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# The Voting Rights Cases

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THE VOTING RIGHTS CASES

Very few statutes can ever have been drafted with a wavier eye to the prospect of litigation, or a keener intention to ward it off as long as possible, than the Voting Rights Act of 1965.<sup>1</sup> It was enacted, indeed, as a substitute for litigation, which had proved a sadly inadequate engine of reform. Care was taken, therefore, to ensure that the enterprise launched by the statute would be going before litigation could test it in the local federal courts,<sup>2</sup> and § 14(b) hopefully designated the District Court for the District of Columbia as the only forum in which suit attacking the statute on a broad front could be brought.<sup>3</sup> Yet Congress, in trying to escape the clutches of hostile courts, did not avoid the precipitate embrace of a sympathetic one: the Supreme Court of the United States. The Voting Rights Act of 1965 came to judgment there with extraordinary rapidity and under extraordinary conditions.

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<sup>1</sup> The Voting Rights Act of 1965 is Public Law 89-110, 89th Cong., 1st Sess. (1965); 79 Stat. 437 (1965); 42 U.S.C. §§ 1973 *et seq.* (1965 Suppl.). It is also reproduced as an appendix to the Court's opinion in *South Carolina v. Katzenbach*, 383 U.S. 301, 337-55 (1965), and, for convenience, references to the statute hereafter made will be to the Court's appendix.

<sup>2</sup> See §§ 4(b), 9(a), and 14(b), 383 U.S. at 341, 346, 353.

<sup>3</sup> "No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant thereto." 383 U.S. at 353.

## I. SOUTH CAROLINA V. KATZENBACH

The train of events that led to the decision of *South Carolina v. Katzenbach*<sup>4</sup> on March 7, 1966, in the Supreme Court was apparently first set in motion some three weeks after the Voting Rights Act was approved. On August 31, 1965, Leander H. Perez, Jr., District Attorney of Plaquemines Parish, Louisiana, filed suit in the Twenty-fifth Judicial District Court of Louisiana against Bruce Rhiddlehoover and Billy Travis, federal voting examiners appointed pursuant to § 6 of the Act to serve in that parish.<sup>5</sup> District Attorney Perez, represented by his father, Leander the Elder, Baron of Plaquemines, asked that the defendants be forbidden to register as voters persons who, in the District Attorney's view, failed to meet valid requirements of state law. The complaint did not put in issue the constitutionality of the Voting Rights Act. It accepted *arguendo* the Act's suspension of "tests or devices" previously administered in Louisiana, and contended only that the Attorney General and the Civil Service Commission, in discharging their statutory duty of instructing examiners to abide by those other qualifications prescribed by state law which are not inconsistent with the federal Constitution and laws<sup>6</sup> had misinterpreted the state law; chiefly, it seems, by being in error on the question whether qualifications relating to age and residence needed to be met by the date of registration or by the date of the next election. The Fifth Judicial District Court of Louisiana issued an *ex parte* temporary restraining order, whereupon the defendant examiners removed to the United States District Court for the Eastern District of Louisiana. There the temporary restraining order was promptly dissolved on September 3. The following month, District Judge Ellis also denied plaintiff's motion to remand. Thus, except during a hurricane, registration proceeded in Plaquemines Parish, although Judge Ellis—erroneously, as one may well think—denied defendants' motion to dismiss.<sup>7</sup>

Other direct attacks on the administration of the Act foundered on § 14(b) with even greater promptness.<sup>8</sup> But a series of suits be-

<sup>4</sup> 383 U.S. 301 (1966).    <sup>5</sup> *Id.* at 343-44.    <sup>6</sup> §§ 7(b) and 9(b), *id.* at 344-45, 347.

<sup>7</sup> *Perez v. Rhiddlehoover*, 247 F. Supp. 65 (E.D. La. 1965).

<sup>8</sup> *O'Keefe v. New York City Board of Elections*, 246 F. Supp. 978 (S.D. N.Y. 1965); *McCann v. Paris*, 244 F. Supp. 870 (W.D. Va. 1965).

gun in September in Alabama, Mississippi, and Louisiana proved more troublesome. Injunctions were issued by state courts in a number of counties in those states against the appropriate local officials, forbidding them to place on the voting rolls the names of voters registered by federal examiners.<sup>9</sup> These injunctions did not interfere with registration, but they challenged the constitutionality of the Act and, if obeyed, would have rendered registration futile. If obeyed, they could also have subjected the state officials to whom they were addressed, and possibly the state officials and judges who obtained and issued them, to criminal prosecution under § 12 of the Act.<sup>10</sup>

Whatever their political and personal preferences, the state election officials were thus offered a Hobson's choice. It is difficult to imagine, however, that the Attorney General could not have solved their dilemma by instituting actions under § 12(d) of the Act for preventive relief against them. Actually he believed, as he later made clear, that he had ample authority to bring such suits, not only pursuant to § 12(d), but also, reasonably enough, in the exercise of the inherent power of the United States "to vindicate its rights in its own courts," as well as under 42 U.S.C. § 1971(c).<sup>11</sup> Yet the Attorney General made no move. His attention turned instead to the original jurisdiction of the Supreme Court.

An argument can be made, proceeding from the bare text of § 14(b),<sup>12</sup> that a federal district court would be free to adjudicate the constitutionality of the Voting Rights Act in a case in which the Attorney General was seeking an injunction against a state official—an injunction that, arguably, should not issue unless the Act was constitutional. In such a case, the result of a holding that the Act was unconstitutional would not be the sort of decree, forbidding execution of the Act, which § 14(b) allows only the District Court for the District of Columbia to issue. This is not much of an argument, but in voting cases tried before federal district judges in the Deep South,

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<sup>9</sup> See U.S. COMMISSION ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT . . . THE FIRST MONTHS* App. E, 74-78 (1965).

<sup>10</sup> 383 U.S. at 350-52.

<sup>11</sup> Brief in Support of Motions for Leave To File Original Complaints and Motions for Expedited Consideration, Nos. 23, 24, 25, Orig., at pp. 9-10, *United States v. Alabama*, 382 U.S. 897 (1965).

