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 ON BEHALF OF THE STATE OF GEORGIA AS AMICUS CURIAE

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BRIEF

On Behalf of the State of Georgia as Amicus Curiae.

I.

INTEREST OF THE STATE OF GEORGIA.

Pursuant to the order of this Court of November 5, 1965, extending invitation to any state to submit brief, *amicus curiae,* 34 Law Week 3160, the State of Georgia herewith submits its brief in support of the complaint of the plaintiff, South Carolina.

At the outset, the position of this amicus curiae should be made clear in several respects.

Denial of the right to vote because of racial considerations is no more the policy of Georgia than it is of the United States. Only last year, the General Assembly of

Georgia for the first time in the state's history undertook a comprehensive revision of the election laws to the end that election frauds of every description shall no longer be tolerated.[1] No reports of denials of the right to register or vote have been called to the attention of state authorities in over six years, but should such contingencies arise, State law now affords adequate machinery to correct any abuses.[2]

Second, the *amicus curiae* concedes the power and propriety of Congress' undertaking to fulfill its responsibilities in affording to all citizens the rights guaranteed by the Constitution of the United States. But the proper remedy for one evil discrimination is to eradicate it, and not to supplant it with another even more invidious in character. And to this we may add that the Constitution can never be vindicated in one area by transgressing its clear provisions in another, whatever the hysteria which happens to engulf the beleaguered body of law-makers at any given time.

Third, Georgia, as one of the seven states,[3] brought under Section 4 of the Voting Rights Act, has a vital interest in assuring that its electoral processes be not debilitated by those deemed incompetent to participate in the decisions of government. Only recently, this Court acted decisively in striking down the Georgia County Unit System on the ground that it operated to dilute the vote of some citizens and thereby denied equal protection. **Gray v. Sanders,** 372 U. S. 368, 9 L. Ed. 2d 821 (1963) and cf. **United States v. Saylor,** 322 U. S. 385, 88 L. Ed. 1341 (1944). Here, the dilution is even more egregious. The complex problems of the Twentieth Century demand an enlightened electorate. Now is hardly the time to experiment with ignorance and incompetency.

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[1] Ga. Laws 1964 Ex. Sess., p. 26.

[2] Id., Sections 34-202, 34-203, 34-903, 34-904.

[3] 30 Federal Register 9897, 10 Race Rel. L. R. 1397 (1965).

II.

SUMMARY OF ARGUMENT.

1. The Act Is Unconstitutional as Being in Violation of Article I, Section 2, and the Seventeenth Amendment. Section 4 of the Act, in purporting to suspend the literacy and other tests imposed as a prerequisite to voting or registering to vote in certain states is unconstitutional because there is no delegation of power in the Constitution to support it, and because such provision also violates Article I, Section 2, and the Seventeenth Amendment, which declare that electors in federal elections shall have the qualifications requisite for the most numerous branch of the state legislatures. Under Art. II, Section 1, as amended by the Twelfth Amendment, qualifications of voters who select presidential electors are also defined by state law. The United States is a government of delegated powers only. **United States v. Harris**, 106 U. S. 629, 27 L. Ed. 290 (1883); Tenth Amendment to the Constitution. In a long line of decisions, this Court has never departed from the proposition that the qualifications of electors are fixed by state law, subject only to exceptions not relevant here. **Minor v. Happersett**, 21 Wall. 162, 22 L. Ed. 627 (1875); **The Federalist**, No. 60; **McPherson v. Blacker**, 146 U. S. 1, 36 L. Ed. 2d 869 (1892); **Gray v. Sanders**, 372 U. S. 368, 9 L. Ed. 2d 821 (1963); **Baker v. Carr**, 369 U. S. 186, 243, 7 L. Ed. 2d 663 (1962); **Carrington v. Rash**, 380 U. S. 89, 13 L. Ed. 2d 675 (1965). This power has not been abrogated by any amendment adopted subsequent to the adoption of the original Constitution, **Newberry v. United States**, 256 U. S. 232, 248, 65 L. Ed. 913 (1921), and in any event, the Seventeenth Amendment, adopted subsequent to the Fourteenth and Fifteenth Amendments, is the last expression, and constitutes a recognition by Congress and the people of the position urged here. Nor can the Act be supported by Article I, Section 2, relating to Congress'

power to regulate the "times, places and manner of holding elections." **Newberry v. United States,** supra; **4 Elliot's Debates 71; The Federalist,** No. 59. Nor can the Act be sustained as "appropriate legislation" under Section 2 of the Fifteenth Amendment, as Congress' power under that Section does not exceed its authority under Section 1, which limits it to a proscription of discrimination by state action based upon race or color. **Civil Rights Cases,** 109 U. S. 3, 13, 27 L. Ed. 835 (1883); **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588 (1876); **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876). The Act also can not be sustained under the "necessary and proper" clause (Art. I, Sec. 8, Cl. 14). **Kinsella v. United States ex rel. Singleton,** 361 U. S. 234, 247, 4 L. Ed. 2d 268 (1960).

Literacy and other like tests have long been recognized as a valid qualification for voting under state law, and are not discriminatory as to race. **Lassiter v. Northampton County Board of Elections,** 360 U. S. 45, 3 L. Ed. 2d 1072 (1959). Discrimination in administration is possible under any law, but this does not invalidate the law itself. The presumption of state discrimination sought to be established by Section 4 (b) of the Act is itself unconstitutional because (1) it is arbitrary and is not supported by a rational connection between the fact found and the fact presumed. **Bailey v. Alabama,** 219 U. S. 219, 55 L. Ed. 191 (1911)-(2). The presumption also violates the separation-of-powers doctrine as it constitutes an effort by Congress to adjudicate a question which is judicial in nature. Therefore, the presumption of Section 4 (b) being itself unconstitutional, it adds nothing to the act, and leaves it exposed as a patent effort by Congress to establish qualifications for electors contrary to those prescribed by state law, and hence unconstitutional.

2. Section 5, in Undertaking to Vest in the District Courts for the District of Columbia a Veto Power Over the Legislation of Certain States, Is Unconstitutional as

an Effort to Confer Non-judicial Powers on the Federal Courts. The Section also cannot be sustained under the "local function" powers of the court for the District, as the power in question has no connection with local affairs in the District.

3. The Act Is Unconstitutional as a Bill of Attainder, in Violation of Article I, Section 9. This provision affords protection to an entire class, as well as to individuals. **Cummings v. Missouri,** 4 Wall. 277, 18 L. Ed. 356 (1867); **United States v. Lovett,** 328 U. S. 303, 90 L. Ed. 1252 (1946).

4. The Act Violates the Equality of States Required by the Constitution.

5. Section 14 (b) of the Act Is Unconstitutional. Access to the Courts is a privilege and immunity of national citizenship, **Slaughter House Cases,** 16 Wall. 36, 79, 21 L. Ed. 394, 409 (1873), and is also embraced within the concept of due process of law. **Ex Parte Hull,** 312 U. S. 546, 549, 85 L. Ed. 1034 (1941). A citizen of a State covered by the act has his vote diluted by the votes of other persons unqualified under state law just as much so as a citizen who complains that he is denied the right to vote because of his race or residence. The latter has the right to institute suit to vindicate his constitutional rights in the state of his residence, whereas, a citizen complaining of the dilution of his vote because of the inclusion of the votes of incompetent persons is required to travel to the District of Columbia to institute suit. This constitutes an illegal discrimination. Moreover, a state official against whom suit is instituted by the Attorney General is prevented from asserting as one defense the unconstitutionality of the voting rights act. This constitutes a denial of due process of law, as well as a denial of equal protection. The state has standing to assert these issues. **NAACP v. Alabama,** 357 U. S. 449, 458, 2 L. Ed. 2d 1488 (1958).

III.

ARGUMENT.

1. The Act Is Unconstitutional as Being in Violation of Article I, Section 2, and the Seventeenth Amendment.

Section 4 of the Voting Rights Act declares that no person shall be deprived of his right to vote in any federal, state, or local election because of his failure to comply with any "test or device" in any State with respect to which determinations have been made under subsection (b) thereof, or in any political subdivision with respect to which such determinations have been made as a separate unit.

The "determination" referred to, as set forth in subsection (b), is as follows:

> "(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.
>
> A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

"Tests or devices" are defined by subsection (c) as:

> ". . . any requirement that a person as a prerequisite for voting or registration for voting (1) demon-

strate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

It is the contention here that these provisions violate Article I, Section 2, of the Constitution of the United States, and the Seventeenth Amendment, which confer upon the states the power to prescribe voter qualifications. The argument supporting this contention may be broken down into five basic parts: (a) Article I, Section 2 and the Seventeenth Amendment vest in the states the exclusive power to prescribe voter qualifications, subject only to exceptions not applicable; (b) The power of the states over voter qualifications has not been abrogated by any amendment to the Constitution; (c) The Act is not "Appropriate Legislation" to enforce the Fourteenth and Fifteenth Amendments; (d) Literacy and other like tests constitute legitimate voter qualifications and do not violate the Fifteenth Amendment's ban upon racial discrimination in voting; (e) The presumption of State discrimination in voting prescribed by Section 4 (b) of the Act, being arbitrary and unreasonable, does not save the Act, and leaves it exposed as a patently unconstitutional attempt by Congress to displace state qualifications for voting. These five points will be discussed in the order stated.

(a) Under Article I, Section 2, and the Seventeenth Amendment, the Power to Prescribe Voter Qualifications Is Lodged Exclusively in the States, Subject Only to Stated Exceptions.

The Constitution, Art. I, Sec. 2, Cl. 1, provides:

"The House of Representatives shall be composed of members chosen every second year by the People

of the several States, **and the electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature.**"

Art. I, Sec. 4, Cl. 1, provides:

"The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators."

Art. II, Sec. 1, as amended by Amendment 12, provides for election of the President and Vice President by a "number of electors equal to the whole number of Senators and Representatives to which the State may be entitled . . .", and it is provided that these electors shall be appointed by "each State" **in such manner as the Legislature thereof may direct".**

The Fourteenth Amendment, Sec. 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 provides that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article".

The Fifteenth Amendment declares:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United

States or by any State on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

The Seventeenth Amendment, insofar as relevant, provides:

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

Every inquiry involving an assertion of federal power by Congress must begin with a recurrence to certain fundamental propositions concerning the federal system.

Ours is a dual or federal system, wherein the members of the organized society possess dual citizenship. Consequently, the individual acquires certain rights by virtue of his national citizenship, and other rights by virtue of his state citizenship. **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588 (1876).

In ascertaining whether any particular right springs from federal or state sources, it is a cardinal rule, ably expressed by this Court in **United States v. Harris,** 106 U. S. 629, 27 L. Ed. 290, 292 (1883),

". . . that the Government of the United States is one of delegated, limited and enumerated power. (Martin v. Hunter, 1 Wheat., 304; McCullock v. Maryland, 4 Wheat., 316; Gibbons v. Ogden, 9 Wheat.; 1. Therefore, every valid Act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution; section 1, of the first article, declares that all legislative powers granted

by the Constitution shall be vested in the Congress of the United States. Section 8, of the same article, enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power 'To make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof'. Article X, of the Amendments to the Constitution, declares that 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people'."

"Mr. Justice Story, in his Commentaries on the Constitution, says:

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it not be expressed, the next inquiry must be, whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, then it may not exercise it."

Applying these principles to the present question, what do we find?

In the plainest language possible, Art. I, Sec. 2, declares that electors for members of the House of Representatives "shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature".

When the method of selecting Senators was changed from election by the State Legislatures to election by the people in the Seventeenth Amendment, Section 1 thereof adopted language identical to Art. I, for it was provided:

"The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." This amendment was adopted subsequent to the Fifteenth, and in case of conflict, controls.

The effect of this language is clearly stated in Willoughby, **The Constitutional Law of the United States,** pp. 540-541:

> "A distinction is to be made between the right to vote for a representative to Congress and the conditions upon which that right is granted . . . the right to vote is conditioned upon and determined by State law. But the right itself, as thus determined is a Federal right. That is to say, the right springs from the provision of the Federal Constitution that Representatives shall be elected by those who have the right in each state to vote for the members of the most numerous branch of the State legislature. **The Constitution thus gives the right but accepts, as its own, the qualifications which the States severally see fit to establish with reference to the election of the most numerous branch of their several State legislatures . . .**" (emphasis supplied).

