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 OF THE PLAINTIFF

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MISCELLANEOUS

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v.

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

BRIEF OF THE PLAINTIFF

JURISDICTION

The Plaintiff is a Sovereign State of the United States. The Defendant is a resident of a State other than the Plaintiff and is currently serving as the Attorney General of the United States. The jurisdiction of this Court is invoked under Article III, §2, Clauses 1 and 2 of the Constitution of the United States.

QUESTIONS PRESENTED

1. Because of their patent abrogation of other constitutional limitations and guarantees and their failure to accomplish reasonably its purposes, do §§4, 5, 6(b), 11 and 12 of the Act fail to meet the standard of appropriateness required by the Fifteenth Amendment?

2. By applying, only because of the past lawful conduct of their citizens, to predetermined Sovereign States to deprive their citizens and governments of their lawful electorate and to paralyze the legislative and administrative control of future elections by their governments, do §§4, 5, and 6(b) of the Act constitute a Congressional "legislative trial" of nine Sovereign States and their citizens in violation of Article I, §9, Clause 3, and Article III of the Constitution of the United States?

STATEMENT

On August 6, 1965 the President approved the Voting Rights Act of 1965, Public Law 89-110.[1] The next day appropriate "notices" were published in *The Federal Register* by the Department of Commerce, Bureau of Census and the Department of Justice in order to make certain provisions of the Act applicable to South Carolina and certain other Sovereign States.[2] On the same day the Defendant directed the Chairman of each County Board of Registration in South Carolina to suspend the enforcement of her lawful literacy test.[3] As directed, enforcement of these tests was discontinued.[4] On September 29, 1965 South Carolina filed with this Court a motion requesting permission to file her Complaint challenging the enforcement of certain provisions of the Act by Nicholas deB. Katzenbach, Attorney General. By his Memorandum of October 1965, the Defendant declined to oppose this Motion and permission to file was granted by Order of this Court on November 5, 1965.

Meanwhile, on November 8, 1965, the Defendant dispatched, under the Act, federal examiners to Dorchester and Clarendon Counties in South Carolina, not because of

[1] Hereinafter referred to as "the Act".

[2] Complaint, Exh. F-3, p. 35. The covered territories were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia and parts of Arizona and North Carolina. Coverage was not initially invoked as to counties in Idaho and Maine.

[3] Complaint, Exhs. F-1 and 2, p. 32-34.

[4] As we go to press, the Civil Rights Commission reports that approximately 9,500 South Carolina residents have since been registered. *The State* (Columbia, S. C.) p. 1-B, Dec. 6, 1965.

any enforcement of South Carolina's literacy requirement, but presumably because officials in those counties refused to open their registration books on days not required by South Carolina law.[5] On November 19, Defendant filed his Answer to the Complaint. This brief is filed in anticipation of the hearing on the pleadings set for January 17, 1966.

INTRODUCTION

At the outset, it is essential that the extent of this challenge be made clear. The Act as a whole is very broad, containing many prohibitions against the deprivation of the right to vote because of racial discrimination. Specific provisions authorize resort to the Federal Courts to enforce the protections guaranteed.[6] Upon a finding that the outlawed discrimination exists, the federal judiciary is given broad remedial powers to correct these conditions, including the right to authorize federal examiners to enforce the State law fairly.[7]

For the most part this action does not challenge the validity of these sections which prohibit the unlawful conduct and authorize judicial remedies to prevent its occurrence. Rather this proceeding questions the constitutionality of those sections of the Act falling into two general categories: (1) those which prejudge, without any judicial hearing, the conduct of selected States and automatically suspend their valid laws and legislative capacities,[8] and (2) those which make criminal, conduct unrelated to race or any form of "State action".[9] It is this method in which Congress has chosen to legislate, not its goals, that are challenged.

Undoubtedly much will be said about the deference due Congressional legislation and the presumption of constitutional validity which attaches to any legislative action.

[5] See Appendix A, Reply Memorandum for Plaintiff, p. 5, November 1965; *The National Observer,* November 22, 1965, p. 2.

[6] §3, Complaint Brief, Appendix B, p. 80-82.

[7] §6(a), Complaint Brief, Appendix B, p. 85.

[8] §§4, 5, and 6(b) of the Act, Complaint Brief, Appendix B, p. 82-86.

[9] §§11 and 12, Complaint Brief, Appendix B, p. 91-93.

These principles cannot be questioned and should be studiously enforced wherever applicable. The conduct of one federal Branch is always entitled to such respect from another. But as will hereafter be shown, when that conduct exceeds constitutional bounds, it is the duty of the other branch of the government, in fact its reason for existence, to bring it into compliance with the Constitution.[10]

SUMMARY OF ARGUMENT

I

The Voting Rights Act of 1965, in its pertinent parts, is not "appropriate" legislation to enforce the Fifteenth Amendment in that, without regard to racial discrimination, it deprives South Carolina and certain other states of the rights to prescribe voter qualifications as reserved and guaranteed by Article I, Sections 2 and 4 of and by the Seventeenth Amendment to the Constitution of the United States.

The percent of persons voting in South Carolina in the Presidential election of November, 1964, has no relation to the denial or abridgment of the right of a citizen to vote on account of race. The failure of 50 percent of South Carolinians over the voting age to vote in the 1964 election is due to economic and political factors without the scope of the Fifteenth Amendment. The Act, in suspending voter literacy tests in South Carolina, while leaving similar tests in effect in other states, violates the Constitutional prin-

[10] *Bordens Farm Products v. Baldwin,* 293 US 194.

The Court is respectfully requested to consider the Plaintiff's brief filed with her Complaint and the Appendices thereto, in conjunction with that which follows.

No further comment on jurisdiction or the right to maintain this action will be made except:

(1) On the question of "standing", the Court's attention is directed, in addition to the authorities cited at Complaint Brief p. 44 to 48, to *Hopkins Federal Savings & Loan Association v. Cleary,* 296 US 315.

(2) To meet any suggestion that this cause is against the Federal Sovereign, without its permission, to the expressions of footnote 9 at page 48 of the Complaint Brief would be added the thought that the Congressional waiver of §4(a) of the Act extends to the Original Jurisdiction of this Court, which is, by the Constitution, coextensive in all relevant aspects with that of the United States District Court for the District of Columbia.

ciple of Equality of Statehood, as implied in Article IV, Sections 2 and 4 and in the Fifth Amendment.

In creating a conclusive presumption that the failure of 50 percentum of South Carolina's residents of voting age to vote was caused by racial discrimination in voter registration, the Act is arbitrary in violation of the due process clause of the Fifth Amendment.

Section 5 of the Act prohibits South Carolina and her inhabitants from amending their election laws, standards, practices and procedures without the approval of the Attorney General of the United States or of the United States District Court for the District of Columbia. Sections 6 and 7 of the Act provide for the appointment by the Civil Service Commission, at the instance of the defendant, of examiners with authority to register persons ineligible to vote under her literacy test, under circumstances they prescribe, and to require state election officials to keep these names on the registration books and to allow them to vote in all elections. These sections usurp the powers of South Carolina's legislative and executive departments in violation of Article 4, Sections 2 and 4 and the provisions of the Fifth Amendment.

II

The Act adjudges South Carolina and her citizens guilty of racial discrimination in voter registration solely on the basis of a past fact — the failure of 50 per centum of her residents of voting age to vote in November, 1964. By so doing, the Congress has usurped the federal judicial power in violation of the separation of powers among the three Branches of Government inherent in the Constitution as expressed in Article III. By diluting the vote of electors qualified under South Carolina law, by allowing the unqualified to vote and paralyzing their Legislature, the Act takes from the inhabitants of South Carolina their government and thus their liberty, without a judicial trial, in violation of Article I, Section 9 of the Constitution.

ARGUMENT

I.

THE ACT IS NOT "APPROPRIATE" TO ENFORCE THE FIFTEENTH AMENDMENT

A. THE CHALLENGED PROVISIONS OF THE ACT DEPRIVE SOUTH CAROLINA AND HER CITIZENS OF BASIC RIGHTS SECURED AND PROTECTED UNDER OTHER PROVISIONS OF THE CONSTITUTION

The Act is grounded upon the Fifteenth Amendment, §2 of which authorizes Congress to enforce its provisions by "appropriate" legislation.[11] To judge its "appropriateness", it is necessary to begin with consideration of the basic structure of the Constitution. It creates a government of limited powers.[12] In any matter of constitutional interpretation, the decision must be made in the light of the whole compact. Each limitation and guarantee must be construed in harmony with others.

> It is settled beyond dispute that the Constitution is not self-destructive. In other words that the powers which it confers on the one hand it does not immediately take away on the other;[13] . . .

This must be true, for no one provision is superior to the others.

> As no constitutional guaranty enjoys preference, so none should suffer subordination or deletion.[14]

Equally do these principles apply to the constitutional amendments.

Except to the extent that an amendment specifically changes an existing guarantee or limitation, the preexisting provision speaks with the same voice.

> Nothing new can be put into the Constitution except through the amendatory process; nothing old can be taken out without the same process.[15]

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[11] Complaint Brief, Appendix B, p. 79.

[12] *Marbury v. Madison*, 1 Cranch 175.

[13] *Billings v. United States*, 232 US 261, 282. Cf. *Rhode Island v. Massachusetts*, 12 Pet. 657.

[14] *Ullmann v. United States*, 350 US 422, 428.

[15] *Ibid.*

This status of the amendments was only recently so characterized:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interest at stake in any concrete case.[16]

Therefore it is proper to judge the "appropriateness" of this legislation not only in light of the Fifteenth Amendment which it purportedly enforces, but also against the background of the entire Compact.[17] If it exceeds the sole purpose of the Fifteenth Amendment to prevent racial discrimination in voting by unnecessarily abrogating basic limitations and guarantees contained elsewhere in the Compact, it cannot be deemed "appropriate".[18] This, the challenged provisions of the Act clearly do.

> 1. Sections 4, 5 and 6(b) grant the right to vote to certain of South Carolina's unqualified residents in violation of her laws and deprive her and her citizens of their right to prescribe lawful voter qualifications and regulations for her elections in violation of Article I, §§2 and 4 and the Seventeenth Amendment to the Constitution of the United States.

There can be no serious doubt that the original architects of the Constitution, in granting limited powers to the Federal Government through its provisions, intended to reserve to the Sovereign States exclusive control over all matters pertaining to suffrage and elections, except in certain particulars dealing with national representatives. The Constitutional language is specific:

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[16] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 US 324, 332.