<sup>12</sup> See note 3 *supra*.

the Attorney General has been known to lose cases, for the time being, on arguments that were not much.<sup>13</sup> With spring primaries impending, time was then of the essence, and to go before some of the federal district judges in Alabama, Mississippi, and Louisiana was to take a chance. Once having taken his chances even in one district court, the Attorney General would very likely find that he had made an irrevocable election. He would be foreclosed from bringing suits against the states themselves in the original jurisdiction of the Supreme Court. For in these circumstances he would be coming into the original jurisdiction with nothing but a form of direct appeal, and possibly an interlocutory one, at that. Moreover, the outlook for the success of the Act in general was good. The Act was being widely administered and obeyed. It was, in truth, having its period of maximum effectiveness in placing large numbers of Negroes on voting rolls—more and faster than it has done since.<sup>14</sup> Any decree holding it unconstitutional, no matter how obviously vulnerable and temporary, would have had its adverse effect on officials elsewhere who had been complying—reluctantly and not universally, but widely and voluntarily. And so the Attorney General took no chances.

The potentially ugly situation in the several counties in Alabama, Mississippi, and Louisiana solved itself well before winter. The Alabama election officials who were under state injunction, not having been sued by the Attorney General, sued him. They obtained a decree from a three-judge federal court<sup>15</sup> dissolving all the Alabama injunctions.<sup>16</sup> In deference to the plain command of § 14(b), the court did not pass on the constitutionality of the Act but went about its business by assuming it. The efforts to thwart execution of the Act in Mississippi and Louisiana evidently then collapsed of

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<sup>13</sup> See, for one of many examples, the litigation history recited by the Court of Appeals in *United States v. Ramsey*, 353 F.2d 650 (5th Cir. 1965). And Judge Ellis, in the *Plaquemines Parish* case mentioned above, see note 7 *supra*, although he granted relief, failed to dismiss the case, as he should have done pursuant to § 14(b).

<sup>14</sup> See U.S. COMMISSION ON CIVIL RIGHTS, *op. cit. supra* note 9: N.Y. Times, April 11, 1966, p. 38, col. 7 (City Ed.) (“Negro Vote Lists Rise 50% in South”).

<sup>15</sup> A three-judge court was presumably available to them, since they were formally suing to enjoin enforcement of the Act, but would not have been available to the Attorney General. Compare 28 U.S.C. § 2282, with § 101(d) of the Civil Rights Act of 1964, 78 Stat. 241, 242 (1964), 42 U.S.C. § 1971(h) (1964).

<sup>16</sup> *Reynolds v. Katzenbach*, 248 F. Supp. 593 (S.D. Ala. 1965).

their own weight. But by then it was late November, and the Attorney General had long since committed himself to litigating in the original jurisdiction.

On September 29, 1965, South Carolina moved for leave to file a complaint against the Attorney General in the original jurisdiction of the Supreme Court. The complaint challenged the constitutionality of the Act as a whole, except for § 3 (authorizing appointment of examiners, not by the Attorney General acting on his own, but as part of a judicial decree),<sup>17</sup> § 14(c) (nullifying the New York requirement of literacy in English as applied to Puerto Ricans educated in American-flag schools),<sup>18</sup> § 10 (authorizing the Attorney General to institute suits challenging the poll tax),<sup>19</sup> and one or two miscellaneous sections. The response of the Attorney General was to move for leave to file complaints of his own, in the name of the United States, against Alabama, Louisiana, and Mississippi. Each of these complaints alleged that local election officials were obeying state court injunctions that forbade them to comply with the Voting Rights Act. The Attorney General asked for judgments declaring the constitutionality of §§ 4, 6, and 7 of the Act, insofar as these sections suspended literacy and other tests, authorized the appointment of federal examiners, and required the listing as voters of persons registered by examiners. He asked also that the injunctions issued against the local election officials be declared null and void, and that these officials be ordered to do their federal duty.<sup>20</sup>

On the same day on which he moved for leave to file these complaints, the Attorney General responded to the South Carolina suit in a memorandum signed by Solicitor General Marshall. The Government, said the Solicitor General, did not oppose South Carolina's motion for leave to file a complaint. "For the reasons stated in the brief of the United States in support of its motions for leave to file original complaints [against Alabama, Mississippi, and Louisiana] . . . filed with the Court this day . . . we believe that the Court has

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<sup>17</sup> 383 U.S. at 338-39.

<sup>18</sup> *Id.* at 341-42.

<sup>19</sup> *Id.* at 347-49.

<sup>20</sup> Motions for Leave To File Complaints, Complaints, and Motions for Expedited Consideration, Nos. 23, 24, 25, Orig., United States v. Alabama, United States v. Mississippi, United States v. Louisiana, 382 U.S. 897 (1965).

jurisdiction to entertain this original action and may appropriately exercise its jurisdiction here."<sup>21</sup>

But the jurisdictional issues in the two cases, South Carolina's against the Attorney General and that of the United States against Alabama, Mississippi, and Louisiana were very different.<sup>22</sup> In its own suit, the United States was doing precisely what it could have done in the lower federal courts. It was seeking, by the exercise of inherent authority and of statutory authority, particularly under § 12(d) of the Voting Rights Act, to vindicate the supremacy of national law, which was being flouted by officials of the named states. The suit was against the states, rather than individual officers of the states, because these officers were acting under state law, and because suits against the states would reach them all most economically. There is nothing extraordinary about framing an action of this sort with a state as defendant. Section 601(d) of the Civil Rights of 1960 explicitly permits it, for example.<sup>23</sup> All that is required to make out a case against a state in such circumstances is that there be a real controversy—that officers of the state, acting under state law, be engaged in obstructing the execution of national law.<sup>24</sup> A controversy there was, in this instance, at the time of the filing of the motions. Whether a case was made out in the original jurisdiction thus became only a question of ripeness and *forum non conveniens*. It was along these lines that the brief for the United States constructed its argument.

Quite another sort of jurisdictional question was raised by South Carolina's complaint. South Carolina sought an injunction forbidding the Attorney General to execute the Voting Rights Act, which suspended provisions of South Carolina's voter qualification law, as well as the operation of parts of her election machinery, and substituted federal law and machinery. The constitutionality of the

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<sup>21</sup> Memorandum for the Defendant, No. 22, Orig., at pp. 1-2, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>22</sup> They had in common only the difficulty presented by § 14(b) of the Voting Rights Act, *supra* note 3, which, the Solicitor General argued, should not be read as depriving the Supreme Court of jurisdiction of appropriate original actions, "in view of the constitutional basis of this Court's original jurisdiction." Memorandum for the Defendant, *supra* note 20, at p. 2, n. 1.