Similarly, in Mathews, **The American Constitutional System,** 2nd Ed., p. 363 (1940), it is said:

> "Two provisions of the Constitution other than section 2 of Art. I and the Seventeenth Amendment indirectly leave to the States powers over voting qualifications. The first is Sec. 1 of Art. II which grants to the States the right to choose the manner of appointing Presidential electors. If elections are designated as the manner of appointing electors, the States have authority to determine what shall be the qualifications of voters in these elections. The second provision is the second section of the Four-

teenth Amendment. 'This section of the amendment clearly recognizes the right of a State to adopt suffrage qualifications which exclude certain of its adult male citizens from voting.' By this section the State is penalized for denying the right to vote to male citizens of twenty-one years of age for reasons other than participation in rebellion or other crime; but the right to deny the suffrage, meaning ordinarily the right to establish qualifications restricting the right to vote, is legally sanctioned."

In **Minor v. Happersett,** 21 Wall. 162, 22 L. Ed. 627, 629 (1875), decided prior to adoption of the Nineteenth Amendment, it was said, in upholding a Missouri statute denying the right of suffrage to women:

"The Constitution does not define the privileges and immunities of citizens. For that case we need not determine what they are, but only whether suffrage is necessarily one of them.

"It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State Legislature. Const., art. 1 and 2. Senators are to be chosen by the Legislatures of the States and necessarily the members of the Legislature required to make the choice are elected by the voters of the state. Const., art. 1, and 3. Each State must appoint in such manner as the Legislature thereof may direct, the electors to elect the President and Vice-President. Const., art. 2, and 2. The times, places and manner of holding elections for Senators and Representatives are to be prescribed in each

> state by the legislature thereof; but Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators. Const., art. 1, and 4."

The rationale behind this choice of language can be determined from an examination of contemporary authorities.

In the debates which took place in the constitutional conventions held in the original States for the purpose of ratifying the Constitution, it was pointed out that since elections for Congressmen would likely be held at the same time and as a part of elections for state officers, a hard and disagreeable situation would arise; an elector could vote for state officers, but would be held ineligible to vote for congressman—a situation which would possibly arise had the Constitution sought to prescribe uniform qualifications or to authorize Congress to do so. **5 Elliot's Debates, p. 385.**

Mr. Nichols of Virginia had this to say concerning Art. I, Sec. 2, to wit:

> "I will consider it first, then, as to the qualifications of the electors. The best writers on government agree that, in a republic, those laws which fix the right of suffrage are fundamental. If, therefore, by the proposed plan, it is left uncertain in whom the right of suffrage is to rest, or if it has placed that right in improper hands, I shall admit that it is a radical defect; but in this plan there is a fixed rule for determining the qualifications of electors, and that rule the most judicious that could possibly have been devised, because it refers to a criterion which cannot be changed. A qualification that gives a right to elect representatives for the state legislatures, gives also, by this Constitution, a right to choose representatives for the general government. As the

qualifications of electors are different in the different states, no particular qualifications, uniform through the states, would have been politic, as it would have caused a great inequality in the electors, resulting from the situation and circumstances of the respective states. Uniformity of qualifications would greatly affect the yeomanry in the states, as it would either exclude from this inherent right some who are entitled to it by the laws of some states at present, or be extended so universally as to defeat the admirable end of the institution of representation." **3 Elliot's Debates, p. 8.**

Similarly, in **The Federalist,** No. 52, it was said:

"The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the convention. 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 constitu-

> tions, 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."

Beyond question, Hamilton considered that Art. I, Sec. 4, conferred no authority on Congress to prescribe qualifications of electors. In **The Federalist,** No. 60, in combatting the argument that Congress might exercise its power under this provision so as to secure the franchise only to the rich by discriminate selection of places in which to hold elections, Hamilton replied:

> "The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the 'times', the 'places', the 'manner' of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."

Another reason behind Art. I, Sec. 2, was said to be the desire to achieve a mixed representation, which could not be obtained had uniform qualifications for electors been prescribed by the Constitution. In this regard, **1 Story on the Constitution,** 4th Ed., Secs. 585, 586, p. 420, says:

> "Without, therefore, asserting that such a mixed representation is absolutely and under all circumstances the best, it might be safely affirmed that the existence of various elements in a composition of the representative body is not necessarily inex-

> pedient, unjust, or insecure, and, in many cases, may promote a wholesome restraint upon partial plans of legislation, and insure a vigorous growth to the general interest of the Union. The planter, the farmer, the mechanic, the merchant, and the manufacturer might thus be brought to act together, in a body representing each; and thus superior intelligence, as well as mutual good-will and respect, be diffused through the whole of the collective body."

Some confusion on the question may arise from statements in numerous decisions concerning whether the right of suffrage with respect to members of Congress is derived from state or federal sources.

For example, in **Minor v. Happersett,** 21 Wall. 162, 22 L. Ed. 627 (1875), it was said that the right of suffrage was not a privilege and immunity of national citizenship (p. 171), and "the Constitution of the United States does not confer the right of suffrage upon anyone" (p. 178).

Similar statements were made in **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588, 592 (1876); **Mason v. Missouri ex rel. McCoffery,** 179 U. S. 328, 335, 45 L. Ed. 214 (1900); **McPherson v. Blacker,** 146 U. S. 1, 37, 36 L. Ed. 869 (1892); **Breedlove v. Suttles,** 302 U. S. 277, 283, 82 L. Ed. 252 (1937).

On the other hand, apparently contradictory statements may be found in such cases as **Wiley v. Sinkler,** 179 U. S. 58, 62, 45 L. Ed. 84 (1900); **Swafford v. Templeton,** 185 U. S. 487, 46 L. Ed. 1005 (1902); and **U. S. v. Mosley,** 238 U. S. 383, 59 L. Ed. 1355 (1915).

In the Wiley Case, the Court declared:

> "The right to vote for members of the Congress of the United States is not derived merely from the Constitution and Laws of the state in which they are

chosen, but has its foundation in the Constitution of the United States."

Actually, the cases are not in conflict. They must each be read in the context of their particular facts. The cases were all harmonized in **Ex Parte Yarbrough,** 110 U. S. 661, 28 L. Ed. 274 (1884), which was a petition for habeas corpus attacking convictions under Sections 5508 (similar to 42 U. S. C. A. 1985) and 5520 (now 18 U. S. C. A. 594) of the Revised Statutes, the indictment alleging that defendants assaulted and beat a Negro citizen for having exercised his right to vote in an election for representative to Congress. The Court upheld these statutes as applied to persons interfering with electors voting for federal officials, as against the argument that since, as it was claimed, the right to vote was derived from the states, Congress could not protect it. In rejecting this contention, it was said:

> "**But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.**
>
> "**The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely: by election.**
>
> "Its language is: 'The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the same qualifications requisite for electors of the most numerous branch of the State Legislature.' **Article I, Section 2.** The States in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine.* They define who are to vote for the popular branch of

their own Legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualifications of its own electors for members of Congress.

"It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the State.

"Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of **Minor v. Happersett,** 21 Wall. 178 (88 U. S., XXII, 631), that 'the Constitution of the United States does not confer the right of suffrage upon anyone', without reference to the connection in which it is used, insists that the voters in this case do not owe their rights to vote in any sense to that instrument.

"But the Court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men."

"In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. But the Court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors."

In other words, the right to vote for a candidate for Congress is derived from federal sources in the sense

that the federal Constitution creates the office, provides for election by the people, and authorizes Congress in Art. I, Sec. 4, to alter the "times, places and manner of holding elections for Senators and Representatives." On the other hand, the right is a state right in the sense that the Constitution itself, in Art. I, Sec. 2, and the Seventeenth Amendment, has referred the question of qualifications for electors to state law.

In the **Yarbrough Case,** the Court expressly recognized that "the importance to the General Government of having the actual election, the voting for those members, free from force and fraud **is not diminished by the circumstance that the qualifications of the voter is determined by the law of the State where he votes"** (p. 663). Art. I, Sec. 2, expressly declares that electors for Congress shall have the same qualifications as electors for members of the most numerous house of the State Legislature (p. 663).

Substantially the same explanation was given in **United States v. Classic,** 313 U. S. 299, 85 L. Ed. 1368 (1941), where indictments were returned against Louisiana election officials for having altered and falsely counted votes cast in a primary election for nomination of candidates for Congress. The prosecution was brought under what is now 18 U. S. C. A., Secs. 241 and 242.

Observing that Louisiana statutes incorporated primaries as an integral part of its election process, the Court held the statutes applicable to the Louisiana primary, in effect disapproving a contrary holding in the Newberry case.

It was said:

> "The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the

Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

* * * * * * *

"While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the States (see Minor v. Happersett, 21 Wall. (U. S.) 162, 170, 22 L. Ed. 627, 629; United States v. Reese, 92 U. S. 214, 217, 218, 23 L. Ed. 563-565; McPherson v. Blacker, 146 U. S. 1, 38, 39, 36 L. Ed. 869, 878, 879, 13 S. Ct. 3; Breedlove v. Suttles, 302 U. S. 277, 283, 82 L. Ed. 252, 256, 58 S. Ct. 205); this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by Sec. 2 of Art. 1, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Sec. 4 and its more general power under Art 1, Sec. 8, clause 18, of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers'."

"And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states."

At page 317, however, it was clearly stated that this authority was derived from Art. 1, Sec. 4, and see page 310, holding that the right to vote for members of Congress is defined in Art. I, Sec. 2, declaring that Representatives are to be chosen by the people, etc., subject to regulations prescribed by Sec. 4.

However, the question as to qualifications for electors is not seriously disputed today.

In **Ventre v. Ryder**, 176 F. Supp. 90, 94 (D. C. La. 1959), the Court held:

> "Under our constitutional system, the qualifications of voters is a matter committed to the States, subject only to federal constitutional restrictions prohibiting discrimination on account of race, color, sex. . . ."
>
> * * * * * * *
>
> "The question of whether or not a voter is a qualified elector is a State matter to be determined by state law and state courts" (p. 97).

In **Tullier v. Giordano**, 265 F. 2d 1 (C. A. 5th, 1959), an injunction was sought against a Louisiana registrar, the charge being that he refused to register, by means of the literacy test imposed by state law, all voters not friendly to his political faction. The Court declared:

> "Under our federal system the qualification of voters is left to the several States subject to some limitations imposed by the United States Constitution. As originally adopted, the constitution contained few provisions on the subject of voting rights."

The Court then referred to Art. I, Secs. 2 and 4; Art. II, Sec. 1, and the Twelfth, Fourteenth, Fifteenth, Seventeenth, and Nineteenth Amendments.

In **Darby v. Daniel**, 168 F. Supp. 170 (D. C. Miss. 1958), in upholding the Mississippi literacy test, it was said:

> "Any consideration of the constitutionality of the challenged portions of the Amendment begins with the fundamental fact that, under our constitutional system, the qualification of voters is a matter committed exclusively to the States" (p. 176).

See also **Pirtle v. Brown**, 118 F. 2d 218 (C. A. 6th, 1941), Cert. den. 314 U. S. 621.

The question as to presidential electors was settled in **McPherson v. Blacker**, 146 U. S. 1, 36 L. Ed. 869 (1892), which involved mandamus by nominees for Presidential elector against the Michigan Secretary of State, seeking to have declared unconstitutional a recent Michigan statute governing election of presidential electors. The new statute provided for the election by districts of presidential and vice-presidential electors, and plaintiffs contended that the Constitution required the state to act as a unit, and not delegate to subdivisions the right to select electors.

The Court rejected this attack, holding that "the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States", referring to Art. II, Sec. 1, Cl. 2 (p. 35).

No violation of the 14th or 15th Amendments was found, as the right of suffrage was held to be derived from state citizenship (pp. 37-8).

