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The Rape of Title III

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Title III of the Voting Rights Act Amendments of 1970[1] lowered the minimum voting age to 18 in both national and state elections. In *Oregon v. Mitchell*[2] the Supreme Court held five to four that Congress had the power to lower the voting age in federal elections, but realigned and also held five to four that Congress had exceeded its legislative authority in overriding state age voter qualifications. Justices Douglas, Brennan, White and Marshall held

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1. The Voting Rights Act Amendments of 1970, Pub. L. No. 91-285 (June 22, 1970) [hereinafter cited as Title III]. Title III of the Act provides:

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 citizens 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 such primary or election on account of age if such citizen is eighteen years of age or older.

ENFORCEMENT

SEC. 303. (a)(1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as they may determine to be necessary to implement the purposes of this title.

EFFECTIVE DATE

SEC. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971.

2. 400 U.S. 112 (1970). Oregon sought an injunction against the enforcement of Title III. The United States sought to enjoin the states of Arizona and Idaho from enforcing their age voter qualifications, literacy tests, and residency and absentee balloting provisions to the extent they conflicted with the other provisions of the 1970 Voting Rights Act Amendments.

that the entire act was constitutional while Chief Justice Burger and Justices Blackmun, Harlan and Stewart took the opposite position. Justice Black's vote produced the anomalous result. While the ultimate holding of the case is clear, the ninety-page decision reveals the complexity of the issues before the Court. In determinng the constitutionality of this statute the Court was forced to reexamine the relationship between the states and Congress and ultimately between Congress and the Supreme Court. Congress did not pass Title III without considering alternative means of reducing the voting age,[3] and it was *only* after concluding that there was no compelling state interest to justify the state restriction of the franchise to those citizens aged 21 or older did Congress enact this legislation. After making this determination, and subsequent relying on the rationale of *Katzenbach v. Morgan*,[4] Congress enacted Title III as an appropriate exercise of it's enforcement powers under Section 5 of the fourteenth amendment.[5]

Initially this article will examine the two bases upon which Congress acted by discussing the emergence of the right to vote as protected by the fourteenth amendment. An analysis of the case will follow. Finally this article will analyze the effects of *Oregon v. Mitchell* upon the states, the power of Congress, and the role of the Supreme Court in 'Our Federalism'.[6]

The Right to Vote

The right to vote in both national and state elections has been slow to achieve constitutional dimensions.[7] Nowhere does the constitution expressly confer

3. *Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 160-282 (1970). [Hereinafter referred to as HEARINGS].

Although Title III did pass the Senate 64-17, 116 CONG. REC. § 3585 (daily ed. March 12, 1970), there was considerable discussion both on the floor and in committee whether to lower the voting age by statute or by amendment. The solicited opinions of noted constitutional lawyers, Dean Pollack and Archibald Cox, were inconclusive as to whether such a statute would pass judicial scrutiny. The discussions of constitutional principles and authorities, however, were greatly tempered by the urgency of accomplishing the desired goal. Congressional passage of the statute not only affirmatively resolved the legality of the statute but reflected the political decision to forego the traditional method by which radical changes in the electorate have been accomplished.

4. 384 U.S. 641 (1966). *See* note 21 *infra*.

5. U.S. CONST. amend. XIV, §§ 1, 5.

Section 1. [No] State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.* (Emphasis added).

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

6. Younger v. Harris, 39 U.S.L.W. 4201 (U.S. Feb. 23, 1971).

7. *See* Kirby, *The Constitutional Right to Vote*, 45 N.Y.U. LAW REV. 995 (1970).

the right of suffrage;[8] indeed if it were expressly granted in the Bill of Rights then *any* state qualification of this right would have to meet the strictest judicial scrutiny.[9] Although the states have "broad powers under which the right of suffrage may be exercised,"[10] this area of primary responsibility may be exercised only within the limits prescribed by the Constitution.[11] Clearly any state practice which denies a citizen the right to vote on account of race or color is prescribed by the fifteenth amendment and will meet with the strictest congressional and judicial scrutiny.[12] The majority of early state suffrage issues, however, were argued and decided on the basis of the equal protection

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8. "The Constitution . . . does not confer the right of suffrage upon any one." Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874). Once suffrage has been granted, it is protected by the Constitution. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Black, Harlan, JJ. dissenting). However it may be argued that the right to vote in federal elections is directly conferred upon citizens in the sense that article I, section 2 and the seventeenth amendment define the qualifications for voting in federal elections.

Although the "nonjusticiability" of the republican form of government clause has long been an impregnable barrier to the invocation of the Court's adjudicatory powers, a viable argument could be made that the right to vote is implicit in state elections. A republican form of government which Congress must guarantee to the states in accordance with the Constitution must mean the exercise of the suffrage by all those who may competently participate.

"Indeed, the right to vote is also central to the First Amendment. As a comprehensive charter of freedom of political expression, that Amendment embraces not only the rights specifically enumerated, but also those additional rights necessary for their full exercise and enjoyment." Brief for Plaintiff at 31 n.22, Oregon v. Mitchell, 400 U.S. 112 (1970). *See* NAACP v. Button, 371 U.S. 415, 429-430 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

9. "I think State regulations should be viewed quite differently where it touches or involves freedom of speech, press, religion, petition, assembly, or other specific safeguards of the Bill of Rights. It is the duty of this Court to be alert to see that these Constitutionally preferred rights are not abridged." Morey v. Doud, 354 U.S. 457, 471 (1957) (Black, J. dissenting); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). In Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court held that a state must furnish an indigent prisoner with a trial transcript in order to perfect an appeal in a criminal case. The traditional test of "invidious" or "hostile" discrimination was rejected due to the sensitive constitutional rights involved. Therefore, even though there was neutrality on the face of the statute and any inequality might be accidental, there was a positive right placed upon the states to insure equality. "Such a law would make the *constitutional promise* of a fair trial a worthless thing. . . ." 351 U.S. at 17 (emphasis added).

10. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959).

11. U.S. CONST. art. 1, § 2, cl. 1; art. 1, § 4, cl. 1; amends. XIV, XV, XVII, XIX, and XXIV.

12. U.S. CONST. amend. XV, §§ 1-2 state:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

In Gaston County v. United States, the use of the county's literacy test was suspended. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Voting Rights of 1965 was held constitutional as an appropriate exercise of Congress' enforce-

clause of the fourteenth amendment, and various qualifications placed on the right to vote by the states were upheld under a "rational nexus" test.[13] The Warren Court was moving toward the realization of the right to vote as a basic constitutional right by applying a more sophisticated standard in defining "equal protection."[14] In *Harper v. Virginia Board of Elections*[15] the Court found that the right to vote was denied some Virginia citizens by means of a state poll tax. Although the poll tax was applied in a non-discriminatory manner, Justice Douglas speaking for the Court stated:

> Wealth, like race, creed, or color is not germane to one's ability to participate intelligently in the electoral process. Since voter qualifications have no relationship to wealth, or paying a tax, the degree of discrimination is irrelevant. In this context—that is, as a condition of obtaining the ballot,—the requirement of fee paying causes invidious discrimination.[16]

The Warren Court failed to heed Justice Frankfurter's 1946 warning in

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ment powers under Section 2 of the fifteenth amendment. After substantial fact-finding Congress could reasonably conclude that literacy tests and related devices were administered in a discriminatory fashion with the purpose of disenfranchising Negroes. In Guinn v. United States, 238 U.S. 347 (1915), Oklahoma's grandfather clause declared unconstitutional as a denial of the right to vote.

13. Traditionally state legislation challenged under the equal protection clause of the fourteenth amendment carried a presumption of constitutionality. As long as there existed a reasonable relationship between the purpose of the statute and a legitimate governmental interest the statute was upheld. This test of constitutionality did not bar consequential discrimination flowing from the application of such state laws. In Lassiter v. Northhampton Bd. of Elections, 360 U.S. 45 (1959), a North Carolina literacy test requirement was examined on equal protections grounds and upheld. A "rational nexus" test was applied and the Court found the literacy requirement sufficiently related to a permissible state policy of promoting intelligent use of the ballot. In Breedlove v. Suttles, 302 U.S. 277 (1937), the Court unanimously upheld a poll tax for state elections. Williams v. Mississippi, 170 U.S. 213 (1898), held literacy, residency, poll tax, and morality requirements as valid under the equal protection clause. That application of these devices denied Negroes the right to vote contrary to the fifteenth amendment was not argued in any of the above cases.

14. The Court has rejected the proposition that the equal protection clause is limited to intentional, arbitrary, or invidious discriminations affecting an identifiable class of persons. Rather it discussed the right to vote as a specially protected and fundamental right:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). Clearly people cannot be excluded from exercising this right because of state qualifications or classifications unless those classifications are supported by a *compelling state interest. See* Claude, *Nationalization of the Electoral Process*, HEARINGS at 395-424 (1970).

15. 383 U.S. 663 (1966) (Black, Harlan, JJ. dissenting). *See also* Gray v. Sanders, 372 U.S. 368 (1963) (voters cannot be classified on the basis of where they live; all votes must be weighted equally in statewide elections).

16. 383 U.S. at 668.

Colegrove v. Green[17] that "Courts ought not to enter this [congressional districting] political thicket,"[18] and in *Baker v. Carr*[19] the judiciary embarked upon a revolutionary course of vindicating fundamental principles of representative government. In a series of "reapportionment" cases the Court established a constitutional doctrine of equal representation for equal numbers of people.[20] The Court made clear that once the franchise has been granted to a class of persons the equal protection clause requires *true* equality in the exercise of that right. Thus while the equal protection clause fully protects the quality of the vote among the enfranchised elite, the state may still capriciously withold the ballot from an entire class of voters.

The Court addressed the issue of the total disenfranchisement of a class of persons on grounds other than those specifically prohibited by the Constitution in *Carrington v. Rash.*[21] In *Carrington* it was held that a Texas constitutional provision which prevented citizens who had entered military service in another state from acquiring voting residence in Texas so long as he remained in the military was a denial of the equal protection. The Court could have declared this statute unconstitutional on bases which would have placed the right to vote on secure constitutional grounds.[22] Instead, it laid the basis for perpetuating a case-by-case approach to state voting qualification by selectively reviewing the degree of each alleged discrimination. Since *Carrington*, however, a line of cases has emerged in which the Supreme Court applied the "compelling state interest" standard in evaluating the exclusion of otherwise qualified voters from a *special* election.[23] In *Kramer v. Union Free*

17. 328 U.S. 549 (1946) (Black J. dissenting).

18. *Id.* at 556.

19. 369 U.S. 186 (1962) (Frankfurter, Harlan, JJ. dissenting). A claim asserted under the equal protection clause challenging the constitutionality of the apportionment of seats in a state legislature, can be maintained in the federal courts; the appellants had standing to sue, the issue was justiciable, and the courts had jurisdiction.