<sup>23</sup> 74 Stat. 92 (1960), 42 U.S.C. § 1971(c) (1964); *United States v. Mississippi*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965).

<sup>24</sup> Cf. *United States v. West Virginia*, 295 U.S. 463 (1936).

Act was attacked under the Fifteenth Amendment, and also under the Due Process and Bill of Attainder Clauses. Jurisdiction was rested on Article III, because South Carolina was suing a citizen of New Jersey—not at the moment, one might think, the most relevant fact about Nicholas deB. Katzenbach, but apparently a jurisdictional fact nonetheless. The decisive issue, however, was whether South Carolina had standing. The only interests, if any, that could give South Carolina standing were her functional interest as a sovereign, her interest, that is, in the continued execution of her own laws without hindrance from national authority, and her interest as protector of those of her citizens entitled to vote under her present laws, whose vote would be diluted by the addition of new voters to the rolls. In no fashion did the brief in support of the motions of the United States to file complaints against Alabama, Mississippi, and Louisiana discuss the question of South Carolina's standing, or otherwise attempt to justify acceptance of jurisdiction in *South Carolina v. Katzenbach*, and this despite Solicitor General Marshall's assertion that for "reasons stated in the brief of the United States in support of its motions for leave to file . . . we believe that the court has jurisdiction to entertain" *South Carolina v. Katzenbach*. This was simply a way of shuffling the jurisdictional issue in *South Carolina v. Katzenbach* from one set of papers to another, faster than the eye could follow. In neither did the Government discuss it. And in the shuffle, the issue got lost altogether, for an implied promise by the Government to return to it at the argument on the merits was never carried out.<sup>25</sup>

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<sup>25</sup> "At all events," the Solicitor General said in his memorandum in *South Carolina v. Katzenbach*, "the Court may grant the State's motion for leave to file a complaint without now resolving the question of jurisdiction, which can properly be postponed to the time when the case is considered on the merits." Memorandum for the Defendant, No. 22, Orig., at p. 2, n. 1, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). But in the brief for the Attorney General on the merits, jurisdictional problems were dismissed in a footnote in this fashion: "In view of the Court's decision to grant plaintiff's motion for leave to file the complaint herein, we proceed to the merits in this brief." For the rest, there was merely the suggestion, later accepted by the Court, 383 U.S. at 316-17, that §§ 11 and 12(a), (b), and (c), imposing criminal sanctions and authorizing injunctive relief, which South Carolina was attacking along with most of the rest of the Act, were not ripe for adjudication since they had not yet been invoked. Brief for the Defendant, No. 22, Orig., at pp. 2, 3, nn. 3, 4, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

But see *United States v. Harvey*, 250 F. Supp. 219 (E.D. La. 1966), which invoked



Having decided—not unreasonably, for only hindsight tells us that the situation was going to solve itself without such drastic action—that he had no safe alternative but himself to seek redress in the original jurisdiction, the Attorney General presumably feared that it would somehow damage his position if at the same time he tried to block South Carolina's access. He wound up in the end, not with his own case, but with South Carolina's. The motions of the United States for leave to file bills of complaint against Alabama, Mississippi, and Louisiana were denied.<sup>26</sup> On the same day, South Carolina's motion was summarily granted, Black, Harlan, and Stewart, JJ., dissenting.<sup>27</sup> The Court, unaided by counsel, chose what was jurisdictionally by far the weaker of the two cases offered.

"Original jurisdiction," said Chief Justice Warren's opinion for the Court, without dissent on this issue, "is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2 of the Constitution. See *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 [1945]."<sup>28</sup> But in that case Georgia had a proprietary claim, and to the extent that she was also suing as protector of her people, she was not, as Mr. Justice Douglas pointed out for the Court, suing the United States or a federal officer, and she was not seeking "to protect her citizens from the operation of Federal statutes."<sup>29</sup> Nor, in the instant case, was South Carolina or one of her political subdivisions suing pursuant to congressional direction, as under § 4(a) of the Voting Rights Act,<sup>30</sup> to establish facts on which application of federal law, or an exemption from it, is made to depend. These distinctions are crucial. It has heretofore been established that a state is not, as the phrase goes, the *parens patriae* of her citizens as against the federal government. It is no part of a state's "duty or power," said the Court in *Massachusetts v. Mellon*,<sup>31</sup> "to enforce their [her citizens'] rights in respect to their relations with the Federal Government. In that field, it is

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§ 11(b). This suit was filed on December 17, 1965. The District Court (West, J.) held the section unconstitutional as applied, although it shored up its dismissal of the suit with an alternate factual finding, as well.

<sup>26</sup> 382 U.S. 897 (1965).

<sup>27</sup> *Id.* at 898.

<sup>29</sup> 324 U.S. at 446-47.

<sup>28</sup> 383 U.S. at 307.

<sup>30</sup> 383 U.S. at 339-40.

<sup>31</sup> 262 U.S. 447, 486 (1923); and see *Florida v. Mellon*, 273 U.S. 12 (1927); *Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944).

the United States and not the State which represents them as *parens patriae* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protection measures as flow from that status." The Court in *South Carolina v. Katzenbach* itself dismissed South Carolina's argument that she had been adjudged guilty of discrimination by the Voting Rights Act, without trial, in violation of the Fifth Amendment's Due Process Clause and of the Bill of Attainder Clause of Article I. Certainly, as the Court briefly indicated, this argument is weird enough on its merits. But the Court went on to say: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal government, the ultimate *parens patriae* of every American citizen. *Massachusetts v. Mellon*, 262 U.S. 447, 485-86; *Florida v. Mellon*, 273 U.S. 12, 18."<sup>32</sup> If this is so, it is precisely as true with respect to the argument, which the Court then proceeded to discuss at length on the merits, that Congress exceeded its powers under the Fifteenth Amendment. It is no less true that South Carolina lacked standing as the parent of her citizens to urge their claim that Congress violated the Fifteenth Amendment to their detriment, than that South Carolina lacked standing to urge her citizens' claim that Congress inflicted harm on them by an Act violating the Due Process Clause of the Fifth Amendment and the Bill of Attainder Clause of Article I.

