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FIDDLING WITH THE CONSTITUTION WHILE ROME BURNS: THE CASE AGAINST THE VOTING RIGHTS ACT OF 1965

*Dr. James McClellan**

Like other small municipalities in the mountainous regions of north Georgia, where the Blue Ridge and the Appalachian Trail mark their timeless entry into the southern Piedmont, the City of Rome is a predominantly white community. Flanked to the north by "Mountain Republicans," Rome shares a common heritage with the rural areas of east Tennessee, northeastern Alabama, the western Carolinas, and southwestern Virginia that dates back to the War Between the States. In these areas, union sentiment ran the highest in the old Confederacy, frustrating the secessionists and even the war effort. Long before the war, the small upland farmers who populated this region were a class apart from the lowland planters. They had neither slaves nor plantations, and their politics traditionally have reflected different interests and attitudes. Even today one senses an attachment to the ancient Republican traditions. "They vote a straight Republican ticket election after election. Nor are the mountaineers Republicans by choice; they are Republicans by inheritance."

Because the Negro population of this area has never been substantial in number, the tiny hamlets and small towns dotting the southern tip of the Blue Ridge historically have conducted their political affairs in an atmosphere that is relatively free of racial strife compared to the southern parts of the state, where the Negro population of Georgia is concentrated. Many of the thinly populated counties of north Georgia, for example, contain almost no Negroes. According to the 1980 Census, Forsythe County contains only one Negro; Fannin County has only seven; Gilmer, just twenty-two. Dawson County has none. Throughout the region, Negroes represent a miniscule fraction of the total population.²

Rome, located in Floyd County on the fringe of the Mountain Republican area, contains a percentage of Negroes slightly larger than most of the counties to the north, but is otherwise represen-

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1. V. KEY, *SOUTHERN POLITICS* 280-81 (1949).

2. UNITED STATES BUREAU OF THE CENSUS, *POPULATION & HOUSING, FINAL P & H UNIT Count, Series PHC 80-V* (1980).

tative of the area in that whites comprise the great bulk of the population.³

Thus situated, the City of Rome has experienced fewer racial problems than most small cities of the Deep South. Though it did not elude entirely the whirlwinds of Reconstruction politics,⁴ Rome seldom felt a conspicuous federal presence in its local affairs. And when the initial flurry of federal laws generated by the civil rights movement of the late 1950's and early 1960's fell on Georgia, Rome was more of an observer than an intended recipient. While other Georgia cities to the south, such as Albany and Atlanta, were embroiled in civil disturbances, Rome was seemingly untouched by racial discord. Enjoying considerable local autonomy, Rome quietly built a record of success in race relations beginning in the 1960's largely on its own initiative.⁵ But with the passage of the Voting Rights Act of 1965,⁶ Rome soon found itself caught up in the broad sweep of federal electoral reform. Not since 1867, when General John Pope established a military outpost in Rome,⁷ had the mountain city experienced such direct federal intervention in the conduct of its affairs.

Rome stoutly resisted the application of the Voting Rights Act to its political affairs and eventually brought an action in 1977 against the United States for declaratory relief. Claiming exemption from the statute on the ground that the City's various annexations and voting changes over the course of a decade had neither the purpose nor the effect of denying or abridging the right to vote on the

3. In 1970, Rome had a population of 30,759, of whom 23,543, or 76.6% were white and 7,216, or 23.4% were Negro. The voting age population in 1970 was 79.4% white and 20.6% Negro. The actual number of registered voters in Rome closely paralleled these percentages: as of 1975, Rome had 13,097 registered voters, of whom 83.9% were white and 15.5% were Negro. *City of Rome v. United States*, 472 F. Supp. 221, 223 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980). Justice Marshall's opinion for the Court omits reference to the 1975 population data contained in both the district court's opinion and in Brief for Appellants at 5, *City of Rome v. United States*, 446 U.S. 156 (1980).

4. See A. CONWAY, *THE RECONSTRUCTION OF GEORGIA* (1966); *The Condition of Affairs in Georgia: Statement of Hon. Nelson Tift to Reconstruction Committee of the House of Representatives*, Washington, February 18, 1869 (1971). Although all the southern states had many common experiences under Reconstruction, those on whom it bore the hardest had a large Negro population—South Carolina, Louisiana, and Mississippi in particular.

5. See the district court's findings in 472 F. Supp. at 224-27.

6. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976), *as amended by Act of June 22, 1970*, Pub. L. No. 91-285, 84 Stat. 314 (1970) and Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975)).

7. A. CONWAY, *supra* note 4, at 142.

basis of race, Rome argued that Attorney General Griffin Bell had unconstitutionally applied the Act to the city. A three-judge District Court for the District of Columbia rejected this argument, however, holding that although Rome's electoral changes were enacted without discriminatory purpose, they were nevertheless prohibited under the Act because of their discriminatory effect.⁸ In *City of Rome v. United States*,⁹ the Supreme Court affirmed the District Court ruling. In response to the city's claim that the Voting Rights Act exceeded Congress' enforcement power under the fifteenth amendment, the Court reaffirmed its expansive view of the enforcement power in *South Carolina v. Katzenbach*¹⁰ and went on to write a new chapter in the history of the fifteenth amendment. Under section 2 of the amendment, the Court concluded, Congress' enforcement powers are so broad as to include the right to prohibit practices that in and of themselves do not violate section 1, so long as the prohibitions attacking discrimination are "appropriate."

City of Rome thus represents a bold new course of Constitutional development under the Reconstruction Amendments in that Congress may now reach beyond the substantive provisions of the amendments themselves to prohibit state action which, in Congress' judgment, has an unintended but discriminatory impact. No less significant or novel is the underlying political theory of democratic representation implicit in the Court's decision, suggesting that the fifteenth amendment not only guarantees freedom from racial discrimination in the exercise of the franchise, but also creates a minority right to hold office.

In response to *City of Rome* and the body of case law that has been developed by the Supreme Court under the Voting Rights Act since 1966, this article offers the thesis that the Act itself is an unconstitutional exercise of legislative power under the fifteenth amendment, and that *City of Rome* is contrary to the intentions of those who framed both amendment and the Act. Examining this decision and earlier cases in the light of Congressional hearings and debates on the adoption and extension of the Voting Rights Act, the article contends that the Court has interpreted the Act to include political rights for minorities and restrictions on the states that run counter to the expressed intent of those who participated in the formulation of the Act. An accompanying analysis of the debates on the framing and adoption of the fifteenth amendment further maintains

8. 472 F. Supp. at 245.

9. 446 U.S. at 187.

10. 383 U.S. 301 (1966).

that the framers specifically considered and rejected the position now supported by the Court that literacy tests and the right to hold office fell within the purview of the amendment, it being generally agreed in 1869 that the states retained their power over these aspects of the franchise.

Crucial to a proper interpretation of both the Act and the enforcement clause of the fifteenth amendment are the debates on the Ku Klux Klan Act of 1871, when the framers of the Reconstruction Amendments first attempted to analyze in depth their understanding of Congress' power to enforce these amendments "by appropriate legislation." Though ignored by the Court, these important debates shed considerable light on the intended scope and meaning of the enforcement power. From an analysis of this legislative history, the author concludes that the framers of the Reconstruction Amendments did not intend to confer upon Congress all of the power over political rights that is embodied in the Voting Rights Act of 1965, and expressly favored a construction of the enforcement power that was consistent with the principles of Federalism.

Finally, this article briefly examines the line of cases culminating in *City of Rome* against the backdrop of the American political tradition, and asserts that the Court has imposed upon Georgia and the other states singled out by the Voting Rights Act a theory of democracy that is essentially foreign to the American experience. This article thus challenges the underlying assumption of the Court's ruling that a system of proportional representation, guaranteeing the election of Negro candidates, will necessarily enhance the influence of the black community in local affairs.

I. GENESIS OF THE VOTING RIGHTS ACT OF 1965

Although the Equal Protection Clause frequently has been utilized to protect the right to vote, the fifteenth amendment, declaring that the right to vote shall not be denied or abridged "on account of race, color, or previous condition of servitude," was originally intended to serve as the real workhorse of Negro suffrage.¹¹ Two months after the amendment was adopted, Congress, exercising its new enforcement powers under section 2,¹² passed the Enforce-

11. That the framers of the fourteenth amendment never intended to protect political rights and Negro suffrage under the equal protection clause is convincingly argued by R. BERGER, *GOVERNMENT BY JUDICIARY* 52-192 (1977).

12. The thirteenth, fourteenth and fifteenth amendments contain almost identically worded sections empowering Congress to enforce them. Section 2 of both the thirteenth and fifteenth amendments provides that "Congress shall have power to enforce

ment Act of 1870.¹³ But this measure, which sought to prohibit both state and private action interfering with voting rights, was largely unsuccessful. The Supreme Court struck down provisions of the Act aimed at private action,¹⁴ and Congress in 1894 repealed most of the remaining sections of the statute dealing with official action.¹⁵

Congress then withdrew from the field, and for the next sixty years the task of eliminating racial qualifications in the franchise devolved principally on the Supreme Court. In carrying out this responsibility, the Court assiduously thwarted state efforts, whether statutory or administrative, to disenfranchise the Negroes, even reaching out to strike down attempts by political organizations to exclude Negroes from voting in primary elections.¹⁶ Throughout this period, the Court's discussion of Congress' enforcement powers under the fifteenth amendment was necessarily limited to the issue of whether Congress could proscribe private action. The only remedial legislation passed by Congress was the Force Act of 1871, designed to supplement the Enforcement Act of 1870 by providing for the appointment of federal officers to supervise elections of members of the House of Representatives.¹⁷ In *Ex Parte Siebold*¹⁸

this article by appropriate legislation." Section 5 of the fourteenth amendment, however, states that "The Congress shall have power to enforce by appropriate legislation, the provisions of this Article." The Court has discerned no difference among the clauses and none was intended. See *City of Rome v. United States*, 446 U.S. at 207-08 n.1 (1980) (Rehnquist, J., dissenting); *United States v. Guest*, 383 U.S. 745, 783-84 (1966) (Brennan, J., concurring in part, dissenting in part); *James v. Bowman*, 190 U.S. 127 (1903). Enforcement clauses have been routinely added to constitutional amendments since the adoption of the Reconstruction Amendments. See U.S. CONST. amends. XVIII, § 2, XIX, para. 2, XXIII, § 2, XXIV, § 2, XXVI, § 2 (proposed).

13. Ch. 114, 16 Stat. 140 (1870). As originally introduced by Representative John Bingham of Ohio (author of section 1 of the fourteenth amendment), the Act covered only state action under the fifteenth amendment. Under the sponsorship of Senator John Pool, a Republican from North Carolina, however, the Act was broadened to cover private action and action interfering with rights under both the fourteenth and fifteenth amendments. See also the Force Act of 1871, ch. 99, 16 Stat. 433.

14. *James v. Bowman*, 190 U.S. 127 (1903). The Court struck down section 5 of the Act on the ground that the fifteenth amendment did not authorize Congress to prohibit private interference with the right to vote.

15. Ch. 25, 28 Stat. 36 (1894); ch. 15, 35 Stat. 1153 (1909). The surviving statutes of this period are 18 U.S.C. §§ 241-242 (1976) (criminal) and 42 U.S.C. §§ 1971(a), 1983, 1985(3) (1976) (civil). The debates on the enactment and repeal of the Act are collected in I B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* 443-543, 803-84 (1970).

16. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

17. Ch. 99, 16 Stat. 433 (1871). In effect, the Act suppressed state electoral processes.

18. 100 U.S. 371 (1880).

the Supreme Court upheld the Force Act as a proper exercise of Congress' powers under article I, section 4 (the "Times, Places and Manners Clause"), without reaching the question of Congress' enforcement powers under the fifteenth amendment. In 1894, however, this measure was repealed.

The general theory thus adopted concerning Congress' power over the electoral process indicated that Congress could legislate under the fifteenth amendment to protect the suffrage in all elections against state interference based on race, color, or previous condition of servitude,¹⁹ whereas under article I, section 4, Congress could legislate against public or private interference but only in federal elections. Protection against private interference with the right to vote in state elections was therefore thought to be beyond the scope of Congress' powers.