20. In Reynolds v. Sims, 377 U.S. 533 (1964), the Court held as a basic constitutional standard that the equal protection clause required both houses of a state legislature be apportioned on the basis of population. In Wesberry v. Sanders, 376 U.S. 1 (1964), the Court held that the test to determine the validity of congressional districting schemes was one of equality of population among various districts. In Gray v. Sanders, 372 U.S. 368 (1963), the Court adopted its "one man one vote" holding. For an excellent analysis of the reapportionment cases *see* R. McKay, Reapportionment: The Law and Politics of Equal Representation (1965).

21. 380 U.S. 89 (1965).

22. The Court could have held that the federal statute forbids such discrminations. The State of Texas conceded that but for the petitioner's uniform he would have been eligible to vote in El Paso County, Texas. *Id.* at 91. Therefore, under the supremacy clause (U.S. Const. art. VI, cl. 2) the Texas statute could have been invalidated. The federal statute was also a proper exercise of Congress' power under article I, section 8, clause 12 "to raise and support Armies." Since petitioner had been eligible to vote in his home state before entering military service, it could have also been grounds for invalidation of Texas' statute that it unconstitutionally abridged "a privilege or immunity" of a citizen of the United States.

23. In Evans v. Cornman, 398 U.S. 419 (1970), the Court held that a Maryland

School District[24] the Court laid down its strongest statement of why the traditional presumption of constitutionality cannot be applied to those voting rights cases which affect the very nature of the representative process itself:

> The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are 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 to this basic assumption the assumption can no longer serve as the basis for presuming constitutionality.[25]

The traditional avenues for effecting a remedy to the claimed discrimination, *i.e.*, participation in the political process, are often foreclosed when the disenfranchised are "locked into a self-perpetuating status of exclusion from the electoral process."[26]

In each case the Court emphasized and reaffirmed the states' general prerogatives in areas of citizenship, age, and residency qualifications in general elections. Recently however, several three-judge federal courts, after applying a compelling state interest standard, have held that state residency requirements were invalid under the equal protection clause.[27] Before Title III was enacted by Congress, however, the courts granted such deference to state authority to set age requirements that challenges to the 21-year old minimum voting age for state and federal elections were dismissed for failure to state a

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statute excluding residents of a federal enclave located in Maryland from voting in state elections was held unconstitutional. "[B]efore [the right to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Id.* at 422.

In Cipriano v. City of Houma, 395 U.S. 701 (1969), the Court held an election statute prohibiting non-property owners from voting in special revenue bond elections invalid. In Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), the Court held invalid a provision of a New York law limiting voter eligibility in local school elections to those who owned or leased taxable property or had a child enrolled in school. In each case the state defended the classification on the grounds that the excluded class was not primarily interested in the issues of the election and that only those persons substantially affected by the resolutions of certain issues should have a voice in voting. The Court rejected the states arguments and found that the effects of a vote often fall indiscriminately on all residents; moreover the Court held that in none of the cases did the statute purport to do what the state claimed it was supposed to do. "[Whether] a state might, in some circumstances limit the franchise to those primarily interested . . ." was left unresolved. 395 U.S. at 704. *See also* Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

24. 395 U.S. 621 (1969).

25. *Id.* at 628.

26. *Id.* at 640.

27. The compelling state interest test has been applied to state residency requirements. The one-year residency requirement was held unconstitutional in Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970). *See also* Bufford v. Holton, 319 F. Supp. 843 E.D. Va. 1970 *appeal filed*, Virginia Bd. of Election v. Bufford, 39 U.S.L.W. 3405 (U.S. Mar. 16, 1971). Both cases declared that any residency requirement limits

cause of action.[28] Yet a denial of the vote is an egregious wrong if it has been unreasonably imposed. A person excluded from voting in *all* elections is no less discriminated against than one permitted to vote in *some*, or whose vote has been diluted such as in the reapportionment cases. To hold that a state is less compelled to justify an age qualification is patently untenable. First, assuming *arguendo* that some age qualification is necessary and valid, it does not follow that the existing age qualification is necessarily valid. Second, because the present age qualification was reasonable at a prior time in our history does not mean that it is reasonable now. The justification for age requirements is to insure the intelligent exercise of the ballot increased educational opportunities and the subsequent change in youth compells us to reexamine the voting standard. Therefore, the compelling interest test should be applied in *all* cases involving the right to vote. The 18-20 year olds may not be "fenced out from the franchise"[29] without subjecting the states to a heavy burden of justifying their age requirements.

Congress was aware of the constitutional concern shown by the courts to broaden access to the right to vote; it was also increasingly preoccupied with insuring the legitimacy and credibility of the representative form of government in America.[30] Since Congress passed Title III pursuant to its enforce-

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two fundamental rights, the right to vote and the right to travel interstate, a privilege and immunity of citizens of the United States. Therefore, the state must show a compelling state interest served by these requirements. In *Kohn* it was noted that durational residency requirements have fallen into judicial disfavor. *See also* Burg v. Canniffe, 315 F. Supp. 380 (D. Mass. 1970); Broumstein v. Ellington (M.D. Tenn. 1970); Hall v. Beals, 396 U.S. 45 (1969). The case of Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965), which upheld the Maryland residency requirement, was distinguished in *Bufford* on the ground that at the time of the decision the compelling state interest test had not matured and had not been engrafted upon the criteria used to weigh the validity of state laws. Since Pope v. Williams, 193 U.S. 621 (1904), which upheld a one-year residency requirement, was not controlling, the issue of the reasonableness of state laws is a continuing question.