Cooley on **Constitutional Limitations**, Vol. II, pages 1360-1, declares:

> "The whole subject of the regulation of elections, including the prescribing of qualifications for suffrage, is left by the national Constitution to the several States, except as it is provided by that instrument that the electors for representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State legislature, and as the Fifteenth Amendment forbids denying of citizens the right to vote on account of race, color, or previous condition of servitude."

It is also interesting to note that when the Constitution was being drafted, the Committee on Detail originally proposed giving Congress the power to fix the qualifications of electors in the following language:

"The qualifications of electors shall be the same (throughout the states, viz.) with that in the particular states unless the legislature shall hereafter direct some uniform qualifications to prevail through the states:

(Citizenship
manhood
sanity of mind
previous residence for one
year; or possession of real
property within the state
for the whole of one year,
or inrolment in the militia,
for the whole of a years)."

See Farrand, The Records of the Federal Convention, Vol. 2, pp. 139-140.

However, this provision was later deleted. See Vol. 2, pp. 155, 613.

In Curtis, **History of the Constitution of the United States,** Vol. 2, pp. 194-200, it is said that the Committee on Detail evolved Art. I, Sec. 2, so as to avoid the situation whereby an elector in one state could vote for highest state officers but not for members of Congress, viz.:

"Another difficulty which attended the adjustment of the right of suffrage grew out of the widely differing qualifications annexed to that right under the State constitutions, and the consequent dissatisfaction that must follow any effort to establish distinct or special qualifications under the national Constitution. In some of the States, the right of voting was confined to 'freeholders'; in others—and by far the greater number—it was extended beyond the holders of landed property, and included many other classes of the adult male population; while in a few,

it embraced every male citizen of full age who was raised at all above the level of the pauper by the smallest evidence of contribution to the public burdens. The consequence, therefore, of adopting any separate system of qualifications for the right of voting under the Constitution of the United States would have been that, in some of the States, there would be persons capable of voting for the highest State officers, and yet not permitted to vote for any officer of the United States; and that in the other States persons not admitted to the exercise of the right under the State constitution might have enjoyed it in national elections."

* * * * * * *

"The Committee of Detail, after a review of all these considerations, presented a scheme that was well adapted to meet the difficulties of the case. They proposed that the same persons who, by the laws of the several States, were admitted to vote for members of the most numerous branch of their own legislatures, should have the right to vote for the representatives in Congress. The adoption of this principle avoided the necessity of disfranchising any portion of the people of a State by a system of qualifications unknown to their laws. As the States were the best judges of the circumstances and temper of their own people, it was certainly best to conciliate them to the support of the new Constitution by this concession" (p. 200).

In **Baker v. Carr,** 369 U. S. 186, 243, 7 L. Ed. 2d 663 (1962), the Tennessee Reapportionment case, Mr. Justice Douglas stated in a concurring opinion:

"That the States may specify the qualifications for voters is implicit in Article I, Section 2, Clause 1, which provides that the House of Representatives shall be chosen by the people and that the Electors

(voters) in each state shall have the qualifications requisite for electors (voters) of the most numerous branch of the State legislature. The same provision, contained in the Seventeenth Amendment, governs the election of Senators."

In **Gray v. Sanders,** 372 U. S. 368, 9 L. Ed. 2d 821, 829 (1963), which is the Georgia County Unit case, the majority opinion declares:

> "States can within limits specify the qualifications of voters both in state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. 1, Sec. 2. As we held in Lassiter v. Northampton County Election Board, 360 U. S. 45 . . ., a state may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group."

The case of **State of Alabama v. Rogers,** 187 F. Supp. 848, 854 (D. C. Ala. 1960), was an Action by the Attorney General under the 1960 Civil Rights Act to compel production of voting records. The State filed cross complaint, attacking the constitutionality of the Act. The Court stated:

> "Although the particular qualifications one must possess to exercise this right to vote are left to the states—as long as that exercise is within the constitutional framework—the power to protect voters who are qualified is confided to the Congress of the United States."

In **United States v. Fox,** 211 F. Supp. 25, 30 (D. C. La. 1962), Louisiana had, in 1962, amended its laws so as to dispense with the provisions requiring an applicant to interpret provisions of the constitution, in favor of a law whereby 6 questions with 3 optional answers on each card,

for the applicant to circle the correct answer, are submitted to each applicant. To pass, he must answer 4 questions correctly. There are 10 such cards or sets of questions from which the applicant draws one, face down. Suit was instituted against the registrars of Plaquemines Parish, Louisiana, alleging discrimination in registration of Negroes. At the outset, the Court declared:

> "The law is clear that 'The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised absent of course the discrimination which the Constitution . . .'
>
> * * * * * * *
>
> In Guinn v. United States, 238 U. S. 347, the Supreme Court upheld the right of the states to apply a literacy test to all voters irrespective of race and color, saying, 'No time need be spent on the question of the validity of the literacy test considered alone as we have seen its establishment was but the exercise by the State of a lawful power vested in it, not subject to our supervision, and indeed, its validity is admitted.' "

See also **United States v. Penton**, 212 F. Supp. 193, 201 (D. C. Ala. 1962).

In **Carrington v. Rash**, 380 U. S. 89, 13 L. Ed. 2d 675 (1965), a provision of the Texas Constitution was challenged which prohibited any person from voting in Texas who moved his home there during the course of military duty for so long as he remained in the service. While the statute was held unconstitutional under the Fourteenth Amendment, it was held:

> "There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed,

'the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.' **Lassiter v. Northampton Election Bd.**, 360 U. S. 45, 50. Compare **United States v. Classic**, 313 U. S. 299; **Ex parte Yarbrough**, 110 U. S. 651. 'In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' **Pope v. Williams**, *supra*, at 632."

(b) **The Power of the States to Prescribe Qualifications Has Not Been Abrogated by Any Amendment to the Constitution.**

The Fourteenth Amendment prohibits any state from denying equal protection. The Fifteenth prohibits a state from abridging the right to vote because of "race, color, or previous condition of servitude."

The Seventeenth Amendment provides for election of Senators by the people, but in Section 1 expressly adopts as qualifications for electors, the qualifications prescribed by state law for electors of the most numerous branch of the State Legislatures.

The Nineteenth Amendment declares that the right to vote shall not be denied or abridged by the United States or any State on account of sex.

These amendments do not confer the right to vote on anyone. They are negative in character only, and merely declare that certain things can **not** be considered in defining the right to vote.

In **Newberry v. United States**, 256 U. S. 232, 248, 65 L. Ed. 913 (1921), this Court held that prior to the Sev-

enteenth Amendment, Art. I, Sec. 4, defined the sole authority of Congress over elections for Congress and the Senate. It was said:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4. 'The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.' "

Insofar as the **Newberry Case** held federal law inapplicable to primaries, it undoubtedly has been superseded by **United States v. Classic,** 313 U. S. 299, 85 L. Ed. 1368 (1941), but the principle just enunciated was not affected, the decision in the Classic Case having been predicated upon the fact that state law had there made the primary an integral part of the state election machinery, and in practice, it had become the only meaningful election.

In **Minor v. Happersett,** supra, decided after adoption of the Fourteenth Amendment, an attack on Missouri statutes denying women the right to vote was upheld as against the claim that such law was in violation of the Amendment, the Court declaring that the right of suffrage is not a privilege and immunity of national citizenship (p. 171), and it was further said:

> ". . . the Constitution of the United States does not confer the right of suffrage upon anyone" (p. 178).

In **Ex Parte Yarbrough,** supra, decided in 1884, the Court recognized that the matter of qualifications of voters was still left to the states (110 U. S. at 663).

In **U. S. v. Munford,** 16 F. 223 (C. C. Va. 1883), it was held that Congress' power under the Fifteenth Amend-

ment was limited to matters involving racial discrimination.

In **Lackey v. United States**, 107 F. 114, cert. den. 181 U. S. 621, Section 5507 of the Revised Statutes, derived from the Enforcement Act of 1870, was declared unconstitutional. This statute sought to make unlawful the bribing of voters in a purely state election, without any requirement that such action be based on race or previous condition of servitude. The Court noted that Congress' power under the Fifteenth Amendment was limited to state action. It was said that the Amendment confers no right to vote on anyone, but merely forbids discrimination by the State based upon race (p. 118). Moreover, the Amendment does not protect the Negro against any obstruction of his right to vote, **unless such obstruction was because of his race.**

Similarly, in **United States v. Cruikshank**, 92 U. S. 542, 23 L. Ed. 588, 592 (1876), it was held:

> "In Minor v. Happersett, 21 Wall. 178 (88 U. S., XXII, 631), we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In U. S. v. Reese just decided (ante, 563), we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination

comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

In **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876), an indictment was brought under Sec. 4 of the Enforcement Act of 1870 (16 Stat. 140) against Kentucky election officials for refusing to receive and count the vote of a Negro in an election for municipal officials, Sec. 4 providing for the punishment of anyone who by force, bribery, threats, etc., hinders, delays, or obstructs a citizen from doing any act required to be done in order to qualify him to vote. Upon argument, the Government abandoned consideration of all claims not dependent upon the Fifteenth Amendment. Noting that the Fifteenth Amendment does not confer the right of suffrage on anyone (p. 594), the Court concluded that Sec. 4 was not limited to the authority of the 15th Amendment, i. e., obstructions based upon race, color, etc., but purported to apply to any obstruction. So being, Sec. 4 was held unconstitutional, and the Court found itself unable to limit it to deprivations based on race, as its terms did not admit of separability, and any attempt to so do would render it so vague as to leave the accused uncertain of its scope.

In **Guinn v. United States,** 238 U. S. 347, 362, 59 L. Ed. 1340 (1915), the Oklahoma "Grandfather Clause" was declared unconstitutional, which in effect imposed a literacy test against Negro voters, but exempted White voters. The Court was clear to point out, however, that neither the Fourteenth nor Fifteenth Amendments had affected the power of the states to prescribe qualifications not dependent upon race. It was said:

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those

governments from the beginning, and without the 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 rest would be without support, and both the authority of the nation and the 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 Amendment seeks to regulate its exercise as to the particular subject with which it deals.

"Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both."

The effect of the Fourteenth, Fifteenth, Seventeenth and Nineteenth Amendments is well stated in an article entitled "Voting Rights", 3 Race Rel. L. R. 371, 372 (1958), viz.:

"**The effect of these constitutional provisions, however, is not to confer on any person a federal right to vote. The state, not the federal government, is still primarily responsible for voting rights; but once the state purports to give any person or class the elective franchise, the federal constitutional and statutory provisions immediately and automatically operate to limit the power of the state to determine whether it will withhold the franchise from any person or group of persons.** Thus, upon the adoption of the Nineteenth Amendment, all state constitutional and statutory provisions withholding the elective franchise from women solely because of their sex were immediately null and void. See People ex rel. Murray v. Holmes, 341 Ill. 23, 173 N. E. 145 (1931); Annot., 71 A. L. R. 1332 (1931). **It would**

> **seem, therefore, that the states are free to establish any requirement they may deem wise, as long as these requirements are not discriminatory nor based on sex, race, color or previous condition of servitude.** As a consequence, voting rights may, and often do, vary widely from state to state."

Anticipating the argument that Congress derives power for the present legislation from Art. I, Sec. 4, Cl. 1, relating to Congress' power to make regulations relative to the "times, places and manner of holding elections for Senators and Representatives", some discussion relative to that clause is deemed appropriate.

It would be enough to say that since Art. 1, Sec. 2, makes express reference to qualifications of electors by adopting those applicable to state legislatures, and since the Seventeenth Amendment makes similar provision as to Senators, these specific provisions will necessarily control over the more general language of Art. I, Sec. 4, even assuming the latter to be otherwise applicable, which as will be hereafter shown, it definitely is not. See **50 Am. Jur. 371**, Sec. 367, setting forth the rule that specific provisions of a document control as against more general ones, which, without the specific, would be included in the general.

Certainly, the reference to "time" and "place" in Art. I, Sec. 4, has no relevance here.