[17] "Nor, where fundamental rights are declared by the constitution, is it necessary at the same time to prohibit the legislature, in express terms from taking them away. The declaration is itself a prohibition, and is inserted in the constitution for the express purpose of operating as a restriction upon legislative power." *1 Cooley's Constitutional Limitations*, 358 (8th ed. 1927). See *Minor v. Happersett*, 21 Wall 162, 175.

[18] See the careful language of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat 1, 196 and *McCullough v. Maryland*, 4 Wheat 316, 421.

> . . . the Electors in each State shall have the Qualifications requisite for the Electors of the most numerous branch of the State Legislature. Article I, §2
>
> 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 . . . alter such regulations. Article I, §4[19]

This was the intent of the authors. Referring to the definition of the right to suffrage Hamilton or Madison said:

> It was encumbent on the convention, therefore, to define and establish this right in the Constitution. . . . The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every state, because it is conformable to the standard already established, or which may be established, by the state itself. It will be safe to the United States, because, being fixed by the State Constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the states will alter this part of their Constitutions in such a manner as to abridge the rights secured to them by the federal Constitution.[20]

Even more important, to date, this has been the understanding of this Court. In practically every case to reach it involving voting rights, no matter what the outcome, the decision carefully reiterated the exclusive prerogative of the States to provide the qualifications of its electors and regulate its elections, except as specifically limited by the Constitution. For example, *Minor v. Happersett*, 21 Wall 162; *United States v. Cruikshank*, 92 US 542; United *States v. Reese*, 92 US 214; *Ex Parte Seibold*, 100 US 371, *In Re Rahrer*, 140 US 545; *McPherson v. Blacker*, 146 US 1; *Williams v. Mississippi*, 170 US 213; *Mason v. Missouri*, 179 US 328; *James v. Bowman*, 190 US 127; *Pope v. Williams*, 193 US 621; *Guinn v. United States*, 238 US 347;

[19] Cf. Article II, §1, Clause 2 of the Constitution of the United States.

[20] "The Federalist, No. LII" (Hamilton or Madison), Lodge, *The Federalist*, 328 (1888).

Breedlove v. Suttles, 302 US 226; *Snowden v. Hughes*, 321 US 1, *Lassiter v. Northhampton Board of Elections*, 360 US 45; *Gray v. Sanders*, 372 US 368; *Carrington v. Rash*, 380 US 89.

The Fifteenth Amendment of 1870 made no change in this basic Constitutional design. Its language, in relevant aspects, refers only to *abridgment* or *denial* by *States* of the right to vote *on account of race*.[21] The available legislative history before and after its passage indicates no change in the reservation.[22] Such must have been the understanding of Congress forty-three years after the passage of that Amendment when it passed an amendment changing the manner of choosing Senators.[23] The original language of the constitutional structure was reaffirmed:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.[24]

Again, the understanding of this Court with respect to the effect of the Fifteenth Amendment has been no different.

> Beyond doubt the Amendment does not take away from the State government in a general sense the power of suffrage which has belonged to those governments from the beginning, and without possession of which power the whole fabric upon which the division of State and National authority under the Constitution and the organization of both governments rests would be without support and both the authority of the Nation and State would fall to the ground. In fact the very command of the Amendment recognizes the possession of the general power by the State, since the

[21] Complaint Brief, Appendix B, p. 79.

[22] Appendix, Brief of the Commonwealth of Virginia as *Amicus Curiae*, in this cause.

[23] It is noteworthy that this change was made by constitutional amendment, and not by Congress, even though federal representatives were involved. Compare *Morgan v. Katzenbach*, ... F Supp ... (D.C. 1965) 34 LW 2265.

[24] Seventeenth Amendment, Complaint Brief, Appendix B, p. 79.

Amendment seeks to regulate its exercise as to the particular subject with which it deals.[25]

In short, the sole effect of the Fifteenth Amendment on the exclusive rights of the Sovereign States to regulate suffrage was that they could make no distinction in granting or withholding the privilege on the basis of race. Presumably, Congressional legislation to enforce this mandate could not go beyond this limit.

But Congress now purports to do so. Sections 4 and 5 of the Act, (1) *grant* certain of South Carolina's previously unqualified citizens *the right* to participate *as electors* in her governments in violation of her laws and, (2) deprive her legislature, officials and residents of their right to regulate freely their future elections. These sections cannot be "appropriate" within the meaning of the Fifteenth Amendment.

South Carolina's literacy test was lawful prior to August 6, 1965. It required only the ability to read and write and was simpler than that only recently unanimously upheld by this Court, with seven of the present members sitting. *Lassiter v. Northhampton Board of Elections*, 360 US 45.[26] In its decision, this Court unequivocably held that a literacy requirement was not offensive to the Fifteenth Amendment —that it deprived no one of the right to vote because of *race*. This decision was consistent with available legislative history of the Fifteenth Amendment on this subject.[27]

Yet, by §4 of the Act, Congress has attempted to suspend South Carolina's literacy requirement *regardless of race*. Under the Act, at the Defendant's direction, both white and Negro illiterates are now being registered to vote. Race, under the Act's suspension, is not a factor. The Act abso-

[25] *Guinn v. United States*, 328 US 347, 362. Cf. *McPherson v. Blacker*, 146 US 1, 38; *Breedlove v. Suttles*, 302 US 277; *Pope v. Williams*, 193 US 621; *Gray v. Sanders*, 372 US 368; and, quoted at Complaint Brief, p. 60, *United States v. Reese*, 92 US 214 and *Minor v. Happersett*, 21 Wall 162.

[26] South Carolina's Constitution contains no English language requirement, as presented there. Its administration could not be less complicated. Complaint, Par. 11, p. 6, Exh. B, p. 20.

[27] Appendix, Brief of the Commonwealth of Virginia as *Amicus Curiae*, in this cause.

lutely grants the right to *all* illiterates in South Carolina to participate in her elections.

Perhaps, consistently, neither is "race" relevant to those States not covered by §4. In the unaffected States,[28] their existing literacy tests are still a prerequisite to voting eligibility, regardless of whether they effectively deny any race the right to vote. Likewise all "uncovered" States are free to enact such tests if none exist. Equally consistent, the present or future stringency of such requirements are not affected by the Act.

If, regardless of race, Congress may, under the Fifteenth Amendment, deprive South Carolina of the right to prescribe a lawful literacy requirement for her elector qualifications in spite of Article I, §§2 and 4 and the Seventeenth Amendment to the Constitution, may it not also deny *any* qualifications for the participation of her citizens in its elections? In effect, the Act attempts to do so.

By §5 of the Act, South Carolina may not now change any "qualification, prerequisite standard practice or procedure" with respect to voting in effect on November 1, 1964 without the prior approval of the Executive or Judicial arm of the Federal Government.[29] Again, "race" is not a factor under the Act. Regardless of whether the change affects Negro or white, governs federal or state elections, is designed to improve or modernize election procedures, or lessen or remove registration qualifications, it is prohibited without prior approval.[30] Under the Act, the Federal, not the State, government, now controls the future of election procedures in South Carolina.

Nor is this all. Since she is covered by §4, South Carolina is subject to federal "examiners" at the whim of the

[28] California, Connecticut, Delaware, Hawaii, Massachusetts, New Hampshire, New York, Oregon, Washington, Wyoming and, perhaps, Maine (See Answer, Par. 17, p. 4). These states now have some form of literacy requirement.

[29] Either the Attorney General or the United States District Court for the District of Columbia. Sect. 5 of the Act, Complaint Brief, Appendix B, p. 84-85.

[30] In 1965, South Carolina's Legislature extended the closing hours of her polling places from 6:00 P.M. to 7:00 P.M. See Complaint Brief, Appendix A, p. 75. This practice was not in effect on November 1, 1964. Is it valid under §5? If not, are all votes cast after 6:00 P.M. in future elections subject to challenge under the Act?

Defendant under §6(b).[31] These examiners, under other provisions, at times and places suitable to them, receive applicants, issue voting certificates, supervise elections, review voter tabulations, and determine to their satisfaction the valid State voter qualifications to be enforced.[32] Monthly, these examiners submit the thousands of names enrolled during the previous month to the *county* registration office, and challenges are permitted at the *State* Civil Service Office within ten days thereafter, *if* accompanied by affidavits of two persons having personal knowledge of the basis of the challenge *and* a certification of service of the prescribed notice of the challenge in person or by mail to the person challenged.[33] Except as to successful challenges, the county official is required to place all names submitted on the registration rolls and to permit their vote.[34] How does a limited county registration staff check the residence, age, sanity and felony conviction record of thousands of persons, in the presence of two witnesses, within ten days? In practical effect, under the Act, federal officials determine which persons, not already registered on August 6, 1965, shall become eligible voters in South Carolina and certain of her sister States.

The presence of the federal examiners produces further interesting side effects. Presumably they will only be in South Carolina temporarily until existing illiterates have been registered.[35] Yet under the Act, the illiterate remains an eligible voter until his name is removed *by the examiner*.[36] Under her Constitution and statutes, South Carolina requires her electorate to re-register or re-enroll every ten years.[37] Are these provisions now invalid with respect to illiterates registered by the federal examiner, if he is no

[31] Complaint Brief, Appendix B, p. 86. They are now present. See footnote 5, p. 3.

[32] Sects. 7, 8 and 9 of the Act, Complaint Brief, Appendix B, p. 86-89.

[33] Sects. 7(b) and 9(a) of the Act. Complaint Brief, Appendix B, p. 86-89. There is no requirement that the enrollment list contain addresses of the illiterate electors.

[34] Sect. 7(b) of the Act, Complaint Brief, Appendix B, p. 86.

[35] Sect. 13 of the Act, Complaint Brief, Appendix B, p. 93.

[36] Sect. 7(d) of the Act, Complaint Brief, Appendix B, p. 87.

[37] Article II, §4(d), Constitution of South Carolina, §23-67 of the 1962 Code of Laws of South Carolina.

longer present? If so, the Act not only grants the illiterate the right to vote, but also places him in a privileged category over the other electorate. Similar problems exist with respect to the death, removal or felony conviction of the illiterate after the examiners' departure. Under these provisions, the deprivation of South Carolina's control over her electorate and elections would appear to be complete and, perhaps, permanent.

In summary, if §§4, 5 and 6(b) of the Act be valid, the doctrines of the specific constitutional reservations of Article I, §§2 and 4 and the Seventeenth Amendment on the Federal Government of limited powers, the intentions of the compact architects, the cited decisions of this Court, and the particular language of this Court that:

> A State, so far as the Federal Constitution is concerned, might provide by its own Constitution and laws that none but native-born citizens be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated; . . .[38]

no longer obtain in South Carolina and in all or part of the territories of eight of her sister States.

