447–1534; S. Rep. 162, Pt. 3, 13–14. These facts illumined the direct testimony of expert witnesses: (1) that the areas in which use of tests and devices and distinctly low voter participation coincided were those in which there was reason to apprehend the most serious racial

Amendment are well documented in the reports of this Court. See note 35, *supra*, p. 49.

[42] See note 33 at pp. 44–45, *supra*.

discrimination in voting and (2) that there appeared to be a causal relationship. House Hearings 12, 24, 26–27, 88, 258, 265, 273. Senate Hearings 1447–1534 (especially pp. 1447–1455 containing "Explanation of Attached Tables Demonstrating that there is a High Probability of Voting Discrimination Where the Use of 'Tests or Devices' Coincides with Low Voter Participation").[43]

Congress was not unmindful of South Carolina's argument that the triggering mechanism in Section 4(b) is unreasonable because it fails to recognize that participation of South Carolina's citizens in elections is affected by factors such as their low level of education and income (Plaintiff's Brief, pp. 18–19 and Appendix C). The argument was made in Congress and rejected.[44] It contains numerous fallacies. One

[43] South Carolina suggests (Brief in support of motion for leave to file complaint, p. 54) that voting in primaries would be a more accurate gauge of access to the franchise, at least in predominantly one-party States. However, the most recent statistics supplies by South Carolina (Exhibit C–1 to the Complaint) show that in 1962 24.69% of the adult population voted in the general elections and 25.92% voted in primary elections. In devising a rule of nationwide applicability it is unnecessary for Congress to observe such fine distinctions. Actual participation in voting is a more accurate indicator of access to the franchise than registration figures because of the common failure of local officials to remove from the rolls the names of persons who have died or moved away. House Hearings 328; Senate Hearings 587, 596, 599–600, 602.

[44] See, *e.g.*, Senate Hearings, 32–37 (poll tax, lack of political contests, apathy, low education); 111 Cong. Rec. 8079 (daily ed. 4/23/65) (lack of political contests); *id.* at 11303 (daily ed. 5/26/65) (inability of aliens and military personnel to vote); *id.* at 11305 (daily ed. 5/26/65) (low education and distant registration offices in rural counties).

of them is that, although all the factors bearing upon the situation of Negroes in South Carolina may well contribute to low Negro registration and participation in voting, Congress was required to determine only whether the participation of less than half the voters evidenced a sufficiently substantial danger that the test or device was an engine of racial discrimination to warrant its suspension pending more careful inquiry (should the State wish to contest the existence of such a danger). The presence of other contributing factors is not inconsistent with substantial danger of racial discrimination.

In framing an enforcement measure to bar the use of a test or device to violate the Fifteenth Amendment, Congress, moreover, could properly take into account the fact that the causes cited by South Carolina for low Negro participation in voting—inferior educational attainment and income—are themselves related to official racial discrimination violating the Fourteenth Amendment, another evil which Congress has legislative power to redress. (Amend. XIV, Sec. 5.)[45] South Carolina's own brief makes

[45] Congress was well aware of the relationship between violations of the Fourteenth and Fifteenth Amendments. During the Senate debate Senator Bayh called attention to it (111 Cong. Rec. (daily ed.) 8198:

"Sumter County, Ala., provides an excellent illustration. In 1935, there were 536 white and 5,400 Negro children enrolled in elementary schools in Sumter County. For every 21 white students there was 1 teacher. There was only 1 teacher for every 45 Negro students. The white teachers were paid nearly five times as much as Negro teachers. Expenditures per pupil were even more discouraging. While $75 per pupil was appro-

it clear that the low average educational attainment of her citizens is largely a matter of race. She reports that the median number of school years completed by white persons 25 years of age or older is 10.3 (just below the national average), whereas for

priated for white students, $4 per pupil was appropriated for Negro students.

"Certainly the great weight of responsibility for equal opportunity in the country today is in the area of additional educational opportunities. The figures which I have stated portray as dramatic evidence of unequal opportunity as any that I have discovered.

