IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1970
**Nos. 43, 44, 46 & 47**
**Original**

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STATE OF OREGON, *Plaintiff,*
—v.—
JOHN N. MITCHELL, *Defendant*

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STATE OF TEXAS, *Plaintiff,*
—v.—
JOHN N. MITCHELL, *Defendant.*

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UNITED STATES, *Plaintiff,*
—v.—
STATE OF ARIZONA, *Defendant.*

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UNITED STATES, *Plaintiff,*
—v.—
STATE OF IDAHO, *Defendant.*

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# BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

## Interest of *Amicus**

The American Civil Liberties Union is a national, non-profit organization whose goal is the preservation and strengthening of personal liberty. Its interest in this litigation is two-fold:

First, the ACLU has long recognized, with the Court, that voting is a right "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). It is thus concerned with judicial consideration of federal legislation which is aimed at the redress of unjust and unconstitutional limitations on the franchise.

Second, the careful delineation of the power of Congress to act in areas which involve constitutionally protected rights of individuals is itself of fundamental importance to the interests of the ACLU.

## Question Presented

Whether Title III of the Voting Rights Act Amendments of 1970, which confers the right to vote upon eighteen year old citizens, is a valid exercise of the power conferred on Congress by Section 5 of the Fourteenth Amendment.

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* Letters of Consent have been obtained from the Solicitor General of the United States and the Attorneys General of Oregon, Arizona and Idaho and filed with the Clerk of the Court.

## Introduction and Summary of Argument

The purpose of this brief is limited. It is addressed only to Title III of the Voting Rights Acts Amendments of 1970—involving extension of the franchise to eighteen year old citizens—although much of what is argued necessarily accrues to the support of Title II as well. Moreover, it is limited to a discussion of the judicial deference which is the due of the congressional judgments which are the constitutional predicate for Title III; it does not include a discussion of the very substantial basis for those judgments. Such discussion is omitted in the belief that the brief of the United States and those of the other *amici* in support of Title III ably adduce the relevant materials.

In arguing for a broad margin of deference to the judgment of Congress here, your *amicus* necessarily draws heavily upon the Court's opinion in *Katzenbach* v. *Morgan*. But special attention is paid to the basis for the *Morgan* decision, which, it is argued, is the special reliance which the Court can and should place on congressional decision-making in the context of issues of federal authority as against the reserved power of the States. In addition, there is discussion of the appropriate limits of the doctrine of the *Morgan* case. It is argued that where congressional decisions are being reviewed on the basis of asserted deprivations of individual liberties secured by the Constitution that *Morgan* is wholly inapplicable. This distinction is offered as the rationale upon which is bottomed the Court's assurance that *Katzenbach* v. *Morgan* will not make possible congressional dilution of Fourteenth Amendment guarantees. Finally, it is argued that Congress' enactment of Title III is an especially appropriate occasion for the application of the principles of *Katzenbach* v. *Morgan*.

## I.

**Congress is well constituted to resolve issues of federal legislative authority, and great deference is and should be paid to its judgment as regards such issues.**

The premise upon which the arguments in this brief are founded was articulated a century and a half ago by Chief Justice John Marshall:

> . . . [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 421 (1819).
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> . . . [W]here the law . . . is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground. *Id.* at 423.

While not consistently followed throughout the years since its announcement,[1] it is a proposition which this Court has fully embraced in the past several decades. It has

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[1] See, e.g., *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936); *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935); *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U.S. 330 (1935).

become the yardstick against which all challenged congressional exercises of power are measured, whether derivative of the interstate commerce clause, *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); *Wickard* v. *Filburn,* 317 U.S. 111 (1942); of §2 of the Eighteenth Amendment, *James Everard's Breweries* v. *Day,* 265 U.S. 545 (1924); of §2 of the Fifteenth Amendment, *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966); of §5 of the Fourteenth Amendment, *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); or of §2 of the Thirteenth Amendment, *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

