

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Voting/Voting Rights Act of 1965

South Carolina v. Katzenbach, 383 U.S. 301 (1966)

South Carolina was one of seven states completely covered by the Voting Rights Act (VRA) of 1965.¹ Because that state had administered various tests for voting and less than 50 percent of adults in that state voted in the 1964 national election, all state voting tests were suspended. Under the VRA, both South Carolina and all local governments in South Carolina could make changes to their election law only if those changes were approved by the Department of Justice or a federal court in the District of Columbia. South Carolina asked the Supreme Court to issue an injunction against Nicholas Katzenbach, the attorney general of the United States, forbidding Katzenbach from enforcing many provisions of the VRA. Twenty-one states filed or signed amicus briefs which maintained that the VRA was constitutional. The Massachusetts brief declared:

Today, residents of one state frequently move to another, carrying with them training and attitudes from their former residences. It is of concern to the States joining herein that newly arrived Negro residents will not come from a background of systematic deprivation of their constitutional and political rights. Quite apart from the injustice that such citizens will have suffered, they will be poorly prepared to participate in the democratic process at their new residence. Furthermore, when, under color of law, any state denies to Negroes the right to vote, its action must inevitably lend a facade of respectability to the misguided efforts of those persons in other states who might desire to hamper the efforts of Negro citizens to exercise their legal and constitutional rights. In this fashion the legally established discrimination practiced by a few states serves throughout the country to retard national progress toward full equality and racial harmony. Every state, therefore, is interested in seeing that the rights conferred by the Fourteenth and Fifteenth Amendments are uniformly effective throughout the nation.

Five states filed or signed briefs supporting South Carolina. The Mississippi brief asserted:

In enacting the Voting Rights Act, Congress exercised purely judicial functions of investigating past facts, making legislative findings of past guilt and then passing a fiat to enforce liabilities on certain states. Such an advocate-judge type of function amounts to a legislative trial and is a bill of attainder. The States attained under this act are inflicted with deprivations of their unqualified rights to use valid, constitutional laws and to make reasonable changes in their voter requirements for a five-year period while other states, both with and without past histories of discrimination, are permitted to use and enforce identical laws. Such principles of legislation have recently been condemned by this Court in the field of regulation of Communist activities. The Constitution is no less available to and protective of the sovereign State of South Carolina than it is to the Communist Party.

The Supreme Court unanimously sustained all provisions of the Voting Rights Act, with the exception of the preclearance provision, which was sustained by an 8-1 vote. Chief Justice Warren's opinion held that the ban on voting tests and preclearance were reasonable exercises of the congressional power under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. The Supreme Court in Lassiter v. Northampton County

¹ The other six were Alabama, Alaska, Georgia, Louisiana, Mississippi, and Virginia.

Bd. of Elections (1959) had declared that states had the power to require literacy tests. In South Carolina, however, the justices unanimously determined that Congress could ban literacy tests. On what basis did the justices claim the two decisions were consistent? Do you think they were consistent? Suppose Congress concluded that more educated people were less prone to supporting racial discrimination. Could Congress require a literacy test? Chief Justice Warren's opinion for the Court interprets Section 5 of the Fourteenth Amendment as granting Congress the same broad power over racial discrimination as McCulloch v. Maryland (1819) interpreted Article I as granting Congress over interstate commerce and related matters. What argument did Warren make to support this conclusion? Is this conclusion correct? Justice Black insisted that the preclearance provisions violated state sovereignty. Where in the Constitution did he find this state sovereignty restriction on the Fourteenth Amendment? Was he correct? Suppose Congress had insisted that southern state capitals be moved closer to African-American populations. Would that have been a legitimate use of Congressional power under the Fourteenth and Fifteenth Amendments?

CHIEF JUSTICE WARREN delivered the opinion of the Court.

...

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from [Section] 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by "appropriate" measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution. We therefore deny South Carolina's request that enforcement of these sections of the Act be enjoined.

... Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. . . .

...

According to the evidence in recent Justice Department voting suits, [discriminatory administration of voting tests] is now the principal method used to bar Negroes from the polls. . . . White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers. Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error. . . .

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. . . .

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.

The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the

ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. . . .

The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. . . .