Here matters stood when Congress reasserted its enforcement powers in response to the civil rights movement that erupted in the wake of *Brown v. Board of Education*.²⁰ The first in a series of remedial statutes designed to assist in federal enforcement of fifteenth amendment rights, the Civil Rights Act of 1957²¹ made it unlawful for any person, whether acting as a public official or privately, to interfere with the right to vote in any election for federal officers. At the heart of the Act's enforcement mechanism were provisions authorizing the Attorney General to institute civil suits for injunctions in aid of the right to vote in state, territorial, district, municipal, or other territorial subdivision elections, and to seek injunctive relief in the courts against violations of civil rights protected under section 2 of the Ku Klux Klan Act of 1871.²²

This Act was followed by the Civil Rights Act of 1960, which again increased the powers of the executive branch and strengthened existing procedures by authorizing the Attorney General to obtain a finding, through the courts, of a "pattern or practice" of voter discrimination in any jurisdiction. Upon the entering of such finding,

19. *James v. Bowman*, 190 U.S. 127 (1903); *United States v. Reese*, 92 U.S. 214 (1876).

20. 347 U.S. 483 (1954).

21. Pub. L. No. 85-315, 71 Stat. 694 (1957) (codified in scattered sections of 5, 28 & 42 U.S.C. (1976)).

22. 42 U.S.C. §§ 1971(b), (c) (1964). Section 2 of the Klan Act is now 42 U.S.C. § 1985 (1976). In addition, the 1957 Act established a "temporary" United States Commission on Civil Rights (subsequently extended on numerous occasions to 1981) to investigate civil rights violations and make recommendations to the President and Congress, and provided for an additional Assistant Attorney General to direct a new Civil Rights Division in the Department of Justice.

which significantly removed the issue of Negro voting beyond a case-by-case determination, all qualified Negroes would be registered to vote by court-appointed referees.²³

Title I of the Civil Rights Act of 1964²⁴ signaled a new direction in voting rights legislation by restricting the rights of the several states in their determination of voter qualifications. Unlike the earlier statutes, which forbade the discriminatory application of state voter qualification standards, the 1964 Act went beyond the realm of regulation to impose the equivalent of a federal literacy test. The Act not only prohibited the discriminatory administration of literacy tests in federal elections, but also established a "rebuttable presumption" of literacy for any prospective voter who had completed the sixth grade in a school where the English language had served as the basis of instruction.²⁵

Finally, in the Voting Rights Act of 1965,²⁶ Congress exceeded what had previously been regarded as the limit of its authority under the Enforcement Clause of the fifteenth amendment. Grounded in part on section 2 of the fourteenth amendment and article I, section 4 of the Constitution, the Voting Rights Act prohibited not only various forms of state action in the electoral process, but also private acts of voter intimidation in federal, state and local elections.²⁷ Creating what are admittedly "stringent new remedies for

23. Pub. L. No. 86-449, 74 Stat. 86 (1960) (codified in scattered sections of 18, 20 & 42 U.S.C. (1976)). The 1960 Act also authorized the appointment of federal voting referees and provided safeguards for the protection and inspection of federal election records.

24. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 5, 28 & 42 U.S.C. (1976)).

25. 42 U.S.C. § 1971 (a)(C)(c) (1964).

26. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976)).

27. In its section-by-section analysis of the Act, the House Judiciary Committee commented, in anticipation of a constitutional challenge, that

[t]he power of Congress to reach intimidation by private individuals in purely local elections derives from Article I, section 4, and the implied power of Congress to protect Federal elections against corrupt influences, neither of which requires a nexus with race. While Article I, section 4 and the implied power of Congress to prevent corruption in elections normally apply only to Federal elections, and section 11 applied to all elections, these powers are *plenary* within their scope, and where intimidation is concerned, it is impractical to separate its pernicious effects between Federal and purely local elections.

H. R. REP. NO. 439, 89th Cong., 1st Sess. 30-31 (1965), as quoted in II B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES 1502-03 (1970) (emphasis added). The Supreme Court has not ruled on the constitutionality of section 11 of the Act relating to private actions interfering with voting rights in federal, state and local elections.

voter discrimination,"²⁸ the Act established federal supervision over state voter qualification tests and state electoral processes "which in the thoroughness of its control is reminiscent of the Reconstruction era."²⁹ While strengthening judicial remedies, the Act also provided for direct federal intervention through a variety of complex administrative remedies to remove both immediate and future impediments to minority political participation and representation. Enacted in response to demonstrations in Selma, Alabama protesting discriminatory voting registration practices, the Act was originally conceived as a temporary expedient to end almost a century of racial discrimination in the electoral process.³⁰ The bill that was submitted to Congress by President Lyndon Johnson on March 17, 1965 provided that the Act should remain in effect for ten years.³¹ Congress rejected this proposal in favor of a five-year period; but in 1970 Congress extended coverage of the Act for another five years and in 1975 extended it again for seven.³² With two important exceptions, most provisions of the Voting Rights Act are scheduled to "expire" in 1982.³³

28. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

29. C. Rice, *The Voting Rights Act of 1965: Some Dissenting Observations*, 15 KAN. L. REV. 159, 163 (1966).

30. The historical setting of the Act is discussed in II CONGRESSIONAL QUARTERLY SERVICE: CONGRESS AND THE NATION 1965-1968 356-64 (1969); see also *South Carolina v. Katzenbach*, 383 U.S. at 308-15 (1966) (discussing Congressional and judicial concern over tactics regularly employed in the South to evade the fifteenth amendment and prevent Negroes from voting). For a discussion of earlier federal efforts to enforce Negro voting rights, see Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973); Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1053 (1965).

31. Significant portions of the legislative history of the original act are contained in H.R. REP. NO. 439, 89th Cong., 1st Sess. 72 (1965), reprinted in [1965] U.S. CODE CONG. & AD. NEWS 2437-508 and II B. SCHWARTZ, *supra* note 27, at 1484; S. REP. NO. 162, 89th Cong., 1st Sess. (1965); *Joint Views of 12 Members of the Judiciary Committee Relating to the Voting Rights Act of 1965*, attached to S. REP. NO. 162, *supra*, and reprinted in [1965] U.S. CODE CONG. & AD. NEWS 2540. President Johnson's March 15 address on voting rights to a joint session of Congress one week after the Selma disturbance, and floor debate on the Act, are contained in II B. SCHWARTZ, *supra* note 27, at 1506.

32. Congressional action on the most recent extension of the Act in 1975 is contained in *Hearings on the Extension of the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 House Hearings*]; *Hearings on the Extension of the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Senate Hearings*]; S. REP. NO. 94-295, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. CODE CONG. & AD. NEWS 774.

33. Technically speaking, a covered state would not be automatically exempt

II. PROVISIONS OF THE VOTING RIGHTS ACT OF 1965

A. *General Provisions*

The Act consists of nineteen sections, some of which are permanent legislation of general application throughout the nation. Among the general provisions is section 2, which prohibits the states from using any racially discriminatory "voting qualification or prerequisite to voting, or standard, practice or procedure."³⁴ Far-reaching and reminiscent of the previously abandoned Force Act of 1871, section 3(a) of the Act authorizes federal courts to replace state election officials by federal examiners, with full power to examine and register voters "whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the guarantees of the fourteenth or fifteenth amendment in any State or political subdivision." If the court finds that any voter qualification test has been used in a discriminatory manner, it may suspend the use of the test indefinitely and prevent the enforcement of any "voting qualification or prerequisite to voting, or standard, practice or procedure" that is different from that in force when the proceeding was commenced, unless the court is satisfied that the procedure in question "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."³⁵ Section 10 of the Act, superseded by *Harper v. Virginia State Board of Elections*,³⁶ and the twenty-fourth amendment banning the payment of poll taxes as a requirement for voting, contains a Congressional finding that the poll tax violated the fifteenth amendment; and it instructs the Justice Department to bring suit against its application.³⁷

under section 4 even if Congress failed to extend the Act beyond August 6, 1982, as it would still be necessary for the state to bring an action for declaratory judgment. See 42 U.S.C. § 1973 b(a) (1976). 42 U.S.C. § 1971 (1976), in which subpart (a)(2)(c) prohibits the use of a literacy test as a condition for voting, is permanent legislation. The bilingual ballot requirements in 42 U.S.C. §§ 1973aa-1a are not scheduled for expiration until August 6, 1985. Senator S. I. Hayakawa and Representative Paul McCloskey, California Republicans, have introduced legislation calling for repeal of the bilingual requirements. See note 272, *infra*. Senator Charles Mathias, a Maryland Republican, and Representative Peter Rodino, a New York Democrat, introduced legislation on April 8, 1981 to extend the Voting Rights Act for ten years to August 6, 1992, and to nullify the effects of *City of Mobile v. Bolden*, 446 U.S. 55 (1980). See N.Y. Times, April 8, 1981, at A10, col. 3.

34. 42 U.S.C. § 1973 (1976). The original act is reprinted as an Appendix to *South Carolina v. Katzenbach*, 383 U.S. at 337-355.

35. 42 U.S.C. § 1973a(a) (1976).

36. 383 U.S. 663 (1966).

37. 42 U.S.C. § 1973h (1976).

Other sections provide civil and criminal penalties for violations of the Act.³⁸

B. Special Provisions

1. Sections 6-9: Federal Voting Examiners and Observers

The foundation of the Act rests on its special provisions, sections 4 through 9. These requirements are temporary and apply only to selected states and political subdivisions. Sections 6 through 9 are designed to strengthen earlier federal voting registration programs by authorizing the Attorney General, at his discretion, to use examiners and observers where voting qualification tests have been suspended under section 4 of the Act.³⁹ Unless overruled by a Federal District Court, the Attorney General may appoint federal examiners to enter a covered jurisdiction and decide who shall be eligible to vote in all federal, state and local elections, if: (1) he has received complaints from twenty or more residents that they have been denied the right to vote on account of race or color, and he believes those complaints to be meritorious; or (2) in his judgment "the appointment of examiners is otherwise necessary to enforce the guarantees of the fourteenth or fifteenth amendment."⁴⁰ Examiners are authorized to list individuals who satisfy state voter qualifications and to issue them a certificate evidencing their eligibility to vote.⁴¹ Observers act as poll watchers to make certain that all eligible persons are permitted to vote and ascertain whether their ballots have been accurately counted. The observers are field employees of the Civil Service Commission or other federal agencies. In the period between 1965 and 1974, more than 6,500 observers were sent into the Deep South, almost half of whom were used to cover elections in Mississippi.⁴² In general, both examiners and observers have been used sparingly, and most served during the first years when the Act went into effect. In the period between 1965 and 1975, only 60 counties and parishes ever had examiners and only 155,000 of the more than one million new minority registrants in the covered states were registered by this method.⁴³ The limited use of examiners since 1970 underscores the early suc-

38. 42 U.S.C. §§ 1973i-1973j (1976).

39. 42 U.S.C. §§ 1973e-1973g (1976).

40. 42 U.S.C. § 1973d (1976).

41. 45 C.F.R. § 801.205 (1979).

42. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 35 (1975) [hereinafter cited as VOTING RIGHTS ACT: TEN YEARS AFTER].

43. *Id.* at 33.

cess of the Voting Rights Act in getting Negroes registered to vote, and probably the mere threat of examiners has deterred many local registrars from blocking registration.⁴⁴

2. Section 4: Covered Jurisdictions

Sections 4(a) and 4(b) establish an automatic formula or "triggering" mechanism whereby a state (or one of its local units of government) is prohibited from applying any "test or device"⁴⁵ as a qualification for voting in any election if the state or local unit maintained any test or device on November 1, 1964 and less than 50 percent of its voting age population was registered to vote or actually voted in the 1964 presidential election. Amendments to the Act have extended the coverage formula of section 4 to include jurisdictions that maintained a test or device on November 1, 1968 or 1972, and had less than a 50 percent turnout in the 1968 or 1972 presidential elections.⁴⁶ Direct judicial review of the findings by the Attorney General which trigger the suspension of tests is barred.⁴⁷

Jurisdictions covered in 1965 and early 1966 included Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 28 of the 100 counties in North Carolina, 4 of the 14 counties in Arizona, Honolulu County, Hawaii, and Elmore County, Idaho. Since 1965, other jurisdictions have been added and coverage extends also to Texas, certain counties in California, Colorado, Florida, Michigan, New York, South Dakota, and Wyoming, and a number of towns in the New England states of Massachusetts and New Hampshire.⁴⁸

44. *Id.* at 34-35.

45. Section 4(c) of the Act defines a "test or device" as any requirement that a person, as a prerequisite for registration or voting, demonstrate literacy, educational achievement, knowledge, or good moral character, or produce registered voters or other persons to vouch for his qualifications. 42 U.S.C. § 1973b(c) (1976). *See also* 42 U.S.C. § 1973b(f)(3) (1976).

46. 42 U.S.C. § 1973b(b) (1976).

47. *Id.* Under § 4(b) of the Act,

[t]he provisions of subsection (a) shall apply in any state or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November, 1964.