With respect to "manner", this word generally has reference to the procedure or the way of doing a thing, and does not define who is qualified to do it. In re **Koelhoffer's Estate**, 25 A. 2d 638, 644, 20 N. J. Misc. 139; **State v. Adams**, 2 Stew. 231, 242 (Ala.).

People v. Guden, 75 N. Y. S. 347, 349 (1902), holds:

> "The 'manner of election' does not go to the question of what body of electors shall elect."

Livesley v. Litchfield, 83 P. 142, 144, 47 Or. 248, 114 Am. St. Rep. 920 (1905), held:

> "The authority given by Section 7 of Article 6 to prescribe the 'time and manner' in which municipal officers may be elected or appointed does not, we think, include the power to determine what shall constitute a legal voter."

The Court then quoted from **People v. English,** 139 Ill. 622, 29 N. E. 678 (1892), to the effect that:

> "The Constitution having thus made provision for such officer, and for his and her 'election', and having prescribed, in Sec. 1 of Art. 7 (Ill. Const.), the qualifications essential to entitle a person to vote at 'any election', it must be presumed that it was and is the true intent and meaning of the instrument that no person shall have the right to vote for a county superintendent of schools who does not possess such qualifications. * * * Said section 5 (art. 8) provides, not only that the qualifications, powers, duties, compensation, and term of office of the county superintendent of schools shall be prescribed by law, but also that the 'time and manner' of election of such superintendent 'shall be prescribed by law'. What is meant by the expression 'manner of election'? Was it intended thereby to give to the Legislature the power of prescribing the qualifications which would entitle persons to vote at any election for such county superintendent? The word 'manner' is usually defined as meaning way of performing or executing, method, custom, habitual practice, etc. * * * (It) indicates merely that the Legislature may provide by law the usual, ordinary, or necessary details required for the holding of the election."

In **Newberry v. United States,** 256 U. S. 232, 250, 257, 65 L. Ed. 913 (1921), the Court, in speaking of Article 1,

Sec. 4, stated that "Sundry provisions of the Constitution indicated plainly enough what its framers meant by elections and the 'manner of holding' them", following which the Court enumerated a list of provisions, all of which were purely procedural in nature. Reference was made to Hamilton's statement in **The Federalist**, No. 60, to the effect that the qualifications of electors, unlike other matters, could not be altered. In dealing specifically with the language as to "manner of holding", it was said:

> "Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private, animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these."

In **Smiley v. Holm**, 285 U. S. 355, 76 L. Ed. 795 (1932), the Court specified some of the things which properly might be included within the term "manner", to wit:

> "The subject matter is the 'times, places and manner of holding elections for Senators and Representatives'. It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."

In the Constitutional debates, the discussion relative to Art. I, Sec. 4, centered principally around the reference

to "place and time". See 3 **Elliot's Debates,** pp. 60, 175, 366, 403-4; Id. Vol. 2, p. 32.

Mr. Madison stated that this authority in Congress was necessary, and he gave several examples, all of which involved procedural matters. **5 Elliot, pp. 401-402.** See also 2 Elliot, pp. 22-34; 48-49; 325; Vol. 4, p. 104.

Mr. Steele of North Carolina stated the issue very succinctly, viz.:

> "Every man who has a right to vote for a representative to our legislature will ever have a right to vote for a representative to the general government. Does it not expressly provide that the electors in each state shall have the qualifications requisite for the most numerous branch of the State Legislature? Can they, with a most manifest violation of the Constitution, alter the qualifications of the electors? The power over the manner of elections does not include that of saying who shall vote:—the Constitution expressly says that the qualifications which entitle a man to vote for a state Representative. It is, then, clearly and indubitably fixed and determined who shall be the electors; and the power over the manner only enables them to determine how these electors shall elect—whether by ballot, or by vote, or by any other way." **4 Elliot 71.**

In a disputed election case before Congress in 1842, it was declared that the purpose of Art. I, Sec. 4, was to authorize Congress to act in case the States did not. It was pointed out that 7 of the 13 original States protested against this section, and it was finally approved with the understanding that Congress would act only where the States had failed to do so. 1 Bart. El. Cas. 47 (1842).

Similar views were expressed by Hamilton in **The Federalist,** No. 59, where it was said:

"It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed; that it must either have been lodged wholly in the national legislature, or wholly in the State Legislature, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

"Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say, that a neglect or omission of this kind would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk."

From another standpoint, it is clear that Art. I, Sec. 4, does not support the validity of the Act, insofar as it

would illegalize literacy tests. The words: "times, places and manner" appear in that sequence. "Times" and "places" are specific in nature, and precede the more general term "manner".

Consequently, under the rule of interpretation known as *ejusdem generis,* the meaning of "manner" is restricted by "times" and "places." **50 Am. Jur. 244**, Sec. 249. As stated in **Cutler v. Kouns**, 110 U. S. 720, 728, 28 L. Ed. 305 (1884),

> "The rule of interpretation correctly stated is, that where particular words of a statute are followed by general, the general words are restricted in meaning to objects of like kind with those specified."

See also **United States v. Salen**, 235 U. S. 237, 59 L. Ed. 210 (1914), and **Cleveland v. United States**, 329 U. S. 14, 18, 91 L. Ed. 12 (1946).

Since "times" and "places" deal only with the physical or procedural aspects of an election, it is clear that "manner" must likewise be limited, and cannot be held to embrace such substantive matters as the qualifications of electors. To construe it otherwise would not only violate the rule of *ejusdem generis,* but likewise completely nullify so much of Art. I, Sec. 2, and Section 1 of the Seventeenth Amendment, as adopt the qualifications prescribed by state law. Even as to the original Constitution, i. e., Art. I, Sec. 2, all provisions must be construed so as to give effect to each, **50 Am. Jur. 361**, Sec. 358, and to harmonize all parts and avoid inconsistencies. **50 Am. Jur.** 367, Sec. 363. To assert otherwise here would require that we go even further and assume that Section 1 of the Seventeenth Amendment, although a later expression of the people than Art. I, Sec. 4, was nevertheless subordinate to the latter.

The extent of Congressional power is also indicated to some extent by Congressional interpretation thereof as

evidenced by statutes enacted by Congress in the past. Some of these statutes are as follows:

2 USCA 1, as amended—Time for election of Senators, and certification of results.

2 USCA 2 and 2a—Number, apportionment and reapportionment of representatives.

2 USCA 3—Election of Representatives by districts.

2 USCA 4—Representative at Large following increase due to reapportionment.

2 USCA 5—Nomination of Representative at Large.

2 USCA 6—Reduction of representation following census.

2 USCA 7—Time of Election.

2 USCA 8—Vacancies.

2 USCA 9—Voting by written, printed ballot, or voting machine.

2 USCA, Chap. 7—Contest of elections.

2 USCA, Chap. 8—Corrupt Practices Act. See U. S. v. Foote, 42 F. Supp. 717 (D. C. Del. 1942), upholding 2 USCA 250, penalizing expenditures to influence voting, the Court predicating its decision on Art. I, Sec. 4.

See also 18 USCA, Sections 591, et seq., defining penal offenses relative to elections, such as intimidation of voters (Sec. 594), and expenditures to influence voting (Sec. 597).

As pointed out in **Ex Parte Yarbrough**, 110 U. S. 661, 28 L. Ed. 274 (1884), and in **United States v. Classic**, 313 U. S. 299, 85 L. Ed. 1368 (1941), Congress can legislate so as to regulate the conduct of **Federal elections** so as to protect them against fraud, violence and the like, even as against the acts of private individuals, but as stated in the **Yarbrough Case**,

". . . the importance to the General Government of having the actual election, the voting for those mem-

bers, free from force and fraud is not diminished by the circumstance that the qualifications of the voter is determined by the law of the state where he votes" (p. 663).

In the **Classic Case**, in speaking of Congress' authority under Art. I, Sec. 4, it was said:

> "And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states."

At page 317, however, it was clearly stated that this authority was derived from Art. I, Sec. 4, and see page 310, holding that the right to vote for members of Congress is defined in Art. I, Sec. 2, declaring that Representatives are to be chosen by the people, etc., subject to regulations prescribed by Sec. 4.

At page 320, it was said:

> "Not only does Sec. 4 of Art. I authorize Congress to regulate the manner of holding elections, but by Art. I, Sec. 8, clause 18, Congress is given authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution. 'Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to that end which are not prohibited but consistent with the latter and spirit of the Constitution, are constitutional.' "

But in this respect, it is clear that this Court was referring to the process of the election itself, in the sense

that unless Congress could regulate primaries, state law could in effect completely destroy Congress' power under Art. I, Sec. 4, by incorporating primaries into its election machinery to such an extent, as was done there, as to make the primary the real election and the general election only a formality. The Court obviously was not concerned with the substantive qualifications of electors.

In Christensen, "The Constitutionality of National Anti-Poll Tax Bills," 33 Minn. L. R. 217 (1949), the author declares that the states prescribe qualifications subject only to the Fifteenth and Nineteenth Amendments, dealing with race and sex. He discusses the **Classic Case** and concludes that at pages 307, 310, 314, the Court was saying that it is only the right of **qualified** voters (under state law) that is a national right.

Other cases have recognized Congress' power as to federal elections in similar terms. See **Ex Parte Siebold,** 100 U. S. 383, 25 L. Ed. 717 (1880); **U. S. v. Gale,** 109 U. S. 1, 27 L. Ed. 857 (1883); **United States v. Munford,** 16 F. 223 (c. c. Va. 1883); **United States v. Mosley,** 238 U. S. 383, 59 L. Ed. 1355 (1915); **United States v. Belvin,** 46 F. 381 (c. c. Va. 1891); **Larche v. Hannah,** 177 F. Supp. 816 (D. C. La. 1959), reversed, 363 U. S. 420, 4 L. Ed. 2d 1307 (1960); and cf. **Logan v. United States,** 144 U. S. 263, 36 L. Ed. 429 (1892).

On the other hand, federal legislation governing **state elections** is limited by the Fourteenth and Fifteenth Amendments to **discrimination** arising from **state action,** and Congress is powerless to legislate regarding state elections with respect either to private individuals, or interferences not concerned with race. **Lackey v. United States,** 107 F. 114, cert. den. 181 U. S. 621; **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588 (1876); **United States v. Harris,** 106 U. S. 629, 27 L. Ed. 290 (1883); **Baldwin v. Franks,** 120 U. S. 678, 30 L. Ed. 766 (1887); **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876).

Moreover, the mere fact that members of Congress are also voted on in a state election confers no power on Congress to regulate the latter. **Ex Parte Siebold,** supra (100 U. S. at 393); **Ex Parte Perkins,** 29 F. 900 (C. C. Ind. 1887).

It is also interesting to note that in the 1959 Report of the United States Civil Rights Commission, Commissioners Hannah, Hesburgh, and Johnson recommended adoption of a constitutional amendment which would outlaw use of literacy tests. See Report, p. 143; **4 Race Rel. L. R.** 791 (1959). It is significant that even such partisans who obviously favor abolition of literacy tests believe that a constitutional amendment will be required to accomplish it. Commissioners Storey and Carlton, who opposed the proposal, agreed in this respect, for they declared:

> "On principle, proposals for constitutional amendments which would alter long-standing Federal-State relationships, such as the constitutional provision that matters pertaining to the qualifications of electors shall be left to the several States, should not be proposed in the absence of clear proof that no other action will correct an existing evil. No such proof is apparent." **4 Race Rel. L. R.,** p. 793.

Directly in point is the recent decision of the three-judge district court in the District of Columbia, striking down Section 4 (e) of the Voting Rights Act, which purports to invalidate state laws requiring, as a condition of the right to vote, the ability to "read, write, understand, or interpret any matter in the English language." **Morgan v. Katzenbach,** ... F. Supp. ..., 34 L. W. 2265, decided November 15, 1965. In this case, the Court declared:

> "Whenever Congress took steps to prohibit the states from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a con-

stitutional amendment, which later was ratified by the states. So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evident, therefore, that it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment. If Congress had the authority to take such action by legislation, the use of the laborious process of amending the Constitution would have been an exercise in futility or at least unnecessary surplusage."

