IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 43 Original

STATE OF OREGON, *Plaintiff,*

—vs.—

JOHN N. MITCHELL, Attorney General of the United States, *Defendant.*

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE, AMICUS CURIAE

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INTEREST OF THE AMICUS

The Democratic National Committee ("DNC") is an agency of the National Democratic Party, established at each national convention, which has the obligation and authority to promote the principles and programs of the Democratic Party. As the representative of one of the two major political parties, the DNC is vitally interested in the preservation and strengthening of the nation's political processes. An informed, educated electorate composed of all those who are subject to the obligations of citizenship is essential to the proper functioning of our democratic form of government. The DNC believes that extension of the franchise to those citizens over 18 years of age and not yet 21 will infuse new vitality into the political life of the country, will help cure the pervasive sense of alienation and powerlessness affecting the nation's youth and will end a long-standing discrimination between citizens.

STATUTE INVOLVED

Title III of the Voting Rights Act Amendments of 1970, Public Law 91-285, provides in part as follows:

DECLARATION AND FINDINGS

Sec. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

PROHIBITION

Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

STATEMENT OF THE CASE

Expansion of the franchise is not new to American political life. This country has from its inception repudiated religious and property tests. The Fifteenth Amendment struck down racial limitations, and the Seventeenth required direct election of Senators. The Nineteenth Amendment enfranchised women, and the Twenty-third Amendment gave the vote in presidential elections to residents of the District of Columbia. The Twenty-fourth Amendment, together with this Court's decision in *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966), ended state poll taxes. This course of action has "translated into reality the democratic ideals of the Declaration of Independence," [1] and with each expansion of the franchise "new vitality has been infused into the lifestream of the Nation, and America has emerged the richer." [2] Title III of the Voting Rights Act Amendments, which prohibits the denial of the right to vote on account of age if the person in question is 18 or older, is but the latest step in this progression. The effect of the statute will be to increase by nearly 10 million people those who may exercise the franchise in 48 states and the District of Columbia, an increase of 8%.[3]

Congress did not act precipitously. In fact, the matter was considered as early as 1942 in the form of a proposed

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[1] Congressman Albert, 116 CONG. REC. 5645 (daily ed. June 17, 1970). Unless otherwise indicated, all Congressional Record citations will be to the daily edition.

[2] Message of President Lyndon B. Johnson to the Congress of the United States on lowering the Voting Age, 1968 CQ Almanac 87-A.

[3] See 116 CONG. REC. 3488. Georgia and Kentucky already allow 18-year-olds to vote. Alaska and Hawaii have set the voting age at 19 and 20, respectively.

constitutional amendment sponsored by Senator Vandenberg.[4] Thus, Congress was able to draw upon the wisdom it had gained over many years, and much of its experience is spread over the pages of the Congressional Record and the Senate Hearings.[5]

Moreover, Congress did not merely conclude that, all factors considered, 18 was preferable to 21 as a minimum voting age. Instead, Congress concluded, as the legislative findings indicate, that the denial of the vote to those over 18 on account of age bears no reasonable relationship to any compelling state interest and therefore constitutes a denial of due process and equal protection of the laws. The question of the constitutionality of proceeding by statute was extensively debated and the guidance of leading authorities on the Constitution was obtained. *See, e.g.,* 116 CONG. REC. 3502-03; 3511-15 (March 11, 1970). After much deliberation, Congress came to the conclusion that the denial of the franchise to those over 18 and not yet 21 was an invidious discrimination at least equal in scope and effect to that dealt with by statute in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966).

The constitutionality of Title III was sustained in a recent decision of a unanimous three-judge District Court, *Christopher* v. *Mitchell,* Civ. No. 1862-70 (D.D.C. Oct. 2, 1970). That court considered and rejected claims identical to those presented to this Court.

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[4] See Message of President Lyndon B. Johnson, *supra,* note 2.

[5] This record includes extensive floor debate, the Senate Hearings on the Voting Rights Amendments, and hearings before Senator Bayh's subcommittee on Constitutional Amendments, which "provided the basic record on which the Senate" acted. 116 CONG. REC. 3715 (March 13, 1970) (Senator Mansfield).

ARGUMENT

I. Legislative History.

The legislative history has been exhaustively discussed in other briefs before the Court, and it will not be repeated here. The DNC would, however, call the Court's attention to the most important factors influencing the Congress.