Chief Justice Marshall's classic formulation has significance on two levels. First, it is a reading of the necessary and proper clause, Article I, §8, cl. 18, which eschews any notion that Congress is confined to doing the minimum necessary to discharge its functions, and extols broad congressional license to undertake anything "plainly adapted" to its legitimate ends. Second, it is an announcement of broad deference to Congress on the question of its authority to act as against the reserved powers of the States. This latter principle has been reexpressed in various ways, but while the verbal formulae have varied,[2] their thrust

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[2] "In enacting this legislation Congress has affirmed its validity. That determination must be given great weight . . ." *James Everard's Breweries* v. *Day, supra,* 265 U.S. at 560.

"[W]here we find that the legislators . . . have a rational basis . . . our investigation is at an end." *Katzenbach* v. *McClung, supra,* 379 U.S. at 303-4.

"It is enough that we be able to perceive a basis upon which Congress might predicate a judgment . . ." *Katzenbach* v. *Morgan, supra,* 384 U.S. at 653, 656.

"Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery." *Jones* v. *Alfred Mayer Co., supra,* 392 U.S. at 440.

has been constant: where Congress has in good faith attempted to exercise its enumerated and incidental powers, great deference is to be paid to its judgment that it is acting within the compass of those powers. Stated differently, a weighty presumption of validity attaches to a congressional enactment as against the charge that it exceeds the bounds of federal authority.

This posture of judicial deference is grounded on the view that Congress itself is best able to strike the balance between the demands of national unity and the claims of reserved state autonomy. Thus, Chief Justice Marshall, at the outset of judicial consideration of congressional power to act under the interstate commerce clause, urged complete reliance on "[t]he wisdom and discretion of Congress, their identity with the people, and influence which their constituents possess at elections." *Gibbons* v. *Ogden*, 9 Wheat. 1, 197 (1824).

Such reliance is well placed, given the great political strength which the states enjoy in the national legislative process. The Senate, of course, constitutes an institutionalized guarantee of state and regional eminence in Congressional deliberations. Moreover, members of the House of Representatives themselves depend for election each term on intra-state constituencies whose political inclinations will amply reflect independent state and local concerns.[3] Professor Wechsler has expressed the consequence of these observations well:

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[3] "A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular states." Madison, *The Federalist*, No. 46 at 294 (Lodge ed. 1888).

[T]he national political process in the United States —and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states. Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states. Nor is this tendency effectively denied by pointing to the size or scope of the existing national establishment. However useful it may be to explore possible contractions in specific areas, such evidence points mainly to the magnitude of unavoidable responsibility under the circumstances of our time.

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[T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.

Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands. Wechsler, *The Political Safeguards of Federalism: the Role of the States in the Composition and Selection of the National Government,* 54 Col. L. Rev. 543, 558-59 (1954) (footnotes omitted).

This is not to suggest that Congressional treatment of issues of national authority is exclusively political in substance. While it is the political framework within which Congress legislates that insures that themes of state prerogative enjoy prominence, Congressional consideration of problems of federalism has been consistently marked by close attention to the constitutional bases for national action. The review of judicial precedent and expert opinion has become a regular feature of Congressional debate where any substantial question of federal authority is raised.[4]

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[4] Debate on each of the recent civil rights enactments has included extensive discussion of their constitutionality:

Civil Rights Act of 1964, Senate Debate, Cong. Rec. Vol. 110: Sens. Holland and Ribicoff, p. 13059; Sen. Ervin, pp. 13074-77; Sen. Clark, pp. 13079-81; Sens. Byrd and Miller, pp. 13153-74; Sen. Byrd, pp. 13190-214; Sen. Russell, p. 13309; Sen. Humphrey, p. 13310; Sen. Robertson, pp. 13334-76; Sen. McClellan, pp. 13378-415; Sen. Ervin, pp. 13473-89; Sen. Russell, p. 13654; Sen. Ervin, pp. 13709-21; Sen. Robertson, pp. 13881-97; Sen. Douglas, pp. 13922-23.