A determination or certification of the Attorney General or of the Director of Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

48. 45 Fed. Reg. 18898 (1980). For a listing of the various jurisdictions covered from 1965-1975, *see* VOTING RIGHTS ACT: TEN YEARS AFTER, *supra* note 42, at 13-16.

Under section 4(a) of the Act, however, a covered jurisdiction may "bailout" and exempt itself if it can persuade the District Court for the District of Columbia that the jurisdiction has not used a test or device in a discriminatory manner for seventeen (originally five) years preceding the filing of an action for a declaratory judgment.⁴⁹ Since 1965, only one state has succeeded in bailing out. In 1966, and again in 1971, Alaska gained exemption, but the 1975 extension of the Act re-established coverage.⁵⁰ One other state, Virginia, attempted without success to bailout in 1973.⁵¹ Since 1970, all literacy tests throughout the nation have been suspended under the Act.⁵² In addition, section 4(e) of the Act deals with the question of literacy. Unlike most other provisions of the statute, which rest on Congress' power to enforce the fifteenth amendment, section 4(e) was a last-minute floor amendment to the Act based on the Enforcement Clause of the fourteenth amendment. Designed by Senator Jacob Javits (R.-N.Y.) and Robert Kennedy (D.-N.Y.) to emasculate the New York State literacy test and expand the suffrage in New York City, section 4(e) provides that the right to vote cannot be denied to any person because of an inability to read or write English if that person successfully completed the sixth grade in a Puerto Rican school where instruction was given in a language other than English.⁵³

3. Section 5: The "Preclearance" Requirement

Once a state or one of its political subdivisions has been subjected to the strictures of section 4 and is prohibited from applying

49. 42 U.S.C. § 1973b(a) (1976).

50. Alaska subsequently filed yet another bailout suit but abandoned it. See *Alaska v. United States*, No. 78-0484 (D.C. Cir. May 10, 1979) (stipulated dismissal of the action).

51. *Virginia v. United States*, 386 F. Supp. 1319 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 901 (1975).

52. 42 U.S.C. § 1973aa (1976). Amendments to the Act in 1970 also abolished durational residency requirements for Presidential elections and lowered the voting age to eighteen. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 316, 318. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court upheld the amendments, except the proviso lowering the voting age for state and local elections, but this objective was nevertheless achieved by the subsequent adoption of the twenty-sixth amendment.

53. 42 U.S.C. § 1973b(e) (1976). Writing for the Court, Justice Brennan held in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), that section 4(e) was a valid exercise of the powers granted to Congress by section 5 of the fourteenth amendment, and that the New York English literacy requirement, as applied to disfranchised Puerto Ricans protected by section 4(e), was superseded by virtue of the Supremacy Clause of article VI of the Constitution. The Court declined to rule on the question of whether New York's literacy requirement was constitutional. See *Cardona v. Power*, 384 U.S. 672 (1966).

a voter qualification test, it may not thereafter make any changes in its electoral laws unless the executive or judicial branches of the federal government agree beforehand that such changes are nondiscriminatory. Section 5 of the Act stipulates that no state or local government may even enact a new law "or seek to administer any voting qualification or prerequisite to voting [that is] different from that in force or effect on November 1, 1964," without first gaining the approval of the Attorney General or the United States District Court in the District of Columbia.⁵⁴ The announced purpose of the section 5 preclearance provision "was to break the cycle of substitution of new discriminatory laws and procedures when old ones were struck down."⁵⁵ The more immediate objective of this provision is to give government lawyers in the Voting Section of the Civil Rights Division of the Justice Department direct and continuous administrative supervision over the affected states and their political entities, and to avoid the inconvenience of the judicial process. The provision's obvious effect is to give the federal government a veto over all new electoral laws enacted by the covered jurisdictions, whose pre-existing voter qualification standards have been frozen under section 4 of the Act.

Until 1971, section 5 was rarely employed to challenge state electoral changes, owing in part to the Justice Department's preoccupation with review of existing statutes and uncertainty as to the scope of section 5's coverage.⁵⁶ No less uncertain at the time was the scope of the Attorney General's authority under section 5. Seemingly a delegation of unfettered discretion regarding procedures, standards and administration, section 5 is silent with respect to the procedures the Attorney General must follow in deciding whether to challenge a state submission for an electoral change, what standards govern the contents of these submissions, and what is meant by the sixty-day provision of section 5 in which the Attorney General is to respond to requests for his approval of electoral changes.⁵⁷

54. 42 U.S.C. §§ 1973c (1976). Amendments to the Act have extended this restriction to include laws that were in effect in 1968 and 1972.

55. VOTING RIGHTS ACT: TEN YEARS AFTER, *supra* note 42, at 25.

56. *Id.* at 25, n.53; MacCoon, *The Enforcement of the Preclearance Requirements of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U.L. REV. 107 (1979); *see also* Perkins v. Matthews, 400 U.S. 379, 393 n.11 (1971).

57. Section 5 of the Act provides that a newly enacted electoral change may be enforced if it is submitted to the Attorney General and he does not interpose an objection "within sixty days after such submission, or upon good cause shown . . . [n]either an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin en-

Moreover, section 5 does not even authorize the Attorney General to promulgate any regulations. Such regulations were nevertheless issued in 1971, surviving constitutional attack in *Georgia v. United States*.⁵⁸ "If these regulations are reasonable and do not conflict with the Voting Rights Act itself," declared Justice Stewart for the Court, "then 5 U.S.C. section 301, which gives to '[t]he head of an Executive Department' the power to 'prescribe regulation for the government of his department' . . . is surely ample legislative authority for the regulations."⁵⁹ Reversing the burden of proof, which would ordinarily be carried by the federal government, the Act and accompanying regulations require the submitting jurisdiction to demonstrate to the satisfaction of a three-judge District Court in Washington or the Attorney General that its proposed change "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."⁶⁰ The regulations candidly acknowledge that "section 5 . . . imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia."⁶¹ Should a state or one of its political subdivisions fail to submit a formal request for a change of its electoral laws, both the Attorney General and private parties⁶² may bring suit to enjoin enforcement of the law. Following a request for preclearance, the Attorney General has sixty days in which to interpose an objection or allow the change to stand; and the voting practices submitted become fully enforceable if the Attorney General fails to make a timely objection.

The vagueness of this provision, inviting arbitrary discretion, has produced considerable confusion and controversy. Although the

forcement of such qualification." 42 U.S.C. § 1973c (1976). Does any objection suffice? May the Attorney General simply object to all section 5 submissions? See *Georgia v. United States*, 411 U.S. 526, 542-43 (1973) (White, J., dissenting).

58. 411 U.S. at 536.

59. *Id.* The Court cited *United States v. Morehead*, 243 U.S. 607 (1916) and *Smith v. United States*, 170 U.S. 372 (1897) as authority for this proposition. The regulations are contained in 28 C.F.R. pt. 51, §§ 51.1-51.29 (1971); see also D. HUNTER, *FEDERAL REVIEW OF VOTING CHANGES: HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT* (2d ed. 1975).

60. 42 U.S.C. § 1973c (1976). As of 1975, the alternative of seeking a declaratory judgment without review by the Attorney General had been used only once. *VOTING RIGHTS ACT: TEN YEARS AFTER*, *supra* note 42, at 29.

61. 28 C.F.R. § 51.19 (1971).

62. See *Allen v. State Bd. of Elections*, 393 U.S. 544 (1966).

Act states that a new state law may be enforced if "the Attorney General has not interposed an objection within 60 days *after such submission*,"⁶³ i.e., of their filing, the regulations promulgated by the Attorney General provide that no submission is complete until the Attorney General has received all of the information that he deemed essential in making a decision.⁶⁴ The Act is silent as to the effect of the sixty-day rule upon requests for reconsideration of an adverse ruling by the Attorney General, but regulations specify that these requests shall also be decided within sixty days of their receipt.⁶⁵ Neither the Act nor the regulations explain the application of the sixty-day rule to supplements to requests for reconsideration. In *City of Rome*, however, the Court upheld the Attorney General's interpretation of his regulations on this question and ruled that the sixty-day period commences anew when the submitting jurisdiction supplies additional information on its own accord.⁶⁶ "In recognition of the Attorney General's key role in the formulation of the Act," said Justice Brennan in *United States v. Sheffield Board of Commissioners*, "this Court . . . has given great deference to his interpretations of it."⁶⁷

If the Attorney General fails to make an objection, the state may enforce the change; but there is no certainty that the law will remain in effect, for section 5 of the Act contains this qualifier: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment . . . shall bar a subsequent action to enjoin enforcement of such . . . practice or procedure."⁶⁸ Continuous administrative supervision over the states and their local units of government is thus expected under the Act, even if the courts break the cycle and rule against the Attorney General. The broad scope and massive burden of this entire operation is reflected in the statistics compiled in the Justice Department. The 1975 Senate Hearings on the extension on the Act revealed that in the period between 1965 and 1974, the Attorney General's staff processed more than 1,000 requests for voting changes each year.⁶⁹ In 1979, a Justice Department official estimated that the Department's staff of eleven

63. 42 U.S.C. § 1973c (1976) (emphasis added).

64. 28 C.F.R. §§ 51.3, 51.10(a), 51.18 (1971).

65. 28 C.F.R. § 51.3(d) (1971).

66. 446 U.S. at 171.

67. *United States v. Sheffield Bd. of Comm.*, 435 U.S. 110, 131 (1978).

68. 42 U.S.C. § 1973c (1976).

69. *1975 Senate Hearings*, *supra* note 32, at 597; *see also* *United States v. Sheffield Bd. of Comm.*, 435 U.S. at 147 (Stevens, J., dissenting).

section 5 analysts was processing from fifty to seventy-five submissions per week—more than double the number just five years earlier.⁷⁰

These figures reflect a more than startling increase in section 5 litigation.⁷¹ More fundamentally, the figures reveal the radical transformation of the Voting Rights Act that has taken place since 1970.⁷² When Justice Department officials, led by Attorney General Nicholas Katzenbach, appeared before Congress in 1965 to explain and defend President Johnson's proposed bill to eliminate discriminatory voting practices, they emphasized the limited scope of the Act. Its purpose, the officials uniformly agreed, was simply to remove the barriers to Negro voter registration. Those barriers, in fact, were the very basis of the Selma demonstrations which prompted the Johnson Administration to draft the bill. Appearing before a subcommittee of the House Judiciary Committee, Assistant Attorney General Burke Marshall, in response to a question by a member of the Committee, flatly stated that, "[t]he problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."⁷³ Before that same body, Attorney General Katzenbach repeatedly emphasized that "the whole bill really is aimed at getting people registered." "Our concern today," he said, "is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote."⁷⁴ Ten years later, testifying as a

70. MacCoon, *supra* note 56, at 113 n.45. In addition, the Voting Rights Section of the Civil Rights Division maintains a mailing list of interested parties who receive a weekly listing of current section 5 submissions. This procedure is designed to allow private parties to monitor state and local governmental units for compliance and to assist the Justice Department in enforcement of the Act. *Id.* at 109 n.11. Also strengthening enforcement and encouraging litigation is the 1975 amendment to the Act which permits a court, at its discretion, to award attorney's fee to prevailing parties in voting rights cases. 42 U.S.C. § 19731(e) (1976). See *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976).

71. In the period between 1965 and 1977, 6,400 electoral change requests were submitted. Approximately 5,800 of these were made from 1971 to 1974. *1975 Senate Hearings*, *supra* note 32, at 597. See *United States v. Sheffield Bd. of Comm.*, 435 U.S. at 147 n.8 (1978) (Stevens, J., dissenting).

72. See Thernstrom, *The Odd Evolution of the Voting Rights Act*, 55 PUB. INTEREST 49 (1979).

73. *Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Committee on the Judiciary*, 89th Cong., 1st Sess. sec. 2, at 74 (1965) [hereinafter cited as *1965 House Hearings*]. See also *Allen v. State Bd. of Elections*, 393 U.S. at 564 (1969).