Of course the original jurisdiction should provide a forum for the adjudication of issues that could arise, absent a federal union, between sovereigns, and that, absent such a union, would be dealt with by international arbitration, or would result in international conflict of one sort or another.<sup>33</sup> The original jurisdiction serves also for the adjudication of claims by the states against citizens and entities not within their control—claims that the states, if they were fully sovereign, might also prosecute in an international forum or by unilateral means. Such claims may be founded on a state's duty or desire, as *parens patriae*, to protect the interests of her own citi-

<sup>32</sup> 383 U.S. at 324.

<sup>33</sup> See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 258 (1953); *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Florida*, 363 U.S. 121 (1960); *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 691 (1950); *United States v. California*, 332 U.S. 19 (1947).

zens, and perhaps this explains *Georgia v. Pennsylvania R. Co.* Finally, it may be that proprietary claims of the states, no matter how attenuated, may be defended in the original jurisdiction against infringement by federal law, simply and more than somewhat arbitrarily because they are proprietary rather than functional or protective.<sup>34</sup> But it is altogether different for a state to be raising, as did South Carolina, nothing more than her interest in the execution of her own laws rather than those of Congress, and her interest in having Congress enact only constitutional laws for application to her citizens. A state is said to have no standing in such circumstances, not because the interests asserted are unreal or inadequately particular to the state, but because by hypothesis they should not, in such circumstances, suffice to invoke judicial action. For purposes of litigation with the United States (through the officers charged with execution of federal laws), a state should have no recognizable interest in ensuring the fidelity of Congress to constitutional restraints. Only citizens and other persons have a litigable interest of this sort, and then only if they can show injury, being affected either in their pocketbooks or by a disadvantageous change in their position in the legal order. This has heretofore been the settled view, and for good reason.

One may explain away *Georgia v. Stanton*<sup>35</sup> as *sui generis*—a political question case.<sup>36</sup> There is some support also for reading *Massachusetts v. Mellon* as a holding that courts can find no criteria to define the occasions when Congress may or may not tax and spend for the general welfare—that, in other words, the General Welfare Clause raises a political question of sorts.<sup>37</sup> But there remains a simple proposition, which perhaps the Court has seldom had occasion to affirm unambiguously, but which it has equally seldom denied, even tacitly, before now.<sup>38</sup> This proposition is that the nature

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<sup>34</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>35</sup> 6 Wall. 50 (1867).

<sup>36</sup> Cf. *Mississippi v. Johnson*, 4 Wall. 475 (1867); but cf. *Texas v. White*, 7 Wall. 700 (1869).

<sup>37</sup> Cf. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); but cf. *United States v. Butler*, 297 U.S. 1 (1936).

<sup>38</sup> Some subterranean implications that may be read into the brief order in *Alabama v. United States*, 373 U.S. 545 (1963), need to be noted. The case is the subject of a curious and totally ambiguous citation in the Memorandum for the

of the federal union, the power and function of Congress and the President, and the power and function of the judiciary all would be radically altered if states could come into the original jurisdiction at will to litigate the constitutional validity of national law applicable within their territories. To allow the states to litigate in this fashion—which is precisely what South Carolina was allowed to do—would be a fundamental denial of perhaps the most innovating principle of the Constitution: the principle that the federal government is a sovereign coexisting in the same territory with the states and acting, not through them, like some international organization, but directly upon the citizenry, which is its own as well as theirs. The states are built into the political structure of the federation, and play their part in the formation of its institutions. But they are not to contest, as if between one sovereign and another in some quasi-international forum, the actions of the national institutions. For the national government is fully in privity with the people it governs, and needs, and should brook, no intermediaries.

It would make a mockery, moreover, of the constitutional requirement of case or controversy, which is at the heart of Marshall's argument in *Marbury v. Madison*<sup>39</sup> and forms an essential limitation on the reach of the power of judicial review, to countenance automatic litigation—and automatic it would surely become—by

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Defendant filed in answer to South Carolina's motion for leave to file in *South Carolina v. Katzenbach*. The passage in question is as follows: "Federal jurisdiction is premised upon the portion of Clause 1 of the same Section [Art. 3, § 2] that extends the judicial power of the United States to 'Controversies . . . between a State and Citizens of another State.' Attorney General Katzenbach is a citizen of New Jersey. See *Alabama v. United States*, 373 U.S. 545." Memorandum for the Defendant, No. 22, Orig., at p. 2, n. 1, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). *Alabama v. United States* was Governor George C. Wallace's motion for leave to file a complaint in the spring of 1963 to prevent the President from using troops in Birmingham, during the marching there. In a brief order, instead of dismissing for lack of jurisdiction with a citation to *Massachusetts v. Mellon*, the Supreme Court said that all the President was shown to have done was to alert troops for possible use in Birmingham. Such merely preparatory measures and their possible effects in Alabama could afford no basis for relief, the Court said, and so denied leave to file. One can hardly credit the implication of this brief order that Alabama might otherwise have had standing, any more than one could credit its implication that, everything else being equal, the Supreme Court would undertake to review the exercise of presidential discretion in the use of troops under 10 U.S.C. § 333.

<sup>39</sup> 1 Cranch 137 (1803).

states situated no differently than was South Carolina in this instance. The distinction between a Supreme Court, generally limited in the timing and circumstances of its interventions to "cases" in which public authority has touched private interests or the supremacy of national law needs to be brought home to persons private or public, on the one hand, and the sort of council of revision rejected by the framers,<sup>40</sup> on the other, would then be almost wholly obliterated. There would then be no need to worry about who could sue if Congress or the President created a duke, or supported an ambassador at the Vatican, or established a church,<sup>41</sup> or conducted atomic tests, or this or that disagreeable war.<sup>42</sup> South Carolina could sue, and one or another South Carolina undoubtedly always would, and promptly too. The consequent aggrandizement of the judicial function is something to contemplate. Nor would there be any call, and scarcely the possibility, as there was not in *South Carolina v. Katzenbach*, for a record exemplifying the actual operation of a statute, bringing to the Court for constitutional judgment not Congress' prophecy of the consequences of its action but the actual flesh and blood of those consequences in the life of the society. Time and again, precisely like a council of revision, the Court would be pronouncing the abstraction that some law generally like the one before it would or would not generally be constitutional in the generality of its applications. Such an abstraction was what the Court was reduced to pronouncing on the merits of *South Carolina v. Katzenbach*.