"In 1950, the story was not changed. It was modified somewhat. While the disparity was not as great in 1950 as it was in 1935, it remained. For every 21 white students there was 1 teacher. There was 1 teacher for every 30 Negro students. A Negro teacher received approximately two-thirds the compensation received by a white teacher. While $198 per pupil was appropriated for white students, $63 per pupil was appropriated for Negro students. Likewise, expenditures to provide transportation to and from schools were higher for whites than Negroes and school sessions were longer for whites than for Negroes.

"Yet, in order to vote in Sumter County, Ala., under State law a Negro would have to take the same educational achievement test that is administered to whites. These States cannot have it both ways. They cannot, on the one hand, provide their Negro citizens with an inferior education, while at the same time, require them to pass a stiff educational test as a prerequisite to the exercise of the right to vote. As the Attorney General said to the Judiciary Committee:

" 'Years of violation of the 14th amendment would become the excuse for continuing violation of the 15th amendment right to vote.'

"Even a fairminded Federal examiner could not fairly administer a literacy or informational test under these conditions. The bias is built in."

See also Senate Hearings 22; House Hearings 16; S. Rep. 162, Pt. 3, 16.

non-white persons it is 5.9 (Br. pp. 46–47). Thus, South Carolina herself suggests that low voting participation is attributable largely to non-participation by the State's Negro population. These figures coincide with an historic policy of segregated education. South Carolina's constitution (Article XI, Sec. 7) and statutes (S.C. Code 21–751 (1962)) still provide for enforced segregation. Although the Board of Education of Clarendon County, South Carolina, was one of the original defendants in the school desegregation cases (*Brown* v. *Board of Education,* 347 U.S. 483; 349 U.S. 294) not a single school in South Carolina was desegregated prior to 1963. At the present time 6 out of a total of 107 school districts have been desegregated by court order. In each of those cases an affirmative and continuing public policy of segregated education was found.[46] Nor is it irrelevant that South Carolina, by statute and ordinance, has long officially supported the caste system which relegates Negroes to an inferior social and economic position.[47] In States maintaining and

[46] See *Brunson* v. *School District 1 of Clarendon County*, 311 F. 2d 107 (C.A. 4), certiorari denied, 373 U.S. 933; *Brown* v. *School District 20 of Charleston County*, 226 F. Supp. 819 (E.D.S.C.), affirmed, 328 F. 2d 618 (C.A. 4), certiorari denied *sub nom. Allen* v. *Brown*, 379 U.S. 825; *Stanley* v. *Darlington County School District*, 9 Race Relations L. Rep. 1293 (E.D.S.C.); *Randall* v. *Sumter School District No. 2*, 232 F. Supp. (E.D.S.C.), 241 F. Supp. 787; *Whittenburg* v. *School District of Greenville County*, 9 Race Relations L. Rep. 719 (W.D.S.C.); *Adams* v. *Orangeburg County School District No. 5*, 232 F. Supp. 692 (E.D.S.C.).

[47] Even in the twentieth century the caste system has restricted the South Carolina Negro at every turn. He began life in neighborhoods segregated by law. See, *e.g.*, City Code of

enforcing a public policy of racial segregation in the economic, educational and social activities of the community, the disfranchisement of the Negro would appear to be as much the cause as the effect of his low economic and educational status. Certainly it is not unreasonable to anticipate that a group denied access to the principal and most effective mode of political expression will eventually be shortchanged in other areas affected by State action. See Myrdal, *The American Dilemma* (1962), pp. 435–436. Conversely, opening the polls tends to correct other denials of equal protection.

We do not suggest that the constitutionality of the triggers leading to temporary suspension of tests and devices defined in Section 4(c) rests upon the fact that the States to which they apply have engaged in other forms of unconstitutional racial discrimination. The critical question remains whether the triggers and temporary suspension are reasonably adapted to the constitutional end of eliminating a significant danger that South Carolina's literacy test is an instrument of racial discrimination violating the Fifteenth Amendment. In determining the relationship of means to end, however, it is appropriate to

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Spartanburg, S.C. (1949) § 23–51. He attended segregated schools. S.C. Code (1962) § 21–751. He could play only in parks designated for his race. *Id.*, § 51–2.4. He was kept apart at work. See, *e.g.*, *id.*, § 40–452. He was kept apart while traveling (*id.*, §§ 58–714, 58–1331)—except while accompanying a white child (*id.*, § 58–1333). Operators of station restaurants, under pain of fine or imprisonment, might not furnish the Negro meals "in the same room, at the same table or at the same counter" with whites. *Id.*, § 58–551. He was required to worship apart (see, *e.g.*, City Code of Greenville, S.C. (1953), § 31–5), and to be buried apart (*id.*, §8–1).

consider not only the affirmative connection but also the fact that the measure, to the limited extent that it misses the mark or sweeps more broadly than intended, will tend to remedy other constitutional violations.