Referring to this Court's decision in **Carrington v. Rash**, supra, the Court observed that a state may not, in prescribing voter qualifications, establish an unreasonable classification, but then declared:

> "This rule is inapplicable in the instant case because in Lassiter v. Northampton Election Bd., 360 U. S. 45, * * * it was held that a distinction between citizens who can read and write English and those who cannot, is not an unreasonable classification and does not violate the Equal Protection * * * Clause."

(c) The Act Is Not "Appropriate Legislation" to Enforce the Fourteenth and Fifteenth Amendments.

Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment, authorize Congress to enforce those amendments by "appropriate legislation". While the title of the Act here declares that its purpose is "To enforce the Fifteenth Amendment . . .", reference is also made in the body to the Fourteenth Amendment.

Under these amendments, Congress is limited to legislating against State action discriminatory in nature.

Civil Rights Cases, 109 U. S. 3, 13, 27 L. Ed. 835 (1883); **Lackey v. United States,** 107 F. 114 (c. c. Ky. 1901), cert. den. 181 U. S. 621; **United States v. Cruikshank,** 92 U. S. 542, 23 L. Ed. 588, 592 (1876). In this respect it is important to recall that Congress' power under the Fourteenth and Fifteenth Amendments is in a sense more restricted than its power to legislate as to the "manner" of federal elections under Art. I, Sec. 4. Under the latter, if the subject matter is legitimately concerned with the "manner" or conduct of the election process itself, Congress can legislate even as against private individuals, **United States v. Classic,** 313 U. S. 299, 315, 85 L. Ed. 1368 (1941), and such legislation is not limited to proscribing discrimination. **United States v. Munford,** 16 F. 223 (c. c. Va. 1883); **United States v. Foote,** 42 F. Supp. 717 (D. C. Del. 1942). Under the Fourteenth Amendment, however, Congress can legislate only so as to prevent discrimination, and under the Fifteenth Amendment, only as against discrimination based upon race or previous condition of servitude. **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876).

Applying these principles, it necessarily follows that any effort by Congress to outlaw literacy tests can not be predicated upon either of these two amendments. Literacy tests uniformly have been upheld as against claims that they constituted discrimination. **Williams v. Mississippi,** 170 U. S. 213, 42 L. Ed. 1012 (1898). **Trudeau v. Barnes,** 65 F. 2d 563 (C. C. 5th, 1933); **Darby v. Daniel,** 168 F. Supp. 170 (D. C. Miss. 1958); **Williams v. McCulley,** 128 F. Supp. 897 (D. C. La. 1955); **Lassiter v. Northampton County Board of Elections,** 360 U. S. 45, 3 L. Ed. 2d 1072 (1959). These cases are discussed at length in Part (d), infra.

Therefore, since literacy tests do not constitute discrimination, they can not be reached under either the Fourteenth or Fifteenth Amendments.

Moreover, the proposition goes even further here. To uphold the Act in this regard would require a holding that the **general** reference in these two amendments is sufficient authority for Congress to supersede the **specific** language of Art. I, Sec. 2, remitting all questions of qualifications to state law, and that such authority is also paramount to similar, specific language adopted subsequent thereto in the Seventeenth Amendment. In other words, the Government necessarily must contend that despite the rule that the latest expression of the law-making body controls, the plain language of the Seventeenth Amendment can not be given effect because of the enforcement clauses of the earlier Fourteenth and Fifteenth Amendments.

While Congress has a wide choice in selecting means to implement its powers, **United States v. Classic,** 313 U. S. 299, 320, 85 L. Ed. 1368 (1941), the means sought to accomplish even a legitimate end must not be unreasonably broad, and may in no event themselves be violative of the Constitution. **Shelton v. Tucker,** 364 U. S. 479, 5 L. Ed. 2d 231 (1961); **Smith v. California,** 361 U. S. 147, 4 L. Ed. 2d 205 (1959); **Speiser v. Randall,** 357 U. S. 513, 2 L. Ed. 2d 1460 (1958); **Apetheker v. Secretary of State,** 378 U. S. 500, 508, 12 L. Ed. 2d 992 (1964). As an example, in the Shelton case, Arkansas had enacted a law requiring public school teachers to list annually all organizations to which they had belonged or contributed within the preceding five years. In striking down this statute the Court recognized that a state has a legitimate interest in the fitness of its school teachers, and it was further recognized that the associational relationships of the teachers would have some bearing on this question. However, considering the adverse consequences likely to flow from disclosure of membership in certain organizations which the Court considered legitimate, i. e., the N. A. A. C. P., the Court held that the means selected

by Arkansas were too broad to accomplish the legitimate end, which the Court said could be more narrowly achieved. It was said that,

> "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

The less "drastic" alternative to outlawing literacy tests altogether is simply what is now being done, and that is to seek Court relief against discriminatory administration of such tests, as was done in such cases as **United States v. Alabama,** 192 F. Supp. 677 (D. C. Ala. 1961), and **Sellers v. Wilson,** 123 F. Supp. 917 (D. C. Ala. 1954).

Nor is it any answer to say that the proof is difficult in such cases. This argument, if valid, could be used to justify legislation authorizing imprisonment without trial.

The whole problem simply gets back to the proposition that the Constitution adopts the qualifications of electors prescribed by state law. Legislation which would in effect abrogate the Constitution in this respect can hardly be called "appropriate" for any purpose.

The legislative history of the Fifteenth Amendment also supports the view that it was not intended to authorize federal control of literacy and intelligence qualifications of voters.

The provision which later became the Fifteenth Amendment was proposed by the 3rd Session of the Fortieth Congress in 1869, and was declared, in a proclamation of the Secretary of the State, dated March 30, 1870, to have been ratified by the legislatures of 29 of the 37 states. It is interesting to note that during the debates in Congress, a measure was decisively defeated in the House which would have outlawed educational qualifications. See HR

402, 40th Cong., 3rd Sess., by Mr. Boutwell of Massachusetts, rejected by a vote of 45 to 95 (H. J. p. 231; Cong. Globe, pp. 726-728). A similar proposal by Senator Wilson of Massachusetts was defeated in the Senate by a vote of 19 to 24. Subsequently, the Senate accepted a modified version of Mr. Wilson's "educational" Amendment, but it was rejected by the House, 37 to 133, primarily because of the educational feature. Subsequently, conference committees adopted the language which later became the Fifteenth Amendment, and which makes no reference to educational or literacy matters. See Annual Report of the American Historical Association, 1896, House Documents, Vol. 74, No. 2, pp. 233-235 (54th Cong., 2nd Sess.).

Judicial Construction of Section 2 of Fifteenth Amendment.

In **Karem v. United States,** 121 Fed. 250, 258 (C. C. 6th, 1903), it was held:

> "Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color, or condition. The act commonly known as the 'Enforcement Act' (being the act of May 31, 1870; 16 Stat. 140) contained a number of sections which were plainly intended to enforce the provisions of the fifteenth amendment. These sections were the first, third, fourth, and fifth. The first has been carried into the Revised Statutes as section 2004 (U. S. Comp. St. 1901, p. 1272). The Third, having been held unconstitutional, is dropped out. The fourth, in a somewhat changed form, is carried into the Revised Statutes as section 5506, and the fifth section is section 5507 (U. S. Comp. St. 1901, p. 3712) of the Revised Statutes. The third, fourth and fifth sections of that act have been held to have been

> in excess of the jurisdiction of the Congress under the fifteenth amendment, and therefore null and void. The ground upon which this conclusion was reached was that neither section was confined in its operation to discriminations on account of race, color, or previous condition of servitude, and all were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under the article. United States v. Reese, 92 U. S. 214, 23 L. Ed. 563; Lackey v. United States, 46 C. C. A. 189, 107 Fed. 114, 53 L. R. A. 660."

In this case, the Court held that 5508 of the Revised Statutes was not "appropriate legislation" for the enforcement of the Fifteenth Amendment. Section 5508 declared it a crime for any two or more persons to "conspire to injure, oppress, etc., any person in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . .". The Court reasoned that since 5508 was not limited to state action it could not be sustained under the Fifteenth Amendment. In other words, Section 2 of the Fifteenth Amendment is a grant of power no broader than the subject matter dealt with in Section 1, and does not afford any substantive power itself.

In **McKay v. Campbell**, 2 Abb. 120, 16 Fed. Cas. No. 8,839 (D. C. Oregon 1870), it was held:

> "Notwithstanding the (Fifteenth) amendment any state may deny the right of suffrage to citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc. The power of Congress in the premises is limited to the scope and object of the amendment. It can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several

states where they reside, without distinction of race, color, or previous condition of servitude."

In **United States v. Reese,** 92 U. S. 214, 23 L. Ed. 563 (1876), demurrer was interposed to an indictment under the Civil Rights Act of 1870 (16 Stat. 140) against Kentucky election officials for refusing to receive the vote of a Negro. Section 1 of the Act merely declared the right of all persons to vote without regard to their race, and did not itself prescribe any penalty or remedy. Remedy was prescribed by the 3rd and 4th sections of the bill, the former declaring that the offer of a person seeking to vote to perform any prerequisite under state law should be deemed compliance therewith where complete performance was frustrated by an officer or person, who would thereby be subject to stated penalties. Section 4 prescribed punishment for any person who, by force, bribery, threats, etc., prevented or obstructed any citizen from doing any act required to be done to qualify him to vote. The Government relied entirely upon the Fifteenth Amendment to sustain this legislation, and the question, as stated by the Court, was,

> ". . . whether the act now under consideration is appropriate legislation . . ." (23 L. Ed. at p. 564).

Observing that the power of Congress to legislate at all upon the subject of state elections is derived entirely from the Fifteenth Amendment (23 L. Ed. at 565), the Court held that the Act was unconstitutional because it did not purport to be limited to denials based upon race or previous condition of servitude, as was the Fifteenth Amendment from which it was derived. The Court further held that the act was not separable so as to be held applicable only to deprivations based upon race. The Court concluded,

> "We must therefore, decide that Congress has not as yet provided by 'appropriate legislation' for the

offense charged in the indictment'' (23 L. Ed. at p. 366).

Here again, Section 2 is held to be limited by Section 1.

In **United States v. McElveen**, 177 F. Supp. 355, 358 (D. C. La. 1959), Judge Skelly Wright declared:

> ''To be appropriate under the Fifteenth Amendment, legislation must be directed against persons acting under color of law, state or federal, and it must relate to the denial, by such person, of citizens' right to vote because of race. Any congressional action which does not contain these two elements cannot be supported by the Fifteenth Amendment.''

But in the Voting Rights Act, Congress seeks to enact legislation not so limited, by suspending state voter qualifications absent any showing of discrimination.

In **United States v. Miller**, 107 Fed. 913, 914 (D. C. Ind. 1901), in speaking of the second section of the Fifteenth Amendment, it was held:

> ''It is manifest that no power is conferred on Congress by the second section to enact legislation for the regulation and control of elections generally, nor for securing to the citizens of the United States the right to vote at all elections. The right of suffrage is not inherent in citizenship, nor is it a natural and inalienable right, like the right to life, liberty, and the pursuit of happiness. Unless restrained by constitutional limitation, the legislature may lawfully confer the right of suffrage upon such portion of the citizens of the United States as it may deem expedient, and may deny that right to all others. Before the adoption of the fifteenth amendment, it was within the power of the state to exclude citizens of the United States from voting on account of race, age, property, education, or on any other ground however arbitrary or whimsical. The Constitution

of the United States, before the adoption of the fifteenth amendment, in no wise interfered with this absolute power of the state to control the right of suffrage in accordance with its own views of expedience or propriety. It simply secured the right to vote for members of Congress to a definite class of voters of the state, consisting of those who were eligible to vote for members of the most numerous branch of the state legislature. Further than this, no power was given by the Constitution, before the adoption of the fifteenth amendment, to secure the right of suffrage to any one. The fifteenth amendment does not in direct terms confer the right of suffrage upon any one. It secures to the colored man the same right to vote as that possessed by the white man, by prohibiting any discrimination against him on account of race, color, or previous condition of servitude. Subject to that limitation, the states still possess uncontrollable authority to regulate the right of suffrage according to their own views of expediency."