A. *Improved Education and the Influence of the Mass Media Make Young People Better Informed on Public Issues Than Earlier Generations*

One theme reoccurring throughout the debate is the fact that the current generation is far better educated than any prior generation. Seventy-eight percent of those in the 18-20 age group are high school graduates and forty-six percent are already enrolled in college. 116 CONG. REC. 3584 (March 12, 1970) (Senator Mondale). Those in the 18-20 age group have a higher average grade level attained than the country at large.[6]

A second theme found in the Congressional debate is the fact that radio and television bring news of public events to all our citizens with an impact and immediacy impossible only twenty years ago. Thus, citizens 18-20, like all other citizens, are far better informed of public issues than their counterparts of the recent past. *See, e.g.,* 116 CONG. REC. 3516 (March 11, 1970) (Senator Ellender).

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[6] Those 18 to 19 have an average grade level attainment of 12.2 years. Those 20-21 have an average attainment of 12.7. Those 21 and over have an attainment of 12.2, while those 25 and over have an average attainment of only 12.1. The older voters of the country have a much lower average attainment. Those 55 to 64 have an average attainment of 10.5, while those 65-74 have only 8.8 years. *Educational Attainment,* Bureau of the Census, Series p-20 No. 194 (March 1969).

B. *Youth Has Proven Its Competence in Dealing With Political Issues*

Congress found that in the four states which allow voting prior to 21, the experience is uniformly good. *See, e.g.,* 116 CONG. REC. 5668 (June 17, 1970) (Representative Burlison); 116 CONG. REC. 3514 (March 11, 1970) (Senator Cooper). Many members of Congress who have had personal experience in dealing with disenfranchised young people expressed their admiration for the maturity and judgment they have shown. *See, e.g.,* 116 CONG. REC. 3584 (March 12, 1970) (Senator Hatfield). The experience of Congressmen in this regard is especially noteworthy because the House vote took place shortly after the influx of students to Washington to confer with their Congressmen about the Cambodian incursion. *See, e.g.,* 116 CONG. REC. 5656-57 (June 17, 1970) (Representative Podell).

C. *No Compelling State Interest Is Served by the 21-Year Age Limit*

Congress realized that the 21-year-old age requirement for voting was an archaic tradition, rather than a conscious decision based on a well-thought-out state policy. Indeed, it was suggested that the age of 21 was originally set as the mark of manhood because at that age a man was strong enough to wear armor. *See, e.g.,* 116 CONG. REC. 5640 (June 17, 1970) (Representative Matsunaga). Whatever the original validity of 21 as a benchmark, Dr. Margaret Mead's testimony before Senator Bayh's subcommittee indicated that within the last 100 years, "the age of maturing young people has lessened by three years." 116 CONG. REC. 3510 (March 11, 1970) (Senator Bayh). Thus, from a scientific point of view, the Congress was justified in advancing the age of voting to 18.

Moreover, Congress found that young people were educated in the rights of citizenship and were interested in voting at 18. The denial of the vote at that point contributed to the unfortunate high rate of voter apathy in this country. See 116 CONG. REC. 3584 (March 12, 1970) (Senator Mondale). Further, Congress was aware that other countries, including Great Britain, have lowered the voting age to 18 in recent years. 116 CONG. REC. 3519 (March 11, 1970).

D. *The Major Obligations of Citizenship Are Imposed at 18*

The earlier maturation testified to by Dr. Mead has been recognized by society in many areas, especially those involving the more burdensome obligations of citizenship. Young men are eligible for the draft at 18. Indeed, almost half of those Americans who have given their lives in Vietnam have been in the 18-20 age group. 116 CONG. REC. 3499 (March 11, 1970) (Senator Cook). In all states except California, young people are subject to adult criminal sanctions at the age of 18. 116 CONG. REC. 3518 (March 11, 1970) (Senator Randolph). Young people who are members of the work force are subject to taxation. According to Department of Labor statistics, over 66% of the men and nearly 50% of the women aged 18 and 19 were in the labor force as of May, 1970. *Employment and Earnings,* Vol. 16, No. 12, table A-3 (1970). A large portion of these people were already married and raising families. 116 CONG. REC. 3492 (March 11, 1970) (Senator Goldwater).