(b) The urgency of prompt enforcement required immediate suspension of all tests and devices, pending full judicial determination, where the guides most readily available indicated danger of continuing violations

In weighing the relationship of the triggers to the objective of preventing the use of voting tests and devices as instruments of racial discrimination while permitting their operation where there was no significant danger of abuse, Congress properly gave weight to the urgent need for a general and immediate remedy for the demonstrated widespread use of tests and devices as instruments for abridging the right to vote by reason of race or color. Congress fully realized that the triggering facts, even when considered in context (pp. 55–64, *supra*), were not certain proof of violations. Given time, careful investigation, and court review, it might turn out that the triggers swept more broadly than necessary and that a State such as South Carolina did not in fact use its literacy test as an engine of discrimination. Congress provided for such an inquiry, at the request of a State, in Section 4 (a) and (d). The function of the triggers and suspension pending the outcome of litigation is simply to meet an extraordinarily urgent situation.

The President's Message to Congress on March 15, 1965, stated the basic facts (H. Doc. 117, 89th Cong., 1st Sess., p. 8):

(1) That the 15th amendment of our Constitution is today being systematically and willfully circumvented in certain State and local jurisdictions of our Nation.

(2) That representatives of such State and local governments, acting "under the color of law," are denying American citizens the right to vote on the sole basis of race or color.

(3) That, as a result of these practices, in some areas of our country today no significant number of American citizens of the Negro race can be registered to vote except upon the intervention and order of a Federal court.

(4) That the remedies available under law to citizens thus denied their constitutional rights—and the authority presently available to the Federal Government to act in their behalf—are clearly inadequate.

(5) That the denial of these rights and the frustration of efforts to obtain meaningful relief from such denial without undue delay is contributing to the creation of conditions which are both inimical to our domestic order and tranquillity and incompatible with the standards of equal justice and individual dignity on which our society stands.

The subsequent hearings and debates developed abundant evidence that, notwithstanding intensive litigation under the voting provisions of the Civil Rights Acts of 1957, 1960 and 1964, the promise of the Fifteenth Amendment remained largely unfulfilled and that, at the prevailing rate of progress, large numbers of Negroes were doomed to lifelong disfranchisement (see House Hearings 5–9, 66, 258, 287, 307, 436; Senate Hearings 9–14). Thus, in 100

counties, between 1956 and 1963 Negro registration had increased from 5% to 8.3%, leaving more than 600,000 adult Negro residents still disenfranchised. *1963 Report of the United States Commission on Civil Rights* 14–15. Negro registration in Alabama, where 12 voting rights actions had been commenced by the Department of Justice, increased by only 9.2% to a total of 19.4% between 1958 and 1964—whereas more than 69% of the adult white population of Alabama is registered. Similarly, Negro registration in Mississippi, despite 22 voting rights suits initiated by the Department of Justice, barely increased from 4.4% in 1954 to 6.4% in 1964—while more than 70% of the adult white population is registered. And in Louisiana (where more than 80% of the adult white population is registered) 14 such actions had inched Negro registration from 31.7% to 31.8% in 1965. S. Rep. No. 162, Pt. 3 at 6; House Hearings 4, 32, 257. The testimony also shows that this record of failure was attributable to the delays inherent in case-by-case litigation, to the difficulties in policing judicial decrees, and to the intransigence and evasions of local officials. House Hearings 51, 60; Senate Hearings 9–14; S. Rep. 162, Pt. 3, 6–9. Any possibility of attributing the low registration of Negroes to indifference to the franchise is negatived by the widespread public demonstrations against continued denial of constitutional rights.