The Court did no more than skim the surface of the Act. Application of the Act is triggered by a formula having to do with the use by a state or county of tests (such as literacy) as a prerequisite to voting, and with the incidence of a low voting rate. The Court held the formula rational, emphasizing that it only amounted, after all, to a presumption, since § 4(a) also provides for termination of coverage in any state or county which can prove to the satis-

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<sup>40</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 507, 513-14, n. 6 (1965) (Black, J., dissenting).

<sup>41</sup> Compare *Brown, Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, [1963] SUPREME COURT REVIEW 1, 15-33, with Black, *Religion, Standing and the Supreme Court's Role*, 13 J. PUB. LAW 459 (1964).

<sup>42</sup> See *Pauling v. McNamara*, 331 F. 2d 796 (D.C. Cir., 1963), cert. denied, 377 U.S. 933 (1964). Cf. *Luftig v. McNamara*, 252 F. Supp. 819 (D. D.C. 1966).

faction of the District Court for the District of Columbia that for five years past it has used no test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." South Carolina contended that these supposed termination proceedings were a snare and could not come to anything, because the burden of proof was impossible. Hence the presumption should be treated as conclusive. Not so, said the Court. The burden of proof would turn out to be "quite bearable."<sup>43</sup> But this could only be the rankest speculation, one way or the other. It is almost farcical that such an issue should have been decided otherwise than on the full record of an appeal from an actual termination proceeding. The Court could not possibly know when it decided *South Carolina v. Katzenbach* what a termination proceeding would look like.

The formula that triggers the Act is in turn triggered when the Attorney General determines that a state or political subdivision maintained as of November 1, 1964, "any test or device," and the Director of the Census certifies that fewer than 50 per cent of persons of voting age residing there were registered on November 1, 1964, or voted in the presidential election of that year. Section 4 goes on to say that a determination or certification of this sort by the Attorney General or the Director of the Census, as well as a determination that the conditions for appointing examiners have been met (§ 6), or that examiners should be withdrawn (§ 13), "shall not be reviewable in any court." The Supreme Court read this provision as denying judicial review (although what is meant by the word "reviewable" would be open to question, depending on the procedures used to invoke judicial action)<sup>44</sup> and held it constitutional as such, citing *United States v. California Eastern Line*<sup>45</sup> and *Switchmen's Union v. National Mediation Board*.<sup>46</sup> But the *California Eastern Line* case itself indicates that the issue of a right to judicial review has not usually been dealt with by the Court in these absolute terms. The kind of action sought to be reviewed (whether within administrative discretion or arguably *ultra vires*), and other statutory and procedural variables have often been decisive. And

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<sup>43</sup> 383 U.S. at 332.

<sup>44</sup> Cf. *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

<sup>45</sup> 348 U.S. 351 (1955).

<sup>46</sup> 320 U.S. 297 (1943).

the authority of the *Switchmen's Union* case, beyond its own narrow circumstances, is more than highly dubious.<sup>47</sup> It is no daring guess to assert that if the Court had been faced with an actual case, rather than with the bare bones of the statute, it would not have been content with the advisory abstraction that it handed down on the issue of a right to judicial review. The result it would have reached would have depended on circumstances now unknown.

Finally, there was the issue which drew a pained dissent from Mr. Justice Black. Section 5 of the Act provides that whenever any state or county which is covered by the Act under the automatic trigger provisions "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it must either submit it for approval to the Attorney General, or else bring an action for a declaratory judgment in the District Court for the District of Columbia, and show that the new qualifications, prerequisite, etc., "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."<sup>48</sup> Unless the Attorney General approves, or a declaratory judgment is obtained, the new qualification, prerequisite, etc., cannot be effective. Mr. Justice Black thought that this provision was unconstitutional, because the declaratory judgment action in the District of Columbia could not be a case or controversy.<sup>49</sup> To this the Court's reply, in something less than a paragraph, was that the controversy would be real and concrete enough,<sup>50</sup> which is probably right, since in the manner characteristic of declaratory judgment actions, all that the section effects is to reverse the parties; and as under § 4(a), the point of *Massachusetts v. Mellon*, discussed earlier, would not be encountered. An additional answer is that even if one suspects that such a controversy might not be sufficiently concrete, it was surely premature to hold the section unconstitutional on this basis.

Mr. Justice Black also thought, however—and he laid much more stress on this point—that it was, in any event, unconstitutional for Congress to put such a suspensive veto on state laws.<sup>51</sup> As to this,

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<sup>47</sup> See JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 339-53 (1965).

<sup>48</sup> 383 U.S. at 342-43.

<sup>49</sup> *Id.* at 357-58.

<sup>50</sup> *Id.* at 335.

<sup>51</sup> *Id.* at 358 *et seq.*

the Court answered even more briefly that Congress had had experience with legislative stratagems continually invented by the states to frustrate decrees and statutes in implementing the Fifteenth Amendment and that under "the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."<sup>52</sup> The constitutional holding, and the reasoning supporting it, are all contained in the word "permissibly." But the issue surely has complexities, and surely depends on variables that could not conceivably form the basis for either the Court's or Mr. Justice Black's conclusion at this time, on this record. At one extreme, there should not be much question that Congress could, under the Fifteenth Amendment, prospectively suspend not only the literacy and understanding tests which have been in use in some states but also any future variations of them.<sup>53</sup> At the other extreme, if a state changed its minimum age for voting and refused to submit this change either to the Attorney General or to the District Court for the District of Columbia, it would have a strong constitutional case. And there is a whole spectrum of problems between these extremes, which might have become evident and to which solutions might have varied, if the Court had allowed real cases to arise.

## II. HARPER V. VIRGINIA BOARD OF ELECTIONS

The Court was not quite finished with the Voting Rights Act of 1965. Two weeks after the abstractions of *South Carolina v. Katzenbach*, came *Harper v. Virginia Board of Elections*,<sup>54</sup> holding the poll tax unconstitutional.

The poll tax provision of the Act, § 10, is the result of much travail in Congress. Section 10 "finds" that the poll tax inhibits voting by the poor, is not reasonably related to "any legitimate State interest in the conduct of elections," and in some areas has the effect of discriminating by race. "Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the pay-

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<sup>52</sup> *Id.* at 335.