28. Even before the passage of Title III, individuals between the ages of 18-21 initiated suits in federal courts alleging the unconstitutionality of the state minimum age voting qualification of 21. *See* Brief for Appellants, Puishes v. Mann (9th Cir. 1970) reprinted in *Hearings* at 509-560, and Complaint, WMCA Vote at 18 Club v. Bd. of Elections, 319 F. Supp. 543 (S.D.N.Y. 1970) reprinted in HEARINGS at 561-582.

29. " 'Fencing out' from the franchise a section of the population because of the way they may vote is constitutionally impermissible." Carrington v. Rash, 380 U.S. 89, 94 (1965).

30. Proponents of Title III wanted to insure the legitimacy of both state and federal governments by extending to young adults the 'right' to legitimately participate in the democratic process. *See* HEARINGS. Congress was particularly concerned with the high proportion of men between the ages of 18-21 who were subjected to the draft and indeed had been killed in Vietnam. While "conscription without representation" has long been the hue and cry of the proponents of the 18-year old vote, more than one Senator was of the opinion that it was also in the interest of national security to assure that those participating in the nation's war have the right to select those persons making the decision to fight. *See* 116 CONG. REC. 3058 (daily ed. March 5,

ment powers under Section 5 of the fourteenth amendment, the focus of the judiciary's review would presumably be on this congressional power rather than on the superseded state law under the fourteenth amendment.[31] The Court previously upheld Section 4(e) of the 1965 Voting Right Act[32] against a New York state assertion that prior to the enactment there had been no determination by any court that the New York literacy test was a violation of equal protection, and that Congress' power under Section 5 was restricted to situations where a court had found a state enactment unconstitutional. The Court specifically rejected this argument:

> . . . 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.[33]

Section 5 was described as 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."[34] The states of Oregon and Texas distinguished *Katzenbach v. Morgan* on the ground that Congress' legislation was directed toward removing a racial discrimination particularly cognizable under the equal protection clause. In *Katzenbach* the congressional power to determine and correct violations of the equal protection clause not involving racial discrimination was left undetermined. In *Oregon v. Mitchell* that question was finally answered.

Opinions of the Eight Justices

The effect of Title III was more than an expansion of the franchise. It

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1970) (remarks of Senator Kennedy).

During World War II Congress suspended state voter qualification statutes to ensure military personnel the right to vote. *See* Brief for NAACP as amicus curiae at 5, Oregon v. Mitchell, 400 U.S. 112 (1970). The NAACP argued that Congress had the authority to pass Title III on the basis of article I, section 8 and the necessary and proper clause.

31. Katzenbach v. Morgan, 384 U.S. 641 (1966), established that Section 5 of the fourteenth amendment gave Congress power equivalent to its power under the necessary and proper clause. Distinguishing Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), in which the Court upheld a state literacy test absent a congressional statute forbidding such a practice, Justice Brennan stated that the ". . . inquiry was not whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, but rather could Congress effectively prohibit the enforcement of such a state law by acting itself." *Id.* at 649.

32. 42 U.S.C. § 1973b(e) (1964).

33. Katzenbach v. Morgan, 384 U.S. 641 (1966).

34. *Id.* at 651.

marked a deep congressional inroad into an area traditionally left to the states. Although purporting to decide the constitutionality of Title III on the sole basis of Congress' power to pass the statute, under Section 5 of the fourteenth amendment,[35] Justices Burger, Stewart, Harlan and Blackmun colored their judicial inquiry with a scepticism born of this unusual procedure.[36] By their reading of the Constitution and it's history they clearly rejected Congress' proposition that it could alter the qualifications for voting in either state or federal elections by mere legislation. They concurred with Justice Black's finding that the power to regulate state voter qualifications was reserved to the states but dissented from his holding that a reading of article I, section 2[37] with article I, section 4[38] gave Congress the power to regulate federal voter qualifications. They stated that "manner" in article I, section 4,

> . . . can hardly be read to mean qualifications for voters, when it is remembered that Section 2 of the same Article I explicitly speaks of the representatives. It is plain, in short, that when the Framers meant qualifications they said qualifications. That word does not appear in Article I Section 4.[39]

Furthermore, they not only examined Congress' power, but summarily evaluated as reasonable the state age qualification laws that Congress was attempting to displace.[40] Having made this substantive determination they precluded Congress from making a finding which concededly was essential to sustain Congress' power to pass this legislation. Thus, the broad powers of Congress recognized by the Court in *Katzenbach v. Morgan*[41] were limited here on factual grounds.[42]

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35. "Before turning to a discussion of my views, it seems appropriate to state that we are not called upon in these cases to evaluate or appraise the wisdom of abolishing literacy requirements . . . or of reducing the voting age to 18. Whatever we may think as citizens, our single duty as judges is to determine whether the legislation before us was within the constitutional power of Congress to enact." 400 U.S. at 282.

36. "From the standpoint of the bedrock of the Constitutional structure of this Nation, these cases bring us to a crossroad that is marked with a formidable 'stop' sign. That sign compels us to pause before we allow those decisions to carry us to the point of sanctioning Congress' decision to alter state-determined voter qualifications by simple legislation, and to consider whether sounder doctrine does not in truth require us to hold that one or more of the changes which Congress has thus sought to make can be accomplished only by constitutional amendment." *Id.* at 152.

37. U.S. CONST. art. I § 2.

38. U.S. CONST. art. I § 4.

39. 400 U.S. at 288.

40. "Yet it is inconceivable to me that this Court would ever hold that the denial of the vote to those between the ages of 18 and 21 constitutes such an invidious discrimination as to be a denial of the equal protection of the laws." *Id.* at 295, n.14.