The problem facing Congress was epitomized by developments in Dallas County, Alabama, whose county seat is Selma. Dallas County had a voting-age population of approximately 29,500, of whom 14,400

were white persons and 15,100 were Negroes. As of 1961, 9,195 whites—64 percent of the voting age total—and 156 Negroes—1 percent of the total—were registered to vote. The racial discrimination inferable from these statistics was confirmed by a Department of Justice investigation, and suit was brought on April 13, 1961. Thirteen months later the district court refused all relief. Two and one half years after suit was instituted, the court of appeals reversed and ordered the entry of an injunction. A second trial documented the discriminatory misuse of tests and devices since entry of the decree, and on February 4, 1965, almost four years after suit was first brought, the district court entered a decree enjoining use of the complicated literacy and knowledge-of-government tests. Even then there were major delays and obstacles to Negro registration. The government was required to apply for supplemental orders on several further occasions.[48] There were demonstrations, violence and dangerous tensions, followed by the historic march from Selma to Montgomery. The example of Dallas County was often cited in Congress as evidence of the ineffectiveness of existing methods of enforcement and the need for swift relief.

[48] During some of the period Negroes were intimidated from appearing at the registration office. See *Williams* v. *Wallace*, 340 F. Supp. 100 (M.D. Ala.). In *United States* v. *Clark*, 10 Race Rel. Rep. 236 (April 16, 1965), a three-judge court enjoined Sheriff Clark and his deputies and posse from harassing Negroes in the exercise of their constitutional rights. At this time, two other Dallas County voting intimidation cases are pending decision in the Fifth Circuit. *United States* v. *McLeod*, No. 21475 (argued March 24, 1965); *United States* v. *Dallas County*, No. 21477 (argued March 24, 1965).

Even where litigation was initiated on a State-wide basis the delays were long and frustrating. The complaint in *United States* v. *State of Mississippi* was filed on August 28, 1962. On September 6, a three-judge court was designated to hear the case. The defendants were granted two extensions of time in which to plead, giving them a total of 60 extra days. On November 19, 1962, the defendants filed motions to dismiss the case and for a more definite statement, severance, the striking of parts of the complaint, and a change of venue. On March 12, 1963, seven months after suit was filed, some of the motions were denied and decision was deferred on others. Under the order, discovery proceeded while the motions were pending. On October 30, 1963, all pending motions were argued, including the motions to dismiss but it was not until March 6, 1964, a year and a half after suit was filed, that the district court entered judgment dismissing the complaint for failure to state a claim. The government appealed and on March 8, 1965, this Court unanimously reversed the district court's dismissal of the case and remanded the case for trial. At the time Congress acted, the three years of litigation had produced an important ruling but no practical enforcement of the Fifteenth Amendment. One could only speculate how much longer it would be before a final decree was entered.

Further delay in halting the widespread violations of the Fifteenth Amendment would do irreparable injury both to the victims of the discrimination and to the integrity of our political processes. The depth of the injustice resulting from any further exclusion of

a large class of citizens upon the most invidious of grounds was evidenced, if evidence were needed, by the reaction in Selma, Alabama, the March to Montgomery and similar demonstrations. What was needed was a clear-cut formula which would work with reasonable accuracy during any period required for investigation and more refined classification. The constitutional objective which Congress was entitled to pursue was not compliance eventually but *enforcement now.*

Under such circumstances Congress might well have chosen to outlaw all use of tests and devices for a specified period where they carried the degree of risk of violations inferable from the triggering facts and their known historical context. It is no objection that there might be instances of violations not brought under Section 4. Congress could provide this remedy for the States and counties where the danger was apparently greatest, leaving the Department of Justice free to litigate other violations under Section 3 of this Act and under the voting rights provisions of prior legislation.

> * * * Evils in the same field may be if different dimensions and proportions, requiring different remedies. Or so the legislature may think. * * * Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others. [*Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489.]

See *United States* v. *Darby*, 312 U.S. 100, 121; *Currin* v. *Wallace*, 306 U.S. 1.