This case held unconstitutional, as exceeding Congress' power under the Fifteenth Amendment, Section 5507 of the Revised Statutes, declaring it a crime to hinder or prevent another from exercising the right of suffrage, on the ground that it was not limited to deprivations based upon race.

Relevance of Adoption of the Seventeenth Amendment.

When the 17th Amendment was adopted, providing for popular election of Senators, language was included which declares:

"The electors in each state shall have the qualifications requisite for electors of the most numerous branch of state legislatures."

This language is identical to Art. I, Sec. 2, Cl. 1, which is the basis for the entire body of federal decisions holding that voter qualifications are vested entirely in the states. Since the Seventeenth Amendment was adopted subsequent to the Fifteenth, it is clear that as to Senators, it supersedes anything to the contrary in the latter, and in any event, it is indicative of the fact that it was never intended or understood that the Fifteenth Amendment had superseded the authority of the states to prescribe voter qualifications beyond the holding in **United States v. Reese**, 92 U. S. 214, 23 L. Ed. 563, 564 (1876), to wit:

> "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude."

Moreover, when the Seventeenth Amendment was under debate before Congress, the House rejected an amendment which would have destroyed the States' powers to prescribe qualifications for electors for Senator and Representative. It was defeated 123 to 189.

Musmamio, **Proposed Amendments to the Constitution**, House Doc. No. 551, 70th Congress, at page 221.

Thus, it is apparent that the Fifteenth Amendment was intended to go no further than to prohibit a denial of the franchise based upon racial grounds.

Moreover, the Act cannot be sustained under the "necessary and proper" clause.

The "necessary and proper" clause, Art. I, Sec. 8, Cl. 18, is not an independent grant of power. It was recently so held by this Court in **Kinsella v. United States ex rel. Singleton**, 361 U. S. 234, 247, 4 L. Ed. 2d 268 (1960).

In this case, the question at issue was whether the dependent wife of a peace-time soldier who accompanied him overseas could be tried by a court-martial under Sec. 2 (11) of the Uniform Code of Military Justice, without regard to Article 3, and Amendments 5 and 6 of the federal constitution. This Court held first, that the Statute could not be upheld under the grant of power contained in Article I, Sec. 8, Cl. 14, "To make rules for the Government and Regulation of the land and naval forces." To the Government's argument that the statute was sustainable under Art. I, Sec. 8, Cl. 18, the "Necessary and Proper" Clause, it was said:

> "If the exercise of the power is valid it is because it is granted in clause 14, not because of the Necessary and Proper Clause. The latter clause is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of Sec. 8 'and all other powers vested by this Constitution . . .'."

(d) **Literacy and Other Like Tests Constitute Legitimate Voter Qualifications and Do Not Violate the Fifteenth Amendment's Ban Upon Racial Discrimination in Voting.**

The earliest case is **Williams v. Mississippi,** 170 U. S. 213, 42 L. Ed. 1012 (1898), where a Negro indicted for murder in Mississippi moved to quash the indictment on the ground that under Mississippi law, qualification to serve on juries was dependent upon qualification as an elector, and as to the latter, Mississippi law imposed a literacy test and other procedures of such nature as to invite discrimination against the Negro race.

The holding of the Court denying this contention is summarized in the syllabus, viz.:

> "The equal protection of the laws is not denied to colored persons by a state Constitution and laws which make no discrimination against the colored race in terms, but which grant a discretion to certain officers, which can be used to the abridgement of the right of colored persons to vote and serve on juries, when it is not shown, that their actual administration is evil, but only that evil is possible under them."

In **Trudeau v. Barnes**, 65 F. 2d 563 (C. C. 5th, 1933), a Negro brought action against a Louisiana registrar to recover damages for refusing to register plaintiff because of his inability to read and interpret a clause of the Constitution, as required by state law.

The Court upheld the law, declaring that it violated neither the Fourteenth nor Fifteenth Amendments, as it lays down but one test, that of intelligence, which is applicable equally to all.

In **Tullier v. Giordano**, 265 F. 2d 1 (C. A. 5th, 1959), also involving the Louisiana literacy test, the Court declared that "the qualification of voters is left to the several states subject to some limitations imposed by the United States Constitution." The Court then enumerated these limitations as being Art. I, Secs. 2 and 4; Art. II, Sec. 1; and the Fourteenth, Fifteenth, Seventeenth, and Nineteenth Amendments. Reviewing the evidence, the Court concluded that while plaintiff was discriminated against in the registration process, it was not on racial grounds, and hence did not fall within federal protection.

The leading case is **Lassiter v. Northampton County Board of Elections**, 360 U. S. 45, 3 L. Ed. 2d 1072 (1959).

This case was an appeal from a three-judge Federal Court, brought by a Negro seeking to have declared

unconstitutional a provision of the North Carolina Constitution imposing a literacy test as a requisite for voting, as being contrary to the 14th, 15th, and 17th Amendments.

At the outset, the Court, in a unanimous opinion by Mr. Justice Douglas, disposed of a question concerning a "grandfather clause" in the same state constitutional provision, not pertinent to the present inquiry.

As to the literacy test, it was said:

> "We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color. The Court in Guinn v. United States, supra (238 U. S. at 366), disposed of the question in a few words, 'No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawfull power vested in it not subject to our supervision, and indeed, its validity is admitted'."
>
> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, Pope v. Williams, 193 U. S. 621, 633, 48 L. Ed. 817, 822, 24 S. Ct. 573; Mason v. Missouri, 179 U. S. 328, 335, 45 L. Ed. 214, 220, 21 S. Ct. 125, absent of course the discrimination which the Constitution condemns. Article I, Sec. 2, of the Constitution in its provision for the election of members of the House of Representatives and the Seventeenth Amendment in its provisions for the election of Senators provide that officials will be chosen 'by the People'. Each provision goes on to state that 'the electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State

Legislature'. So while the right of suffrage is established and guaranteed by the Constitution (Ex parte Yarbrough, 110 U. S. 651, 663-665, 28 L. Ed. 274, 278, 279, 4 S. Ct. 152; Smith v. Allwright, 321 U. S. 649, 661, 662, 88 L. Ed. 987, 995, 996, 64 S. Ct. 757, 151 A. L. R. 1110), it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See United States v. Classic, 313 U. S. 299, 315, 85 L. Ed. 1368, 1377, 61 S. Ct. 1031. While Sec. 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote', the right protected 'refers to the right to vote as established by the laws and constitution of the State'. McPherson v. Blacker, 146 U. S. 1, 39, 36 L. Ed. 869, 878, 13 S. Ct. 3.

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (Davis v. Beason, 133 U. S. 333, 345-347, 33 L. Ed. 637, 641, 642, 10 S. Ct. 299) are obviously examples indicating factors which a State may take into consideration in determining the qualifications of voters. 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 intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might

conclude that only those who are literate should exercise the franchise. Cf. Franklin v. Harper, 205 Ga. 779, 55 S. E. 2d 22, app. dismd. 339 U. S. 946, 94 L. Ed. 1361, 70 S. Ct. 804. 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. Stone v. Smith, 159 Mass. 413, 413, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards'' (360 U. S. at pp. 50-53).

In footnote 7, the Court noted that 19 states now impose some sort of literacy test, including Georgia.

The Court noted, however, that literacy tests may be administered unfairly, or as held in **Davis v. Schnell,** 81 F. Supp. 1093, Aff'd. 336 U. S. 933, they may be void on their face when they confer such broad discretion in their administration as to indicate, in the light of persuasive legislative history, that they were intended and calculated to be an instrument of discrimination.

It was concluded:

''The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language'. That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen. Certainly we can not condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot'' (pp. 53-4).

Further consideration should be given to some of the cases cited by the Court.

The case of **Guinn v. United States**, 238 U. S. 347, 59 L. Ed. 1340 (1915), cited by the Court in the **Lassiter Case**, concerned an indictment under what is now 18 U. S. C. A. 241, against Oklahoma election officials for having refused to permit Negroes to vote. The state law contained a so called "grandfather" clause whereby persons qualified to vote on January, 1866, were automatically qualified to vote, whereas all other persons were required to undergo a literacy test.

The Court concluded that the grandfather clause itself was void as being contrary to the Fifteenth Amendment, in that it set up a discrimination based on race. But it was expressly held that the Fifteenth Amendment's grant of power as to racial discrimination did not destroy the authority of the states over suffrage, viz.:

> "Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the 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 rest would be without support, and both the authority of the nation and the 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 Amendment seeks to regulate its exercise as to the particular subject with which it deals."
>
> * * * * * * *
>
> "Thus the authority over suffrage which the states possess and the limitation which the Amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both" (p. 362).

And again, at page 366:

> "No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and indeed, its validity is admitted."

While the literacy test considered alone was held to be valid, it was stricken down under principles of inseparability because of its being tied to the racial discriminatory features of the grandfather clause.

The case of **Pope v. Williams,** 193 U. S. 621, 48 L. Ed. 817 (1904), also cited by the Court, was an appeal by one Pope from a refusal of state authorities in Maryland to register him as a voter, because of his failure, upon moving to Maryland from elsewhere, to file notice of intention to become a citizen at least one year before applying to register, as required by state law, the latter being attacked as violative of the 14th Amendment.

The Court upheld the requirement, remarking that the right to vote is not conferred by the Constitution, and although the right to vote for a member of Congress comes in part from the Constitution,

> "But the elector must be one entitled to vote under the state statute" (p. 633).

The Court concluded:

> "The right of a state to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution" (pp. 633-4).

The "conditions already stated", referred to above, had reference to discriminations based on race.

The case of **Mason v. Missouri ex rel. McCoffery,** 179 U. S. 328, 45 L. Ed. 214 (1900), also cited, was a mandamus from state Courts by Missouri registration officials, seeking to require the auditor of St. Louis to pay their expense incurred in administering the law. The auditor defended on the ground that the law was violative of equal protection because it set up separate and distinct registration procedures for citizens in St. Louis. In upholding the law, the Court declared:

> "The general right to vote in the state of Missouri is primarily derived from the state (United States v. Reese, 92 U. S. 214, 23 L. Ed. 563), and the elective franchise, if one of the fundamental privileges and immunities of the citizens of St. Louis, as citizens of Missouri and of the United States, is clearly such franchise 'as regulated and established by the laws or Constitution of the state in which it is to be exercised'" (p. 335).

McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869 (1892), involved mandamus by nominees for presidential elector against the Michigan Secretary of State, seeking to have declared unconstitutional a recent Michigan statute governing election of presidential electors. The new statute provided for the election by districts of presidential and vice-presidential electors, and plaintiffs contended that the Constitution required the state to act as a unit, and delegate to subdivisions the right to select electors.

The Court rejected this attack, holding that "the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States", referring to Art. II, Sec. 1, Cl. 2 (p. 35).

No violation of the 14th or 15th Amendments was found, as the right of suffrage was held to be derived from state citizenship (pp. 37-8).

Davis v. Beason, 133 U. S. 333, 33 L. Ed. 637 (1890), upheld an act of the Territory of Idaho denying the franchise to bigamists and polygamists.

The case of **Davis v. Schnell**, 81 F. Supp. 872 (D. C. Ala. 1949), aff'd. 336 U. S. 933, involved the validity of the Boswell Amendment to the Alabama Constitution, which required that an applicant for registration "understand and explain" an article of the federal Constitution.

The Court, observing that this law conferred a virtually unlimited discretion, in that the "explanation" was not even required to be "reasonable", held it unconstitutional in the light of persuasive legislative history indicating that its clear legislative purpose was to serve as a means of discriminating against Negro applicants. The Court referred to a legislative history replete with speeches and statements by the Amendment's sponsors that such was its purpose.