41. Katzenbach v. Morgan, 384 U.S. 641 (1966).

42. The congressional statute dealt with age classifications and as such *Morgan* did not apply because the "compelling state interest" test only would apply to racial discriminations.

In reviewing the constitutionality of the 1970 statute Justice Harlan predictably was wedded to the historical intent of the Framers of both the Constitution and the Reconstruction Amendments.[43] This historical probing is a necessary concommitant of his philosophy on the role of the Supreme Court.[44] Since the passage of the Reconstruction Amendments did not affect the traditional power of the states to establish voter qualifications in both state and federal elections, Congress may not use these amendments as a basis for altering voter qualifications.[45] Hence, the Reconstruction Amendments did not void state voter qualifications but merely deprived a state of it's full representation if it placed racial qualifications on the franchise.[46] Alternatively Justice Harlan found that the right to vote was not among the privileges or immunities of a citizen of the United States protected by the fourteenth amendment.[47] To deviate from the constitutional interpretation of the fourteenth amendment would require the passage of an amendment; otherwise the Court would be reading it's policy predilections into the Constitution. If the Court can not do this by decision, Congress may not do this by legislation. Believing that a national judgment on voter qualifications is no more astute than those of the states, Harlan saw no merit in Congress' power to pass this statute under Section 5 since,

> I think it is fair to say that the suggestion that members of the age group between 18 and 21 are threatened with unconstitutional discrimination, or that any hypothetical discrimination is likely affected by lowering the voting age, is little short of fanciful.[48]

On the other hand, Justices Douglas, Marshall, White and Brennan did not consider it an affront to the Constitution that Congress by-passed the amendment process. They held Title III constitutional and an appropriate exercise

43. In previous cases involving judicial or congressional power to regulate elections Harlan always wrote a detailed opinion involving historical analysis on the intent of the Framers. *See* Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962); Gomillion v. Lightfoot, 364 U.S. 339 (1960). For an excellent discussion of Harlan's theory of the fourteenth amendment *see* Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

44. For Harlan a Supreme Court Justice must decide the cases in light of the Constitution and this means that he must discuss the intent of the Framers. "Every Constitution embodies the principles of its framers. . . . If its meaning in any place is left open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers; and their authority increases in proportion to the evidence which they have left on the question." CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866) (remarks of Senator Sumner). Harlan believes this view to be undoubtedly sound.

45. 400 U.S. at 155. Previously Harlan held that equal protection is irrelevant to state suffrage issues. *See* Carrington v. Rash, 380 U.S. 89 (1965).

46. Oregon v. Mitchell, 400 U.S. at 169-170.

47. *Id.* at 164, 175.

48. *Id.* at 212.

of congressional power under Section 5 of the fourteenth amendment as interpreted in *Morgan*.[49] Confining themselves to the merits of the government's arguments, they did not focus upon the issue whether a state statute prohibiting 18 year olds from voting would withstand judicial scrutiny under a compelling state interest standard. Congress could reasonably have concluded through its legislative fact-finding that the denial of the franchise to those 18 to 21 was a denial of equal protection. Since nothing in Section 5 limits Congress' power solely to racial discrimination, and since, according to *Mitchell*, Congress can legislate to obtain equality in ways consistent with the Constitution, the proper role for the judiciary must be to affirm Congress' judgment.[50] Justices Marshall, Brennan, and White not only devoted considerable time to rebutting Harlan's conclusion concerning the fourteenth amendment, but revealed the ambiguities which clouded the passage of both the fourteenth and fifteenth amendments.[51] They attempted to show that any reference to historical interpretations of the Reconstruction Amendments would be at best conjectural authority.

Justice Douglas wrote a separate opinion upholding Title III[52] under both the equal protection and the privileges and immunities clauses. Using article I, section 2, the fifteenth and seventeenth amendments, and the Supreme Court cases since *Ex Parte Yarborough*,[53] Douglas distinguished the right to vote as a "civil right of the highest order."[54] As a civil right protected by the fourteenth amendment the issue is the extent of Congress' power under Section 5 of that amendment. Congress "might well conclude that a reduction in the voting age from 21 to 18 was needed in the interests of equal protection."[55] Where "fundamental rights and liberties are asserted under the equal protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."[56] Since the reach of Section 5 is quite broad, when Congress concludes that legislation is necessary and proper, the Court must let the statute stand.

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49. 384 U.S. 641 (1966).
50. 400 U.S. at 248, 251.
51. *Id.* at 252-53.
52. *Id.* at 135-152.
53. 110 U.S. 651 (1884).
54. "Whatever distinction may have been made, following the Civil War, between 'civil' and 'political' rights, has passed into history." Oregon v. Mitchell, 400 U.S. at 139. Harlan's view of equal protection leads him to conclude that "political" rights are not protected though "civil" rights are. *Id.* at 137. Thus Douglas is able to write-off Harlan's historical findings as irrelevant to the present issue.
55. In Harper v. Virginia State Bd. of Elections, [citation omitted], we stated, "Notions of what constitutes equal treatment for purposes of the Equal Protection clause *do* change." *Id.* at 139 (emphasis the Court's).
56. *Id.* at 142, quoting from Harper v. Virginia Bd. of Elections, 383 U.S. 663 670 (1966).