In abrogating these traditional principles, these sections of the Act cannot be said to be "appropriate".

> 2. The Act violates the fundamental constitutional principles of Equality of Statehood.

The Constitution was formed by equal Sovereign States, from whom the Union drew its enumerated powers. From its inception these States stood on "equal footing" before the National Sovereign.

> There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion, which they may possess and

[38] *Pope v. Williams*, 193 US 621, 633.

> exercise over persons and subjects within their respective limits.[39]

This was the status of newly admitted states upon joining the Union.

> Equality of constitutional right and power is the condition of all the States of the Union, old and new.[40]

Of course this equality was never understood to extend to economic stature or standing among the States, since each entered with a different geology, population, location, area and latitude.[41] However, until now, there has always been equality in political rights and sovereignty.[42] Until now, any legislation of the federal Congress affecting those political rights and sovereignty has applied equally, on a nationwide basis, to all sovereign members of the Union.

The Act would change this fundamental doctrine. Sects. 4, 5 and 6(b) are carefully limited in their application to seven Sovereign States and portions of two others. Based upon past election results and tabulations, these provisions were tailored to limit their application to those particular States as if descriptions of geographical boundaries had been used.[43]

Only in these nine states are lawful voter qualifications suspended. Only in these states are the legislatures stricken dumb on election laws, the duties of local registrars usurped by federal examiners, and the supervision of elections delegated, in practical effect, to federal employees—all without any form of judicial hearing.

If Congress may so abrogate this fundamental principle, when purporting to enforce the Fifteenth Amendment, why may not it do so under its other enumerated powers? Under the guise of the Fourteenth Amendment, why could Congress not deprive nine states of the right to punish

[39] *Illinois Central Rrd. Co. v. Illinois*, 146 US 387, 434; *Coyle v. Smith*, 221 US 559, 580.

[40] *Escanaba & L. N. Transportation Co. v. Chicago*, 107 US 678, 689.

[41] *U. S. v. Texas*, 339 US 707.

[42] *Illinois Central Rrd. Co. v. Illinois*, supra; *Stearns v. Minnesota*, 179 US 223.

[43] The only possible exception might be Alaska and Elmore County, Idaho.

murder, or theft, or fraud, or arson, or the right to protect one or more forms of property? If these sections of the Act are "appropriate", where does the precedent stop?

An argument similar to this legislation was presented to this Court about two years ago.[44] The Solicitor General contended that the prior conduct of the governments of certain southern States constituted their use of the police power "state action" under the Fourteenth Amendment, in contradistinction to the standard applicable elsewhere. Said Mr. Justice Black:

> There is another objection to accepting this argument. If it were accepted, we would have one Fourteenth Amendment for the South and quite a different and more lenient one for other parts of the country. Present "state action" in this area of constitutional rights would be governed by past history in the South—by present conduct of the north and west. Our Constitution was not written to be read that way and we will not do it.[45]

This clear violation of the principles of the Equality of Statehood cannot be deemed "appropriate" legislation.

3. In violation of the Fifth Amendment, §4 of the Act creates an arbitrary and irrebuttable presumption of racial discrimination by South Carolina and her inhabitants in connection with her voter registration.

Ordinarily, the legislative function is prospective in nature—that of prescribing rules for future conduct.[46] Occasionally, however, usually because of some "emergency" or popular pressure, or in order to solve some particularly perplexing problem, the Legislature undertakes to determine by statute in advance the effect of certain given conduct by the use of "presumptions".

As a protection against abusive use of such "presumptions" by an overzealous Congress, a specific restriction

[44] Supplemental Brief of the United States as *Amicus Curiae*, *Griffin v. Maryland, et al*, Nos. 6, 9, 10, 12 and 60, October Term, 1963.

[45] *Bell v. Maryland*, 378 US 226, 334 (Dissenting Opinion).

[46] *Prentis v. Atlantic Coast Line Co.*, 211 US 210.

was added to the compact,[47] with the burden of its enforcement resting upon the Judiciary.[48] This "due process" limitation on the Congress requires that the presumption be reasonable and not "arbitrary" and that it be subject to being rebutted by proof to the contrary, or be not absolutely conclusive. The presumption of §4 abrogates both of these limitations of the Fifth Amendment.

(a) The presumption is arbitrary.

Only last month this Court reaffirmed the standard against which such legislation must be tested:

> Such a legislative determination would not be sustained if there "was no rational connection between the fact proved and the fact presumed, if the inference of one from proof of the other is arbitrary because of the lack of connection between the two in common experience . . ."[49]

There, "possession, custody and control" of an illegal whiskey still could not be inferred from "presence" at the site, as Congress had directed. Similarly, in *Tot v. U. S.*, 319 US 463, the Congressional presumption that a firearm in the possession of a convicted felon, must have been shipped in interstate commerce was arbitrary and unconstitutional.[50]

Sometimes this legislative restriction is described in terms to the effect that the conduct on which the presumption is based must give fair warning of the result presumed.

> What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. . . . For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance. . . .[51]

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[47] The Fifth Amendment. As *parens patriae* the Plaintiff here asserts the rights of her citizens to its protections against the National Legislature.

[48] *Marbury v. Madison*, 1 Cranch 175.

[49] *U.S. v. Romano*, ... US ....., 34 L.W. 4022, 4023 (Nov. 22, 1965).

[50] Cf. *Bailey v. Alabama*, 219 US 219, *Mobile J.K.C.R.P. Co. v. Turnipseed*, 219 US 35.

[51] *Morrison v. California*, 291 US 82, 90.

At other times, this Court has talked in terms of whether the Legislature could fairly shift the burden of proof to the accused, relieving the government of its obligation to prove its case.

> The question for decision therefore was whether the allocation of the burden of proof on an issue concerning freedom of speech falls short of the requirements of due process.[52]

Under any of these approaches, Congress has created an arbitrary presumption in §4 of the Act.[53] It is presumed that South Carolina was guilty of racial discrimination in the administration of her voter registration laws on November 1, 1964 because (1) she had a literacy requirement and (2) less than 50% of her population over age 21 voted in the Presidential election of November 1964. An analysis of each of these essential facts, in light of the result presumed, is necessary.

(1) The percentage voting test

The presumption of §4 assumes racial discrimination in *registration.* The principal fact upon which it rests is *voting,* not registration. Congress has said that because 32% of South Carolina's *registered* voters did not *vote,* she is guilty of not registering her Negro citizens. There is absolutely no rational connection between the two conclusions. For example, if 100% of her literate population over 21 were registered, but only 49% chose to vote, South Carolina would be presumed guilty of racial discrimination in her registration procedures. On the other hand if she were, in fact, guilty of discrimination in registration and if 90% of her registered voters had voted,[54] the presumption would not apply.

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[52] *Speiser v. Randall,* 357 US 513, 523. See *Manley v. Georgia,* 279 US 1, 5; *McFarland v. American Sugar Refining Co.,* 241 US 79.

Reflecting the same principle, are those cases dealing with improper legislative classification. The facts upon which the separate treatment is supported must reasonably justify the classification. *Carrington v. Rash,* 380 US 89; *McLaughlin v. Florida,* 379 US 184; *United States v. Carolene Products Co.,* 304 US 144; *Bordens Farm Products Co. v. Baldwin,* 293 US 194; and *Chastleton Corp. v. Sinclair,* 264 US 543.

[53] Sometimes hereinafter referred to as the "trigger".

[54] Such a percentage turnout was not unheard of in the 1964 election. See Complaint, Exh. C-2, p. 23.

The absurdity of the relationship between the fact and the conclusion is further revealed in the evidence presented to Congress. There was evidence submitted of known voter discrimination in parts of Florida, Arkansas, Texas, Tennessee, Kentucky and New York.[55] However, these states are not reached by the "trigger", even though, like South Carolina, Arkansas and Texas also voted less than 50% of their population over twenty-one.[56] This, even though the Defendant testified that South Carolina, unlike these states, was free of voter discrimination.

> That this premise is generally valid is demonstrated by the fact that in six of the seven states in which tests and devices would be banned statewide by §3(a), voting discrimination has been unquestionably widespread in all but South Carolina and Virginia, and other forms of racial discrimination, suggestive of voter discrimination, are general in both of these states.[57]

The arbitrariness of the percentage voting test in relation to racial discrimination and registration is further illustrated by its failure to allow any consideration of the variation in factors which affect the test itself. The Act's history clearly shows that the 50% voter test was designed to measure South Carolina's turnout against that of the national average of 62%[58] yet there are factors peculiar to South Carolina and some of the other "covered" States

[55] Hearings, H.R. 6400, Ser. 2, p. 68-69, 75-76, 89, 273-284, 362-364, 368-369, 373, 405, 418-421, 461-462, 508-518, 527-529, 674, 714; S. 1564, Pt. 1, p. 246, 238, 339. (All references here to "Hearings" refer to the published hearings before the subcommittee of the House or Senate Judiciary Committees on the Act depending upon the reference to the House (H.R. 6400) or the Senate (S. 1564) Bills); United States Code Congressional and Administrative News, 89th Cong. 1st Sess. p. 2540, 2645-47 (hereinafter referred to as "US Code News").

[56] Interestingly enough the District of Columbia, like South Carolina, only voted 38%. Hearings, S. 1564, Pt. 1, p. 238. See the explanation the Defendant offered. Hearings, S. 1564, Pt. 1, p. 29-30.

[57] Hearings, H.R. 6400, Ser. 2, p. 12, Attorney General Katzenbach. Cf. Hearings, H.R. 6400, Ser. 2, p. 112-120; S. 1564, Pt. 2, p. 1513-1514; US News Code, p. 2544. To date the Defendant *still* knows of *no* voter discrimination in South Carolina. See his Answer, pars. 14 and 15, p. 4.

[58] See, for example, Hearings, H.R. 6400, Ser. 2, p. 26-27.

which affected her voter participation and which are unrelated to racial discrimination.[59]

For several generations the income and educational levels of South Carolina's inhabitants have been substantially below those of other States against whom her voter turnout was measured.[60] She has traditionally maintained an agrarian economy with no major metropolitan centers, as distinguished from the urban industrial nature of much of the rest of the country. The religion of her population is more predominantly Protestant than that of most areas. As shown by Appendix C, page 46, all of these economic and population characteristics tend to reduce her voter participation and are peculiar only to South Carolina and some of the other "covered" States.[61] Yet, the "trigger" allows no room for their consideration.