If a literacy test is so arbitrary and without ascertainable standards on its face, the **Schnell** case and the recent decision in **Louisiana v. United States**, 380 U. S. 145, 13 L. Ed. 2d 709 (1965), teach that it will be held unconstitutional, and no new federal legislation is needed. As stated by the Alabama Supreme Court in **In re Opinion of the Justices**, 252 Ala. 351, 40 So. 2d 849, 855 (1949):

> "In order to meet the requirements of the Fifteenth Amendment and the discriminatory provisions of the Fourteenth Amendment, the standard of qualification and accompanying requirements must be of such a character as to furnish a reasonably marked guide for the boards of registrars in a judicial capacity to so act that there will not be in the ordinary course any discrimination in the application of the Fifteenth or Fourteenth Amendments."
>
> (For a table of states, showing the requirements of each with respect to literacy tests and other qualifications to vote, see 3 Race Rel. L. R. 390-1).

(c) **The Presumption of State Discrimination in Voting Prescribed by Section 4 (b) of the Act, Being Arbitrary, and Unreasonable, Does Not Save the Act, and Leaves It Exposed as a Patently Unconstitutional Attempt by Congress to Displace State Qualifications for Voting.**

For present purposes, we of course, concede the constitutional validity of the "freezing" principle developed by the Fifth Circuit Court of Appeals under which a finding of discrimination in voting in a given political subdivision is held to warrant the granting of relief in such a manner as to preclude the imposition of otherwise valid state voter qualifications until such time as the effect of past discrimination can be overcome, or until a general re-registration takes place. See **Louisiana v. United States,** 380 U. S. 145, 13 L. Ed. 2d 709 (1965); **United States v. Ward,** 349 F. 2d 795 (C. A. 5th, 1965); **United States v. Lynd,** 349 F. 2d 785 (C. A. 5th, 1965); **United States v. Ward,** 345 F. 2d 857 (C. A. 5th, 1965); **United States v. Parker,** 236 F. Supp. 511 (D. C. Ala. 1964); **United States v. Mississippi,** 339 F. 2d 279 (C. A. 5th 1964); **United States v. Ramsey,** 331 F. 2d 824 (C. A. 5th, 1964); **United States v. Atkins,** 323 F. 2d 733 (C. A. 5th, 1963); **United States v. Penton,** 212 F. Supp. 193 (D. C. Ala. 1962); **United States v. Duke,** 332 F. 2d 759 (C. A. 5th, 1964).

However, the obvious differences between that rule and the present act should be emphasized: (1) In the "freezing" cases, a "pattern or practice" of discrimination is established by competent evidence in a judicial hearing, whereas here a legislative presumption of a generalized character is sought to be established in lieu of evidence; (2) The freezing principle is involved only as to the particular voting unit found to be guilty of discrimination, whereas here the act falls on the entire state; (3) Under the freezing principle, the federal court-suspension

of voter-qualification laws is automatically ended by a general re-registration of all voters, whereas such is not true here.

Properly construed, Section 4 (b) is in reality a rule of substantive law, rather than a presumption, but it is akin to a presumption in that it is a legislative act which draws one inference from the existence of other stated facts.

As stated in **9 Wigmore on Evidence**, Sec. 2492, 3rd Ed.,

> "In strictness, there cannot be such a thing as a 'conclusive presumption'. Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; **and to provide this is to make a rule of substantive law, and not a rule apportioning** the burden of persuasion as to certain propositions or varying the duty of coming forward with evidence."

The leading case on presumptions is **Bailey v. Alabama,** 219 U. S. 219, 55 L. Ed. 191 (1911), involving review of an Alabama conviction for intentionally defrauding of one's employer. The statute declared it a crime for any one, with intent to defraud, to enter into a written contract for service, secure advances, and then refuse to complete the service. The refusal to render the service, or to refund the money advanced, was declared to be prima facie proof of the intent to defraud.

The Court declared,

> "This Court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evi-

> dence, in the courts of its own government. . . . In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and when the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law . . ." (p. 238).

Moreover, noting that here the state statute dealt with a subject matter proscribed by the 13th Amendment and federal statutes—peonage—it was further said:

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the erection of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution . . ." (p. 239)

and,

> "What the state may not do directly it may not do indirectly" (p. 244).

Applied to the present problem, it can be said that Congress can not supersede the State's power to define qualifications indirectly by framing the law in terms of a presumption.

In a later case, **Manley v. Georgia,** 279 U. S. 1, 7, 73 L. Ed. 575 (1929), a Georgia statute was held violative of due process which created a prima facie presumption of fraud by the directors of a bank upon a showing merely of insolvency of the bank, the Court declaring that "the connection between the fact proved and that

presumed is not sufficient. Reasoning does not lead from one to the other." That same year, another Georgia statute was declared void which raised a presumption of negligence on the part of a railroad merely upon a showing that an accident happened at its crossing, the presumption being characterized as "unreasonable and arbitrary." **Western & A. R. R. v. Henderson**, 279 U. S. 639, 644, 73 L. Ed. 884 (1920).

In another famous case, **Tot v. United States**, 319 U. S. 463, 87 L. Ed. 1519 (1943), a presumption created by Sec. 2 (f) of the Federal Firearms Act was held violative of the Due Process Clause of the Fifth Amendment. This presumption declared that upon a showing of a prisoner's prior conviction of crime and present possession of a firearm, the presumption arises that such firearm was received by him in interstate commerce, and that such receipt occurred subsequent to July 30, 1938, the date of the statute. The Court declared that the validity of a presumption is dependent upon the existence of a rational connection between the fact proved and the fact presumed—not the comparative convenience as between the parties of producing evidence relevant to the issue.

Just recently, in **United States v. Romano**, ... U. S. ..., 34 Law Week 4022 (1965), this Court held unconstitutional 26 U. S. C., Section 560 (b) (1), declaring that presence at an illicit still gives rise to a presumption of guilt of the offense of possession, custody, and control. The Court observed that mere presence at a still had been held sufficient to support a presumption as to the offense of "carrying on", as the latter is so broad that anyone "present" may legitimately be presumed to be engaged in one phase of "carrying on". However, mere presence alone, so the Court found, would not give rise to inference as to the specific aspect of the operation being engaged in by the accused. Therefore, the statute was held void under the "Rational Connection" test.

Also related to the present question is the recent decision in **Speiser v. Randall,** 357 U. S. 513, 2 L. Ed. 2d 1460 (1958). The California Constitution conferred a tax-exemption upon honorably-discharged veterans, but declared that such exemption is not available to anyone advocating violent or forcible overthrow of the government.

Implementing legislation required an annual application containing an oath by the applicant to the effect that he did not believe in such, etc.

Recognizing that the statute imposed an indirect restraint upon free speech, this Court passed over this question and held the statute invalid under due process as improperly placing the burden of proof—that the burden of proving one disqualified for the tax exemption should be on the state.

It is submitted that the presumption here created is patently arbitrary, and does not satisfy the required test of a rational connection between the fact proved and the fact presumed.

This arbitrariness is particularly emphasized as to Georgia. Under Georgia law, the literacy or citizenship test is submitted to the voter at the time he registers, not at the time he votes, Ga. Code Ann., Sections 34-617, 34-618 (Ga. Laws 1964 Ex. Sess., pp. 26, 57-58). For the 1964 election, of the 2,636,000 persons of voting age in Georgia, 1,666,778 were registered or a total of 63.2%. Consequently, Georgia is not brought under Section 4 of the Act by virtue of so much of Section 4 (b) as relates to registration, but comes under said section only by virtue of the number of persons who actually voted in 1964, which was **43.2%.** But the number of people who actually voted has nothing to do with the number of people who registered. In other words, Section 4 operates to set aside a requirement of Georgia law which is germane only at the registration stage, not by virtue of

something which happened then, but by virtue of something that happened later when the election was held. The Georgia literacy and citizenship tests have nothing whatever to do with voting, but only with registration. They could not possibly be used as a device for discrimination in voting, but at most in registration. Georgia meets the requirement of Section 4 as to registration, but not as to the number of people voting. Had only 80% of the Georgia voters registered in 1964 voted in the November General Election that year, Georgia would not have come within the Act at all. Assuming but not conceding that the fact that only 43.2% of registered voters voted in 1964 might be consistent with a finding of discrimination in the voting process itself; it by no means gives rise to any inference as to discrimination in registration, and the inference or "presumption" created by Section 4 operates to dispense with state law requirements at the registration stage, not at the voting stage. Georgia laws are thus sought to be suspended, not because of state action against which alone the Fifteenth Amendment is directed, but by virtue of individual action in the failure of a sufficient percentage of registered voters to vote. There is, therefore, no rational connection with the fact proved to the fact presumed, or to the result which flows therefrom. Moreover, there is no basis whatever for any presumption that the small voter turnout in 1964 was the result of discrimination in voting.

There have been only two cases to arise in Georgia involving claims of discrimination in the electoral process. The first was **Thornton v. Martin**, 1 Race Rel. L. R. 213 (M. D. Ga., 1955), and the second was **United States v. Raines**, 362 U. S. 17, 4 L. Ed. 2d 524 (1960); S. C. 203 F. Supp. 473 (M. D. Ga. 1961). Both of these cases involved alleged discrimination in the registration process. So far as we are advised, there have never been any

claims as to discrimination in Georgia in the actual voting procedure itself.

Secondly, the presumption sought to be established by Section 4 is patently arbitrary in that there is no rational connection between a small voter turnout and registration procedures. The seven states found by the Director of the Census to fall within Section 4 are Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. 30 Federal Register 9897 (1965); 10 Race Rel. L. R. 1397. With respect to illiteracy, the six southern states rank as follows, counting from highest percentage of illiterates down, 25 years and older:

Rank		Percentage
1.	Louisiana	21%
2.	South Carolina	20%
3.	Mississippi	18%
4.	Georgia	17%
5.	Alabama	16%
9.	Virginia	13%

With respect to average per capita income, these same six states rank as follows, beginning with the lowest 1959 per capita income and progressing up:

Rank		Per Capita Income
1.	Mississippi	$ 967.00
3.	South Carolina	1142.00
4.	Alabama	1246.00
10.	Georgia	1359.00
11.	Louisiana	1369.00
15.	Virginia	1598.00

(Source: 1960 Census of Population, per capita and Median Family Income in 1959, for States, Standard Metropolitan Areas, and Counties, PC(SI)-48, at p. 4).

It is more logical to assume that illiteracy and lack of wealth is responsible for a small voter turnout than it is to assume discrimination as the cause, for "discrimination is not to be presumed." **Snowden v. Hughes,** 321 U. S. 1, 88 L. Ed. 497 (1944).

Moreover, Section 4 transcends the separation of powers, for it by its nature necessarily constitutes an attempted adjudication of rights by Congress which only a court in a given case can do based upon evidence.

In **Kilbourn v. Thompson,** 103 U. S. 168, 192, 26 L. Ed. 377 (1881), the House of Representatives had passed a resolution declaring that the United States was a creditor of Jay Cooke & Co., which was in bankruptcy; that certain settlements had been made resulting in losses to the United States; and directing that an investigation be conducted by a Congressional Committee. A subpoena duces tecum was issued to Kilbourn, and upon his refusal to obey, he was taken into custody by officers of the House, who were now sued for damages.

After referring to the separation of powers scheme of the federal government, the Court declared that, looking to the wording of the resolution, the House of Representatives,

> ". . . not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial."

Similarly, Congress in this case has undertaken to weigh and adjudicate a controversy by legislatively declaring that the existence of certain circumstances necessarily gives rise to an inference which by no means logically follows. This is not only beyond Congress' power, but under due process considerations, i. e., the "rational connection" test, it is submitted that a court

could not here legitimately find the fact presumed from the mere facts stated.

The fact that a state has a low percentage of its voting age population registered could very easily result from any number of factors not condemned by the Fifteenth Amendment.

See also **Barenblatt v. United States,** 360 U. S. 109, 3 L. Ed. 2d 1115 (1959).

Congress admittedly could not validly enact a law prescribing qualifications for voters. It obviously can not enlarge its power in this respect by merely declaring that the present legislation is sustainable under the Fifteenth Amendment, nor can the same result be reached by stating an erroneous conclusion that certain facts give rise to an inference of discrimination. If Congress can simply by fiat declare that the abolition of literacy test is necessary to enforce the Fifteenth Amendment, it likewise can declare that freedom of speech must be sacrificed for the same reason.