Civil Rights Act of 1964, House Debate, Cong. Rec. Vol. 110: Rep. Madden, pp. 1511-12; Rep. Celler, pp. 1516-19, 1521-28; Rep. Willis, pp. 1531-35; Rep. Lindsay, pp. 1540-42; Rep. Forrester, pp. 1544-45; Rep. MacGregor, p. 1548; Rep. Lindsay, p. 2269; Rep. Rogers, p. 2277; Rep. Johansen, p. 2279; Rep. Long, p. 2293; Rep. Andrews, p. 2724; Rep. Wyman, pp. 2755-57; Rep. Whitener, pp. 2757-58; Rep. Clausen, pp. 2759-60; Rep. Schwengel, pp. 2760-64.

Voting Rights Act of 1965, Senate Debate, Cong. Rec. Vol. 111: Sen. Andrews, p. 8698; Sen. Ervin, pp. 10555-59; Sen. Talmadge, pp. 10571-74, 10725-26; Sen. Tydings, pp. 10727-29; Sen. Ellender, pp. 10741-65; Sen. Javits, pp. 11014-15; Sen. Kennedy, p. 11015.

Voting Rights Act of 1965, House Debate, Cong. Rec. Vol. 111: Rep. Celler, pp. 15637-38, 15644-52; Rep. Smith, p. 15641; Rep. Willis, pp. 15657-59; Rep. McClory, pp. 15661-64; Rep. Cohelan, p. 15665; Rep. Mathews, pp. 16209-11.

Civil Rights Act of 1968, Senate Debate, Cong. Rec. Vol. 114: Sen. Javits, pp. 536-37; Sen. Talmadge, p. 912; Sen. Hollings, p. 1019; Sen. McClellan, pp. 1157-58; Sen. Stennis, pp. 1281-84;

## II.

**Congressional exercises of the authority granted in §5 of the Fourteenth Amendment should enjoy the full measure of judicial deference.**

*Katzenbach* v. *Morgan, supra,* is an unequivocal application of Chief Justice Marshall's formulation of congressional authority to congressional undertakings under §5 of the Fourteenth Amendment. Fully embraced are both the broad power to undertake anything "plainly adopted" to the amendment's ends, and the principle of great deference to judgments of Congress rendered in the course of such undertakings. At issue in *Morgan* was the validity of Section 4(e) of the Voting Rights Act of 1965, which prohibited the application of English literacy tests to persons

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Sen. Long, pp. 1288-89, 1292-93; Sen. Ellender, p. 1383; Sens. Hill and Ervin, pp. 1708-15; Sen. Sparkman, pp. 1800-02; Sen. Talmadge, pp. 1795-97; Sens. Fong, Ervin and Ellender, pp. 1990-96; Sen. Kennedy, pp. 2084-85; Sens. Ervin and Holland, p. 2095; Sen. Kennedy, pp. 2268-69.

Civil Rights Act of 1968, House Debate, Cong. Rec. Vol. 113: Rep. McClory, p. 22673; Rep. Hungate, p. 22673; Rep. Whitener, p. 22683; Rep. O'Neal, p. 22690; Rep. Celler, p. 22757; Rep. Waggoner, p. 22763; Sen. Esch, pp. 22772-73; Sen. Buchanan, p. 22775.

Debate on the Voting Rights Act Amendments of 1970 was dominated by constitutional discussion of the provisions' constitutionality. See, e.g.:

Con. Rec. Vol. 116 (daily ed., June 17, 1970): Sen. Sparkman, p. 3475; Sen. Magnuson, p. 3476; Sen. Talmadge, p. 3477; Sen. Ervin, pp. 3477-78; Sen. Kennedy, pp. 3478-79; Sen. Kennedy, pp. 3480-90; Sen. Randolph, pp. 3491-92; Sen. Goldwater, p. 3492; Rep. Ottinger, p. 5656; Rep. Matsunaga, pp. 5639-40; Rep. Celler, p. 5642; Rep. McCulloch, p. 5643; Rep. Anderson, p. 5644; Rep. Albert, pp. 5645-46; Rep. Arends, p. 5647; Rep. Poff, p. 5647; Rep. McGregor, pp. 5647-53; Rep. McCloskey, p. 5654; Rep. Bennett, p. 5654; Rep. Fountain, pp. 5654-55.