74. *1965 House Hearings*, *supra* note 73, at 21. When asked, "[h]ow far down the political scale" the term "political subdivisions" went, Katzenbach replied: "I believe

private citizen before a Senate subcommittee in support of the 1975 extension of the Act, Katzenbach reiterated his understanding of the original intent of the legislation:

The Voting Rights Act was originally designed to eliminate two of the principal means of frustrating the 15th Amendment rights guaranteed to all citizens: the use of onerous, vague, and unfair tests and devices enacted for the purpose of disfranchising blacks; and the discriminatory administration of these and other kinds of registration devices. The Voting Rights Act attempted to eliminate these racial barriers, first by suspending all tests and devices in the covered States, and second, by providing for voter registration in those States by Federal officials where necessary to insure the fair administration of the registration system.⁷⁵

That the Justice Department's understanding of the purpose of the legislation was shared by Members of Congress who participated in the formation of the Voting Rights Act is abundantly evident from a careful reading of Congressional debates and committee hearings and reports. As Joseph Tydings (D.-Md.), a member of the Senate Judiciary Committee stated while leading debate on the Senate floor, the provisions for the suspension of literacy tests and the appointment of federal examiners were "the heart of the bill."⁷⁶

The success of the Act in terms of registration was almost instantaneous, and by 1972 more than one million new Negro voters were registered in the seven southern states covered by the Act.⁷⁷ By the early 1970's, however, a new development became evident—the problem of registration, by then essentially solved, had been eclipsed by the preclearance provisions of the Act. Section 5, announced the United States Commission on Civil Rights in 1975, was now "the focus of the Voting Rights Act."⁷⁸

III. *Allen v. State Board of Elections*: THE NEW RIGHT TO POLITICAL OFFICE

The catalyst for this change was not a Congressional alteration of the Act, but the Supreme Court's broad interpretation of the

that the term 'political subdivision' used in this bill is intended to cover the registration area and that the whole bill really is aimed at getting people registered." *Id.*

75. 1975 Senate Hearings, *supra* note 32, at 121.

76. II B. SCHWARTZ, *supra* note 27, at 1526.

77. VOTING RIGHTS ACT: TEN YEARS AFTER, *supra* note 42, at 41. Between 1964 and 1972, the number of new black registrants actually increased by 1,148,621, an increase from 29 percent to over 56 percent of the blacks of voting age. *Id.* at 43.

78. *Id.* at 25.

scope of section 5 in the 1969 case of *Allen v. State Board of Elections*.⁷⁹ As Stanley Pottinger, Assistant Attorney General for the Civil Rights Division of the Justice Department, explained:

The Congressional hearings on the 1970 Amendments to the Voting Rights Act reflect that section 5 was little used prior to 1969 and that the Department of Justice questioned its workability. Not until after the Supreme Court, in litigation brought under section 5 had begun to define the scope of section 5 in . . . [the *Allen* case] did the Department begin to develop standards and procedures for enforcing section 5.⁸⁰

In *Allen*, the Court, speaking through Chief Justice Warren, held that a state covered by the Act must submit for federal approval not only new laws that might tend to deny Negroes their right to register and vote, but all laws that might also tend to have an adverse effect on the political strength of the Negro community in government. In other words, the *Allen* decision brought about a complete metamorphosis of the Act and the fifteenth amendment, converting the right of the individual into a collective right of the Negro population to an elected representative—in effect a guaranteed right of racial minorities to hold office, whether or not they command majority support.

The *Allen* case involved three Mississippi laws and a routine administrative change in Virginia that had altered election practices without preclearance from the Attorney General. In 1966, the Mississippi legislature amended its election laws to provide that members of county boards of supervisors could be elected at large and that in eleven specified counties the superintendent of schools would henceforth be appointed by the board of education. The third law changed the requirements for independent candidates running in general elections. The Virginia case concerned a bulletin issued by the Board of Elections instructing election judges to aid any illiterate voter who requested help in marking his ballot.⁸¹ Whereas the Mississippi amendments arguably were designed to minimize the political impact of the Negro voter, the record showed that the new Virginia regulation was wholly free of discriminatory purpose. In

79. 393 U.S. 544 (1969).

80. 1975 *Senate Hearings*, *supra* note 32, at 581.

81. The appellants were illiterate voters who had attempted to vote for a write-in candidate by sticking labels printed with the candidate's name on the ballot. The voting change was challenged in the district court as instituting a literacy test prohibited under section 4. Not until they argued before the Supreme Court did appellants raise the section 5 issue. 393 U.S. at 553-54.

fact, Virginia election officials had issued the regulation in the belief that existing state voting practices did not conform to the Voting Rights Act.⁸²

Without reaching the issue whether these electoral changes were discriminatory, the Court consolidated the four cases and remanded them back to the district courts with instructions to issue injunctions against enforcement of the enactments until the Attorney General had given his approval that the changes met the requirements of section 5.⁸³ In response to the appellees' argument (based on Congressional hearings) that the scope of section 5 was intended to cover only those changes dealing with voter registration and the right to vote, Chief Justice Warren asserted that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way."⁸⁴ This conclusion was warranted, said the Chief Justice, not by the wording of section 5, but by that of section 2, which referred to any "voting qualifications or prerequisite to voting or standard, practice, or procedure."⁸⁵ The word "procedure" in this section contained no exceptions, indicating "an intention to give the Act the broadest possible scope. . . ."⁸⁶

Warren thus presumed that the framers of the Voting Rights Act intended that federal regulation of voting procedures should include not only those procedures relating to registration and voting, but also those affecting voter impact and election results. Drawing from the Court's "vote dilution" rationale in the reapportionment cases developed under the fourteenth amendment, Warren concluded

82. *Id.* at 552-53.

83. These suits were instituted by private persons and did not originate in the District Court for the District of Columbia. Although the Act does not provide for a private cause of action, the Court, citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), declared that there was an implied right of action because section 5 would be an "empty promise" unless a private individual could seek judicial enforcement of the prohibition. 393 U.S. at 557.

84. 393 U.S. at 566.

85. *Id.* at 567 (citing 42 U.S.C. § 1973 (1964 ed., Supp. II)). Section 2 of the Act provided simply that "[n]o voting qualification or prerequisite to voting, or standing, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified at 42 U.S.C. § 1973 (1965) (amended 1975)). This section was amended in 1975 to include guarantees set forth in 42 U.S.C. § 1973b(f)(2) (1976). See 42 U.S.C. § 1971(g) (1976).

86. 393 U.S. at 566-67. Significant in Warren's opinion was a colloquy between Katzenbach and Senator Hyrom Fong, Republican, Hawaii, in which the Attorney General said that the word "procedure" was "intended to be all-inclusive of any kind of practice." *Id.* at 566.

that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious. . . . [I]t gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'"⁸⁷

In the main, Warren's broad interpretation of section 5's coverage thus rested on statutory language rather than legislative history; for the phrase "all action necessary to make a vote effective," seen here as a linchpin of the *Allen* decision, is taken from the Voting Rights Act itself. Significantly, however, this language is drawn from section 14 of the Act, and not the preclearance provisions.⁸⁸ This section of the Act, it was generally agreed during the course of Congressional deliberation, was simply declaratory of the fifteenth amendment. Senator Everett Dirksen (R.-Ill.), one of the principal sponsors of the Act, observed at one point that all of the states, including those not covered by section 5, were prohibited from discriminating against Negro voters by section 2. Dirksen described this term as "almost a rephrasing of the fifteenth amendment," not the fourteenth, and Attorney General Katzenbach agreed.⁸⁹ Therefore one can reasonably doubt whether the Court's incorporation of section 2 and the fourteenth amendment reapportionment cases into section 5 is consistent with the intent and meaning of the statute or its legislative history.⁹⁰

Such was the basis of Justice Harlan's lengthy dissent in *Allen*, which vigorously assailed the Court's opinion as "an overly broad

87. *Id.* at 565-66 (citing 42 U.S.C. § 19731(c)(i) (1964 ed., Supp. I)). See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). See also *White v. Register*, 412 U.S. 755 (1973); *Fortson v. Dorsey*, 379 U.S. 433 (1965).

88. Section 14 of the Act, codified in 42 U.S.C. § 19731(c)(1) (1976), defines the terms "vote" and "voting" as follows:

The terms "vote" and "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, or having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

89. See *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980). In the *Mobile* case, the Court ruled that the practice of electing city commissioners at-large (dating back to 1911 and not an electoral change falling within section 5) was not an unfair dilution of Negro voting strength in violation of section 2 of the Voting Rights Act, or of the fourteenth or fifteenth amendments.

90. When examined in its proper context, the phrase "all action to make a vote effective" hardly supports Warren's proposition, inasmuch as the section refers specifically to qualifications and procedures concerning registration and balloting, and is silent on the question of post-election results. See text of 42 U.S.C. § 19731(c)(1) (1976), cited in note 88, *supra*.

construction of section 5 of the Voting Rights Act.”⁹¹ In the first place, argued Harlan, the Chief Justice had erroneously assumed that section 5 could be severed from the Act and considered independently. “In fact, however, the provision is clearly designed to march in lockstep with section 4.”⁹² To construe section 5 separately was to lift it out of context in derogation of the obvious reciprocal relationship between the two provisions. Section 4, which suspended all literacy tests and similar “devices” in order to eliminate voter discrimination at the registration stage, necessarily determined the scope of section 5, a backup provision designed to prevent states covered by section 4 from evading its restrictions through the creation of new voter qualification tests.⁹³ Justice Black had made the same observation earlier in *South Carolina v. Katzenbach*,⁹⁴ the point being, as Harlan explained, that section 5 “was not designed to implement new substantive policies, but . . . to assure the effectiveness of the dramatic step that Congress had taken in section 4. The Federal approval procedure found in section 5 only applied to those states whose literacy tests or similar ‘devices’ have been suspended by section 4.”⁹⁵ In short, the only purpose of section 5 was “to imple-

91. 393 U.S. at 582.

92. *Id.* at 584.

93. Justice Harlan offered no legislative history to support his point, apparently believing that it was self-evident. But the legislative record clearly substantiates his claim. For example, Senator Philip Hart, Democrat, Michigan, a prime sponsor of the Act, said that its “two central features” were section 4 and the provisions for federal examiners. “Section 5,” he stated, “is supported by much the same evidence as underlies the suspension of tests or devices. This provision is a further appropriate assurance that 15th Amendment rights will not be denied, either by laws currently in force, or by fertile imaginations.” II B. SCHWARTZ, *supra* note 27, at 1517, 1521. Senator Joseph Tydings, (D.—Md.) also described the “principal provisions of the bill” as the suspension of tests and the appointment of federal examiners. *Id.* at 1526.

94. 383 U.S. at 356 (“Section 4(a) to which § 5 is linked, suspends for five years all literacy tests . . . coming within the formula of § 4(b).”) (*Id.*).

95. 393 U.S. at 584. “The statutory scheme contains even more striking characteristics,” Harlan continued, “which indicate that § 5’s federal review procedure is ancillary to § 4’s substantive commands. A state may escape § 5, *even though it has constantly violated this provision*, so long as it has complied with § 4, and has suspended the operation of literacy tests.” *Id.* By its very nature, in other words, section 5 monitored only new practices that a section 4(b) jurisdiction sought to implement after the date it was designated. A discriminatory practice in effect before designation could not logically be subject to preclearance. Thus in *Beer v. United States*, 425 U.S. 130 (1976), the Court held that a New Orleans reapportionment plan which continued the use of at-large councilmen seats that had been in existence without change since 1954 could not be tested under section 5. See Comment, *Voting Rights—Voting Rights Act of 1965 § 5—Federal Preclearance of Local Election Laws*, 25 N.Y.L. REV. 170-71 (1979).

ment the policies of section 4. . . ."⁹⁶ The Court's broad construction of section 5, Harlan concluded, was nothing less than

a revolutionary innovation in American government that goes far beyond that which was accomplished by section 4. The fourth section of the Act had the profoundly important purpose of permitting the Negro people to gain access to the voting booths of the South once and for all. . . . In moving against 'tests and devices' in section 4. Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments.⁹⁷

Further, argued Harlan, the Court had improperly read the fourteenth amendment into section 5, mistakenly assuming "that Congress intended to adopt the concept of voting articulated in *Reynolds v. Sims* . . . and protect Negroes against a dilution of their voting power."⁹⁸ Harlan's point was well taken. Both the statutory language and the legislative history of the Act, which Harlan cited extensively, revealed that Congress deliberately rejected the construction which the Court was now making.

Congress didn't casually overlook the fourteenth amendment, it "consciously *refused* to base section 5 of the Voting Rights Act on its powers under the Fourteenth Amendment, upon which the reapportionment cases are grounded," asserted Harlan. Indeed, he continued, "[t]he Act's preamble states that it is intended 'to enforce the fifteenth amendment to the Constitution of the United States. . . .'"⁹⁹ Thus the relevant case was not *Reynolds v. Sims* but *Gomillion v. Lightfoot*, and section 5 "should properly be read to require federal approval only of those state laws that change either voter qualifications or the manner in which elections are conducted."¹⁰⁰

That Chief Justice Warren had incorporated section 2 of the Act as well as the fourteenth amendment into the preclearance provisions of section 5 apparently escaped Justice Harlan's attention in the *Allen* decision, and Warren's peculiar reading of the statute concerning the scope of section 5 has gone unchallenged in subsequent cases before the Court. Indeed, Harlan's insightful dissent has been relegated to oblivion, and Warren's claim that section 5 must be given the "broadest possible scope"¹⁰¹ has become the rallying cry

96. 393 U.S. at 585.