A law is not void merely because it may be abused or improperly used. Were this so, no law would be valid, for laws necessarily must be administered by human beings, who perforce in some instances may err or act illegally. Where there is discrimination in administration, there are adequate judicial remedies to reach the problem. Also, when a law is so vague on its face as to confer an unbridled discretion peculiarly capable of discrimination, the courts will strike down the law itself on due process and Fifteenth Amendment grounds. **United States v. Louisiana,** supra.

If the provision be considered not as a presumption, but as a classification, the result is the same, for "arbitrary selection . . . cannot be justified by calling it classification", and the classification "must be based upon some real and substantial distinction, bearing a

reasonable and just relation to the things in respect to which such classifications are imposed," **Southern R. Co. v. Greene**, 216 U. S. 400, 417, 54 L. Ed. 536 (1910); **Gulf, Colorado & S. F. Ry. Co. v. Ellis**, 165 U. S. 150, 155, 41 L. Ed. 666 (1897); **Royster Guano Co. v. Virginia**, 253 U. S. 412, 415, 64 L. Ed. 989 (1920), and what the Fourteenth Amendment demands of the states, the Fifth requires of the federal government, for "it would be unthinkable that the same Constitution would impose a lesser duty on the federal government." **Bolling v. Sharpe**, 347 U. S. 497, 500, 98 L. Ed. 884 (1954).

2. **Section 5 of the Act Is Unconstitutional.**

Under Section 5, laws affecting voter qualifications or procedures differently than those existing on November 1, 1964, and which are enacted by states for which a determination has been made under Section 4, can not become effective until adjudged valid in a declaratory judgment suit in the district court in the District of Columbia.

This is the most drastic law ever proposed. It purports to give the federal judiciary a veto power over state legislation, thereby constituting the federal courts in the District a part of the state's law-making power.

> "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states." **United States v. Cruikshank**, 92 U. S. 542, 23 L. Ed. 588 (1876).

Under the Constitution, Article 3, Section 2, it is only the "judicial power" which extends to the states. Section

5 of the Act does not constitute an application of judicial power. In **McChord v. L & N Railroad Co.**, 183 U. S. 483, 496, 46 L. Ed. 289 (1902), it was declared:

> "The Courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance. If by either body, the legislature of the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction" (p. 496).

As stated in **Prentis v. Atlantic Coast Line Co.**, 211 U. S. 210, 228, 53 L. Ed. 150 (1908),

> "Litigation cannot arise until the moment of legislation is past."

To declare that a state statute shall not become effective until approved by a federal court is to make that court exercise something other than judicial powers. This fact is obviously recognized in the Act, for the authority is limited to the district court for the District of Columbia. The federal district courts in the states, being "Constitutional" or "Article 3" courts, can not exercise non-judicial powers, such as rendering advisory opinions. **Muskrat v. United States**, 219 U. S. 346, 55 L. Ed. 246 (1911); **Chicago & Southern Airlines v. Waterman Steamship Corp.**, 333 U. S. 103, 113 (1948); **United Public Workers v. Mitchell**, 330 U. S. 75, 89, 91 L. Ed. 754 (1947). Any attempt to confer "non judicial" jurisdiction on such a court is void. **Glidden Co. v. Zdanok**, 370 U. S. 530, 583, 2 L. Ed. 2d 671 (1962). Legislative powers can not be conferred on such courts. **United Steelworkers v. United States**, 361 U. S. 39, 4 L. Ed. 2d 12 (1959). On the other hand, the courts for the District of

Columbia, although held to be Article 3 courts are also held to have power to,

> ". . . perform any of the local functions elsewhere performed by state courts." **Glidden Co. v. Zdanok**, 370 U. S. 530, 581, 8 L. Ed. 2d 671 (1962); **O'Donoghue v. United States**, 289 U. S. 516, 545, 77 L. Ed. 1356 (1933), and see, **Ex Parte Bakelite Corporation**, 279 U. S. 438, 73 L. Ed. 789 (1929).

However, these "non judicial" powers exercisable by the District of Columbia courts obviously relate to matters arising within the geographical limits of the District. Therefore, insofar as the Article 3 or "judicial power" of the District Courts are concerned, Section 5 is not sustainable for it does not involve a judicial function; insofar as the "nonjudicial powers" of the District of Columbia courts are concerned (derived from Art. I, Sec. 8, Cl. 17, the "seat of government" clause), Section five does not come within the same as the subject matter in no wise involves matters having any situs, connection or nexus with the District. Consequently, there being no delegation of power in the Constitution to support it, Section 5 can not stand.

Moreover, the validity of Section 5, being dependent upon the irrational presumption sought to be raised by Section 4 of the Act (previously discussed, supra), must necessarily fall with the latter.

3. **The Act Constitutes a Bill of Attainder.**

In the Voting Rights Act, Congress undertakes by legislation to adjudge an entire section of the country guilty of crime (18 U. S. C. A. 241, 242) and impose a "penalty" whereby the laws of each such offending state would be suspended. This is done merely by legislative declaration, without the usual safeguards attendant upon a trial proceeding upon evidence and judicial rules of evidence and procedure.

Black's Law Dictionary defines "Bill of Attainder" as follows:

> "A legislative act, directed against a designated person, pronouncing him guilty of an alleged crime (usually treason), without trial or conviction according to the recognized rules of procedure, and passing sentence of death and attainder upon him. "Bills of attainder," as they are technically called, are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a "bill of pains and penalties," but both are included in the prohibition in the Federal constitution. **Story, Const.,** Section 1344; **Cummings v. Missouri,** 4 Wall. 323, 18 L. Ed. 356; **Ex parte Garland,** 4 Wall. 387, 18 L. Ed. 366; . . ."

This Court has been very sensitive to the Constitutional guarantee prohibiting such laws when the rights of Communists are involved. See **Garner v. Board of Public Works,** 341 U. S. 716, 95 L. Ed. 1317 (1951).

And, just recently, in striking down as a bill of attainder, Section 504 of the Landrum-Griffin Labor Act, declaring it a crime for any member of the Communist Party to hold office or employment with a labor union, this Court noted that the prohibition (Art. I, Section 9) was designed as an implementation of the separation of powers scheme, was to be liberally construed, is not limited to statutes designed as punishment, and then concluded:

> "We cannot agree that the fact that Section 504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named

individuals takes it out of the category of bills of attainder."

"We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in **Lovett** that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in **Lovett**; that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals." **United States v. Brown**, ... U. S. ..., 33 Law Week 4603 (1965).

While usually such bills are directed against named individuals, they also can be directed against an entire class. **11 Am. Jur. 1175**, Section 347; **Cummings v. Missouri**, 4 Wall. 277, 18 L. Ed. 356 (1876); **United States v. Lovett**, 328 U. S. 303, 90 L. Ed. 1252 (1946). The Voting Rights Act is such a measure. It is a "wholesale bill of attainder". Rather than relying upon the already well-established powers of the federal courts to strike down discrimination upon proof in court, the Act undertakes to declare that an entire section of the United States is guilty—in part by association.

As stated in **16 Am. Jur. 2d 751**, Section 411:

"In the case of either bills of attainder or bills of pains and penalties, the legislative body, in addition to its judge, pronounces upon the guilt of the accused, without any forms and safeguards of trial, determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise, and fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

This, Congress can not do under the Constitution, Art. I, Sec. 9, Cl. 3.

4. The Act Violates the Equality of States.

The standard or "presumption" by which applicability of the basic sections of the Act are made to depend, being completely arbitrary and lacking in rationality, it is no different than if Congress had singled these states out by name, and declared that their voter qualification laws were thereby suspended.

> "Equality of constitutional right and power is the condition of all the States of the Union, old and new." **Escanaba & L. M. Transp. Co. v. Chicago,** 107 U. S. 678, 689, 27 L. Ed. 442 (1883).

In **Coyle v. Smith,** 221 U. S. 559, 580, 55 L. Ed. 853 (1911), this Court declared:

> "To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

See also, **49 Am. Jur. 229,** Section 9.

5. Section 14 (b) of the Act Is Unconstitutional.

This section provides as follows:

> "(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto."

The right of free access to the courts is one of the privileges and immunities of national citizenship. **Slaughter House Cases,** 16 Wall. 36, 79, 21 L. Ed. 394, 409 (1873); **NAACP v. Patty,** 159 F. Supp. 503 (D. C. Va. 1958), vacated on other grounds, 360 U. S. 167, and cf. **Chambers v. Baltimore R. Co.,** 207 U. S. 142, 52 L. Ed. 143 (1907). The right is so fundamental that it is included in the due process of law. **Ex Parte Hull,** 312 U. S. 546, 549, 85 L. Ed. 1034 (1941); **Hynes v. Dickson,** 232 F. Supp. 796 (D. C. Cal. 1964); **U. S. ex rel. Mayberry v. Prasse,** 225 F. Supp. 752 (D. C. Pa. 1963); **Hatfield v. Bailleaux,** 290 F. 2d 632 (C. A. 9th, 1961), cert. den. 368 U. S. 862.

A citizen complaining of discrimination in voting, or in legislative representation, has the unqualified right to sue in his home state. The Constitution deprivation suffered by one whose vote is diluted by the votes of those unqualified to vote is no less than that of the voter who is discriminated against because of race or residence, for "that right of suffrage can be denied by a debasement of dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise altogether." **Reynolds v. Sims,** 377 U. S. 533, 555, 12 L. Ed. 2d 506 (1964). On the other hand, a citizen of Georgia duly qualified as to literacy, and who complains that his vote is diluted by the votes of those incompetent under state law, must travel to the District of Columbia, with all the additional expense and hardship attendant thereto. This, in all due respect to the holding in **McCahn v. Paris,** 244 F. Supp. 871 (D. C. Va. 1965), is not equal protection of the law.

Moreover, the thrust of the section is even more harsh with respect to a local state official against whom suit is instituted under the act by the Attorney General. The former could not even assert the unconstitutionality of the Act as a defense. An indispensable facet of due process of law is the opportunity to present every avail-

able defense. **George Moore Ice Cream Co. v. Rose,** 289 U. S. 373, 384, 77 L. Ed. 1265 (1933); **Washington ex rel. Oregon R. & Navigation Co. v. Fairchild,** 224 U. S. 510, 56 L. Ed. 863 (1912); **In re Oliver,** 333 U. S. 257, 92 L. Ed. 682 (1948); **16 Am. Jur. 2d 979,** § 574.

Equal protection of the laws is denied where one class of litigants are "saddled" with "onerous" procedural requirements not imposed against others. **Oyama v. California,** 332 U. S. 633, 644, 92 L. Ed. 249 (1948); **Truax v. Corrigan,** 257 U. S. 312, 66 L. Ed. 254 (1921).

With respect to the standing of the state to assert these constitutional issues, the state obviously may assert the interest of its qualified voters, as this also affects the quality of the government which the state itself enjoys, **Georgia v. Pennsylvania Railroad,** 324 U. S. 439, 451, 89 L. Ed. 1051 (1945), and insofar as the rights of state election officials are concerned, it is enough to say that if the NAACP can assert the rights of its members, the State certainly has standing to assert the rights of its election officials, as its "nexus with them is sufficient to permit that it act as their representative before the Court." **NAACP v. Alabama,** 357 U. S. 449, 458, 2 L. Ed. 2d 1488 (1958).

IV.

CONCLUSION.

Congress cannot, in the Voting Rights Act of 1965, transcend the clear language of the Constitution, ignore almost 100 years of settled construction, and sustain the resulting product as "appropriate legislation" under the Fifteenth Amendment simply by declaring it to be so. Were it otherwise, there would be no reason why Congress might also conclude that proper enforcement requires that trial by jury, the privilege against incrimina-

tion, and every other vestige of the Bill of Rights be dispensed with.

As was cogently said by this Court thirty years ago,

> "Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the States so despoiled of their powers —or what may amount to the same thing—so relieved of their responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified." **Carter v. Carter Coal Company**, 298 U. S. 238, 295, 80 L. Ed. 1160 (1936).

The "Voting Rights Act" of 1965 is unconstitutional, and this Court should so declare it.

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