<sup>53</sup> Compare the way in which the Court dealt, in *Louisiana v. United States*, 380 U.S. 145 (1965), with a new "citizenship" test adopted after suit in that case had been filed.

<sup>54</sup> 383 U.S. 663 (1966).



ment of a poll tax as a pre-condition to voting."<sup>55</sup> But § 10 does not outlaw the poll tax. Rather it authorizes and directs the Attorney General to implement the declaration just recited by bringing suit in the name of the United States for declaratory judgment or injunctive relief against enforcement of the poll tax. Although the point does not appear to have bothered the lower courts that have acted under it,<sup>56</sup> § 10 raises all that has not yet been interred of the difficulty in *Muskrat v. United States*.<sup>57</sup> Since *Harper v. Virginia Board of Elections* arose independently of § 10, however, the Supreme Court did not need to concern itself with the *Muskrat* issue. Nor, in an opinion by Mr. Justice Douglas, did the Court concern itself with very much else.

The opinion, resting exclusively on the Fourteenth Amendment,<sup>58</sup> takes comfort in contemporary constitutional history—everything from *Edwards v. California*,<sup>59</sup> *Skinner v. Oklahoma*,<sup>60</sup> *Brown v. Board of Education*,<sup>61</sup> and *Malloy v. Hogan*,<sup>62</sup> to *Reynolds v. Sims*,<sup>63</sup> everything, that is, save the relevant precedents of *Lassiter v. Northhampton Education Board*,<sup>64</sup> which is dealt with lightly, and *Breedlove v. Suttles*,<sup>65</sup> which is overruled. "Voter qualifications," the Court said, "have no relation to wealth nor to paying or not paying this or any other tax. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."<sup>66</sup> There was nothing in the Court's

<sup>55</sup> 383 U.S. at 348.

<sup>56</sup> See *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex. 1966), *aff'd*, 384 U.S. 155 (1966); *United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966).

<sup>57</sup> 219 U.S. 346 (1911).

<sup>58</sup> Under the Fifteenth Amendment, the question, would, of course, have taken on a different aspect. It would not have been easy to make out a case against the poll tax as a vehicle for depriving Negroes of the vote. The tax has disfranchised people, at least in combination with other factors, but it does not appear to have been aimed solely at Negroes, or to have operated so as to disfranchise them alone. See KEY, SOUTHERN POLITICS 534-35, 537-39, 542 *et seq.*, 579, 585, 597-98, 600-08 (1950). Perhaps in Alabama, recent facts would have made it possible to build a fairly strong Fifteenth Amendment case. See *United States v. Alabama*, *supra* note 56.

<sup>59</sup> 314 U.S. 160 (1941).

<sup>63</sup> 377 U.S. 533 (1964).

<sup>60</sup> 316 U.S. 535 (1942).

<sup>64</sup> 360 U.S. 45 (1959).

<sup>61</sup> 347 U.S. 483 (1954).

<sup>65</sup> 302 U.S. 277 (1937).

<sup>62</sup> 378 U.S. 1 (1964).

<sup>66</sup> 383 U.S. at 666, 668.

opinion, Mr. Justice Black complained in dissent, "which advances even a plausible argument as to why the alleged discriminations which might be effected by Virginia's poll tax law are 'irrational,' 'unreasonable,' 'arbitrary,' or 'invidious' or have no relevance to a single policy which the State wishes to adopt. The Court gives no reason. . . ." <sup>67</sup> Mr. Justice Black, if one may say so, was quite right. The Court gave no reason. It did not even notice the obvious argument, mentioned by Mr. Justice Harlan (in another dissent, joined by Mr. Justice Stewart), that payment of a minimal poll tax might rationally be thought to promote "civic responsibility, weeding out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise."<sup>68</sup> This may be thought a pretty argument and a worthy one, or it may be thought ugly and mean. But irrational?

Mr. Justice Douglas flirted with, but did not adopt, a quite different position. He quoted Judge Thornberry, of the three-judge court that struck down the Texas poll tax in a case arising under § 10, as remarking that if Texas were to place a tax, no matter how small, on the right to speak, no court would hesitate to declare it unconstitutional, for such a tax would be in blatant violation of the First and Fourteenth Amendments.<sup>69</sup> Obviously, however, as Mr. Justice Black suggested, the right to speak could also not be freely abridged on the basis of age, illiteracy, conviction of a felony, or residence; and yet the right to vote is commonly qualified on these grounds.

### III. KATZENBACH V. MORGAN

The third case of the term to pass on the Voting Rights Act of 1965, *Katzenbach v. Morgan*,<sup>70</sup> upheld § 4(e), giving the right to vote to Spanish-speaking Puerto Ricans in New York. It was decided together with a companion case, *Cardona v. Power*,<sup>71</sup> which had arisen and been disposed of in the New York courts before the enactment of the Voting Rights Act of 1965. The Supreme Court vacated and remanded the *Cardona* case, without deciding the constitutionality under the Fourteenth Amendment of the requirement

<sup>67</sup> *Id.* at 676-77.

<sup>68</sup> *Id.* at 685.

<sup>69</sup> *Id.* at 665, n. 2, quoting from 252 F. Supp. at 254.

<sup>70</sup> 384 U.S. 641 (1966).

<sup>71</sup> 384 U.S. 672 (1966).

of the New York law that voters be literate in English. (Justices Douglas and Fortas, dissenting, would have held it unconstitutional.)<sup>72</sup> So § 4(e) of the Voting Rights Act, which forbids a state to condition the vote of a person educated in an American-flag school on his ability to read and understand the English language, came to judgment on the assumption that the constitutionality of literacy in English as a condition on the right to vote is an open question under the Fourteenth Amendment.