97. *Id.*

98. *Id.* at 588.

99. *Id.*

100. *Id.* at 591.

101. *Id.* at 567.

for the continued expansion of federal control over electoral changes in the covered jurisdictions. In an outpouring of decisions since 1969, all resting on the questionable assumptions laid down in *Allen*, the Court has interpreted section 5 to require federal preclearance of laws changing the location of polling places,¹⁰² annexations,¹⁰³ and reapportionment and redistricting.¹⁰⁴

This line of decisions does not include the Mississippi cases consolidated in *Allen* imposing section 5 on laws adopting at-large systems of election, providing for the appointment of previously elected officials, and regulating candidacy,¹⁰⁵ or the more recent intrusions upon state sovereignty in 1978 sanctioned in the *Sheffield* and *Dougherty* cases. In *United States v. Board of Commissioners of Sheffield, Alabama*,¹⁰⁶ the Court declared that section 5 applied not only to counties and other local units of government that actually register voters, but to any entity within a covered jurisdiction having any power over any aspect of the electoral process. The city of Sheffield, Alabama, which did not even conduct voter registration, contended unsuccessfully that it was exempt from section 5 because the Act, by its own terms, applied only to "states and political subdivisions," and according to section 14(c)(2) a political subdivision was defined as a county or other political entity which conducts voter registration. Writing for the Court, Justice Brennan brushed aside this construction as unduly restrictive. The Act was intended to subject all political entities to preclearance, Brennan insisted, and whether a local unit registered voters was immaterial since "cities can enact measures with the potential to dilute or defeat the voting rights of minority group members. . . ."¹⁰⁷ Similarly, in *Dougherty County, Georgia Board of Education v. White*¹⁰⁸ the Court reaffirmed the *Sheffield* doctrine that any political entity within a covered area under section 4 must obtain the approval of the Attorney General if the political entity adopts any new law impacting upon the electoral

102. See *Perkins v. Matthews*, 400 U.S. 379 (1971).

103. See *City of Richmond, Va. v. United States*, 422 U.S. 358 (1975); *City of Petersburg, Va. v. United States*, 410 U.S. 962 (1973), *summarily aff'g* 354 F. Supp. 1021 (D.D.C. 1972).

104. *Beer v. United States*, 425 U.S. 130 (1976); *Georgia v. United States*, 411 U.S. 526 (1973). See also *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) In *Georgia*, the Court found that by extending the Act for another five years in 1970, Congress ratified the sweeping interpretation of section 5 in *Allen* and *Perkins*. See 411 U.S. at 533.

105. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

106. 435 U.S. 110 (1978).

107. *Id.* at 124.

108. 439 U.S. 32 (1978).

process. At issue in *Dougherty* was a rule promulgated by a local school board concerning candidacy qualifications. Finding *Sheffield* dispositive, the Court held that section 5 governed, dismissing the contention that the school board was exempt under the Act because it did not conduct elections.

Thus, one may conclude that the scope of section 5 is boundless. Even those who look favorably upon these results are quick to agree, however, that the Court has stretched the Act beyond its natural limits. As the Director of the Section 5 Unit of the Justice Department's Civil Rights Division has frankly acknowledged, "[m]ere impact on the political process as the defining principle for section 5 coverage . . . could lead to a slippery slope down which falls nearly everything that a political jurisdiction does. Congress probably did not intend section 5 to become such an all-encompassing mechanism."¹⁰⁹ Conceivably, the preclearance requirement could be extended to cover every act of government at the state and local level, inasmuch as any change ultimately affects, directly or indirectly, minority group interests. Reaching conflicting results, lower federal courts have already dealt with the question whether political parties are subject to section 5.¹¹⁰ Apparently, zoning changes, gerrymandering, and the location of public schools and housing projects are all likely candidates for future extensions of section 5, since these matters arguably may affect minority voting strength. Case law indicates that only court-ordered reapportionment plans and other court-ordered electoral changes are clearly exempt from the broad sweep of section 5.¹¹¹

Behind these developments lies a radical redefinition of the right to vote in American politics. The Voting Rights Act was launched for the purpose of giving minority groups greater access to the ballot. Supreme Court decisions since the watershed case of *Allen v. State Board of Elections*¹¹² have shifted the focus from access to result:

They assume a Federally guaranteed right to maximum political

109. MacCoon, *supra* note 56, at 114.

110. Compare *Williams v. Democratic Party*, No. 16286 (N.D. Ga. April 6, 1972), *aff'd mem.*, 409 U.S. 809 (1972) and *United States v. Democratic Executive Comm.*, No. 70-6047 (S.D. Ala. Dec. 22, 1970) (political parties are *not* subject to section 5) with *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972) and *Wilson v. North Carolina State Bd. of Elections*, 317 F. Supp. 1299 (M.D.N.C. 1970) (political parties are covered by section 5). The Act's definition of "vote" refers specifically to both party primaries and general elections. 42 U.S.C. § 1973 1(c)(1) (1976).

111. MacCoon, *supra* note 56, at 114-16.

112. 393 U.S. 544 (1969).

effectiveness. Nowadays local electoral arrangements are expected to conform to Federal executive and judicial guidelines established to maximize the political strength of racial and ethnic minorities, not merely to provide equal electoral opportunity. . . . That no one in 1965 contemplated such a development is indisputable.¹¹³

In brief, both the Act and the fifteenth amendment have become an instrument for elevating the traditional right of equal *opportunity* to a new plateau of equal *result*.

IV. *City of Rome v. United States*:
THE NEW EQUAL PROTECTION GUARANTEE OF THE
FIFTEENTH AMENDMENT

The basic structure of government in the City of Rome was established under a charter granted by the state legislature in 1918. The charter provided for a seven-member commission, with one member from each of seven wards. In 1929, two additional wards were annexed, raising the total to nine. Members of the Commission were elected concurrently, at-large, by plurality vote, and they were also required to meet a residency requirement. In addition, the charter made provision for a Board of Education consisting of five members, to be elected in the same manner with the exception of a residency requirement.¹¹⁴

In 1966, soon after the Voting Rights Act was passed, the Georgia General Assembly amended the City's charter in order to make numerous changes in Rome's system of government. The plurality vote requirement for members of the Commission and Board of Education was changed to majority vote, and provision was made for primary and run-off elections; the number of wards was reduced from nine to three, with one commissioner from one of three numbered posts in each ward; the size of the Board of Education was increased from five to six members, with one member from one of two numbered posts in each of three wards and each candidate required to be a resident of the ward in which he ran; staggered elections for members of the Commission and Board of Education were instituted; restrictions on voter qualifications were eased; and the task of voter registration was transferred to the county. In the period following November 1, 1964, some sixty annexations were also effected, either by local ordinance or state law.¹¹⁵

113. Thernstrom, *supra* note 72, at 50.

114. *City of Rome v. United States*, 472 F. Supp. 221, 223 (D.D.C. 1979).

115. *Id.* at 224.

Not until 1974, when the City submitted an annexation for section 5 preclearance, did the Attorney General learn of these numerous changes. Rome then submitted each one to the Attorney General for approval, with the exception of the transfer of voter registration to Floyd County, which the Attorney General did not oppose. After examining the various changes, the Attorney General agreed to preclear forty-seven of the sixty annexations, the reduction of wards from nine to three, the increase in the size of the Board of Education from five to six, and the liberalization of voter qualifications. But the Attorney General objected to thirteen annexations, the provisions for majority vote, run-off, numbered post and staggered term elections, and the residency requirement for Board of Education elections.¹¹⁶ Nine of the thirteen tracts of land were actually vacant when they were annexed by the city.

The City of Rome then brought suit challenging the Attorney General's actions on six grounds. During the course of litigation, two of the plaintiff's claims were eliminated,¹¹⁷ leaving the following four claims: (1) That Rome was entitled to "bail-out" from coverage under section 4 of the Voting Rights Act; (2) That some or all of the changes to which the Attorney General was opposed had actually been precleared; (3) That section 5 was an unconstitutional exercise of Congressional power; and (4) That the disputed changes had neither the purpose nor the effect of denying or abridging the right to vote on the basis of race. Significantly, the City did not rely on Justice Harlan's key opinion in *Allen* concerning the scope of section 5 and its application to Rome's electoral changes, or raise the issue of whether it was intended or proper to view section 5 in light of the fourteenth amendment and the "vote dilution" rationale set forth in the reapportionment cases. In foregoing the opportunity to lay bare the jerry-built foundation of the *Allen* case, the City necessarily obscured its fourth claim regarding the purpose and effect test. Preferring to attack Congress rather than the courts and follow Justice Black's line of *Katzenbach* dissents in a frontal, if not suicidal, assault against Congress' enforcement powers under the fifteenth amendment, Rome further weakened its position by failing to confront the Congressional debates on the Ku Klux Klan Act of 1871, the one and only instance when the framers and backers of the

116. *Id.* at 229.

117. Rome's allegation that the Attorney General had acted unconstitutionally in applying section 5 to the City was dismissed on the basis of *Morris v. Gressette*, 432 U.S. 491 (1977), and *Briscoe v. Bell*, 432 U.S. 404 (1977). The City conceded that it was the kind of jurisdiction subject to section 5 as determined by the *Sheffield* case.

Reconstruction Amendments explored in depth their understanding of Congress' enforcement powers. Nor did the City of Rome invoke the legislative history of the fifteenth amendment to challenge the Voting Rights Act, a fruitful source of information that would have buttressed its constitutional case.

No less exceptional is the utter failure of the Justice Department to produce evidence that any of the numerous electoral changes promulgated by the City of Rome had the purpose of discriminating against the City's handful of Negro voters. Indeed, the evidence is so supportive of the City's good intentions and the prevalence of long-standing, mutually agreeable race relations and voting practices, as to warrant extensive reiteration. The District Court's findings, based on exhaustive testimony, revealed that the City of Rome had not employed any literacy tests or other devices as a prerequisite to voter registration for seventeen years—before the magic date of November 1, 1964. Although registrants were technically required to pass the Georgia literacy or character tests, affidavits of registration officials, supported by the unanimous testimony of black deponents, showed that such tests had never been applied in a discriminatory manner, and in recent years had not been used at all. Likewise, Rome had not attempted to impede registration through manipulation of requirements relating to time and place, registration personnel, purging or re-registration. In the period from 1964 to 1974, Negro registration remained at a relatively high level, which the District Court conceded was “[a]lso probative of the lack of discrimination in registration. . . .”¹¹⁸

Moreover, the evidence showed that Negroes had not been denied access to the ballot through the inconvenient location of polling places, the actions of election officials, or the treatment of illiterate voters. No obstacles had been placed before black candidates with respect to slating of candidates, filing fees, or access to voters at polling places. Further, whites, including city officials, had encouraged Negroes to run for office in Rome, and one Negro was even appointed to the Board of Education.¹¹⁹

Outside the area of voting, the record was equally free of discrimination. The elected officials and city manager of the City, concluded the District Court,

are responsive to the needs and interests of the black community. The City has not discriminated against blacks in the provision of

118. 472 F. Supp. at 224.

119. *Id.* at 225.

services and has made an effort to upgrade some black neighborhoods. The City transit department, with a predominantly black ridership, is operated through a continuing City subsidy. And the racial composition of the City workforce approximates that of the population, with a number of blacks employed in skilled or supervisory positions.¹²⁰

Finally, the city demonstrated that because Negroes in the City of Rome usually held the balance of power in municipal elections, white candidates "vigorously" sought their support and "spent proportionally more time campaigning in the black community"¹²¹ than in their own.

In response to such overwhelming evidence rebutting the presumption of discrimination, the federal government offered only one argument—the crux not only of this case but of almost the whole body of federal law that had grown out of the *Allen* rationale: All this is true, but "most black voters would prefer to have a black official representing their interests."¹²² The obvious assumption, which the City had quite successfully refuted, was that whites could not fairly represent the interests of the minority, so the case turned not on any discernible denial of voting rights but on the racial preferences of the blacks for black officeholders and their collective "right" to hold office through proportional representation. The Court noted that only four Negroes had ever sought office in Rome; and evidence existed, though not conclusive, of bloc voting, which weighed heavily against the city.¹²³ That bloc voting perpetuating the division between the black and white communities would be an absolute certainty if the blacks were given their own seat on the Commission and Board of Education did not enter into the Court's discussion.