E. *Denial of the Vote to 18-Year-Olds Constitutes Discrimination and Results in the Alienation of Our Youth*

Despite their demonstrated maturity, these young people have not been given the most fundamental right in our political system, the right to vote. Congress was mindful that these people were being taxed without having a voice in the way the money should be spent—an evil which was largely responsible for the American Revolution (*See* 116 CONG. REC. 5673)—and were called upon to give their lives in support of a policy which they had no opportunity to influence. Congress perceived that the result of imposing the obligations of citizenship upon young people without giving them a voice in government has been to increase dangerously their sense of alienation, frustration, powerlessness, and cynical distrust of the established political system.

The extension of the franchise to these young people was viewed by the Congress as a significant step in restoring their faith in the system, curtailing the tendency to resort to violence, and helping to bring about a reconciliation of generations. Thus, Prof. Paul Freund observed, 116 CONG. REC. 3481:

> Not only the younger generation, but all of us, will be the better if the vote is conferred below the age of twenty-one; we need to channel the idealism, honesty, and openhearted sympathies of these young men and women, and their informed judgments, into responsible political influences.

Indeed, at least one Congressman viewed the question of alienation as a matter going to the very survival of the country. *See* 116 CONG. REC. 5665 (June 17, 1970) (Representative Preyer).

The themes discussed above were aptly summarized in the remarks of Representative Tunney:

> In my opinion, we in the Congress can take no more effective step toward bringing the disenchanted and disenfranchised younger members of our country within the system than by allowing them the opportunity to vote. I feel strongly that if at 18 we can ask youths to die in a war that is not of their making; if we can demand that they pay taxes to support policies in which they have played no role; if society treats them as adults when they commit a crime; if they can marry; if they can assume all the fiscal responsibilities of an adult, all of the assets and liabilities, then they certainly ought to be allowed the right to vote. 116 CONG. REC. 5667 (June 17, 1970).

In light of these facts, Congress concluded that the states have no compelling interests to be served in setting the voting age at 21. While discrimination between those over and under 21 was found arbitrary, Congress saw logic in a discrimination between those over and under 18. The point is made by Senator Randolph, 116 CONG. REC. 3519 (March 11, 1970):

> Eighteen is the logical voting age in America. It signals the end and the beginning of many tasks. Foremost is the completion of the formal education process.

The end of high school is indeed an end and a beginning. It signals the end of dependence on the family and the beginning of independence through a full-time job, perhaps a family of one's own, and higher education, often at some distance from home.

II. State Limitations on the Franchise Are Limited by the Fourteenth Amendment Guarantee of Due Process and Equal Protection of the Laws.

This Court, in *Wesberry* v. *Sanders,* 376 U.S. 1, 17 (1964), stated:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.

The vote is one of our most fundamental rights because it is the "preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886). Limitations upon it must therefore be "carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U.S. 533, 562 (1964). Indeed, when a state statute limiting the franchise is challenged, no presumption of constitutionality is afforded it. The usual presumption is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as a basis for presuming constitutionality." *Kramer* v. *Union Free School District,* 395 U.S. 621, 628 (1969).

III. Title III Is Appropriate Legislation Under Section 5 of the Fourteenth Amendment.

Given the standard of review discussed above, there is serious question whether the requirement that a citizen be 21 before he may vote is sufficiently rational under today's conditions to withstand challenge under the Fourteenth Amendment. That question, however, need not be faced because Congress has spoken on the issue, acting under § 5

of the Fourteenth Amendment. As this Court stated in *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 (1966):

> Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

In *Katzenbach* v. *Morgan,* this Court dealt with § 4(e) of the Voting Rights Act of 1965. That Section provided, in substance, that Puerto Ricans residing in New York who had attained a sixth-grade education in Puerto Rican schools where the classroom language was Spanish could not be denied the right to vote in New York solely because they lacked literacy in English. In an opinion by Mr. Justice Brennan, this Court sustained the statute on grounds which confirm a broad congressional power to legislate against the evils at which the Fourteenth Amendment was aimed.

The Court began by specifically rejecting the argument that Congress may not legislate under § 5 of the Fourteenth Amendment unless the state statute which is thereby abrogated is in itself a violation of the Fourteenth Amendment. The Court stated:

> A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing

> the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. 384 U.S. at 648-49.

The Court concluded that § 4(e) could be upheld on either of two alternative theories. First, the Court held that § 4(e) might be regarded as appropriate legislation "to secure for the Puerto Rican community residing in New York non-discriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement." 384 U.S. at 652.