Nor is it a fatal objection that the suspension might not be appropriate in every instance because the reasonably apparent danger was actually unreal. We have already stated the principle that legislation may draw practical lines that sometimes reaches innocent conduct (*supra*, pp. 46–48, 53–55). Congress may employ means which, "although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government." *United States* v. *Darby*, 312 U.S. at 121. See, also, *Currin* v. *Wallace*, 306 U.S. 1. The urgency of the problem with which Congress was confronted—the massive and prolonged deprivation of a fundamental political right—warranted the solution which Congress adopted. Given the alternatives—on the one hand, permitting large numbers of citizens to be illegally deprived of the right to vote in elections of vital concern and, on the other, the risk that some unqualified persons in some areas might be registered—Congress could appropriately choose as it did.

In fact—we must emphasize once again—Congress refrained from permanently outlawing the dangerous tests and devices on the basis of the triggering determinations and chose to use them only as the best evidence available for an immediate, virtually automatic determination operating only for the period necessary to grant a State or political subdivision a

full judicial hearing under Sections 4 (a) and (d). We show presently that the judicial hearing provided affords a fair opportunity to establish, upon all the evidence, whether a literacy test or other device described in Section 4(c) carries sufficient danger of racial discrimination to warrant its disestablishment.

It follows that the interim measure of suspending the operation of tests and devices upon the triggering determinations, pending a judicial hearing, is a measure reasonably adapted to the permissible congressional objective of promptly arresting violations of Section 1 of the Fifteenth Amendment. Since the measure violates no other restriction upon the constitutional power, it is a valid exercise of the enforcement power conferred by Section 2.

Plaintiff's other objections to the triggering mechanism can be answered summarily. Where there was need for prompt action, the operative facts were readily susceptible of objective determination and the door was open to a judicial proceeding, there was no need to provide for judicial review of the determinations of the Attorney-General and Director of the Census. See *United States* v. *Bush & Co.,* 310 U.S. 371; *Schilling* v. *Rogers,* 363 U.S. 666, 674; *Choy* v. *Farragut Gardens,* 131 F. Supp. 609 (S.D.N.Y.). Plainly, Congress could accept the statistical processes of the Bureau of the Census, as it has done for other purposes such as the allocation of congressional seats.

Nor can it be successfully argued that these provisions of the Act constitute a bill of attainder prohibited by Article I, Section 9, Clause 3, because they inflict punishment on a legislatively predetermined class. The argument proves too much. If accepted, it would largely disable Congress from providing for the effective regulation of any activity. Most regulatory legislation establishes classifications on the basis of experience with past events which reveal a need for the imposition of future restraints. Surely Congress may undertake to restrict the production of cotton without, also, restricting the production of carrots. It may tax the sale of automobiles without taxing the sale of bicycles. The fact that the legislation was predicated on substantial evidence of need does not transform it into legislative adjudication. Congress left every State free to seek an adjudication of the applicability of the regulatory scheme in an Article III court. A bill of attainder must inflict punishment, and however broad the concept of punishment may be (see *United States* v. *Brown,* 381 U.S. 437), it surely does not embrace the burden of seeking such an adjudication.

It is worthy of note in this connection that although Congress was well aware of the States and even most of the counties likely to be initially affected by Section 4(b), the triggering standards were made to control objectively, just as in the case of any other legislation requiring classification. And at least in the case of counties it was entirely possible that

the list affected by the determinations would be somewhat different than suggested by early indications.[49]

2. The judicial proceeding authorized by Section 4(a) and (d) affords a State a fair opportunity to show that its literacy test (or any other test or device) is not sufficiently likely to be an instrument of discrimination to warrant disestablishment.

While Section 4(a) requires the suspension of any test or device described in subsection (c) immediately upon the determinations made by the Attorney General and Director of the Census under subsection (b), Section 4(a) also authorizes an immediate judicial inquiry into the reality of the apparent danger of abuse. When the judicial inquiry is completed, the court's final decree supplants the triggering mechanism as the determinant of whether the test or device shall be disestablished as a serious threat to Fifteenth Amendment rights or permitted as a *bona fide* measure of qualification to vote.

The legal principles outlined earlier in this brief make it plain that there is power to provide for disestablishment of a test or device which has been judicially determined to have been an engine of racial discrimination violating the Fifteenth Amendment.