Thus committed to a "winner-take-your-share" theory of elections, or a separatist view of fundamental fairness based on the notion that no racial minority shall be denied the right to political representation, the District Court predictably ruled against the City of Rome on all four counts. Rome's request to "bail-out" from section 5's coverage was rejected on the ground that Congress did not intend that municipalities in covered states should be permitted to ex-

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* One unsuccessful Negro candidate for office "did receive a sizeable number of white votes"—45 percent of the total votes cast in a run-off election in a city with only 15 percent Negro registration. *Id.* at 227.

empt themselves independently, as this practice would create an administrative burden on the Justice Department and open the door to a resurgence of the "same evils" which the Act was designed to eliminate¹²⁴—an argument that hardly seemed applicable to a city like Rome that already had established a commendable record of race relations. Rome's argument that the Attorney General's preclearance of the Georgia Municipal Election Code in 1968 also constituted preclearance of the City's electoral changes was countered by the argument that "submission of state laws authorizing municipalities to adopt certain provisions in their charters does not constitute submission of the actual exercise of this authority by local government"¹²⁵—a position seemingly exacerbating the Justice Department's administrative burden. The City's constitutional challenge to section 5, alleging that the preclearance requirement exceeded Congress' enforcement powers, violated the tenth amendment and the Guarantee Clause, and infringed the rights of private plaintiffs joined in the suit, was dismissed on the basis of *South Carolina v. Katzenbach*.¹²⁶ Acknowledging the presence of "an undercurrent of dissent" within the ranks of the Supreme Court on this issue, the District Court nevertheless declined the plaintiff's invitation "to a life of high adventure," noting that "[f]ar from backing away from *Katzenbach* the Court has in the ensuing years often cited that case with approval."¹²⁷

In response to the City's claim that Congress lacked the enforcement power to prohibit a state or local unit of government from implementing voting changes that had the effect but not the purpose of diluting Negro voting strength, the District Court agreed that the issue of "[w]hether the Fifteenth Amendment reaches only purposeful discrimination is an important and unsettled constitutional question" which the Supreme Court had "never explicitly addressed. . . ."¹²⁸ Even if the amendment itself reached only purposeful discrimination, however, "Congress was within its broad enforcement power . . . when it outlawed voting changes discriminatory in effect only." This bold pronouncement suggesting that Congress' section 2 enforcement powers exceed the substantive provisions of section 1 of the fifteenth amendment, despite the words of limitation that Congress is empowered to enforce only "these provisions," amounts to little

124. *Id.* at 231-32.

125. *Id.* at 233.

126. 383 U.S. 301 (1966).

127. 472 F. Supp. at 235.

128. *Id.* at 237.

less than a complete nationalization of state electoral processes. The Court's statement further assumes, of course, that Congress did in fact outlaw voting changes "discriminatory in effect only" by enacting the Voting Rights Act, an assumption made by Chief Justice Warren in the *Allen* case that rests, as noted earlier, on precarious footing. Thus the real question, not raised in these proceedings, is not simply whether Congress may outlaw state voting practices under the fifteenth amendment that merely dilute Negro voting strength and impede the election of Negroes, but also whether Congress ever intended to do so in the first place. The District Court's foray into "a life of high adventure" to find the outer limits of Congress' mysteriously expanding enforcement powers, which began with a refusal to take the first step when asked to reexamine *Katzenbach* and ended here with the discovery of a new galaxy of legislative power in *City of Rome*, was possible then only because Justice Harlan's crucial dissent in *Allen* was never launched to intercept the mission.

The District Court found additional support for its liberal construction of the enforcement power in *Ex parte Virginia*¹²⁹ and *McCulloch v. Maryland*.¹³⁰ "Let the end be legitimate, let it be within the scope of the constitution," Chief Justice Marshall had declared in *McCulloch* in his classic formulation of the Necessary and Proper Clause, "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."¹³¹ Such was the test of Congressional enforcement power that the Supreme Court had applied back in *South Carolina v. Katzenbach*,¹³² when it first examined the constitutionality of the Voting Rights Act, and the District Court found that test dispositive in determining whether Congress could properly prohibit electoral practices under the fifteenth amendment that had only a discriminatory effect. Under the *McCulloch* standard, said the court, "we have no doubt but that section 5's ban on 'effect' discrimination is an appropriate means even if it is assumed that the desired end is solely the elimination of purposeful discrimination,"¹³³ because "discriminatory effects raise a legitimate, and often compelling, inference of purpose."¹³⁴

129. 100 U.S. 339 (1879).

130. 17 U.S. (4 Wheat.) 316 (1819).

131. *Id.* at 421.

132. 383 U.S. 301, 326 (1966).

133. 472 F. Supp. at 238.

134. *Id.*

This inference, implicit in the Voting Rights Act, was based on a thorough investigation by Congress, which

could well have concluded that wholesale evasion of the Act was likely unless discriminatory effects could be taken as conclusive evidence of purpose. . . . In effect, Congress can be said to have instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose. We can see no constitutional impediment to Congress' taking such an approach.¹³⁵

The assumption, once again, was that Congress took such an approach, an assumption which is not clearly supported by the record. The Court, in fact, cited no legislative history lending weight to this construction. It is noteworthy, however, that section 5 of the Senate version of the Voting Rights Act, S.1564, provided that in order for a state or political subdivision to obtain preclearance for a new voting practice, that entity had the burden of proving that such a change did not have the purpose "or" would not have the effect of denying or abridging the right to vote.¹³⁶ But the House version, H.R. 6400, used the conjunction "and." This choice of words was ultimately adopted by the Conference Committee and made a permanent fixture of the Act.¹³⁷ The Court's reasoning thus seems contrary to the deliberate intention of Congress and the wording of the statute; for if the burden rests on the state to show that its electoral change does not have the purpose *and* the effect of voter discrimination, and the state has met the burden with respect to purpose, simple logic leads to the conclusion that further inquiry into the effect of a particular change would be warranted only if the statute provided that the state must prove that its new voting practice did not have the purpose *or* the effect of voter discrimination.¹³⁸

The District Court experienced little difficulty, however, in deciding that most of Rome's various electoral changes actually had a discriminatory effect. "With respect to the majority vote and runoff election provisions, the discriminatory effect is clear beyond

135. *Id.* at 238-39.

136. *See* II B. SCHWARTZ, *supra* note 27, at 1533.

137. *Id.* at 1592.

138. In Senate debate on S. 1564, Senator Tydings, a principal spokesman for the bill in the Senate Judiciary Committee, gave a carefully prepared address on the Senate floor explaining each provision of the bill. In his remarks on section 5, Tydings asserted: "Although the word 'or,' which frequently has a disjunctive meaning, is used, it is intended that the petitioning state or subdivision must prove an absence of both discriminatory purpose and effect." *Id.* at 1533.

peradventure."¹³⁹ Although the effects of numbered posts, staggered terms, and Board of Education residency provisions were somewhat less clear, the City offered no rebuttal to the expert testimony of the United States Commission of Civil Rights that such practices deprived the Negro community of an opportunity to elect a Negro through "single-shot" voting.¹⁴⁰ The annexations, however, posed a more difficult problem. Deferring to the Justice Department, which was willing to reconsider its objections to the annexation if the City agreed to revert to the plurality win system, the court denied the City's motion as regards the annexation and invited the City to renew its request for preclearance.

The City's second constitutional argument, resting on federalism and the tenth amendment, maintained that section 5 must be declared unconstitutional under the principles established in *National League of Cities v. Usery*.¹⁴¹ In that case the Supreme Court held that the tenth amendment imposed a limitation on Congress' power to regulate commerce, and that Congress was therefore prohibited by the principle of federalism from extending minimum wage and maximum hour regulations through its commerce power to employees of state and local governments. The District Court refused to apply this reasoning to the Voting Rights Act, however, noting that the Supreme Court had reserved the question whether the tenth amendment also limited Congress' enforcement powers under the fourteenth amendment. If the Supreme Court were confronted with the issue, the District Court was nevertheless confident that the Justices would follow *Fitzpatrick v. Bitzer*,¹⁴² a case decided only four days after *National League* and also written by Justice Rehnquist, which held that the eleventh amendment did not operate as a limitation on Congress' enforcement powers. "[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies," said the Court in *Fitzpatrick*, "are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."¹⁴³ Both the tenth and eleventh amendments shared a common grounding in states' rights and the principles of state sovereignty.

139. 472 F. Supp. at 244.

140. *Id.* The Commission described "single-shot" voting as a device which "enables a minority to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." *Id.* at n.90 (citation omitted). This technique is, of course, merely a form of bloc voting.

141. 426 U.S. 833 (1976).

142. 427 U.S. 445 (1976).

143. *Id.* at 456.

By parity of reasoning, the enforcement power of Congress under the fifteenth amendment, which had a "common history" with that of the fourteenth, was not limited by the federal principle. "Although *Fitzpatrick* did not directly address the question presented here," the court concluded, "we find that analytically it compels a like result."¹⁴⁴

In effect, then, the District Court assumed that Congress' enforcement powers are broader than its commerce power, a construction that is nowhere supported in the debates on the framing and adoption of the Reconstruction Amendments. Equally disturbing are the far-reaching implications of the decision: if the enforcement powers are not limited by the federal principle, apparently those powers are not limited at all, except by the self-restraint of Congress itself. Review of Congressional enactments by the Supreme Court is a potential limit on the exercise of power, of course, but in the absence of the tenth amendment few compelling reasons, if any, would exist to nullify federal statutes that would necessarily be directed against state action anyway. The District Court's reasoning thus leads to the extraordinary conclusion that the Reconstruction Amendments repealed the tenth amendment, a revolutionary doctrine that was roundly opposed, as will presently be seen, by the members of Congress who framed the Reconstruction Amendments. Moreover, the Court's analogy between the tenth and eleventh amendments overlooks the different purposes these amendments were designed to accomplish. The tenth amendment, encompassing the Constitution in entirety, was intended to limit the powers of the federal government to those delegated by the states, and to reaffirm the principle that those powers not delegated were reserved to the states and the people. The eleventh amendment, on the other hand, was adopted for the narrow purpose of reversing the Supreme Court's decision in *Chisholm v. Georgia*.¹⁴⁵ Although this provision limits the federal judicial power, the amendment is directed not against the federal government as such but against out-of-state and foreign citizens. The amendment simply bars suits against a state by citizens of other states, and by its terms does not even bar a suit by a citizen against his own state. In short, the eleventh amendment is almost totally unrelated to relations between the federal government and the states and matters affecting the division of power between two levels of government. It is the tenth amendment which addresses the question of power in the federal system. The eleventh

144. 472 F. Supp. at 240.

145. 2 U.S. (2 Dall.) 419 (1793).

amendment deals solely with the issue of sovereign immunity and seeks to protect the states not against the federal government but merely against suits by out-of-state citizens. To treat the two amendments as an embodiment of the same principles and purposes is to misconstrue the meaning of federalism under the American constitutional system.

Turning finally to the two remaining constitutional issues raised by *City of Rome*, the District Court quickly disposed of both in summary fashion. The City's contention that section 5 constituted a violation of the Guarantee Clause was dismissed as a political question not amenable to judicial resolution. In reply to the private plaintiff's complaint that the actions of the Attorney General and the operation of section 5 had prevented the City from holding elections since 1974 in contravention of the plaintiffs' civil rights, the District Court responded with the curious observation that the City of Rome was equally to blame because it had refused to cooperate with the Attorney General. But "even if fundamental interests were at stake . . .," concluded the court, "we believe section 5 of the Act is justifiable in advancing the compelling national interest of enforcing the Fifteenth Amendment by 'erasing the blight of racial discrimination in voting.'"¹⁴⁶ Whether this statement meant that fifteenth amendment rights were to be preferred to the so-called "Fundamental Freedoms" of the first amendment the Court did not say.

On appeal, *City of Rome* was argued before the Supreme Court during the October Term, 1979. In affirming the judgment of the lower court, a divided Supreme Court, speaking through Justice Marshall, closely followed the path of reasoning blazed by the District Court, although with less attention to the finer points developed by the District Court. Among the usual outpouring of concurring and dissenting opinions,¹⁴⁷ only Justice Rehnquist, joined by

146. 472 F. Supp. at 242 (citations omitted).

147. Justices Blackmun and Stevens concurred, the former conditioning his approval on matters relating to annexation, the latter emphasizing the right of Congress to regulate voting practices in Rome even though "there has never been any racial discrimination practiced in the city." 446 U.S. at 190 (Stevens, J., concurring). In dissent, Justice Powell contended that the Court's ruling conflicted with *Sheffield* and argued that the Court had misinterpreted the "bail-out" provisions of section 4 of the Act. "The Court today," Justice Powell observed, "decrees that the citizens of Rome will not have direct control over their city's voting practices until the entire State of Georgia can free itself from the Act's restrictions." *Id.* at 203 (Powell, J., dissenting). This interpretation, he complained, would only serve to "vitiate the incentive for any local government in a state covered by the Act to meet diligently the Act's requirements." *Id.* at 206 (Powell, J., dissenting.)