educated in Puerto Rico. In sustaining the enactment as an exercise of §5 authority, the Court considered two alternative bases upon which Congress could have validly relied. First, Congress might have concluded that 4(e) would confer "enhanced political power" which would be "helpful in gaining non-discriminatory treatment in public services for the entire Puerto Rican community", and thereby enable "the Puerto Rican minority . . . to obtain 'perfect equality of civil rights and the equal protection of the laws.'" 384 U.S. at 652-53.

Second, Congress might have concluded that, as applied to educated Puerto Ricans, the English literacy requirement was itself an "invidious discrimination." 384 U.S. at 653-56.

As to either basis for congressional action, the Court in *Katzenbach* v. *Morgan* declined to review the legislative judgment. As to both, the Court held that it was for Congress to weigh the conflicting considerations, and as to both, Congress' judgment would prevail so long as the Court "could perceive a basis" for that judgment. 384 U.S. at 653, 655-56.

*Katzenbach* v. *Morgan* was not a novel pronouncement; its essence was anticipated in one of the first exegeses of the Fourteenth Amendment, rendered some eleven years after that Amendment's ratification:

> It is the power of Congress which has been enlarged [by §5]. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the Amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have

> in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power. *Ex parte Virginia,* 100 U.S. 339, 345-346 (1880).

More contemporaneously, opinions by Justices of the Court had indicated adoption of an expansive view of §5 authority. In *United States* v. *Guest,* 383 U.S. 745 (1966), Mr. Justice Brennan, joined by Chief Justice Warren and Mr. Justice Douglas, observed:

> Viewed in its proper perspective, §5 appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. No one would deny that Congress could enact legislation directing state officials to provide Negroes with equal access to state schools, parks and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities. And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided

purpose. 383 U.S. at 784 (concurring and dissenting opinion) (footnotes omitted).

Mr. Justice Black, while dissenting from the judicial conclusion that Virginia's poll tax was violative of the equal protection clause, nevertheless declared that he had "no doubt at all that Congress has the power under §5 to pass legislation to abolish the poll tax if it believes that the poll tax is being used as a device to deny voters equal protection of the laws." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 678 (1966) (dissenting opinion); see also *South Carolina* v. *Katzenbach,* 383 U.S. 301, 355 (1966) (concurring and dissenting opinion of Mr. Justice Black); *Bell* v. *Maryland,* 378 U.S. 226, 326 n. 11 and text (1964) (dissenting opinion of Mr. Justice Black, with whom Mr. Justice Harlan and Mr. Justice White joined).

And, in upholding the Voting Rights Act of 1965, the Court interpreted §2 of the Fifteenth Amendment in a fashion which closely anticipated its opinion in *Katzenbach* v. *Morgan*:

> "The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. *Cf.* our rulings last Term, sustaining Title II of the Civil Rights Act of 1964, in *Heart of Atlanta Motel* v. *United States,* 379 US 241, 258-259, 261-262, 13 L ed 2d 258, 269, 270, 271, 85 S Ct 348; and *Katzen-*

*bach* v. *McClung,* 379 US 294, 303-304, 13 L ed 2d 290, 297, 298, 85 S Ct 377." *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 324.

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"We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under §2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, 'This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' *Gibbons* v. *Ogden,* 9 Wheat. 1, 196, 6 L ed 23, 70." *Id.* at 327.