[49] Indeed, surveys conducted by the Bureau of the Census after the Voting Rights Act was enacted resulted in determinations that Aroostook County, Maine, expected to be covered (see House Hearings, p. 44), was not subject to the Act, and, on the other hand, that Coconino and Navajo Counties, Arizona, and Honolulu County, Hawaii, not thought to be covered (see House Hearings, pp. 42, 44), were in fact reached. See 30 Fed. Reg. 14,505.

See *Louisiana* v. *United States,* 380 U.S. 145, and the discussion at pp. 45–51, *supra.* Nor can there be objection to confining the litigation to the United States District Court for the District of Columbia. Trial in a three judge federal court at the Nation's capital provides a convenient forum and ensures a prompt and impartial determination relieved of local pressures on either hand. There is ample power to confine specialized litigation to a single tribunal. *Lockerty* v. *Phillips,* 319 U.S. 182; *Yakus* v. *United States,* 321 U.S. 414, 427–431; *Bowles* v. *Willingham,* 321 U.S. 503.

The statutory departures from the familiar form of proceeding in equity to enjoin alleged violations of voting rights work no harm to any legitimate State interest and were essential to swifter and more effective enforcement of Fifteenth Amendment rights. The record of delay, frustration and continued violation so long as enforcement required county-by-county evidence (pp. 70–73, *supra*) demonstrated the necessity of proceeding in larger units at least when Statewide figures showed less than half the adult population to have participated in the most recent Presidential election under a Statewide test or device readily susceptible of discriminatory abuse. Section 4(d) eliminates any danger that isolated local incidents of abuse would result in Statewide disestablishment of an otherwise *bona fide* test of voting qualifications, for it provides that no State shall be deemed to have used a test or device to abridge the right to vote on account of race or color if the only incidents of such use have been few in number, have

been speedily remedied and present no reasonable probability of recurrence. Guided by this provision the courts can be expected to apply the test with a practical appreciation of the fundamental aim of barring the use of tests or devices where they present substantial danger of the violations to which they have been so easily and often adapted while permitting their continuance where past performance shows that the test or device has operated even-handedly as a true measure of voter qualifications.[50]

The Congressional decision to shift the burden of proof to the State in a proceeding under Section 4 rests upon three considerations which furnish ample constitutional justification.

First, the very fact that less than half the State's population has participated in a Presidential election under a kind of test or device for determining voting

[50] Before Section 4(d) was added the Attorney General had testified (Senate Hearings 53):

"I think you make a good point, that the committee might wish to consider, that if the difficulty is that there is one instance of one person being denied a vote 10 years, the judge could come—the court could come under this, could read this section in such a way as to say that if that were proved, the literacy test within section 3(a), I think the committee could consider whether or not the meaning of this, or what it ought to be, might not be to show more than one isolated instance.

I wouldn't have any objection to showing more than one isolated instance. I would have objection to making that test one of shifting all of the proof again and all of the thousands of man-hours I think we go into to make a showing similar to what we now have to show in every voting county. If there was—if you wanted to exempt the one or two or three isolated instances of one person and to make the evidence have to establish that it was not an isolated instance with respect to one person, I would have no objection.

qualifications which has often been used as a subterfuge for violating the Fifteenth Amendment indicates a substantial probability that the test is being so used (see pp. 55–69, *supra*). Since Congress can act to meet threats to constitutional rights without requiring proof that they are more likely than not to eventuate in actual injury, it is not irrational to suppress the danger, on the basis of such an inference, unless the opposing party produces contrary evidence, irrespective of whether that procedure would be adequate in a criminal presecution. Even in criminal cases a presumption may be created on the basis of a rational connection between the facts to be demonstrated and the facts actually proved (*United States* v. *Gainey*, 380 U.S. 63, 65–67), and even without a formal presumption, conviction may be warranted if the defendant fails to rebut an inference rationally to be drawn from the demonstrated facts (*Casey* v. *United States*, 276 U.S. 413, 418; *Yee Hem* v. *United States*, 268 U.S. 178, 184; *Hawes* v. *Georgia*, 258 U.S. 1, 4; *Luria* v. *United States*, 231 U.S. 9, 25–26). Here, there are no problems of self-incrimination or interference with the functions of a criminal jury.