Stewart, vigorously opposed the Court's interpretation of the Act and insisted that Congress' enforcement powers were limited by the substantive provisions of the fifteenth amendment. No member of the Court challenged the constitutionality of the Act in line with Justice Black's earlier dissents, or picked up on Justice Harlan's astute criticisms in *Allen* concerning the scope of section 5.¹⁴⁸ Rehnquist did insist, however, that since the enforcement power is a "remedial" grant of authority, then the duty of the Court, in keeping with *Marbury v. Madison*, was "to ensure that a challenged Congressional Act does no more than 'enforce' the limitations on state power established in the Fourteenth [Amendment]."¹⁴⁹ In this case there was no wrong to remedy because the City of Rome had engaged in no purposeful discrimination; and any dilution of the black vote associated with the electoral changes at issue was the result of bloc voting—a matter of private rather than governmental discrimination. Asserting that "the Constitution imposes no obligation on local governments to erect institutional safeguards to ensure the election of a black candidate,"¹⁵⁰ and further insisting that Congress does not have the power to impose such a duty, Rehnquist drew the curtain on *City of Rome* with a stinging rebuke of the producers and directors for having abandoned the script of prior case law:

To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned. The intrusion is all the more offensive to our constitutional system when it is recognized that the only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process.¹⁵¹

Rehnquist's parting shot suggesting that the Court had rewritten the fifteenth amendment to accommodate the majority's own

148. In a footnote, however, Justice Rehnquist indicated an awareness of the issues raised by Justice Harlan, although Justice Rehnquist did not pursue the matter further. Noting that the Voting Rights Act is an exercise of fifteenth amendment power and that vote dilution devices involve the fourteenth amendment, Justice Rehnquist nevertheless deferred to the Court's position that the Act may be applied to remedy violations of the fourteenth amendment. 446 U.S. at 207-08 n.1 (Rehnquist, J., dissenting).

149. *Id.* at 211.

150. *Id.* at 219.

151. *Id.* at 221.

theory of representation reflected the concern expressed earlier by Justice Harlan in his *Allen* dissent that the Court's insistence on Negro officeholders was not necessarily in the best interest of the minority. "It is not clear to me," Harlan confessed, "how a Court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers."¹⁵² To be sure, a white majority dominating a multi-member commission would be better able to ignore the interests of the Negro community if the majority were spared the trouble of campaigning in that community for political support and could vote down the lone black representative without fear of reprisal. Having undermined the need for coalition-building, the Court, in other words may have actually isolated the minority and in effect given it a meaningless role in the political process. And there may be additional consequences, as yet unseen. The Court's theory of representation apparently creates "incentives to keep a city ghettoized. Once a ward system is instituted, the geographical dispersion of blacks cuts in to black power."¹⁵³ In brief, the Court's main accomplishment may well be "[t]he political polarization of the society along racial and ethnic lines . . ."¹⁵⁴ and a concomitant decline in the political efficacy of the Negro minority.

Looming ominously in the background is yet another disturbing aspect about *City of Rome* that led Justice Powell to condemn the Court's decision on grounds of fundamental fairness. "Even though Rome has met every criterion established by the Voting Rights Act for protecting the political rights of minorities," Powell complained, "the Court holds that the City must remain subject to preclearance."¹⁵⁵ The larger issue, which the Court has not fully addressed, is the overinclusiveness of section 4 of the act, which punishes the innocent as well as the guilty by hurling all local communities of a covered state, irrespective of their different racial, ethnic, political, and historical backgrounds, into a common jail. Indeed, the problem, which was hotly debated in Congress in 1965, 1970 and again in 1975, extends to the discriminatory treatment of certain states, primarily in the South, many of which have also made substantial progress in the area of race relations but are unrewarded for their actions and

152. *Allen v. State Bd. of Elections*, 393 U.S. 544, 586 (1969) (Harlan, J., dissenting), as quoted in 446 U.S. at 219 (Rehnquist, J., dissenting).

153. Thernstrom, *supra* note 72, at 65.

154. *Id.* at 75.

155. 446 U.S. at 196 n.4.

unable, like the City of Rome, to bail out and resume their independence on an equal footing with other members of the Union. That the coverage formula in the original Act was also politically motivated and arbitrary even within the South is suggested by the fact that such states as Tennessee, Kentucky, Florida, and President Johnson's own state of Texas were exempted, notwithstanding their record on voter discrimination. Indeed, coverage was aimed almost exclusively at the Deep South, which had supported Barry Goldwater in the 1964 presidential election.¹⁵⁶

The case of Virginia amply demonstrates the inherent arbitrariness of the Act. Appearing before the Subcommittee on Constitutional Rights of the Senate Judiciary in 1975 to testify against the most recent extension of the Voting Rights Act, Attorney General Andrew Miller of Virginia pointed out that in 1965 Virginia was the only state, other than Alaska, which was "triggered" by the Act in the absence of any evidence of racial discrimination in voting. In fact, extensive investigations conducted by the United States Commission on Civil Rights in the Commonwealth in 1961 revealed that black citizens in Virginia, to quote the Commission's report, encountered "no significantly racially motivated impediments to voting."¹⁵⁷ Yet states where voting discrimination was known to exist were exempted from the preclearance provisions of section 5 because they did not maintain any literacy tests. Paradoxically, the Virginia literacy test simply required applicants to provide routine information in their own handwriting concerning their names, addresses, age and occupation.

Superimposed on this matrix of arbitrary presumptions, the

156. Testifying against extending the Act in 1975, Senator James Allen (D.-Ala.) observed that

when the theory of this . . . [Act] was evolved, it was first determined which States the law should be made applicable to, and then they proceeded to find the formula that would end up with those States being covered. And, by using the 50 percent voting in the election factor, that would have included the State of Texas. The President of the United States being a resident of Texas, a citizen of Texas, it was thought inadvisable to include Texas in that formula. So they added a second circumstance, that is, that they must have a device that would hinder registration; namely, the literacy test. And, the double factor . . . is what took Texas out from under it, because they did not have the literacy test.

1975 Senate Hearings, *supra* note 32, at 24. Senator Strom Thurmond (R.-S.C.) charged earlier that "[t]he Voting Rights Act of 1965 was a punitive measure designed to punish the States that supported Goldwater for President." *Hearings on Amendments to the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 91st Cong., 1st & 2d Sess. 7 (1969 & 1970).

157. 1975 Senate Hearings, *supra* note 32, at 825.

Virginia Attorney General observed, was the Supreme Court's decision in *Gaston County v. United States*¹⁵⁸ which doomed Virginia's chances of a bailout by prohibiting any state from terminating coverage if discrepancies in educational opportunity previously existed in that jurisdiction. In any action brought under section 4(a) of the Act, the Court concluded, it was "appropriate for a court to consider whether a literacy or educational requirement has the 'effect of denying . . . the right to vote on account of race or color' because the State or subdivision which seeks to impose the requirement has maintained separate and inferior schools for its Negro residents who are now of voting age."¹⁵⁹ That a lack of educational opportunities for Negroes was a national rather than a local phenomenon highlighted the discriminatory effect of the *Gaston* ruling, in Attorney General Miller's estimation, and he cited numerous examples, based on decisions of the Supreme Court and other federal sources, to prove his point.¹⁶⁰

Instead of amending the Act in light of the *Gaston* decision to bring within its scope all states maintaining literacy tests in which such disparities were found—i.e., all states with literacy tests—Congress in 1970 suspended the use of all literacy tests throughout the country. But Congress did so without compelling the other states which had literacy tests, such as Massachusetts, Maine, New Hampshire and Connecticut, to conform to the requirements of section 5, thereby leaving intact the original discrimination against Virginia and the other states singled out in the 1965 Act.¹⁶¹ Virginia apparently was denied relief from section 5 solely because of a pre-

158. 395 U.S. 285 (1969).

159. *Id.* at 293.

160. Summarizing these findings, the Virginia Attorney General noted the following: (1) Unequal educational opportunity for blacks and whites, whether defined in terms of literacy ability, school facilities and expenditures, or segregation, is not confined to any region of the United States; (2) Blacks lag behind whites in literacy ability and reading comprehension in each region of the nation; (3) A greater percentage of blacks than whites was illiterate in each of the states which maintained literacy tests in 1964 but which were not subjected to the proscriptions of section 5; (4) In each of the literacy test states not subject to section 5 the percentage of black students more than one year behind the school in 1950 exceeded the percentage of white students more than one year behind by increasing margins; (5) A substantial portion of the black students in each of the literacy test states not subject to section 5 in 1970 attended majority black schools and schools in which 95 percent or more of the students were black; and (6) Because of the educational disadvantages suffered by blacks, the use of literacy tests in those states not subject to section 5 has a disproportionate impact on blacks. *1975 Senate Hearings, supra* note 32, at 821-22.

161. *Id.* at 828.

existing lack of equal educational opportunities. Thus, the Voting Rights Act suffers from basic inequities prejudicing not only Virginia but also jurisdictions like the City of Rome that are caught up in seemingly irrebuttable presumptions over which they have no control.

V. THE CONSTITUTIONALITY OF THE VOTING RIGHTS ACT OF 1965:
SOME UNANSWERED QUESTIONS

A. *The Scope of the Fifteenth Amendment and the Question of Original Intent*

The Reconstruction Amendments, proposed and adopted between 1865 and 1870 in a period of profound civil unrest and political turmoil,¹⁶² have surely introduced more uncertainty and confusion into American law than all of the other provisions of the Constitution combined.¹⁶³ Much of this uncertainty stems from the vagueness of certain provisions in the amendments, and the conflicting interpretations of their purpose and meaning offered by those who participated in their creation. In his authoritative study of the question whether the framers and backers of the fourteenth amendment intended to incorporate the Bill of Rights into the word "liberty" of the Due Process Clause, thereby making the first eight amendments applicable to the states, Charles Fairman has warned that one should not expect clarity and precision on all points in the historical record. "We know so much more about the Constitutional law of the Fourteenth Amendment than the men who adopted it," Fairman observes, "that we should remind ourselves not to be surprised to find them vague where we want them to be sharp. Eighty years of adjudication has taught us distinctions and subtleties where the men of 1866 did not even perceive the need for analysis."¹⁶⁴ Adding to the

162. See generally C. BOWERS, *THE TRAGIC ERA* (1929); J. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION* (1902); E. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960); J. RANDALL, *THE CIVIL WAR AND RECONSTRUCTION* (1937); K. STAMPP, *THE ERA OF RECONSTRUCTION: 1865-1877* (1965).

163. One writer has estimated that the fourteenth amendment alone "is probably the largest source of the Court's business, and furnishes the chief fulcrum for its control of controversial policies." R. BERGER, *supra* note 11, at 1.

164. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 9 (1949). "When one realizes how little the men of 1866 foresaw the part the Supreme Court was going to play in working out the Fourteenth Amendment's guarantees of civil rights," Fairman further observes, "it is no wonder that they did not fix their minds squarely on the question the court had to face in 1873 and which is raised again today: what is the *standard* by which to test state action alleged to violate the Fourteenth Amendment?" *Id.* at 23-24.

confusion and impeding understanding is the position taken by some members of the modern Court that the original intent of the framers, even when ascertained, is not binding on the Justices. Thus in reply to Justice Harlan's exhaustive analysis of the historical record in *Oregon v. Mitchell*, demonstrating convincingly that the fourteenth amendment was never intended to "authorize Congress to set voter qualifications, in either state or federal elections,"¹⁶⁵ Justices Brennan, White and Marshall responded that they "could not accept this thesis even if it were supported by historical evidence."¹⁶⁶ Justice Douglas dismissed Harlan's findings with the assertion that they were simply "irrelevant."¹⁶⁷ In the effort to clarify the scope and purposes of the fifteenth amendment, therefore, one is confronted not only with the problem of conflicting views among the authors of the amendment, but also with a seeming indifference, if not hostility, among certain members of the Court toward the original intent of the framers even when that intent is known.

Since the enactment of the Voting Rights Act in 1965, the Court has had numerous opportunities, beginning with *South Carolina v. Katzenbach*,¹⁶⁸ to examine the Act in the terms of the original intent and understanding of those who framed the fifteenth amendment.

165. 400 U.S. at 154.

166. *Id.* at 251.