Secondly, the Court was willing to sustain the statute as a congressional determination that a statute discriminating between those literate in English and those literate in Spanish was, under the circumstances, an invidious discrimination violative of the Fourteenth Amendment's guarantee of equal protection of the laws. The Court stated that because Congress "brought a specially-informed legislative competence" to this subject, "it is enough that we perceive a basis upon which Congress might predicate a judgment" to hold the statute constitutional.

The applicability of the *Morgan* decision to the case now before the Court is obvious. Several points, however, should be stressed.

First, *Morgan* involved the rights of the states to set voter qualifications in the same way as this case. The two cases cannot be distinguished in this regard. Secondly, the legislative findings upon which the *Morgan* decision rested were far less compelling than the legislative record in this case. Third, there can be no doubt that the members of Congress were aware of the necessity of finding an invidious discrimination between 18-20 year olds and other voters, as

opposed to a mere preference for the lower age. Congress acting with reason and due consideration made the finding of discrimination.

A. *The Legislation Is Appropriate to Secure the Rights of the 18-20 Class to Equal Treatment*

As noted above the majority in *Morgan* found the statute sustainable because it might be viewed as necessary to secure the rights of the Puerto Rican community in New York to equal treatment in terms of municipal services. The denial of equal access to municipal services would clearly be a violation of the Fourteenth Amendment, and it was within Congress' power to provide additional voting power as a remedy. This portion of the opinion does no more than follow the rationale of *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), that Congress may take remedial or prophylactic action to prevent violation of Fourteenth Amendment rights. As such, it is not a departure from established principles. *See,* Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 SUPREME COURT REVIEW, 81, 101-03; *Christopher* v. *Mitchell,* Civ. No. 1862-70 (D.D.C. Oct. 2, 1970) slip opinion at 19.

Title III of the Voting Rights Act Amendments may be sustained on this ground. Congress was surely aware that "enhanced political power will be helpful in gaining nondiscriminatory treatment" (384 U.S. at 652) for the young people of America in those areas where legislative programs are of particular interest to them: the draft, foreign policy (especially as it regards the use of military personnel), education, manpower programs and taxation. *See,* 116 CONG. REC. 3486 (March 11, 1970) (Senator Kennedy). Indeed, the statute itself refers to the special burden imposed on 18-20 year olds in the area of national defense.

In *Morgan,* there was no legislative material upon which findings of actual discriminatory treatment in municipal services could be rested. The majority appeared willing to assume those facts necessary to sustain the statute, while the dissent would not. In this case, however, the legislative record contains facts showing an inordinate burden being placed upon people in the 18-20 age group to serve in the military, and an even greater disparity in the burden of casualties. Over 950,000 of the 3.5 million men in our Armed Forces are under 21. And of the 40,028 men killed in Vietnam as of December, 1969, an astounding 19,202 were too young to vote. 116 CONG. REC. 3499 (March 11, 1970).

B. *The Legislation Is Appropriate to Deal With the Sense of Alienation Found in Today's Youth*

A denial of the right to vote has effects which go far beyond the direct result of lessened political influence. The very fact that a person or class believes itself unfairly deprived of access to the political process may well cause deepseated feelings of alienation and powerlessness. The group may reject the legitimacy of the established system because the system has not allowed it to participate in the decision-making process. This feeling of alienation, caused by an apparent or real denial of due process and equal protection, exists among today's youth. An evil so closely related to a denial of equal protection of the laws must be amenable to congressional action under § 5 of the Fourteenth Amendment.

Congress found that the alienation of our youth was caused in large part by the denial to our youth of a voice in decisions which affect them so greatly:

> There is an ominous danger to a democracy if it disenfranchises citizens who are capable. Because, by prohibiting the normal exercise of citizenship in the vote, frustrations arise which can lead to dangerous alternatives in dissent. 116 CONG. REC. 5654 (June 17, 1970) (Representative Bennett).

Congress properly viewed this alienation, and the violence which sometimes accompanies it, as matters of the greatest concern. Indeed, the salutary effect of lowering the voting age in alleviating alienation was a most important factor in the passage of Title III.

> Furthermore, by extending the right to vote [to] our 18-, 19-, and 20-year-olds, we would be showing visible recognition of the national crisis in confidence in our institutions and system among our youth. We would be encouraging and strengthening the position of those who want to work within the system rather than against it. 116 CONG. REC. 5640 (June 17, 1970) (Representative Matsunaga).