The Court, Mr. Justice Brennan writing, began by restating a point made in *South Carolina v. Katzenbach*, namely, that Congress is empowered by § 2 of the Fifteenth Amendment and § 5 of the Fourteenth to enact legislation appropriate to those constitutional provisions. Such legislation may reach into the affairs of the states further and differently than the Amendments themselves, applied by the courts without the aid of implementing legislation, would necessarily do.<sup>73</sup> This much is obvious enough. But in enacting appropriate legislation, is it up to Congress to define the substance of what the legislation must be appropriate to? If something is not an action of a state denying or abridging the right of citizens of the United States to vote, on account of race, color, or previous condition of servitude, may Congress say that it is, and thus reach it by legislation? If something is not an irrational classification by a state, may Congress say that it is and that it violates the Equal Protection Clause, and thus reach it by legislation? Of course, Congress may amass evidence and add the weight of its views, and thus affect, and affect powerfully, the Court's judgment of the applicability of the Fifteenth and Fourteenth Amendments. But may Congress under those Amendments, any more than under, for example, the Commerce Clause, determine the allocation of functions between federal and state governments, and the extent of its own powers? May it determine, not what means are appropriate to the enforcement of the Fourteenth and Fifteenth Amendments, or to the discharge of the function conferred by the Commerce Clause, but the content of those Amendments and of that clause?

These questions did not arise in *South Carolina v. Katzenbach*, where only the appropriateness of the means chosen by Congress was at issue. But in *Katzenbach v. Morgan* the Court did answer

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<sup>72</sup> *Id.* at 675.

<sup>73</sup> See 383 U.S. at 325-27.

these questions. For it rested its conclusion that § 4(e) is constitutional at least in part on a holding that § 5 of the Fourteenth Amendment empowered Congress to act, whether or not, in the judgment of the Court, the requirement of literacy in English may be regarded as a discrimination forbidden by the Equal Protection Clause. It was urged, said the Court, "that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree."<sup>74</sup> To the extent that the Court, in this branch of its decision, purported to rely on evidence of the intent of the framers of the Fourteenth Amendment, the sufficient reply that can be made is James A. Garfield's to John A. Bingham in the House, nearly a century ago. My colleague, said Garfield, "can make but he cannot unmake history."<sup>75</sup> Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions. Rather the framers chose to write an amendment empowering Congress only to rectify inequalities put into effect by the states. Hence the power of Congress comes into play only when the precondition of a denial of equal protection of the laws by a state has been met. Congress' view that the precondition has been met should be persuasive, but it cannot be decisive. That is the history of the matter.<sup>76</sup> But perhaps the Court meant to override history in order to bring § 5 of the Fourteenth Amendment into harmony with some general premise of our constitutional system.

Yet, while Congress must be allowed the widest choice of means in the discharge of its function, the general premise of *Marbury v. Madison*,<sup>77</sup> and of *M'Culloch v. Maryland*<sup>78</sup> also, is that Congress

<sup>74</sup> 384 U.S. at 648.

<sup>75</sup> Quoted in Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60, n. 115 (1955).

<sup>76</sup> See *id.* at 32-40; HARRIS, *THE QUEST FOR EQUALITY* 34-50 (1960). The argument in Frantz, *Congressional Power To Enforce the Fourteenth Amendment against Private Acts*, 73 YALE L.J. 1353 (1964), is not really to the contrary. See 73 YALE L.J. at 1358-59.

<sup>77</sup> 1 Cranch 137 (1803).

<sup>78</sup> 4 Wheat. 316 (1819).

does not define the limits of its own powers. It belongs, rather, to the Court, exercising the function of judicial review, to do so. When it applies the dormant Commerce Clause to the states, or when it protects federal instrumentalities from taxation by the states, the Court acts as a surrogate of Congress, and Congress, therefore, has the last word.<sup>79</sup> In a few other areas—taxation and spending for the general welfare is one; exclusion of aliens has been thought to be another—the Court, finding no standards to guide the exercise of judicial review, has abandoned the function. But the function has not yet been abandoned across the board. Whatever, then, could be the reasons for abdicating judicial review in this area of the Fourteenth Amendment, where it has been traditionally dominant? Certainly no general presumption of our constitutional system counsels any such abdication.

There is a second branch to the Court's decision in *Katzenbach v. Morgan*, which is subtler and more interesting. Congress, said the Court, may not have considered the New York requirement of literacy in English as itself a violation of the Fourteenth Amendment. Rather Congress may have been concerned with evidence of discriminatory treatment of the Puerto Rican community at the hands of New York public agencies. The Court was able to adduce no evidence of such discrimination, either out of the materials that were before Congress or independently of those mate-

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<sup>79</sup> See BROWN, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 221 (1957); FREUND, *THE SUPREME COURT OF THE UNITED STATES*, 92, 93 (1961). But in a letter to Senator Robert F. Kennedy, dated May 17, 1965, which the Senator relied on in the course of debate on § 4(e), Professor Freund wrote: "It would be agreed, for example, that if a State were to deny the franchise to Catholics or to a group of Protestants, the classification could be struck down by Congress or the courts under the 14th amendment's guarantee of equal protection of the laws. The courts do not have sole responsibility in this area. Just as Congress may give a lead to the courts under the Commerce Clause in prohibiting certain kinds of state regulation or taxation, and just as Congress may expressly prohibit certain forms of taxation of Federal instrumentalities, whether or not the courts have done so of their own accord, so in implementing the 14th and 15th amendments Congress may legislate through a declaration that certain forms of classification are unreasonable for purposes of the voting franchise." 111 CONG. REC. 11062, 89th Cong., 1st Sess. (May 20, 1965). But surely the analogy between the respective functions of the Court and the Congress in the areas of state taxation and regulation of interstate commerce and of state taxation of federal instrumentalities, on the one hand, and the area of the Fourteenth Amendment, on the other, is too readily drawn by Professor Freund in this letter.

rials.<sup>80</sup> But perhaps, with some stretching, the presumption of constitutionality should make up for this lack of evidence.<sup>81</sup> The argument then proceeds in this fashion. Instead of directly attacking the discrimination practiced against the Puerto Ricans, as it

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<sup>80</sup> The only item of relevant evidence cited (but not quoted, or even paraphrased) by the Court is the following letter received in 1962 by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, and incorporated in the record of hearings the subcommittee held in the course of that year on literacy tests and other voter qualifications. The letter, dated at New York, April 16, 1962, is signed, Gene Crescenzi. It is short, and the gist of it needs to be quoted in full:

"The fact of disfranchisement of these citizens [Puerto Ricans in New York] operates to make them subject to all kinds of abuses and denials of the equal protection of the law. More serious than this, a fifth column type of activity has arisen in our governmental agencies and among elected public officials in respect to the disfranchised Puerto Ricans.