Black's Dilemma

If Justice Black had decided the case upon the *Morgan* rationale, the focus of his inquiry should have been the reasonableness of Congress' action under Section 5 of the fourteenth amendment. Even if he had utilized the second justification for passage of the Act, *i.e.*, the lack of a compelling state interest in denying the franchise to 18 to 21 year olds, Justice Black would have had to decide the case on fourteenth amendment grounds as the other eight Justices did. However, addressing himself to either of these inquiries would have compelled him to be consistent vis-a-vis Congress' power to determine voter qualifications in both national and state elections.

For Justice Black the issue before the Court was a political question involving ". . . not who is denied equal protection but rather which political body, State or Federal, is empowered to fix the minimum age of voters."[57] Hence, he was forced into the dilemma of finding a two-fold rationale to sustain what he believes is the inherent right of the federal government to preserve itself, and simultaneously protect the concept of Federalism. Justice Black circumvented the government's argument and based his holding on the seldom-used article I, section 2 an darticle I, section 4.

Black stated that article I, section 2 gave the states primary responsibility for setting voter qualifications in congressional elections, and asserted that article I, section 4 was a "compromise clause"[58] which reserved to Congress a supervisory power over all regulations affecting congressional elections. Moreover this supervisory power was augmented by the necessary and proper clause[59] to assure Congress' power over all national elections. Acknowledging that *Wesberry v. Sanders*[60] recognized Congress' power to alter geographical election districts "to vindicate the people's right to equality of representation in the House",[61] he surmised that

> [No] voter *qualification* was more important to the Farmers than the *geographical qualification* embodied in the concept of Congressional districts. . . . There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal elections.[62]

The issue is Justice Black's underlying premise that a geographical district is

57. Oregon v. Mitchell, 400 U.S. at 127 n.10.
58. *Id.* at 119 n. 2.
59. *Id.* at 120.
60. 376 U.S. 1 (1964).
61. Oregon v. Mitchell, 400 U.S. at 121 citing Wesberry v. Sanders, 376 U.S. 1, 16 (1964).
62. Oregon v. Mitchell, 400 U.S. 112, 122 (1971).

a qualification. He concluded by citing *Smiley v. Holm*[63] which extensively interpreted congressional power under article I, section 4 and which explicitly concluded that Congress does have a supervisory power over national elections.

It has been undisputed in both Supreme Court[64] cases and in historical inquiries[65] that Congress has supervisory powers over the "times, places and manner" of congressional elections stemming from article I section 4. To conclude that Congress may also regulate age qualifications it must first be shown that age qualifications come within the "times places and manner" clause of article I, section 4. Justice Black never expressly made this determination.

"Qualifications" in article I, section 2 means age, wealth, property, and residence requirements,[66] all of which are conditions precedent to the exercise of the ballot. The debates over the adoption of the Constitution reflect two overriding reasons why the Framers made the qualifications for congressional election voting dependent upon the states. At the time the Constitution was written the qualifications in the states were diverse[67] and it was impractical to set forth constitutional qualifications which would have won state support.[68] Secondly, the extent of national power over any election was greatly contested.[69] The majority feared that if the national government was given too much power, Congress could easily perpetuate an aristocratic government.[70] By vesting qualifications in the states, not only would ratification be sucessful,[71] but also the states would be more responsive to the peoples right of representation.[72] Consequently, the question who was to vote was left to the states.

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63. 285 U.S. 355 (1932).

64. U.S. v. Classic, 313 U.S. 299 (1941); *In re* Coy, 127 U.S. 731 (1888); *Ex Parte* Yarbough, 100 U.S. 661 (1884); *Ex Parte* Siebold, 100 U.S. 371 (1880); and *Ex Parte* Clarke, 100 U.S. 399 (1879).

65. J. STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed. 1858) [hereinafter cited as STORY'S CONSTITUTION], and J. ELLIOT, 5 ELLIOT'S DEBATES (3d ed. 1937) [hereinafter cited as ELLIOT'S DEBATES].

66. G. PASCHAL, THE CONSTITUTION AND THE UNION, § 17, 41 (1882) [hereinafter cited as G. PASCHAL].

67. 2 STORY'S CONSTITUTION at 637.

68. *Id.* at 576-587. *See also* ELLIOT'S DEBATES at 385.

69. THE FEDERALIST No. 59, 60 (Hamilton).

70. "[It] is alleged that it might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others . . . ." *Id.* No. 60 at 369.

71. On the other hand, the conventions of Virginia, Massachusetts, New Hampshire, and Rhode Island accompanied their ratification with a protest against the exercise of this power and North Carolina refused its ratification on this ground. G. PASCHAL, at § 329.

72. "Every state has its own particular views and prejudices. . . . He urged the necessity of maintaining the existence and agency of the states. Without their coopera-

It was recognized, however, that national elections could not be left solely to the will or whim of the states.[73] Therefore, article I, section 4 empowered the states to regulate the "times places and maner" of holding elections but reserved to Congress the right to alter such regulations. "Times" and "places" insured that the elections would in fact be held,[74] and "manner" referred to the way the ballots would be counted, *i.e.*, either secret or *viva voce*, and the integrity of the regulations for conducting elections.[75] *Smiley v. Holm*, which Justice Black cited in *Mitchell*, clearly interpretated "manner" to refer to procedural aspects!

> The subject matter is the times places and manner of holding elections for Senators and Representatives. It cannot be doubted that these comprehensive words embrace authority to provide a complete code for Congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . .
>
> This view is confirmed by the second clause of Article I, Section 4, which provides that the Congress may at any time by law make or alter such regulations, with the single exception stated. The phrase such regulations plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own.[76]

Later Supreme Court cases referred to this supervisory power as an indispensable right of Congress to secure the purity and legitimacy of all federal elections by appropriate legislation. But the Court has left no doubt that voting qualifications such as age are left to the states.[77]

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tion it would be impossible to support a republican government over so great an extent of country." ELLIOT'S DEBATES at 239.