See also, 116 CONG. REC. at 3496 (Senator Yarborough); 3497 (Senator Hartke); 3500 (Senator Young); 3510 (Senator Bayh); 3524 (Report of Representative Brock on his Tour of Campuses) (March 11, 1970).

Thus, there is ample basis in the legislative history for Title III to be justified as a remedial and prophylactic measure aimed both at securing the rights of 18-20 year olds against discriminatory treatment and at remedying the sense of alienation caused by the perception that they are denied equal protection of the laws when they are denied the vote.[7]

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[7] Although this argument has not been made by the Solicitor General, it is clear that Title III may be sustained on this theory, and the Court need not consider what commentators consider the

C. *Congress Had an Adequate Basis for Finding the 21-Year Requirement to Be a Violation of the Fourteenth Amendment*

The second branch of the Court's opinion in the *Morgan* case rests upon the proposition that Congress, in the exercise of "a specially informed legislative competence" (384 U.S. at 656) might find a state statute an invidious discrimination in violation of the equal protection clause. The Court should honor such a finding if it can "perceive a basis upon which Congress might predicate" such a judgment, even if it would not have made such a finding absent legislative guidance. *Id.*

The evidence of discrimination between those citizens 18 through 20 and those 21 and over upon which Congress made a judgment of discrimination is summarized above at pp. 5-9 and is exhaustively discussed in other briefs before the Court. This information is far more detailed than that involved in the *Morgan* case and provides "a basis" upon which Congress might ground its finding of discrimination. The congressional finding of discrimination is corroborated by the fact that the young people involved believe they are denied equal protection of the laws, and as a result have become dangerously alienated from our political system.

Moreover, the legislative history supporting the Voting Rights Act Amendments of 1970 is so extensive that it should satisfy the requirements even of the two dissenters in the *Morgan* case, Justices Harlan and Stewart. They disagreed with the majority on two points. First, they

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more far reaching alternative theory presented by the *Morgan* decision. *See* Burt, *supra,* at 103; Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 103-06 (1966).

would require a "rational" or "reasonable" basis for the statute, rather than the majority's test of merely perceiving "a basis." Secondly, the majority in *Morgan* appeared willing to assume facts necessary to sustain the statute in the absence of a factual record in the legislative history while the dissenters would require the legislative history to indicate the facts upon which Congress acted. In this case, the factual basis for congressional action is clear on the face of the record, and provides a rational and reasonable basis for the statute. Indeed, the District of Columbia Court believed the issue of rationality to be so clear that detailed elaboration of reasons was unnecessary, *Christopher* v. *Mitchell,* Civ. No. 1862-70 (D.D.C. Oct. 2, 1970) slip opinion at 34.

D. *Title III Is Consistent With the Constitution*

The State of Texas has suggested that the constitutionality of Title III is not governed by the *Morgan* decision because it is not consistent with the letter and spirit of the Constitution. 384 U.S. at 656. In this regard, Texas relies primarily upon § 2 of the Fourteenth Amendment which provides that a state's representation in Congress shall be reduced where the right to vote "is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime . . . ." It is suggested that this language constitutes an affirmative sanction of the 21-year-old voting age.

This is simply not the case. First, the reference to age 21 is merely a codification of the existing practice at the time. *See* 116 CONG. REC. 7279 (May 18, 1970) (Letters of Professor Kaufman of Harvard Law School and Professor

O'Reilly of Boston College Law School); *Christopher* v. *Mitchell,* Civ. No. 1862-70 (D.D.C. Oct. 2, 1970) slip opinion at 56 (MacKinnon, J., concurring).

While § 2 indicates that a voting age of 21 was not considered an invidious discrimination when the Fourteenth Amendment was ratified, it is not dispositive under today's changed circumstances. Not only have the relevant facts changed in the century since the passage of the Fourteenth Amendment, but the law as well.

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 669 (1966) (Emphasis in the original).

IV. The *Morgan* Decision Is Sound and Should Be Reaffirmed.

The *Morgan* decision is in the mainstream of current constitutional development. It was foreshadowed by Mr. Justice Black's dissenting opinion in *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 679 (1966),[8] in the following language:

> I have no doubt at all that Congress has the power under § 5 to pass legislation to abolish the poll tax in order to protect the citizens of this country if it believes that the poll tax is being used as a device to deny voters equal protection of the laws.