Equally relevant in considering the reasonableness of the voter turnout test is the unique political history of South Carolina and some of the other "covered" States. For over forty years these States, under their one-party Democratic Party system, have chosen their elected officials in the primary elections, and not at the general election, which is the measure under the "trigger".[62] The uniqueness of this system to the South is worthy of the Court's judicial notice.[63] It cannot be denied that such a custom of the populace in choosing their local and state officials in a primary affects their interest in the general election, where races for such offices are nonexistent or uncontested.[64]

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[59] Neither does the 50% test reflect any connection with the percentages of white and Negro population in the covered areas. Hearings, H.R. 6400, Ser. 2, p. 48, 91, 289; US Code News, p. 2540.

[60] Complaint Exhs. D-1, 2, p. 24-25.

[61] Hearings, H.R. 6400, Ser. 2, p. 500; S. 1564, Pt. 1, p. 734-741. See the analysis of McConaughy & Gauntlett, *A Survey of Urban Negro Voting Behavior in South Carolina,* 14 S.C.L.Q. 365, 379 (1962).

[62] See Complaint Exh. C-1, p. 21.

[63] Cf. *U.S. v. Classic,* 313 US 299; *Ray v. Blair,* 334 US 214; *Smith v. Allwright,* 321 US 649; *Grovey v. Townsend,* 295 US 145; *Elmore v. Rice,* 72 F Supp 216 (EDSC 1947).

[64] Compare Columns 7-11 with Columns 17 and 18, Complaint Exh. C-1, p. 21. Note the increase in the contested races for local offices in the general election due to the Republican Party activity in 1964. Complaint Exh. A, p. 18-19, Cols. 9-12 compared with Complaint Exh. C-1, p. 21, 1962, Cols. 7-11. This rise reflects a dissatisfaction with the traditional party which kept many voters home on November 3, 1964, proof of which cannot be submitted here. Hearings, H.R. 6400, Ser. 2, p. 500; S. 1564, Pt. 1, p. 240, 267.

That all of these political, economic and population characteristics peculiar to the covered States affected their turnout is verified by comparison of the interest shown by their *registered* voters and those in other States.[65] Almost without exception, a fewer percentage of the registered voters in the covered States turned out on November 3, 1964. Because of this Congress presumes them guilty of discriminatory registration without regard to the facts peculiar to their citizenry and not found to a comparable degree in other States against whom their performance is measured.

Nor can it be suggested that the voter turnout test adopted by Congress was designed in any sense to give South Carolina fair warning of the result to be presumed. Who could have suggested in October 1964 that South Carolina would lose her lawful literacy test and right to control her elections unless a sufficient number of her citizens went to the polls in November?

Neither is this a fair test by which to measure the punishment of the populace of an entire State. Even if warned, how could South Carolina have forced her citizens to vote?

> The act of voting is an exercise of sovereignty and cannot be compelled.[66]

The right is personal and private to the citizen, not the state government.[67]

Finally, the territories caught up by the "trigger" afford perhaps the best example of its arbitrariness. No one would suggest there is massive racial voter discrimination against Negroes in Arizona, Alaska, or Elmore County Idaho (or Aroostook County Maine).[68]

In short, the presumption of registration discrimination because of a low voter turnout finds no basis in human experience and is patently arbitrary.

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[65] Complaint, Exh. C-2, p. 23. Strangely, it does not appear that these percentages were presented to Congress.

[66] *2 Cooley's Constitutional Limitations*, p. 1354 (8th ed. 1927).

[67] *Reynolds v. Sims*, 377 US 533; *U.S. v. Bathgate*, 246 US 220, 227.

[68] While maybe of small import, the "trigger" actually discriminates among the territories it covers. In South Carolina, all political subdivisions are covered even though over 50% of their voting age population voted. See Complaint, Exh. A, p. 18-19, Lines 2, 6, 8, 18, 22, 28, 32, 36. In all other States, except Alabama, Alaska, Louisiana, Mississippi, Georgia and Virginia, only the counties voting less than the requisite 50% are reached.

2. The literacy test

Congress has also presumed registration discrimination on the part of South Carolina because, on November 1, 1964, she had in effect a lawful literacy requirement for voter qualification.[69] This presumption finds no support in the evidence before it.

Again, there was no evidence of "massive" registration discrimination presented as to South Carolina.[70] Yet she is presumed guilty because of the existence of her literacy qualification. Ample evidence of racial discrimination in registration in New York was submitted to the Congress.[71] It too has a literacy test, more stringent than South Carolina's.[72] Yet there is no presumption of guilt on her part because of the existence of her literacy test.

Evidence of voter discrimination in Arkansas, Texas, Kentucky and Florida was also presented.[73] None of these States have a literacy requirement, so they are not presumed guilty of registration discrimination. Yet South Carolina, *with* her literacy requirement, *registered* her citizens on a comparable or higher basis.[74] Plainly, there is no rational basis for assuming that South Carolina is guilty of racial discrimination in registration simply because of the existence of her lawful literacy requirement.

Finally, in considering the reasonableness of the facts to which Congress "triggered" the application of the Act to South Carolina, the very selection of these particular factors is worthy of comment. With next to the highest illiteracy rate in the Union,[75] South Carolina's literacy requirement would ordinarily disqualify more of her citizens from voting than a similar test in other States, regardless of

[69] As elsewhere indicated this requirement was perfectly constitutional, supra, p. 10.

[70] Unquestionably, "massive" discrimination was the target. Hearings, H.R. 6400, Ser. 2, p. 27, 76-77, 287. As to the absence of such in South Carolina, see footnote 57, supra, p. 18.

[71] See footnote 55, supra, p. 18.

[72] Hearings, S. 1564, Pt. 1, p. 766-768.

[73] See footnote 55, supra, p. 18.

[74] South Carolina, 56% registered; Arkansas, 56% registered; Florida, 54% registered; Kentucky, 51% registered; and Texas, 56.3% registered.

[75] Complaint, Exh. B-2, p. 25.

their race. Therefore her electorate would necessarily comprise a smaller percentage of her *total* population over twenty-one than that of other States. Her voter turnout therefore would ordinarily always be a smaller percentage of her *total* population over twenty-one. Yet it is the combination of these two factors—the existence of a literacy requirement and a low percentage turnout of *total* population over twenty-one—on which Congress bases its presumption of racial discrimination. Neither, standing alone, or in combination, in fact reflect unlawful racial *discrimination.*

(b) The presumption is absolutely conclusive

Not only must Congressionally established presumptions be reasonably connected to the facts on which they rest, they must be subject to being disproven in the given case. Due process prohibits the absolute declaration of the conclusion presumed.

> A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repeal it violates the due process clause of the Fourteenth Amendment. . . . Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.[76]

Congress has concluded that South Carolina was guilty of racial discrimination in the administration of her election laws on November 1, 1964. However, she is permitted no opportunity to present evidence or to have a judicial hearing on the fact presumed—her guilt at that time. Her conviction is absolute.

Recognizing the inherent unconstitutionality of such an irrebuttable presumption, Congress sought to avoid its condemnation by authorizing an "escape clause".[77] Under this provision, South Carolina can avoid the Act by proving her

[76] *Manley v. Georgia,* 279 US 1, 6. Cf. *Aptheker v. Secretary of State,* 378 US 500; *Wieman v. Updegraff,* 344 US 183; *Heiner v. Donnan,* 285 US 312; *Western and Atlantic Railroad v. Henderson,* 279 US 639; *Mobile J.K.C.R.P. Co. v. Turnipseed,* 219 US 35; *Lindsley v. National Carbonic Gas Co.,* 220 US 61.

[77] Sect. 4(a), Complaint Brief, Appendix B. p. 82-84.

innocence to a United States District Court in Washington, D. C.[78] But the requirement is not that of proof of conduct on November 1, 1964, but that *for every day* of *the five years* preceding her resort to the procedure.

Could Congress direct that, to be proven innocent, the accused must not only convince the court that he did not steal the articles charged, but that he has never stolen in the past five years? This, in effect, is what §4 offers South Carolina.[79]

In short, South Carolina is not permitted to refute the facts presumed. Section 4 constitutes a conclusive presumption, prohibited by the Fifth Amendment.

Finally, in considering the reasonableness of the presumption established by §4, it should be remembered that, as shown, Congress could not have abolished outright all of the literacy tests across the Nation because of Article I, §§2 and 4 and the Seventeenth Amendment to the Constitution. This is now what it attempts to do in South Carolina under the guise of a "presumption".

> But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it could be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. . . .[80]

In view of its violations of the Fifth Amendment, §4 cannot be deemed "appropriate" legislation to enforce the Fifteenth Amendment.

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[78] The fact that this remedy really affords no relief from the Act and is impossible of use in practical effect is illustrated hereinafter. See p. 45.

[79] In the event of resort to this "escape clause", §4 requires South Carolina to prove the absence of discrimination for the requisite period in *all* of her political subdivisions—if misconduct has occurred in one, the entire State remains "guilty". Yet in North Carolina, Arizona and Idaho, each political subdivision is free to prove its own innocence without effect from other subdivisions.

[80] *Bailey v. Alabama,* 219 US 219, 239.

4. Sections 4, 5 and 6(b) dilute South Carolina's lawful electorate and deprive her and her citizens of their sovereign Legislature in violation of the principles of the Fifth Amendment and Article IV, Section 4 of the United States Constitution

Among the basic purposes in the formation of the Union was the preservation of the States and the protection of the democratic nature of their governments.

> . . . Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may not be unreasonably said that the preservation of the States and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[81]

The compact itself reflects this intent in several provisions. Among others:

> The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion. . . .[82]

Inherent in this guarantee is the restriction on the National Sovereign, that it may not itself deprive the State of its existing republican government.[83]

> That expresses the full limit of national control over the internal affairs of a State.[84]

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[81] *Texas v. White*, 7 Wall 700, 725.

[82] Article IV, §4. Under the "privileges and immunities" Clause of Article V, §2, every citizen is entitled to this Guaranty.

[83] *The Federalist*, No. XLIII (Madison), Lodge, *The Federalist*, 270-271 (1888).

[84] *South Carolina v. United States*, 199 US 437, 454.

This position involves questions of the control of the National Sovereign over the internal affairs of some States, not questions of allocation of powers within a State, or among the Federal Branches in the "political" sense, so as to be nonjusticiable.

"Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define "political questions", and no other feature

Similar principles are contained in the "due process" concepts of the Fifth Amendment. Like the restrictions on the State Legislatures under the Fourteenth Amendment, the National Legislature may not prescribe laws having the effect of depriving the inhabitants of some States of their right to exercise their functions as responsible citizens under a republican form of government:

> 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. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[85]

Through the attacked provisions of the Act, Congress has undertaken to dilute the suffrage rights of South Carolina's citizens and suspend the functions of her Legislature in violation of these principles.

a. The dilution of South Carolina's electorate

From the inception of the Union, suffrage has been regarded as one of the cornerstones of the republican form of government to be preserved by the compact.