"In the week of January 2 to 9, 1962, the employees of Flower Hospital went on strike, they are mostly Puerto Ricans earning \$35 to \$40 per week, approximately 35 of these people were beaten and arrested. In this same week, the mayor of New York raised his wages \$10,000. On January 17th the General Sessions Court announced that it would require probationers who don't speak English to learn English, as the lack of English was the cause of their problems. I could write volumes on the cruelty, brutality, murder, mayhem and general abuse delivered upon the disfranchised Spanish-speaking citizens in New York by the various agencies of our Government, all of which is directly due to their disfranchisement. Having no vote, they have no representation and no means of redress.

"The English literacy requirement is an instrument of racist policies of the State of New York, and it is used to circumvent the U.S. Constitution. It is more vicious in its application in the State of New York because it has driven its racist politicians underground, than in Southern States where segregation has long been a way of life and may be fought in the open in the American way." *Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary on S. 480, S. 2750, and S. 2979, 87th Cong., 2d Sess. 507-08 (1962).*

A statement in 1965 to a subcommittee of the House Committee on the Judiciary by Herman Badillo, a leading Puerto Rican politician and now Borough President of The Bronx, pleaded for passage of what was to become § 4(e), but nowhere charged discrimination in public services or by any public agencies in New York against Puerto Ricans. See *Voting Rights, Hearings before Subcommittee No. 5 of the Committee on the Judiciary on H.R. 6400, House of Representatives, 89th Cong., 1st Sess. 508-17 (1965).*

<sup>81</sup> The stretching, however, would be considerable. It would amount, to change the figure somewhat, to a leap from a presumption buttressed by data, even if data "offered not for the truth of the facts asserted but only to establish that responsible persons have made the assertion and hold the opinions which are disclosed," FREUND, *ON UNDERSTANDING THE SUPREME COURT* 88, and see also 87-89 (1951), to a presumption that makes up for the lack of any data at all—a presumption that, in a case such as the present one, puts the party attacking constitutionality to the task of proving a negative.

could plainly have done under the Fourteenth Amendment, Congress decided to reach it indirectly. It secured the vote for the Puerto Rican community, in the belief that its political power would then enable that community to ensure non-discriminatory treatment for itself. The vote is thus seen as a means of enforcing the Fourteenth Amendment, not as itself the end of the congressional action, and Congress is not in the position of having undertaken to determine the substance of Fourteenth Amendment rights. Congress is merely presumed to have established facts showing that those rights, as judicially defined, have been or may be denied, and of choosing a suitable remedy.<sup>82</sup>

It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

The argument is superficially attractive. But suppose Congress decided that aliens or eighteen-year-olds or residents of New Jersey are being discriminated against in New York. The decision would be as plausible as the one concerning Spanish-speaking Puerto Ricans. Could Congress give these groups the vote? If Congress may freely bestow the vote as a means of curing other discriminations, which it fears may be practiced against groups deprived of the vote, essentially because of this deprivation and on the basis of no other evidence, then there is nothing left of state autonomy in setting qualifications for voting. The argument proves too much. The Court relied on Marshall's famous pronouncement: "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."<sup>83</sup> The

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<sup>82</sup> 384 U.S. at 653.

<sup>83</sup> 4 Wheat. at 421.

Court duly emphasized appropriateness, and adaptation to a given end, but it de-emphasized altogether too much Marshall's caveat that the means chosen must also not be prohibited, and must "consist with the letter and spirit of the constitution."<sup>84</sup>

#### IV. CONCLUSION

The impatience exhibited in *South Carolina v. Katzenbach* with jurisdictional problems of first importance reflects sadly both on the Court and on that very special officer of the Court, the Solicitor General. The Court, to be sure, has been known to swallow jurisdictional scruples before now, with no permanent ill effect. But while no ominous view need be taken of this or other isolated instances, only the most ominous of views can be taken of the practice.

The Court's other two encounters with the Voting Rights Act of 1965 are not a little ironic. No Justices have been more jealous

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<sup>84</sup> A dissent by Judge McGowan from the decision below, *Morgan v. Katzenbach*, 247 F. Supp. 196, 204 (D. D.C. 1965), and the opinion of a three-judge court in New York in another case, in which an appeal was aborted by the intermediate decision of *Swift & Co. v. Wickham* (382 U.S. 111 [1965]), *United States v. County Board of Elections of Monroe County*, 248 F. Supp. 316 (W.D. N.Y. 1965), *appeal dismissed for want of jurisdiction*, 383 U.S. 575 (1966), attempt to rest the constitutionality of § 4(e) on a narrower and more persuasive ground, though one that is also not free from difficulties. Being empowered to make rules and regulations for the governance of territories, Congress bestowed citizenship on natives of Puerto Rico, while at the same time permitting them to be educated in schools in which the language of instruction is Spanish. It also permitted them freely to migrate to the mainland. If Congress now thought that, having migrated to the mainland, Puerto Ricans should not be deprived of a voice in the government of whatever state they settled in because of a lack of literacy in English, which is itself owing to the kind of education Congress provided them with, Congress could, the argument runs, in pursuance of its power to govern the territories, decree that Puerto Ricans must be allowed to vote whether or not literate in English. From this point on, of course, the Supremacy Clause goes the rest of the way to overcome the law of New York. But suppose Congress wanted Puerto Ricans who were altogether illiterate to vote in New York. Or suppose it wanted natives of Guam, whom it had not chosen to make citizens, to vote in New York. Or suppose it wanted Puerto Rico, in its present status, not as a state, to be represented in the Senate and to vote in presidential elections. Congress, moreover, also has power to admit or exclude aliens, and to naturalize them or not. Suppose Congress thought it well that aliens, or aliens of a given nationality, should vote in state elections from the moment they arrived in a state, regardless of the length of their residence, and regardless of their age, or of their previous criminal record. Neither the power to govern territories nor the power to conduct foreign relations has hitherto been thought necessarily to carry everything before it.



guardians of the judicial prerogative, or more energetic wielders of judicial power, than the governing majority of the present Court. And yet *Katzenbach v. Morgan* constitutes restraint, if not abdication, beyond the wildest dreams of the majority's usual *bête noire*, James Bradley Thayer, and in fact beyond anything he intended to recommend. And *Harper v. Virginia Board of Elections* harks attentively to even a timid hint from Congress. One doubts, nevertheless, that a new trend has really been inaugurated.