The rationale of *Katzenbach* v. *Morgan* does raise a question, however, which is at the heart of the reluctance on the part of some[5] to embrace it: does the ambit of discretion enjoyed by Congress under the perceivable basis test extend to congressional enactments which fix a less rigorous standard of Fourteenth Amendment guarantees than would otherwise have been adopted by the Court? The Court answered with a simple no: "Congress' power under §5 is limited to adopting measures to enforce the

[5] See, e.g., *Katzenbach* v. *Morgan, supra,* 384 U.S. at 668 (dissenting opinion of Mr. Justice Harlan); Letter of Professor Gerald Gunther, 116 Cong. Rec. 5649 (daily ed., June 17, 1970); and Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 Supreme Court Review 81.

guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees." 384 U.S. at 651, n. 10.

Behind this response is the distinction between challenges to congressional enactments based on the legislative domain reserved to the State, and challenges based on the domain of personal liberties reserved to each individual. The basis for the great deference afforded Congress' judgment as to its power as against the States, it has been argued here, is that it is a body well equipped to resclve issues of federalism. While congressional actions under §5 necessarily include judgments as to the content of §1 of the amendment, they are broadly deferred to only insofar as such judgments form the basis for a finding that Congress had authority to act. Legislation which "diluted" Fourteenth Amendment guarantees would be subject to challenge on grounds not only that it exceeded federal power but that it constituted a deprivation of individual liberties secured by the Constitution, and as regards the latter, a substantially less full measure of deference would be Congress' due.

This would be particularly true where the congressional enactment was the sort of legislative act which has come to be constitutionally disfavored,[6] as, for example, if it clogged the channels of political discussion by limiting speech and association,[7] or injured a politically impotent

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[6] See generally, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938); and notes 7-9, *infra*, and accompanying text.

[7] See, e.g., *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 603-4 (1967).

minority,[8] or inhibited participation in the process of election.[9] In such an instance, the deference exposed in *Katzenbach* v. *Morgan* would be singularly inappropriate; reliance on congressional judgment would and should be at its nadir.

Thus, there is nothing at all inconsistent with the pronouncement of this Court in *Katzenbach* v. *Morgan,* vesting great discretion in Congress, and its decision the following Term which struck down as unconstitutionally broad §5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. §784(a)(1)(d), *United States* v. *Robel,* 389 U.S. 258 (1967). See also, e.g., *Leary* v. *United States,* 395 U.S. 6 (1969); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Schneider* v. *Rusk,* 377 U.S. 163 (1964); *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1962); and *Reid* v. *Covert,* 354 U.S. 1 (1957).

And thus, if Congress were to authorize racially segregated schools, and proffer §5 of the Fourteenth Amendment as the basis for its authority, the appropriate judicial response to such an enactment would be two-fold. On the issue of federal authority, great deference would be paid to the legislature. On the issue of whether Negro students were being deprived of equal protection of the law by the enactment, no such deference would prevail, and the weighty presumption against racial discrimination

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[8] See, e.g., *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 807 (1969); *Harper* v. *Virginia Board of Elections, supra,* 383 U.S. at 668.

[9] See discussion at citation of voting rights cases at pp. 18-19, *infra.*

would apply, making the invalidation of the legislation inevitable.[10]

This distinction—between federal authority and individual liberties—was recognized by Chief Justice Marshall when he espoused the principle of generous congressional authority which has come to prevail:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution,* are constitutional." *M'Culloch* v. *Maryland,* 4 Wheat. 316, 421 (1819) (emphasis added).

See also, *United States* v. *Robel, supra,* 389 U.S. at 263, n. 20. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 656-58.

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[10] Or, to leave the realm of the hypothetical, consider Title II of the 1968 Omnibus Safe Streets and Crime Control Act, 18 U.S.C. §3501. To the extent that the provisions in that title are in conflict with the standards of due process in the confessions area set out in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), the Court should not grant Congress the broad deference exhibited in the *Morgan* case. On the contrary, the critical nature of personal rights involved should lead the Court to a close consideration of Congress' substitution for the standards in *Miranda.*

## III.

**Congress' enactment of Title III the Voting Rights Act Amendments of 1970 is an especially compelling occasion for the application of the principles announced in *Katzenbach* v. *Morgan*.**

What has been said so far applies generally to §5 exercises of congressional power. It remains to be observed that congressional extension of the franchise to 18 year old citizens is an especially appropriate instance for affording Congress the full margin of deference connoted by the perceivable basis standard. This is so for two reasons.