Second, putting the burden of proof upon the State is warranted by the fact that the State can produce the evidence showing the actual administration of any test or device much more easily than the Attorney General. In civil proceedings this is an accepted basis for the establishment of a presumption. 9 Wigmore, *Evidence* 3d ed. 1940) § 2486; Morgan, *Some Problems of Proof* (1956) 76. Here the State officials know and can readily testify concerning the manner

in which they administer the tests. They have custody of or access to the records. As the Attorney General explained during the congressional hearings, in most instances little more would be required to put upon him the burden of producing evidence of actual use of the test or device to abridge the right to vote on account of race or color. Senate Hearings 26–27. Bearing in mind the balance of convenience, the initial burden put upon the State is scarcely onerous.

Third, Congress could constitutionally provide that any uncertainty remaining at the end of the Section 4(a) litigation concerning the actual use of a test or device should be resolved by disestablishment of the test for the full period necessary to remedy and prevent revival of any abuse. As we have repeatedly pointed out, the power to enforce the constitutional prohibition against discriminatory denial of voting rights includes authority to obviate substantial risks of violation as well as to remedy actual infractions. See pp. 53–55, *supra*. Such a substantial danger exists whenever the evidence adduced at a thorough judicial inquiry leaves uncertainty as to whether a test or device of a kind frequently used to violate the Fifteenth Amendment has actually been used for that purpose in a particular jurisdiction or operates only as a bona fide, non-discriminatory test of voting qualifications.

In effect, therefore, the suit authorized by Section 4(a) operates substantially as an application for an exemption. There is ample constitutional justification for putting upon those seeking the benefit of

exemptions both the burden of seeking such exemption in court and the onus of establishing their entitlement. *E.g.,* Emergency Price Control Act of 1942, Section 203(a), 56 Stat. 23; Civil Rights Act of 1964, Section 709(c), 78 Stat. 241, 263, 42 U.S.C. 2000e-8(c); Interstate Commerce Act, Section 204 (a)(4a), as amended, 49 U.S.C. 304(a)(4a); Securities and Exchange Commission Rule 10 B-8(f), promulgated pursuant to Securities Exchange Act of 1934, 15 U.S.C. 78j(b). See also *Securities & Evchange Commission* v. *Ralston Purina,* 346 U.S. 119.

In the final analysis, the operation of the triggers, the temporary automatic suspension of inherently dangerous tests and devices, and the provision for more detailed judicial inquiry into their actual operation at the request of any State or political subdivision affected, must be viewed as a single integrated measure for quickly halting the widespread use of such tests and devices as instruments for denying or abridging the right to vote on account of race or color in violation of the Fifteenth Amendment. Viewed as a unit, the provisions of Section 4 are plainly adapted to the end of immediate enforcement—a constitutionally permissible objective under Amendment XV, Section 2. They suspend the use of tests without further inquiry only in those instances where the kind of guides immediately available show the greatest danger of discriminatory use; and that suspension operates, if the State or subdivision wishes it lifted, only during the interim period necessary for judicial investigation and a more refined determination of the actual danger of

abuse. Thereafter, the judicial decision replaces the triggering findings as the determinant, and any State is free to resume the use of a test or device which is found to have been used only as a bona fide test of voter qualifications. We submit, therefore, that the Act establishes a fair and reasonable procedure for determining when and whether a literacy test or similar device should be outlawed in a particular State or county as an engine of discrimination or permitted as a legitimate exercise of the power to fix voting qualifications.

III

THE PROVISIONS OF THE VOTING RIGHTS ACT OF 1965 RELATING TO THE REVIEW OF NEW VOTING STANDARDS AND PROCEDURES AND THE APPOINTMENT OF FEDERAL EXAMINERS ARE A PROPER EXERCISE OF CONGRESSIONAL POWER TO ENFORCE THE FIFTEENTH AMENDMENT

The second conclusion which Congress reached on the basis of the evidence before it was that, where the enforcement of tests and devices had been suspended, it might also be necessary to prevent attempts at evasion and circumvention by State or local officials. To that end, two related provisions were included in the Voting Rights Act, applicable to otherwise covered States and subdivisions: First, a prohibition against putting into effect new voting qualifications and procedures until they had been screened administratively or judicially and found harmless (Section 5); and, second, an authorization for the appointment of federal examiners to qualify voting applicants when the Attorney General deemed their use necessary to en-

force the guarantees of the Fifteenth Amendment (Section 6). The appropriateness of these procedures in light of the realities requires little discussion.