Morgan was also anticipated by Judge Wisdom in *United States* v. *Louisiana,* 225 F. Supp. 353, 360-61 (E.D. La.

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[8] Justices Harlan and Stewart intimated no views on the question, and left it open. 383 U.S. at 680-81.

1963), *aff'd,* 380 U.S. 145 (1965). Judge Wisdom held that Congress had full authority "to enact the Civil Rights Act or other appropriate legislation (including registration), under Article I § 4, and to protect the integrity of the electoral process under the 14th and 15th Amendment."

The *Morgan* decision is harmonious with the approach of this Court in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), as well as *Miranda* v. *Arizona,* 384 U.S. 436, 490 (1966), and *United States* v. *Wade,* 388 U.S. 218, 239 (1967) where the Court invited legislative action which might use the Congress' greater fact-finding abilities to provide alternative and superior schemes of protecting the rights in question. Moreover, the power of Congress under § 5 to prohibit action which is beyond the reach of the Court under § 1 alone was suggested in *United States* v. *Guest,* 383 U.S. 745 (1966), where a majority of the Court ruled that Congress could prohibit individual action which might interfere with rights secured by the Fourteenth Amendment against state action.

V. The *Morgan* Decision Is a Doctrine of Restraint and Does Not Give Congress Unwarranted Powers.

As Professor Cox has pointed out, the decision in *Katzenbach* v. *Morgan* constitutes an invitation to Congress to take the lead in fulfilling the promise of the Fourteenth Amendment.[9] If Congress takes up the challenge, the Court will be called upon less frequently to take the lead in this area. Moreover, the *Morgan* doctrine is an invitation to congressional action in areas which increasingly call for the sort of line drawing which Congress is best equipped to carry out. For example, while the Court might find that

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[9] *Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91 (1966).

the line between voters over 21 and under 21 is totally arbitrary, it would have great difficulty in setting a more appropriate dividing line. Congress, however, is institutionally better suited to set a new line which, although containing the arbitrariness which is implicit in any drawing of lines, is far fairer than the present line. *See generally,* Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 SUPREME COURT REVIEW 81, 112-14.

The *Morgan* decision does not constitute an unlimited grant of power to Congress. First, it is limited to "reform" measures, such as the statute now before the Court, which "enforce" the provisions of § 1 of the Amendment. *Morgan* is not applicable, as the Court made clear in footnote 10, to legislation which seeks to reverse Court decisions defining the limits of equal protection. *See generally Christopher* v. *Mitchell,* Civ. No. 1862-70 (D.D.C. Oct. 2, 1970) slip opinion at 21-24.

It is true that *Morgan,* together with *South Carolina* v. *Katzenbach* and *United States* v. *Guest,* confirms a broad congressional power to legislate in areas traditionally subject to regulation by the states. That power, however, like the congressional power to legislate pursuant to the commerce clause, is limited by the restraint and good sense of the Congress. Congress' record in the commerce area has been one of impressive deference to state interests, despite the fact that our economy is becoming more and more a national one. There is no reason to believe that a similar deference will not be shown to state power under § 5 as well.[10]

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[10] Indeed, the decisions on the breadth of the commerce power are such that voting legislation itself might, in large part, be based upon the commerce power. Congress might find, for example, that relocation of industries in certain areas of the country is hampered

In any event, the interests of federalism will have the same source of protection from unnecessary encroachments under § 5 of the Fourteenth Amendment as they have against congressional action under the commerce power:

> The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections . . . . They are the restraints on which the people must often rely solely, in all representative governments. *Gibbons* v. *Ogden,* 22 U.S. 1, 197 (1894).

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by the fears of employees that if they move, they will lose their right to vote for the not insubstantial period required by residency tests. Similar impediments to relocation of employees might arise because of differences in literacy tests or age requirements. This Court, in affirming civil rights legislation under the commerce clause has indicated exceedingly broad deference to congressional findings of this sort. *See, e.g., Katzenbach* v. *McClung,* 379 U.S. 294 (1964). Thus *Morgan* adds little to the power of Congress to reach matters hitherto regulated by the states.

CONCLUSION

For the reasons stated above, the Democratic National Committee respectfully requests this Court to uphold the constitutionality of Title III of the Voting Rights Act Amendments of 1970 and to deny the relief requested by the State of Oregon. To rule otherwise would strike down the major effort of Congress to deal responsibly with the troubling issue of alienation of today's youth.

Respectfully submitted,

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