First, precisely because the question of the 18-year-old vote would be a difficult one for the Court acting alone, it is an especially appropriate one for deference to the judgment of Congress. Congress had, and the Court would have, a persuasive basis for concluding that limiting the franchise to those who were 21 years of age and older unconstitutionally discriminates against younger persons who are well qualified to vote and already bear the burdens of mature citizenship. But a Court which undertook to evaluate the equal protection claim of such young citizens without legislative assistance would be faced with a difficult problem in "line-drawing." Accepting the premise that twenty-one is constitutionally too high a limit, the exact point at which an age limit satisfies the Fourteenth Amendment is the sort of judgment that Courts are poorly equipped to make. Although there are sound reasons for drawing the line at eighteen, that sort of line is far more comfortably drawn by Congress than the Court. While many constitutional interests are well served by principled standards which extend to the full range of applicable

cases, many problems of constitutional dimension necessarily entail essentially *ad hoc* resolutions of competing interests which are insusceptible of principled analysis.[11] Making such determinations is the *forté* of a legislative body. When Congress acts in furtherance of constitutional mandates in areas such as these, its participation should be especially welcome, and its judgment particularly esteemed.

Second, just distribution of the franchise has been recognized to be of paramount importance within our scheme of constitutional government:

> [S]tatutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermine the legitimacy of representative government. *Kramer* v. *Union Free School District,* 395 U.S. 621, 626 (1969).

See also, e.g., *Evans* v. *Cornman,* —— U.S. ——, 26 L. Ed.2d 370 (1970); *City of Phoenix* v. *Kolodziejski,* —— U.S. ——, 26 L. Ed.2d 523 (1970); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966). Where a constitutional right of such fundamental importance is involved, the judiciary should be unusually receptive to participation by Congress in the process of rectifying constitutionally infirm inequalities. A finding by Congress that broadening the franchise will further the mandate of the equal protection clause should not lightly be overturned.

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[11] See *Burt, supra* note 5, at 112.

Recognition of the constitutional importance of the franchise has led the Court to displace the traditional "reasonable basis" standard of equal protection[12] in the voting rights area. In its stead, the Court has posited the requirement of a "compelling state interest" to justify state imposed restrictions on the franchise. *Kramer* v. *Union Free School District, supra,* 395 U.S. at 627; *Cipriano* v. *City of Houma, supra,* 395 U.S. at 704; *Evans* v. *Cornman, supra,* 26 L. Ed.2d at 374 ("overriding interests"); *City of Phoenix* v. *Kolodziejski, supra,* 26 L. Ed.2d at 528 ("overriding interest"). The same constitutional objective which has generated so stringent a test of judicial review—namely, securing the broadest distribution of the franchise which is compatible with sound government—should lead the Court to give very great weight to congressional determinations which expand the franchise on constitutional grounds. Only a firm judicial conclusion that Congress' judgment is entirely unsupportable should move this Court to find that Congress acted without its §5 authority.

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[12] See *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 661 (1911).

## CONCLUSION

Recent years have witnessed a dramatic expansion of the effective content of the equal protection clause of the Fourteenth Amendment. Once considered "the last resort of constitutional arguments," *Buck* v. *Bell,* 274 U.S. 200, 208 (1927), it has come to be the basic tool upon which the judiciary has relied in framing a series of crucial constitutional norms of social and political equality. *Katzenbach* v. *Morgan* constituted a decisive recognition of, and provision for, legislative participation in the process of exploring the parameters of the equal protection clause in an egalitarian era.

Title III of the Voting Rights Act Amendments of 1970 is a manifestation of Congress' acceptance of its responsibilities under §5 of the Amendment. It represents the carefully considered, soundly supported judgment of that body. That judgment should enjoy the fullest measure of deference by the Court.

Respectfully submitted,

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