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government.[86]

Likewise from its inception the right to exercise this sovereign right has not been universal, but has been reserved to those whom the people have determined to have sufficient judgment to sustain the government.

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which could render them nonjusticiable." *Baker v. Carr*, 369 US 186, 229. Relevant also is Mr. Justice Brennen's comment in footnote 53 at page 226 in that decision:

"On the other hand, the implication of the Guaranty Clause in a case concerning Congressional action does not always preclude judicial action."

The sole issue here is the effect of this constitutional provision on the right of Congress to invade and control the internal operations of some Sovereign States.

[85] *Reynolds v. Sims*, 377 US 533, 555.

[86] "The Federalist, No. LII" (Hamilton or Madison), Lodge, *The Federalist*, 327 (1888).

> . . . As a practical fact the sovereignty is vested in those persons who are permitted by the constitution of the State to exercise the elective franchise. . . . In either case, however, it was essential to subsequent good order and contentment with the government, that those classes in general should be admitted to a voice in its administration, whose exclusion on the ground of want of capacity or moral fitness could not reasonably and to the general satisfaction be defended. . . .
>
> The theory in these cases we take to be that classes are excluded because they lack either the intelligence, the virtue, or the liberty of action essential to the proper exercise of the elective franchise.[87]

Literacy, or some ability to read and write, or a comparable factor, has always been one of the essential factors in classifying an electorate for the reason that it enables the elector to understand the problems of government.[88] The need for this judgment was recently recognized by this Court:

> The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color and sex, as reports around the world show. Literacy and intelligency are obviously not synonymous. Illiterate people may be intelligent voters. Yet, in our society when newspapers, periodicals, books and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate could exercise the franchise . . . [Citations omitted] . . . It was said last century in Massachusetts that a literacy test was designed to insure an "independent and intelligent" exercise of the right of suffrage. . . .[89]

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[87] *1 Cooley's Constitutional Limitations*, 82-83 (8th ed. 1927).

[88] Commonly, literacy has been waived if the citizen owns sufficient property, on the assumption that the property owner would acquaint himself with the affairs of the government to whom he paid taxes because of this ownership. Article II, §4(d) of the Constitution of South Carolina, Complaint, Par. 12, p. 7. See US Code News, p. 2597.

[89] *Lassiter v. Northhampton Board of Elections*, 360 US 45, 52.

Nor has the requirement been limited to any one section of the country.[90] Congress has itself recognized it as a necessary ingredient to the exercise of citizenship.[91]

Nor is the requirement without rational basis. Like the child of tender years, how can an illiterate elector make a rational choice between the national parties and their complicated platforms? Like the mentally incompetent, how can he judge between the local candidates? More than personality or appearance over radio or television must influence the majority of voters to prevent government from becoming a Hollywood fan club. How can the illiterate know which box to mark on the ballot, or which lever on a voting machine to pull? Can his vote be more than chance or controlled?

Of course, when the number of illiterates in a State's population become sufficiently small in comparison to the other electorate, his voice can not do serious damage to his government. Fortunately, with the modern increase in education, the illiterate is reaching this minimal status on the National level.[92] But in South Carolina illiteracy is still a major factor.

Her illiteracy rate of 20% of her population over age 25 is second only to that of Louisiana.[93] To grant the vote to

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[90] *Smith v. Stone,* 159 Mass. 413, 34 NE 521 (1893); *Cofield v. Farrell,* 38 Okla. 608, 134 Pac. 407; *Rasmussen v. Baker,* 7 Wyo. 117, 50 Pac. 819 (1897); *Hill v. Howell,* 70 Wash. 603, 127 Pac. 211 (1912); *Franklin v. Harper,* 205 Ga. 779, 55 SE 2d 221 (1949).

[91] The requirements which Congress has imposed upon United States citizenship are much more stringent than those which South Carolina requires for the exercise of the more significant right to vote.

> No person . . . shall hereafter be naturalized as a citizen of the United States . . . who cannot demonstrate—
>
> (1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language . . . and
>
> (2) a *knowledge and understanding* of the fundamentals of the history, and of the principles and form of government, of the United States. *8 USC 1423* [Emphasis added]

[92] See Complaint, Exh. D-2, p. 25. Even so, there is some reason for the requirement:

> At a time when alien ideologies are making a steady and insidious assault up constitutional government everywhere, it is nothing but reasonable that the States should be tightening their belts and seeking to insure that those carrying the responsibility of suffrage understand and appreciate the form and genius of the government of this country and of the States. *Derby v. Daniel,* 168 F Supp 170, 183 (SD Miss. 1958).

[93] Complaint, Exh. D-2, p. 25.

approximately 270,000 of her residents in this category would undoubtedly affect adversely the future course of her governments.[94] Similar conditions exist in the other "covered" States. Of the fifteen States with an illiteracy rate over 10%, literacy tests are suspended by the Act in eight, with four others having no such test.

Nor is this condition the choice of South Carolina and similar situate States. For over fifty years, their economy, which controls their ability to educate their populace, has been hampered and curtailed by factors beyond their control, in some instances to the benefit of other regions of the nation.[95] Only with the industrialization following World War II, and the assistance of this Court and federal regulatory agencies, *New York v. United States*, 331 US 284, is this picture now changing.

Until this change is complete, however, South Carolina's governments will be drastically affected by permitting her illiterates to vote. For this reason her citizens have, in her modern history, required a literate electorate.[96] Congress would now strike down this requirement by the Act. Beyond question, the voice and judgment of South Carolina's literate electorate would be diluted and, in close elections, possibly controlled by the unqualified electors created under the Act. In effect, the vote of the chosen electorate would be as impaired as that in cases before this Court involving other methods.[97]

The Fifth Amendment and the Guaranty Clause deprive Congress of the right to so dilute the voice of South Carolina's electorate.

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[94] Only 524,764 of her citizens voted in November 1964. See Complaint, Exh. A, p. 19.

[95] See for example, *Georgia v. Penna. Railroad Co.*, 324 US 439; Odum and Moore, *American Regionalism, A Cultural-Historical Approach to National Integration* (New York 1938); *Report to the President on Economic Conditions of the South*, National Emergency Committee (Washington 1938); Molyneaux, *What Economic Nationalism Means to The South, Foreign Policy Association World Affairs*, Pamphlet No. 4 (New York 1934); *The Inter-territorial Freight Rate Problem in the United States*, H.R. Document No. 264, 75th Congress, First Session (1937); Arnall, *The Shore Dimly Seen* (Philadelphia 1946); Parkes, *The American Experience* (New York 1947); Hawke, *Economic History of the South* (New York 1934).

[96] Article II, §4(d) of the Constitution of South Carolina of 1896. This requirement is by no means recent. See Appendix A, Complaint Brief, p. 72.

[97] See *Baker v. Carr*, 369 US 186, 208.

(b) The suspension of South Carolina's Legislature

The legislative process is essential to a republican form of government as contemplated by the Constitution.

> . . . the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people.[98]

In South Carolina, as in most States,[99] all powers not limited by the Constitution are vested in her Legislature.[100] Of course she and her sister States have granted certain powers to Congress under the Constitution, over which it may assume exclusive powers.[101] But in matters outside these areas, South Carolina's Legislature is the principal arm of her government.

Section 5 of the Act would paralyze this arm with respect to South Carolina's future elections. As previously illustrated, her Legislature is prohibited from making any change in her election laws or practices without the prior approval of the Executive or Judicial branches of the federal government. When this paralysis is coupled with the presence of federal examiners, who, in practical effect,[102] register her voters, supervise her elections and tabulate the results,[103] it becomes apparent that Congress, by the Act, has undertaken to deprive South Carolina of the right to administer her future elections.

If Congress can deprive a State of so vital a function as the administration of her elections, what limit is there on its right to regulate her other internal affairs? Plainly. such an invasion violates the Fifth Amendment and the

[98] *Duncan v. McCall,* 139 US 449, 461.

[99] *1 Cooley's Constitutional Limitations,* 175 (8th ed. 1927).

[100] *Wofford College Trustees v. Spartanburg County,* 201 SC 315, 23 SE 2d 9; *Ellerbe v. David,* 193 SC 332, 8 SE 2d 518.

[101] Compare for example *Textile Workers Union v. Lincoln Mills,* 353 US 448; *Youngstown Steel & Tube Co. v. Sawyer,* 343 US 579.

[102] See page 12.

[103] Sects. 8 and 12(e) of the Act. Complaint Brief, Appendix B, p. 87-88, 92-93.

Guaranty Clause, in view of which, the Act cannot be termed "appropriate".

In summary, these particular provisions of the Act, whether or not they accomplish the purposes of the Fifteenth Amendment, specifically infringe upon rights and powers reserved to South Carolina and her inhabitants under other equally essential provisions of the Constitution.

B. THE CHALLENGED PROVISIONS OF THE ACT ARE NOT REASONABLY DESIGNED TO ENFORCE THE FIFTEENTH AMENDMENT

The grant of power to Congress under the Fifteenth Amendment is narrow and precise—that of preventing racial discrimination in voting. Any legislative attempt to exercise this power must confine itself to the bounds of this grant and be reasonably designed to accomplish its purpose.[104] The grant itself specifically contains such a restriction.[105] The constitutional term "appropriate" has been defined as "belonging peculiarly . . . fit or proper; suitable".[106]

But even were such a specific limitation not present, its nature would require it to be inferred:

> Recognition of this principle cannot justify attempted exercise of a power clearly beyond the true purpose of the grant.[107]

Apart from a consideration of their violation of other provisions of the Constitution, §§4, 5, 6(b), 11 and 12 of the Act do not meet this standard.

The Fifteenth Amendment is nationwide in its scope.[108] Its prohibition is directed against "the United States" and "any State". The problem which it sought to remedy was

[104] See *Perez v. Brownell*, 356 US 44.

[105] Sect. 2 of Article XV. Complaint Brief, Appendix B, p. 79.

[106] Webster's *New Twentieth Century Dictionary*, p. 88 (Unabridged Ed. 1956).

[107] *Railroad Retirement Board v. Alton Railroad Co.*, 295 US 330.