The frequency with which the adoption of new devices has been resorted to in the past to frustrate or delay the enjoyment of the franchise by the Negro warranted anticipating and forestalling it in the future. We have already alluded to the long history of changing qualifications designed to defeat Negro suffrage (*supra,* pp. 62–63, n. 41). This Court is familiar with the remarkably persistent record of varied schemes devised for that purpose—from the crudest to the most ingenious. Only last Term, the Court had occasion to notice that pattern in Louisiana and Mississippi. See *Louisiana* v. *United States,* 380 U.S. 145, 147–151; *United States* v. *Mississippi,* 380 U.S. 128, 132–136. See, also, the government's briefs in those cases, Nos. 67 and 73, October Term, 1964. Alabama's recent history is comparable. See *United States* v. *Penton,* 212 F. Supp. 193 (M.D. Ala.); *United States* v. *Parker,* 236 F. Supp. 511 (M.D. Ala). Against that background, Congress was fully warranted in guarding against novel methods of voter discrimination. And, since it was impossible to foresee every possible avenue of evasion that might be taken, it was appropriate to require review of all changes of practice or procedure in this sensitive area.

Much the same reasons justify the provision for the appointment of federal examiners in areas where discriminatory practices by local registrars were prevalent and continuing. It is in essential respects like the voting referee provision of the Civil Rights Act of 1960 (42 U.S.C. 1971(e), which has been sustained

against constitutional challenge. See *United States* v. *Manning,* 206 F. Supp. 623, 215 F. Supp. 272 (E.D. La.); *United States* v. *Mayton,* 335 F. 2d 153 (C.A. 5); *United States* v. *Scarborough,* 348 F. 2d 168 (C.A. 5). The same considerations govern here. The litigated cases—all made known to the Congress—establish that racial barriers to registration may be perpetuated by the conduct of individual registrars as well as by more formal standards and procedures inscribed in the statute books. Nor was Congress lacking evidence that some local election officials adhere to their discriminatory practices in defiance of federal authority. *E.g., United States* v. *Lynd,* 301 F. 2d 818 (C.A. 5); *id.,* 321 F. 2d 26; *United States* v. *Louisiana, In re Mary Ethel Fox* (E.D. La., C.A. 2548), affirmed *sub nom. Fox* v. *United States,* 381 U.S. 436; *United States* v. *Cox* (N.D. Miss., C.A. No. 53-61). Moreover, it was reasonable to assume that, in some instances at least, the hostility of the local registrar to Negro suffrage was so notorious that eligible Negroes would be too intimidated to approach him, being reasonably doubtful that his policy had changed. In those circumstances, a neutral examiner is essential to carry out the purpose of the Fifteenth Amendment to allow the exercise of the franchise uninhibited by considerations of race.[51]

CONCLUSION

The case before the Court has roots which go deep. The Voting Rights Act of 1965 corrects the failure of the Nation—an agonizing and damaging failure—to do justice to all of its people and to bring a large class

[51] See, U.S. Commission on Civil Rights, *Voting in Mississippi* (1965), pp. 21-24, 62, and *The Voting Rights Act—The First Months* (1965), p. 21.

of its citizens into the mainstream of American life. The failure has endured for generations, and the twisted branches which have sprung from wrongs long unrectified are deeply entwined in our political life. These considerations do not stand apart from the principles of constitutional adjudication. In the responsible exercise of its express powers, Congress was bound ultimately to face the grave and harsh necessities and to fashion an instrument of redress which cut to the root and branch. So, also, we submit the courts may not blind themselves to what the Nation knows.

This Court should enter judgment for the defendant sustaining the constitutionality of the Voting Rights Act of 1965 and dismissing plaintiff's suit.

Respectfully submitted.

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