73. "[They] could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs." THE FEDERALIST No. 59 at 363 (Hamilton).

74. "If the State legislature were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation . . . [If] the leaders of a few of the most important states should have entered into a previous conspiracy to prevent an election." *Id.* at 365.

75. G. PASCHAL at § 41.

76. 285 U.S. 355, 366-67 (1932).

77. "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is a wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters."

Most constitutional historians believe that the qualifications of article I, section 2 are reserved to the states and do not refer to any regulation the states or Congress could make under article I, section 4.[78] Thus, the majority view finds no precedent enabling Congress to set voter qualifications in either state or federal elections. However, the minority school led by Professor Crosskey[79] believes Congress may regulate all aspects of elections under it's general legislative authority.[80] Crosskey states that the Framers feared the subversion of the election process by the states and they therefore tied state and federal qualifications together in article I, section 2 to prevent the states from dealing uniquely with the federal elections.[81] Since the purpose of article I, section 2 was not to preserve the inviolate authority of the states but merely to insure the integrity of national elections, Congress could also regulate state voter qualifications.[82]

Justice Black justified Congress' power to set age qualification in national elections primarily as a necessary concommitant of it's broad power to set what he terms geographical qualifications. Congressional redistricting was *never* referred to as a qualification.[83] Secondly, the very cases which Justice Black cited to establish congressional supervisory power over national elections distinguished qualifications such as age, which are left to the states, from "times places and manner" regulations which are left primarily to the states but which can be overruled by congressional legislation. Therefore, he did not establish the *crucial* legal relationship between these two articles, but borrowed the minority[84] viewpoint to ensure that the national government could protect its own elections, and reverted to the majority theory[85] to ensure state autonomy over voter qualifications in state elections.

Just as Justice Black's holding that Congress could lower the voting age to 18 was prompted by his belief that there was a necessary reservoir of national

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Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959). *See* Pope v. Williams, 193 U.S. 621, 633 (1904) and Mason v. Missouri, 179 U.S. 328, 335 (1900).

78. "It cannot be said, with any correctness, that Congress can, in any way, alter the rights or qualifications of voters." G. PASCHAL at § 83, *quoting from* STORY'S CONSTITUTION at § 820.

79. William Crosskey is a contemporary constitutional historian who holds that "manner" equals "qualification" and hence Congress may prescribe voter qualifications in both federal and state elections.

80. This general legislative grant is based on the broad language in the preamble, the necessary and proper clause, and the republican form of government guarantee. W. CROSSKEY, I POLITICS AND THE CONSTITUTION 363-577 (3d ed. 1965).

81. *Id.* at 529-30.

82. *Id.* at 533-37.

83. Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

84. The majority viewpoint is that "manner" means "qualification".

85. The majority viewpoint is that "manner" does not mean "qualification".

power for Congress to preserve the representativeness of the national government, so he analogized the reservation to the states of the power to set their own voter qualifications with the maintenance of their sovereignty within the federal scheme. The intent of the Framers of the Constitution, as expressed in the tenth amendment and article I was to reserve to the states the exclusive power to regulate their own elections. This power has been abridged only by amendments to the Constitution.

Justice Black conceded that Congress' power was quite broad under the enforcement clause of the fourteenth amendment but he emphatically qualified the exercise of that power: it was not intended to strip the states of the power to govern themselves or to "convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation."[86] Since voter qualifications are left exclusively to the states, Congress may only infringe on this power by enforcing the Civil War Amendments ban on racial discrimination. He stated:

> In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that the 21-year-old vote requirements were used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence.[87]

The crux of Justice Black's argument is therefore the dogmatic assertion that voter qualifications and local election practices are determined by the states. This position is based on little substantive evidence[88] and is very tenuous when juxtaposed with his admission that "[This] Court has recognized in some instances that the Equal Protection Clause of the 14th Amendment protects against discriminations other than those on account of race."[89] Justice Black appears to be saying that if the Court affirmed Congress' power to set age qualifications in state and local elections the states would be stripped of their last vestiges of sovereignty.

> The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people.[90]

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86. 400 U.S. at 128.
87. *Id.* at 130.
88. Black's opinion was worded with grandiose generalizations. "It is a plain fact of history that the Framers never imagined . . . . It is obvious that the whole Constitution reserves to the States the power to set voter qualifications. . . ." He does, however, appear to rely on the persuasiveness of Harlan's historical inquiry of the rationale behind the fourteenth amendment. *Id.* at 125.
89. *Id.* at 126-27.
90. *Id.* at 127.

Thus, Title III as applied to state voter age qualifications was unconstitutional.