[108] This of course must be true of all constitutional provisions. *King v. Mullins*, 171 US 404; *Davis v. Burke*, 179 US 399.

not limited to any one region or State.[109] To be "appropriate", any legislation under the provision should, like the grant and the problem, be nationwide in form. As previously illustrated, §§4, 5 and 6(b) are not. The Act's history leaves no doubt that they were carefully limited to a few particular states.[110]

Neither does this limited application affect the areas where, according to the evidence presented to Congress, the problem sought to be cured exists. These "trigger" sections cover Alaska, parts of Arizona and Idaho (and possibly Maine) where the Negro population is infinitesimal, as well as South Carolina and Virginia where the defendant admits no "massive" discrimination has occurred.[111] Yet they failed to reach areas where such discrimination was said to exist.[112]

Like that of the Fourteenth Amendment, the grant of the Fifteenth Amendment is prohibitive in nature:

> Its function is negative, not affirmative, and it carries no mandate for a particular measure of reform.[113]

The proscription is that the right ". . . to vote *shall not be denied*". Yet these sections affirmatively *create* a right for citizens of some states to vote, in the teeth of this Court's statement that:

> The Fifteenth Amendment does not confer the right of suffrage upon anyone.[114]

The prohibition is that the protected right shall "not be denied . . . on account of *race*". As this Court only recently noted, illiteracy is colorblind.[115] If, in the covered States, there are more Negroes in this category, the same

[109] See for example the sources of earlier cases before this Court. *James v. Bowman,* 190 US 127 (Ky.); *Ex Parte Seibold,* 100 US 371 (Md.); *Ex Parte Yarborough,* 110 US 651 (Ga.).

[110] See, throughout, Hearings, H.R. 6400, and S. 1564.

[111] See footnote 57, p. 18.

[112] For example, Florida, Texas, Arkansas, Kentucky, Tennessee. Footnote 55, p. 18.

[113] *Owenby v. Morgan,* 256 US 94, 112. Cf. *Slaughterhouse Cases,* 16 Wall 36, 77; *U.S. v. Cruikshank,* 92 US 542, 554.

[114] *U.S. v. Reese,* 92 US 214, 217.

[115] *Lassiter v. Northhampton Board of Elections,* 360 US 45, 52.

may be true of convicted felons, or residents under the voting age. Yet in none of these classifications is race a factor. If one can be stricken down under the authority of the Fifteenth Amendment, so could they all. But this authority is limited to *racial* discrimination.

Broad provisions of §§11 and 12 concerning elections apply to the conduct of all inhabitants, regardless of race or the intent of the conduct to affect race.[116] Construing the similarly conditioned grant of Congressional authority under the Thirteenth Amendment, this Court said, in holding one of the original Civil Rights Acts excessive:

> It covers any conspiracy between two free *white* men against another free *white* man to deprive the latter of any right accorded him by the laws of the State or by the United States. A law under which two or more free *white* private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free *white* citizen of a right protected by the law of the State to all classes of persons . . . cannot be authorized by the Amendment which simply prohibits slavery and involuntary servitude.[117]

The Amendment prohibits the discrimination by "any *State*". Again, the criminal provisions of §§11 and 12 apply alike to the conduct of both private individuals and officials of the Sovereign. Until now, this Court has consistently held that Congressional authority under the Amendment, like that of the Fourteenth Amendment, is limited to "State action" and does not extend to the purely private conduct of private individuals.

> These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of power conferred by the Fifteenth Amendment upon Congress to prevent

[116] Complaint Brief, Appendix B, p. 91-92. The sections are drawn in terms of "no person" and "whoever", without qualification.

[117] *U.S. v. Harris*, 106 *US* 629, 641. [Emphasis added].

> action by the State through some one or more of its official representatives.[118]

Finally, inherent in the Congressional grant of authority of the Fifteenth Amendment is the limitation that this authority be used sparingly, and only to the extent necessary to accomplish its purpose.

> The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same basic purpose.[119]

As heretofore illustrated, these sections completely preempt South Carolina's voter registration qualifications and procedures and the administration of her elections. Such attempted changes in a State's lawful proceedings have previously been turned down as excessive under the Fifteenth Amendment.

> The statute contemplates a most important change in election laws. Previous to its adoption, the States, as a general rule, regulated in their own way, all the details of all elections. They prescribed the qualifications of voters and the manner in which those offering to vote at an election to make known their qualifications to the officers in charge. This Act interferes with this practice and prescribes rules not provided by the laws of the States. It substitutes, under certain circumstances, performance wrongfully prevented for performance itself. If the elector presents his affidavit in

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[118] *James v. Bowman*, 190 US 127, 139, Cf. *Smith v. Allwright*, 321 US 649; *Guinn v. U.S.*, 238 US 347; *U.S. v. Reese*, 92 US 214; *Ex Parte Seibold*, 100 US 371; *U.S. v. Cruikshank*, 92 US 542. The Congressional statute involved in *James v. Bowman* is strikingly similar to §11(b) [Complaint Brief, Appendix B, p. 91] and read:

> Every person who prevents, hinders, controls or intimidates others from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats, or of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.

Application of this established limitation of the Fourteenth Amendment has been much before this Court in recent years. See for example, *Robinson v. Florida*, 378 US 153; *Peterson v. City of Greenville*, 373 US 244.

[119] *Apthcker v. Secretary of State*, 378 US 500, 508.

> the form and to the effect prescribed, the inspectors are to treat this as the equivalent of a specified requirement of a State law. *This is a radical change in the practice.* . . .[120]

But these are not the only excessive features of the Act. Under §14(b),[121] *all* courts are closed to South Carolina and her citizens, except the United States District Court in the District of Columbia, for any matters pertaining to the application of the Act. To question any conduct of a federal examiner, they must travel to Washington, bringing only those witnesses who will voluntarily accompany them.[122] Presumably, the resolution of any contested elections involving any application of the Act or the eligibility of the voters it creates, must take place in Washington, no matter how local or relatively unimportant the office or how small the community involved.[123] After 175 years the reported predictions of a Great Patriot, that entry into the Union could result in the citizens being dragged to Washington to assert their rights in the first instance, would appear to be true.[124]

Even the House sub-committee Chairman termed the provision "harsh."[125] Many of the most avid supporters of some corrective legislation deplored the challenged sections.[126]

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[120] *U.S. v. Reese,* 92 US 214, 219 [Emphasis added]. Compare the provisions of §§6 and 12(e) authorizing the suspension of State procedures and the invocation of Federal tabulation of election results on the basis of "affidavits" to the similar provisions in the Civil Rights Act there considered.

[121] Complaint Brief, Appendix B, p. 94.

[122] Without Court approval, no subpoenas may be issued for witnesses over 100 miles distant from the District. Sect. 14(d), Complaint Brief, Appendix B, p. 94-95. Why?

[123] This requirement unquestionably violates any sense of fairness or real procedural "due process". While Articles II and III of the Constitution vest jurisdiction of the federal courts in Congress, there is no precedent in the history of the Union for such an abuse of this power. No comfort can be found in the temporary Emergency Price Control legislation of World War II, designed to meet the needs of the Nation in crisis. *Lockerty v. Phillips,* 319 US 182; *Bowles v. Willingham,* 321 US 503. This legislation is *permanent* and no such crisis exists.

[124] Patrick Henry. Hearings, H.R. 6400, Ser. 2, p. 560.

[125] Hearings, H.R. 6400, Ser. 2, p. 62.

[126] See for example US Code News, p. 2535-2552 and the testimony reported in the *Hearings* throughout.

Nor does the legislative history reveal any justification for such drastic legislation. Resort had barely been had to existing legislation, only recently passed.[127] Great progress was occurring, even in the areas where the problem was said to be the greatest.[128] Nor was the problem new. According to the Defendant, it had existed for over ninety-five years.[129] But only in recent years had Congress and the Executive branch sought to remedy the situation.[130] This long-standing inaction of federal authority and the impatience with lawful new legislation cannot justify these drastic measures.[131]

Sections 4, 5, 6(b), 11 and 12 of the Act are not reasonably designed to enforce the Fifteenth Amendment and therefore are not "appropriate" legislation.

II

THE ACT CONSTITUTES A LEGISLATIVE TRIAL IN VIOLATION OF ARTICLE I, §9 AND ARTICLE III

In considering the effect of Article I, §9 and Article III on the validity of the Act, it is again necessary to begin with the fundamental design of the Union. The governmental powers granted by the Sovereign and formerly independent States were divided into three distinct categories, with the whole of each category being delegated to a separate department of the government of the National Sovereign—Executive, Judicial and Legislative.[132] The ob-

[127] See footnote 143, p. 40; Hearings, S. 1564, Pt. 1, p. 105-108; H.R. 6400, Ser. 2, p. 75-77, 403. No suits have been brought in South Carolina. S. 1564, Pt. 1, p. 39.

[128] US Code News, p. 2537.

[129] Hearings, H.R. 6400, Ser. 2, p. 3-5. Chairman Celler said 100 years. H.R. 6400, Ser. 2, p. 369.

[130] See footnote 143, p. 40.

[131] See *Ex Parte Milligan*, 4 Wall 2, 120-121; *Schecter Poultry Corp. v. U.S.*, 295 US 495, 528-529.

[132] Article I, §1. "All legislative powers herein granted shall be vested in Congress . . ."

Article II, §1. "The executive power shall be vested in a President . . ."

Article III, §1. "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

vious purpose of the design was to prevent the concentration of these vast powers in one body where they could be overzealously used to endanger the liberty of the government.[133]

In order to accomplish this purpose it was essential to the design that the powers of one branch not be exercisable by another.[134] Particularly did the compact authors fear excessive reach by the legislative arm:

> But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.[135]

While it has been suggested that there was no need for specific prohibition against any such legislative excess, since the grants of power carried within themselves inherent protective restrictions,[136] this Court only last term recognized that specific prohibition against an exercise of the judicial function by the Congress was enunciated in §9 of Article I.

> The best available evidence, the writings of the architects of our constitutional system, indicates that the bill of attainder clause was intended not as a narrow technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the

[133] "The Federalist, No. XLVII" (Madison); Lodge, *The Federalist*, 299-307 (1888); *United States v. Brown*, 381 US 487, 14 L. ed. 2d 484, 488.

[134] *Ibid.* "No. XLVIII" (Madison), 308-313.

[135] "The Federalist No. XLVIII" (Madison), Lodge *The Federalist* 309 (1888).