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. South Carolina and certain of the amici curiae also attack specific sections of the Act for more particular reasons. They argue that the coverage formula . . . violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating guilt through legislation. They claim that the review of new voting rules required in 5 infringes Article III by directing the District Court to issue advisory opinions. They contend that the assignment of federal examiners . . . abridges due process by precluding judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions. . . .

Some of these contentions may be dismissed at the outset. The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court. . . .

. . . 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. . . .

Section 1 of the Fifteenth Amendment declares that "[t]he 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." This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. . . .

South Carolina contends that . . . to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, [Section] 2 of the Fifteenth Amendment expressly declares that "Congress shall have power to enforce this article by appropriate legislation." By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in 1. . . . Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

. . .
The basic test to be applied in a case involving [Section] 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

"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." *McCulloch v. Maryland* (1819).

. . .
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. . . . Congress is not circumscribed by any such artificial rules under [Section] 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* (1824). . .

. . . The measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. . . . Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. . . .

. . . The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name. This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future. In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. . . .

The . . . areas share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and political subdivisions covered by the formula, at least in the absence of proof that they have been free of substantial voting discrimination in recent years. . . .

It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means. Congress had learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed. . . . Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience. See *Williamson v. Lee Optical Co.* (1955), . . . There are no States or political subdivisions exempted from coverage under 4 (b) in which the record reveals recent racial discrimination involving tests and devices. This fact confirms the rationality of the formula.

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Suspension of tests.

. . . South Carolina assails the temporary suspension of existing voting qualifications, reciting the rule laid down by *Lassiter v. Northampton County Bd. of Elections* (1959), that literacy tests and related devices are not in themselves contrary to the Fifteenth Amendment. In that very case, however, the Court went on to say, "Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." . . . The record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years. Under these circumstances, the Fifteenth Amendment has clearly been violated. . . .

The Act suspends literacy tests and similar devices for a period of five years from the last occurrence of substantial voting discrimination. This was a legitimate response to the problem, for which there is ample precedent in Fifteenth Amendment cases. . . . Underlying the response was the feeling that States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about "dilution" of their electorates through the registration of Negro illiterates. Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants. Congress permissibly rejected the alternative of requiring a complete re-registration of all

voters, believing that this would be too harsh on many whites who had enjoyed the franchise for their entire adult lives.

The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. . . . Congress knew that some of the States covered by 4 (b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

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Federal examiners.

The Act authorizes the appointment of federal examiners to list qualified applicants who are thereafter entitled to vote, subject to an expeditious challenge procedure. . . . In many of the political subdivisions covered by 4 (b) of the Act, voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance or evasion of federal court decrees. Congress realized that merely to suspend voting rules which have been misused or are subject to misuse might leave this localized evil undisturbed. . . .

...

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshaled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. . . . We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will not be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly “[t]he 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.”

JUSTICE BLACK, concurring and dissenting.

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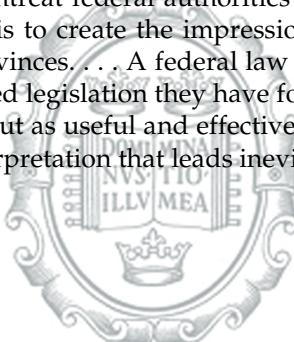
Though, . . . I agree with most of the Court's conclusions, I dissent from its holding that every part of the Act is constitutional. Section 4 (a), . . . suspends for five years all literacy tests and similar devices in those States coming within the formula of 4 (b). Section 5 goes on to provide that a State covered by 4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.

(a) The Constitution gives federal courts jurisdiction over cases and controversies only. If it can be said that any case or controversy arises under this section which gives the District Court for the District of Columbia jurisdiction to approve or reject state laws or constitutional amendments, then the case or controversy must be between a State and the United States Government. But it is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt. If this dispute between the Federal Government and the States amounts to a case or controversy it is a far cry from the traditional constitutional notion of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied. . . .

. . . By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to secure precisely the type of advisory opinion our Constitution forbids. . . . We should . . . reject any attempt by Congress to flout constitutional

limitations by authorizing federal courts to render advisory opinions when there is no case or controversy before them. Congress has ample power to protect the rights of citizens to vote without resorting to the unnecessarily circuitous, indirect and unconstitutional route it has adopted in this section.

My second and more basic objection to 5 is that Congress has here exercised its power under 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. . . . Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One [of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government." I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. . . . A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.



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