The Twenty-sixth Amendment

Oregon v. Mitchell was a pryrrhic victory for the states. Theoretically their traditional power to establish voter qualifications was left unchecked; however the practical ramifications of the decision nullified whatever states' rights victory they had won. Forty-seven states have the economic burden of providing a dual-voting system to comply with the Supreme Court's holding.[91] Notwithstanding the financial burden, questions would arise as to which elections are "Federal". For example, are elections of state party delegates who directly or indirectly choose nominees for federal and state offices "Federal elections"? Also this bifurcated system might create a "potential for confusion in the tabulation of election results."[92] Due to state procedures, lowering the voting age to 18 and avoiding these court-created entanglements in the 1972 elections will prove impossible in most states.[93]

Congress rescued the states from the myriad of problems precipitated by their victory in *Mitchell* by quickly proposing the twenty-sixth amendment to the Constitution.[94] The proposed amendment confers a plenary right on citizens 18 and older to participate in the political process; it is more encompassing that Title III. Title III specifically referred to primary or general elections whereas the amendment addresses itself to the "right to vote". By en-

91. A dual voting system means those only able to vote in federal elections would have to use: (1) a special voting machine, *i.e.*, one with a ballot listing only federal candidates, (2) a voting machine with a complete ballot but a special mechanism to lock levers under State and local elections or (3) paper ballots with a list of only federal candidates. A recent survey indicated that a bifurcated voting age qualification would be expensive and administratively burdensome to operate. The projected expense of such a system in Connecticut is $1.3 million; New York City is $5 million, St. Louis is $2.5 million, New Jersey is $1.5 million, Washington State is $200,000, Chicago is $200,000 and Dade County, Florida is $200,000. It would effect ten million potential voters of 8.5 percent of the population over 18. H.R. REP. No. 37, 92d Cong., 1st Sess. 4-6 (1971). [Hereinafter cited as No. 37].

92. News Release from Rep. Emanuel Celler, March 2, 1971.

93. First, revision of the voting age qualification requires an amendment to the state constitutions. Secondly, every state but Delaware requires a referendum. Also, sixteen states provide for submission of the proposed amendment to two separate sessions of the state legislature before the referendum stage. Consequently not more than 20 states could, if they wanted, lower the voting age, and only eight of those twenty states could do so without resort to some extraordinary procedure such as a special statewide election. No. 37 at 6, 7.

94. H.R. RES. 223, 92d Cong., 1st Sess. (1971).

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

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

compassing the entire political selection process, it includes any local, municipal, or state-wide election as well as those state laws which restrict the right to nominate candidates for these elections on the basis of age.[95]

The twenty-sixth amendment primarily represents a congressional judgment that a minimum voting age above 18 is unreasonable, discriminatory and a violation of the equal protections of the laws. The educational level reached by 18 year olds, the civic and military obligations imposed upon the 18 year olds, and the readiness and capacity to participate in the political process were the bases upon which Congress made this judgment.[96] The second reason for the passage of the amendment at this time was to alleviate the practical dilemma facing the states. Since there is a reasonable time in which the state legislatures may ratify the amendment, Congress has effectively offered the states a way out of the miasma.[97]

Opposition to the amendment is not on it's substantive merits. Rather opponents, like the Court in *Mitchell*, assume the validity of existing age qualifications and regard the issue as the sharing of power between the state and federal governments:

> [This] republic will be better served in the long run if the sovereignty of our States is not further eroded by denying to them the power to fix non-discriminatory qualifications for voting in their own elections.[98]

The critics cite the wholesome trend of decentralization evidenced by Executive proposals (revenue sharing) and recent Supreme Court decisions.[99] Certainly after *Younger v. Harris*[100] there has been a heightened awareness of "Our Federalism". The nature of this criticism begs the real question by clouding the right to vote in political penumbra. Any abridgement of the right to vote regardless of by whom it is imposed may not stand unchallenged. It is precisely because the states and the Courts have refused to deal with this reality that Congress did.

Conclusion

If the twenty-sixth amendment is ratified by three-fourths of the states within seven years the holding of *Mitchell* will be mooted; however the desired goal of Title III will have been effected. To look at the decision in this light ig-

95. No. 37 at 8.
96. *Id.* at 5.
97. More than 45 state legislatures are meeting this year and half of that number are scheduled to meet in 1972. Special sessions in the Fall of 1971 and in the Spring of 1973 are likely to be slated to deal with reapportionment. *Id.* at 7.
98. *Id.* at 25.
99. *Id.* at 24.
100. Younger v. Harris, 39 U.S.L.W. 4201 (U.S. Feb. 23, 1971).

nores the fundamental constitutional ramifications that *Mitchell* has produced.

First, it was a rebuke of Congress. The legal analysis which the Court had applied in cases where the alleged discrimination was the exclusion of a segment of the population from the electoral process was that of a "compelling state interest." The exclusion of the 18-20 year olds from the polls should not have been judged by a different standard. All groups had been "locked into a self-perpetuating status of exclusion from the electoral process."[101] Since five Justices refused to make further incursions into the states' area of traditional power, they applied a test of reasonableness which had presumably been abandoned in deciding voting rights cases. Furthermore, the effect of *Mitchell* was a retreat from the implications in *Morgan* and a firm reminder to Congress that it could not usurp the traditional role of the Court and decide for itself what constituted a states' denial of equal protection of the laws. There was no deference to congressional fact-finding; the burden shifted to Congress to show the propriety of its enactment rather than placing the burden on those whose enactment was being challenged and superseded by Congress.

Secondly, *Mitchell* classified the "right to vote". Although the decision reaffirmed the power of the states to determine how republican their form of government is to be and declined to enshroud the right to vote with full constitutional safeguards, the Supreme Court reaffirmed itself as the final arbiter of the Constitution. Instead of taking the opportunity to focus in on the merits of what Congress was doing in an area which is inherently *preservative* of the foundation of our government, the Court became ingratiated with the necessity of maintaining a balance of power within our federal system. This case will loom large in constitutional law. It will be cited whenever uniform legislation is contemplated by Congress in areas traditionally left to the states, and whenever the issue of the right to vote arises.

Carole Harris
Judy Ripps

101. 395 U.S. at 640.