[136] *1 Cooley's Constitutional Limitations*, 355-359 (8th ed. 1927).

separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.[137]

The history of this Union has proven that such legislative restraint was indeed necessary to protect against inflamatory outrages of segments of our citizenry directed, *rightfully* or *wrongfully*, toward others in this land of liberty.[138]

Two classic examples of such legislative abuse are found in the bitter backwash following the Civil War. By its Reconstruction Constitution, Missouri sought to ban from many phases of public office, employment and professions, those who had either openly or covertly opposed the Union, by requiring, as a prerequisite to their position, an oath revealing the activities, sympathies and desires of the individual at the time of the strife. This past conduct was absolutely condemned. Said this Court in *Cummings v. Missouri*, 4 Wall 277:

> The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punish-

[137] *U.S. v. Brown*, 381 US 437, 14 L ed 2d 484, 488. The subsequent passage of the Fifteenth Amendment was never intended to change this separation of powers. Sect. 2 thereof reads:

> The Congress shall have power to enforce this Article by appropriate *legislation*. [Emphasis added]

[138] *U.S. v. Brown*, 381 US 437, ..., 14 L ed 2d 484, 490. This function was recognized by two members of this Court in one of its earlier decisions. In reviewing the history and reasons for the attainder and *ex post facto* clauses in *Calder v. Bull*, 3 Dall 386, Mr. Justice Chase, for the majority, said:

> The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, Federal and State legislatures were prohibited from passing any bill of attainder or any *ex post facto* law. p. 389.

In his separate opinion, Mr. Justice Iredell put it even more vividly:

> Rival factions, in their efforts to crush each other, have superseded all the forms, and suppressed all the sentiments of justice; while attainders, on the principle of retaliation and proscription, have marked all the vicissitudes of party triumph. The temptation to such abuses of power is unfortunately too alluring for human virtue. p. 399-400.

ment conditionally. . . . The Constitution . . . intended that the rights of a citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. p. 325

Nor did the National legislature escape this vindictive passion. In order to practice in the federal courts, Congress required all attorneys to swear that they had never borne arms against the Union during the rebellion, regardless of any executive pardon. Again this Court struck down such "legislative adjudication", holding the "attainder clauses" applicable to Congress, thus prohibiting this abortion of the federal design. *Ex Parte Garland*, 4 Wall 333.

Our times have seen similar reaction by Congress to popular feeling. Following the tragedy of World War II, this country awoke to find itself confronted by a sinister worldwide conspiracy dedicated to its extinction, apparently openly sponsored by some of its citizens through the American Communist Party. Popular reaction was urgent, resulting in numerous Congressional attempts to expose all members of the party, and rout them out of all employment affecting the national security.[139]

Among the first such bills to be construed by this Court was §304 of the Urgency Deficiency Appropriations Act of 1943, purporting to deprive certain federal employees of further government salaries because of prior questionable Communist associations and backgrounds. *United States v. Lovett*, 328 US 303. The language of Mr. Justice Black, speaking for the majority in striking down this attempted exercise of the judicial function is most noteworthy here:

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take

[139] For example, 62 Stat. 808 (1948); 64 Stat. 987 (1950); 68 Stat. 775 (1954); 76 Stat. 91 (1962).

away the life, liberty or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts . . .

When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. p. 317, 318.

Recently, the attainder provisions were again invoked to prevent legislative condemnation and punishment of the Communist party, though after a temporary lapse.[140] In *United States v. Brown*, 381 US 437, the majority concluded that §404 of the Labor Management Act of 1959 decreeing criminal the service of a member of the Communist party as an officer or employee of the labor union offended the attainder clauses.[141]

Quite parallel and analagous to this popular reaction was the strong upsurge in feeling of public concern over the status of the Negro in American society. Sparked by such decisions of this Court as *Shelly v. Kraemer*, 334 US 1; *Brown v. Board of Education*, 347 US 483; *Burton v. Wilmington Parking Authority*, 365 US 715, and *Peterson v. Greenville*, 373 US 244, the movement to insure equal participation of the Negro in public life exceeded proportions capable of the imagination twenty years ago. As a result, Congress, after a slow start,[142] began in earnest to grant

[140] During the intervening period when the attainder clauses were not invoked, this Court sharply divided when faced with other legislation on this subject. Cf. *American Communications Assn. v. Douds*, 339 US 382 (5-1-1-1); *Fleming v. Nestor*, 363 US 603 (5-4); *Garner v. Bd. of Public Works*, 341 US 716 (5-2-2); *Scales v. U.S.*, 367 US 203 (5-4); *Communist Party v. Subversive Activities Control Board*, 367 US 1 (5-4); *Noto v. U.S.*, 367 US 290 (5-2-2). It is noteworthy that some of this legislation directed to Communist party membership was voided on other grounds closely akin to a "legislative trial". Cf. *Aptheker v. Secretary of State*, 378 US 500. See p. 15 to 24.

[141] This reaction to the hidden enemy that would overthrow our Republic even led Congress to turn on those who invoked his individual rights under the Fifth Amendment. Cf. *Steinberg v. U.S.*, 163 F Supp 590 (Ct. of Cl. 1958) striking down 5 USC 740(d).

[142] No recent important Congressional action occurred before 1957.

equality to the Negro.[143] Because of this momentum of inflamed public opinion, the Act was passed.[144]

The reason for its enactment and manner of its passage are most indicative of the Act's purposes. It was introduced on March 17, 1965 and passed on August 6, 1965, an amazingly short period for legislation of such import. The sub-committee hearings before both Houses were limited to a combined total of only 18 days, at the insistence of the sub-committee chairmen.[145] The territories to which the Act would be applicable were carefully delineated, and sixty-four Senators, presumably from unaffected areas, sponsored its passage.[146] Its sponsors and promoters admitted that it was "drastic" and could not have been enacted if nationwide in its application.[147] Recently enacted existing legislation, to which only bare resort had been had, was termed too time-consuming and expensive,[148] even though the maladies to which it was directed allegedly had existed for over ninety-five years.[149] Its purpose was described as that of reaching areas of "invidious massive discrimination", even though the innocent were caught up.[150] At the time of its consideration, the nation was witnessing an extended and widely publicized protest demonstration over voter registration in one of the allegedly "guilty" areas.[151] Against this background the Act must be judged.

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[143] 71 Stat. 637 (1957); 74 Stat. 90 (1960); 78 Stat. 241 (1954).

It is noteworthy that one of the earlier decisions of this Court prohibiting "judicial trials" struck down Congressional legislation directed against a racial group. *Wong Wing v. U.S.*, 163 US 228.

[144] US Code News, p. 2538.

For the most part, this Court has to date rejected, in this field, resulting attempts to convince the judiciary to uproot unquestionably basic principles of the compact. Cf. *Lassiter v. Northhampton Bd. of Elections*, 360 US 45; *Bell v. Maryland*, 378 US 226.

[145] Hearings, H.R. 6400, Ser. 2, p. 1-2; S. 1564, Pt. 1, p. 4.

[146] Hearings, H.R. 6400, Ser. 2, p. 29; S. 1564, Pt. 2, 1458-1461; US Code News 2610.

[147] Hearings, H.R. 6400, Ser. 2, p. 403, 466, 500-502; US Code News, p. 2540.

[148] See fn. 142, p. 39 and see Hearings, H.R. 6400, Ser. 2, p. 76-77.

[149] See fn. 128, p. 35.

[150] Hearings, H.R. 6400, Ser. 2, 85-86, 105, 259.

[151] Selma, Alabama, where publicity on the demonstration began in January 1965 and began to end in mid-April 1965. *"Time"*, Jan. 29, 1965, p. 20; *"U.S. News & World Report"*, March 8, 1965; *"Time"*, March 26, 1965, p. 20; *"U.S. News & World Report"*, March 29, 1965, p. 27; *"U.S. News & World Report"*, April 5, 1965, p. 37; *"U.S. News & World Report"*, April 12, 1965, p. 86-88. The hearings were replete with references to events there.

The classic definition of "legislative trial", as outlawed by the attainder clause, is

> A bill of attainder is a legislative act, which inflicts punishment without a judicial trial.[152]

By the Act, Congress has adjudged South Carolina and her citizens guilty of using her literacy requirements to prevent her Negro populace from registering to vote.[153] She and her citizens have received no judicial hearing and have had no opportunity to confront their accusers or rebut their evidence. No court, state or federal, has concluded that she, or her citizens so abrogated the provisions of the Fifteenth Amendment.

The Act has predetermined application only to a limited class—South Carolina, her citizens and those of nine other Sovereign States.[154] The size of this class does not excuse the fact that it is limited. *U. S. v. Brown*, 381 US 437,—— 14 L ed 2d 484, 499. Other Sovereign States whose citizens have prescribed similar literacy requirements are not so proscribed—their right to be governed by the voice of a literate electorate remains untouched.

Nor can there by any serious doubt of the punitive design of this Act. Not only do South Carolina citizens lose their right to be governed by a literate electorate, but they forfeit their right to control or further improve the regulations of all phases of their elections. She, and her citizens are so restricted not because of any conduct violative of the Fifteenth Amendment which may have existed at the time of the Act's passage (or immediately prior thereto), but for any such discrimination which may have existed for 5 years previous thereto.[155]

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[152] *Cummings v. Missouri*, 4 Wall 277, 323.

[153] That the "covered" states stand condemned was admitted by the Defendant. Hearings, S. 1564, Pt. 1, p. 45, 83-86, 88-93.

The validity of this position is not dependent upon a conclusion that the Act's presumption is arbitrary.

[154] It is unnecessary for the Court to meet any suggestion that the attainder clause affords no protection to Sovereign States. While the purpose of this constitutional clause, as drawn from the compact design, would refute such a distinction, the Plaintiff, as *parens patriae*, is here also asserting the individual rights of her citizens.

[155] Compare the reaction of this Court to a similar proposition in *U.S. v. Brown*, 381 US 437, ..., 14 L ed. 2d 484, 497.

The Defendant undoubtedly will contend that the Act was designed to prevent future discrimination, not to punish South Carolina's citizens by depriving them of a literate electorate and control of their elections. The Act, stripped of the sections to which objection is here made, would still accomplish that purpose.

In any event, the absolute deprivation of basic rights because of alleged past actions in order to prevent future misconduct is clearly "punitive".

> One of the reasons society imprisons those convicted of crime is to keep them from inflicting future harm, but that does not make imprisonment any less the punishment.[156]

As he suggested to Congress, the Defendant will probably contend that no punishment is involved since South Carolina and her citizens are free to avoid the provisions of the Act by seeking a declaratory judgment as to their conduct from a three-judge court in the United States District Court for the District of Columbia. In taking this position, the Defendant must necessarily concede that, if any such attempt is successful, South Carolina's voter registration rolls may be purged of the thousands of illiterates which have been placed thereon since August 1965. Otherwise the vote of her lawful electorate would remain permanently diluted by the illiterates already registered at his discretion and by his examiners.

Nor is such a remedy "adequate" in any sense of the word. The Defendant described its mechanics:

> Look how this would work. In point of fact, the State could come in and simply have an affidavit, say there has never been any discrimination in the state on racial ground. If that affidavit was not tested and if evidence was not put in by the United States, there would be nothing before the Court to indicate that there had been discrimination and I would think that that in itself would carry the burden.

[156] *U.S. v. Brown*, 381 US 437, ..., 14 L ed. 2d 497.

> I think it would be encumbent upon the United States at that point—after really a simple statement that there had not been discrimination—be encumbent upon the United States to put in evidence that there had been. *It would then be encumbent upon the state to rebut that evidence and to carry the burden.*[157]

How would South Carolina carry this burden? How does any state prove it is completely free of discrimination? While South Carolina denies any systematic, widespread or massive discrimination against her Negro citizens with respect to their right to vote, such incidents undoubtedly have occurred from time to time, as in all states of the Union where substantial racial or foreign national origins minorities exist.[158] Apparently she would remain guilty as charged if *any* such incidents had occurred. In short, the "remedy" is impossible.

In any event, ability to escape the penalty does not lessen the invalidity of the legislative adjudication.

> We do not read either opinion to have set up inescapability as an absolute prerequisite to a finding of attainder.[159]

Reliance will undoubtedly be placed upon several decisions intervening between *Brown* and *Lovett*. While *Brown* casts a serious shadow over their present authority,[160] they are distinguishable. In *American Communications Assn. v. Douds*, 339 US 382, the proscribed class was free to disavow present Communist connections and avoid the proscription. South Carolina cannot now promise to prevent future discrimination and remove itself from the penalties of the Act. Similarly, in *Garner v. Bd. of Public Works*, 341 US 716, the individual's employment was not threat-

[157] The Defendant, Hearings, S. 1564, Pt. 1, p. 26-27. [Emphasis added].

[158] As the Defendant quite candidly admitted before Congress:

> "I don't think that all areas of the country are free of prejudice, and I think it is possible that in any state of this country Negroes may have been discriminated against from time to time. They may be discriminated against now." Attorney General Katzenbach, *Hearings*, H.R. 6400, Ser. 2, p. 27.

[159] *U.S. v. Brown*, 381 US 437, ..., 14 L ed. 2d 484, 497, fn. 32.

[160] See Ibid. 437, ..., 498.

ened if the prohibited activity was discontinued after the adoption of the city charter provisions. In both *Deveau v. Braisted*, 363 US 144 and *Fleming v. Nestor*, 363 US 603 no element of punishment was involved since the legislation was not directed to the prior conduct of the individuals. Furthermore in both cases the prior conduct of the individual had been subjected to a judicial or quasi-judicial proceeding.[161] No mention has been made of *Communist Party v. Subversive Activities Control Board*, 367 US 1 in view of this Court's recent decision in *Albertson v. Subversive Activities Control Board* — US — 34 L. W. 4014.

Whatever the evil sought to be remedied, whatever the pressing urgency for remedial legislation, Congress may not cross the basic constitutional divisions into the realm of the judiciary. Sections 4, 5 and 6(b) of the Act reflect a "legislative trial" of the citizens and governments of South Carolina and certain of her sister Sovereign States, and, as such, abrogate the fundamental law of the Republic.

CONCLUSION

This action does not question whether the first session of the 89th Congress of the United States should have acted to enforce the Fifteenth Amendment. Corrective legislation may or may not have been needed. Basically this challenge is not directed to the need for legislation, but to the manner in which Congress has determined to act.

The manner chosen is unique in legislative history, involving a "trigger" mechanism geared by past innocent conduct to apply automatically to a few selected States, suspending their control of their most essential internal workings. Regrettably, this legislative approach has been first employed in connection with the right held basic by all to the preservation of the Union—the right to vote. Some would prefer that another subject had been chosen to test the fiber of the Constitution against such Congressional action.

[161] Conviction of felony. *Deveau v. Braisted*, supra. Deportation. *Fleming v. Nestor*, supra.

Yet, if, in the judgment of this Court, Congress can, in this area so vital to the governments and inhabitants of all States,

> .... fetter and degrade the State governments by subjecting them to control of Congress and the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character ....[162]

no other topic could make that fact clearer.

We respectfully suggest that, in one of the rare occasions of our history, by the challenged sections of the Act, the Congress has ignored its responsibility to abide by Constitutional boundaries. This proceeding is brought with the confident belief that this Court will not so abdicate its function under the Compact.

For these reasons the relief requested should be granted.

Respectfully submitted,

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[162] *Slaughterhouse Cases* 16 Wall 36, 78.

APPENDIX C

In the various studies on group differences and voting there are several standard groupings which are employed for illustrating differentials in voter participation. Five of the primary groupings employed are:

1. Education
2. Income
3. Age
4. Size of Community
5. Religion

Variations in voter participation within these groups have been examined in several recent studies on voter behavior, with substantially identical conclusions reached.[1] Date in the tables below refer to *non-voting* in national elections.[2]

1. Education

TABLE I

Relation of Educational Attainment to Non-voting

	1948	1952	1954	1964
Grade School	44%	38%	62%	32%
High School	33	20	53	23
College	20	10	40	11

The figures show clearly that the lower the level of educational attainment the lower the voter participation. For the United States as a whole, the median years of school

[1] Angus Campbell and Homer C. Cooper, *Group Differences in Attitudes and Votes* (Survey Research Center, Institute for Social Research, University of Michigan, 1956); Angus Campbell, Philip E. Converse, Warren E. Miller, and Donald E. Stokes, *The American Voter* (New York: John Wiley & Sons, 1960); V. O. Key, Jr., *Public Opinion and American Democracy* (New York: Knopf, 1964); Lester W. Milbrath, *Political Participation* (Chicago: Rand McNally & Co., 1965).

[2] Figures for the elections of 1948, 1952 and 1954 are taken from Angus Campbell and Homer C. Cooper, *Group Differences in Attitudes and Votes*, Chapter 3. Figures for the election of 1964 are taken from U. S. Bureau of the Census, Current Population Reports: *Population Characteristics*, "Voter Participation in the National Election November 1964," Series P-20, No. 143, October 25, 1965.

completed by persons 25 years old and older are 10.6.[3] For South Carolina as a whole the median years of school completed by such persons are 8.7. (For white persons the figure in South Carolina is 10.3 years, and for non-white persons the figure is 5.9 years.)[4]

2. Income

TABLE II
Relation of Total Family Income to Non-voting

	Under $2000	$2000-2999	$3000-4999	$5000-7499	$7500-9999	$10,000 or more
1954	67%	57%	53%	49%	47%	35%
1964	50	41	37	27	21	15

The figures show clearly that the lower the level of family income the lower the voter participation. For the United States as a whole the median family income in 1959 was $5,660.[5] For South Carolina as a whole the median family income was $3,821.[6]

3. Age

TABLE III-a
Relation of Age to Non-voting

	21-24	25-34	35-44	45-54	55-64	65 & over
1954	77%	63%	51%	43%	49%	51%
1964	47	35	26	23	23	33

TABLE III-b
Percentage Distribution of Population by Age

	20-24	25-34	35-44	45-54	55-64	65 & over
U. S.[7]	6.0	12.8	13.5	11.5	8.7	9.2
S. C.[8]	7.0	12.5	12.6	9.8	6.4	6.3

[3] U. S. Census: 1960. Vol. 1, *Characteristics of the Population*, Pt. 1, U. S. Summary, Table 76, p. 1-207.
[4] U. S. Census: 1960, Vol. 1, *Characteristics of the Population*, Pt. 42, South Carolina, Table 47, p. 42-96.
[5] U. S. Census: 1960, *supra*, n. 3, Table 137, p. 1-286.
[6] U. S. Census: 1960, *supra*, n. 4, Table 142, p. 42-377.
[7] U. S. Census: 1960, *supra*, n. 3, Table 45, p. 1-146.
[8] U. S. Census: 1960, *supra*, n. 4, Table 17, p. 42-28.

Table III-a indicates substantial differentials in voter participation among the various age groups. The lowest rate of voter participation is found in the 21-24 year age group. The highest rate of voter participation is found in the three groups covering ages 35-64.

Table III-b shows that by comparison with the national pattern, South Carolina has a larger percentage of its population in the age group with low voter participation and a markedly smaller percentage of its population in the age groups with high voter participation.

4. Size of Community

TABLE IV

Relation of Size of Community to Non-voting

	1948	1952	1954
Metropolitan Area	17%	21%	51%
City or Town	38	27	52
Open Country	59	32	65

Campbell and Cooper, *Group Differences in Attitudes and Votes*, states: "As for voting turnout, the trend over three elections is that of higher voting rates as community size increases. People living in the open country have clearly the poorest voting record over this period." (At. p. 26.)[9]

For the United States as a whole, the population distribution in 1960 was 69.9% urban and 30.1% rural.[10] For South Carolina in 1960 the distribution was 41.2% urban and 58.8% rural[11] a substantially greater orientation toward the non-participating voter category than the national pattern.

[9] See also Lester W. Milbrath, *Political Participation* (Chicago: Rand McNally & Co., 1965), p. 128.

[10] U. S. Census: 1960, supra, n. 3, Table 44, p. 1-144.

[11] U. S. Census: 1960, supra, n. 4, Table 14, p. 42-21.

5. Religion

TABLE V

Relation of Religion to Non-voting

	1948	1952	1954
Protestant	43%	28%	56%
Catholic	20	15	44
Jewish	*	7	47

* The Jewish sample in 1948 was not large enough to justify consideration.

Table V shows that of the three general categories Protestants have the lowest voter participation, Catholics have somewhat greater participation, and Jews slightly greater than Catholics, although the 1954 percentage is a different and, according to general voter studies cited earlier, aberrant figure.

Statistics on religious affiliation are relatively unreliable, but the World Almanac for 1963 shows that for the United States as a whole, of those persons who are members of a religious body, 55% were Protestant, 37% were Catholic, and 5% were Jewish.[12] For South Carolina, of those persons who are members of a religious body, 96.8% are Protestant, 2.6% are Catholic, and 0.4% are Jewish.[13] Relative to church membership population South Carolina is almost entirely Protestant—the category which shows the lowest voter participation.

[12] *The World Almanac 1963* (New York: New York World-Telegram Corp'n. 1963). pp. 705-706.

[13] *The Columbia Record,* December 1, 1965, Sec. B, p. 1, cols. 7-8. Figures reported in the *Record* were taken from those compiled by the South Carolina Christian Action Council.