167. *Id.* at 140. Speaking for all of the members of the Court, Chief Justice Warren announced in *Brown v. Board of Education*, 347 U.S. 483, 489, 492 (1954), that "we cannot turn back the clock to 1868" and summarily rejected evidence concerning the original understanding of the equal protection clause as "inconclusive." See also *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) (the Court is not confined to historic notions of equality); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (evolving standards of decency define the substance of the eighth amendment). One of the earliest calls for judicial legislation was that of J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 183-84 (1909), who suggested that the difficulty of the amending process gave courts freedom of interpretation. See generally T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 14 (1969) (the original understanding must be "leavened" by "considered consensus"); Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975) (the Court properly expounds upon national ideals not mentioned in the Constitution); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 *U. CHI. L. REV.* 661, 686 (1960) (the Supreme Court is the "national conscience" for the American people). Such pronouncements are rarely encountered in the old reports, which more uniformly reflect an attitude of deference toward the original intent of the framers: In "the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex parte Bain*, 121 U.S. 1, 12 (1887).

168. 383 U.S. 301 (1966).

To what extent did the amendment, as originally conceived, contemplate federal regulation of suffrage? What powers, according to the framers, did the amendment confer upon Congress under the Enforcement Clause? Though such inquiries would seem to be a part of the ordinary course of judicial decision-making, the Court has never made them; and in *City of Rome* not even the City officials raised these questions. Had the officials done so, the decision might have produced a different result. At the very least, these questions would have brought pressure upon the Court to justify its holdings in the face of overwhelming evidence that the Voting Rights Act is clearly inconsistent with the aims and purposes of the fifteenth amendment.

Studies by historians, political scientists, and constitutional scholars on the framing and adoption of the fifteenth amendment have been readily available since the turn of the century, so the subject is hardly an arcane obscurity that would tax judicial resources. Writing in 1909, John Mathews, a political scientist at Johns Hopkins University, concluded after examining the debates that "[u]nder the Amendment as actually passed . . . the power still remained with the States to prescribe all qualifications which they had previously been competent to prescribe, with the exception of the three named in the Amendment."¹⁶⁹ This understanding was confirmed and considerably broadened in 1965 by the historian, William Gillette, whose carefully documented monograph has become the standard reference on the origins of the fifteenth amendment.¹⁷⁰

Debates in Congress on the amendment, extending from January to February of 1869, were extensive and complex. These debates involved many all-night sessions, produced incredibly complicated parliamentary maneuvers and entanglements, and filled some three hundred pages of the *Congressional Globe*. Passage of the amendment, at times in doubt, was a victory for the moderates in Congress, who were able to compromise the conflicting positions of those who opposed Negro suffrage, and the radical Republicans who wanted to federalize the electoral process. What was widely understood in 1869 but was not generally realized in later years, until Gillette's study appeared, was that the "primary goal" of the fifteenth amendment "was the enfranchisement of Negroes outside the

169. J. MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 44 (1909).

170. W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965).

deep South."¹⁷¹ Although the amendment would guarantee suffrage to the newly emancipated slaves and protect them against future disenfranchisement, many were already exercising the franchise—at first under military reconstruction and later under new state constitutions. The unenfranchised northern Negroes, on the other hand, stood to benefit principally from the amendment, and would presumably become loyal Republicans.¹⁷²

In early January, various amendment proposals were offered to protect the Negro voter by prohibiting literacy tests and poll taxes. Some versions also sought to guarantee the right of Negroes to hold public office. In time, however, these suggestions were abandoned for lack of support, and the advocates of Negro suffrage were compelled to settle for more modest gains. One of the first advocates to come forward was Representative George Boutwell, a radical Republican from Massachusetts, who introduced an amendment stipulating that "the right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States."¹⁷³ In competition with Boutwell's proposal were amendments offered by the Ohio Republican radical, Samuel Shellabarger, and his colleague, also from Ohio, John Bingham. Shellabarger, a powerful advocate of Negro rights, proposed to confer the right to vote on all males over the age of twenty-one, except former rebels, and to abolish all state literacy and property tests. Bingham's more moderate substitute favored the idea of granting suffrage in both the Negroes and ex-confederates, with a one-year residency requirement. All three amendments were negative in the sense that they prohibited the states from exercising certain powers, and none sought to abolish primary control of suffrage by the states. On January 30, the House rejected both the Shellabarger and Bingham amendments, and passed the Boutwell amendment with the necessary two-thirds majority.

Meanwhile, the Senate was considering an amendment proposed by the Republican moderate from Nevada, William Stewart. Stewart reluctantly endorsed Negro suffrage, but opposed Chinese suffrage. Unlike Boutwell's proposal, Stewart's amendment was couched in affirmative language and guaranteed the right of the Negro to hold office. With the passage of the Boutwell amendment, the Senate dropped Stewart's plan to consider the House version. During the course of this protracted debate, the Senate also considered and rejected

171. *Id.* at 46.

172. *Id.* at 46-49.

173. *Id.* at 53 (citation omitted).

an amendment introduced by Senator Jacob Howard of Michigan, which specified "African suffrage" and left the states the power to impose education and property tests to disenfranchise Negroes, and yet another supported by Senator Henry Wilson of Massachusetts which sought to abolish all qualifications for either voting or holding office because of "race, color, nativity, property, education or religious belief."¹⁷⁴ But only hours after Wilson's amendment was defeated on February 9, the Senate reversed course and adopted a modified version which guaranteed the right to hold office, but did not prohibit the states from setting qualifications for holding office. Now seemingly in control, the radical Republicans quickly added a proposed sixteenth amendment to reform the Electoral College and sent the package to the House.

Led by Boutwell, the House rejected the Senate amendment and requested a conference. Boutwell's cause was considerably strengthened now by the arch-radical Wendell Phillips, who actually favored a guarantee of Negro officeholding but was willing to support the Boutwell amendment because it was the only modest proposal that had a chance of success. With the defeat of the more extreme Wilson plan, the Senate returned to the original amendment offered by Senator Stewart, and on February 17 accepted it as preferable to the moderate Boutwell version because Stewart's proposal contained an officeholding provision. The House, however, rejected the Stewart amendment in favor of Bingham's earlier proposal, and the two houses appeared deadlocked.¹⁷⁵

The stalemate was finally broken on February 24, however, by a conference committee, which dropped demands for officeholding and the ban on most suffrage tests, and recommended the Stewart rather than the Bingham amendment. The amendment thus proposed became the fifteenth amendment to the Constitution. The proposal adopted was actually identical to Stewart's amendment in form, but closely paralleled Boutwell's in substance. The Conference Committee deliberately omitted Negro officeholding and the proposed ban on state literacy, property and nativity tests because the inclusion of these factors might have jeopardized ratification. As Gillette has correctly observed,

[t]his amendment was also a moderate one in that its wording was negative. It did not give the federal government the right to set up suffrage requirements, but left the fundamental right with the states. Framed negatively, it did not directly confer the

174. *Id.* at 59 (citation omitted).

175. *Id.* at 60-70.

right of suffrage on anyone, and the negative wording might obscure the major objective, which was to enfranchise the northern Negro.¹⁷⁶

Debate on the enforcement clause was largely avoided.

From this brief survey of the debates in the Fortieth Congress, and "[b]y the amendments offered and rejected, it is clear that the framers did not intend to establish federal qualifications for suffrage or to abolish the state literacy tests."¹⁷⁷ Section 4(a) of the Voting Rights Act, which suspends literacy tests where such tests have been used to deny the right to vote on account of race would thus seem to be directly contrary to the original intent of the framers of the fifteenth amendment. A suspension or abolition of literacy tests, in other words, would not be an "appropriate" means of enforcing the amendment according to the understanding of the Fortieth Congress. In a probative and detailed analysis of the debates on the framing and adoption of the fifteenth amendment, which fully corroborates Gillette's findings, one constitutional scholar has concluded that "to abolish literacy tests is not an enforcement, but rather an amendment of the Fifteenth Amendment, and is not authorized by any constitutional power found in the national government."¹⁷⁸ The legislative history of the amendment clearly shows that the several states are free to impose or to abolish such voter requirements as literacy tests for any reason, "so long as these tests are applied [equally] . . . to members of all races."¹⁷⁹ The conclusion which necessarily follows is that Congress may not exercise its enforcement power to terminate such tests, and that section 4 of the Voting Rights Act exceeds the constitutional power of Congress. Thus, one may argue that the City of Rome cannot be subjected to the pre-clearance provisions of section 5 of the Voting Rights Act, as this requirement is triggered by section 4, which is *ultra vires* and therefore void.

B. The Scope of the Enforcement Power and the Question of Original Intent

In *South Carolina v. Katzenbach*,¹⁸⁰ (Katzenbach I), when the Supreme Court was first called upon to determine the constitu-

176. *Id.* at 71-72.

177. *Id.* at 72 n.108.

178. Avins, *Literacy Tests and the Fifteenth Amendment: The Original Understanding*, 12 S. TEX. L.J. 24, 68 (1970).

179. *Id.* at 71.

180. 383 U.S. 301 (1966).

tionality of the Voting Rights Act, the issue presented was whether Congress had "exercised its powers under the fifteenth amendment in an appropriate manner with relation to the States."¹⁸¹ In response to South Carolina's contention that the Act exceeded the powers of Congress and violated the rights of the states reserved by the tenth amendment, Chief Justice Warren flatly stated that, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."¹⁸² Warren did not offer an elaborate explanation of this sweeping assertion of federal power, but the clear implication was that federalism, in principle, did not operate as a limitation on Congress' enforcement powers.

The rationality test, Warren further explained, was the one formulated by Chief Justice Marshall in *McCulloch v. Maryland*¹⁸³ in connection with Congress' implied power to enact legislation that is "necessary and proper" to carry into effect Congress' delegated powers. Thus, Congress' power under section 2 of the fifteenth

181. *Id.* at 324.

182. *Id.*

183. 17 U.S. (4 Wheat.) 316 (1819). Is the "rational means" test of the Warren Court an echo of the *McCulloch* test of the Marshall Court, as Warren seems to claim? Marshall did not speak of "rational" means, but of "appropriate" means. These he defined as means which (1) "are plainly adapted" to a legitimate end, (2) "are not prohibited," and (3) are consistent "with the letter and spirit of the Constitution," *Id.* at 420. Assuming that federalism is in keeping with the letter and spirit of the Constitution, Marshall's test, at least on the face of it, would seem to suggest that a law which pursued a legitimate end but violated the federal principle would be an inappropriate means to that end. Moreover, section 2 of the fifteenth amendment requires that legislation enacted by Congress be "appropriate," not "rational." The federal principle, in other words, is most assuredly an omnipresent feature of the *McCulloch* test and a limiting factor on the scope of Congress' powers, whether delegated or implied. That, at least, is the effect of the decisions since 1819 and the meaning attached to *McCulloch* by Marshall himself.

In a series of newspaper essays written in the summer of 1819 under the pseudonyms "A Friend of the Union" and "A Friend of the Constitution," Chief Justice Marshall endeavored to answer the critics of his opinion in *McCulloch* with the assurance that the Necessary and Proper Clause did not enlarge the powers of the national government. As Gerald Gunther has correctly observed,

His [Marshall's] essays and their context indicate that he did not view *McCulloch* as embracing extreme nationalism. The degree of centralization that has taken place since his time may well have come about in the face of Marshall's intent rather than in accord with his expectations. . . . [H]e did not believe that Congress had an unrestricted choice of means to accomplish delegated ends. . . . Clearly these essays give cause to be more guarded in invoking *McCulloch* to support a view of Congressional power now thought necessary.

G. GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 20 (1969). See also Bickel, *The Voting Rights Cases*, SUP. CT. REV. 101 (1966).

amendment, which grants Congress the right "to enforce this article by appropriate legislation," could actually be read as a positive grant of power "to make all laws that are necessary and proper" to carry into effect the prohibition against racial discrimination in voting. In other words, Congress' enforcement power under section 2 was both an enumerated and an implied power.

Warren then turned to sections 4 and 5 of the Voting Rights Act to apply the *McCulloch* test. At the heart of section 4 is the assumption that the remedial powers of Congress under the Enforcement Clause extend to state practices which may be "remedied" by Congress in the absence of a judicial declaration that such practices require a remedy. South Carolina objected to the suspension of its constitutionally acceptable literacy test on the basis of *Lassiter v. Northampton County Bd. of Elections*,¹⁸⁴ which had held that literacy tests were not in themselves contrary to the fifteenth amendment. The members of the Court in *South Carolina v. Katzenbach* were unanimously agreed, however, that Congress had the right to suspend these tests. Did this conclusion mean that Congress' enforcement powers included not only the power to remedy existing defects but also the power to declare, on Congress' authority alone, that a defect existed where the Court had said there was none before? Under section 4, Congress apparently was not remedying a defect in response to a judicial decision, but was in fact deciding for itself both the existence of a defect and the appropriate remedy.

Additionally, section 5 of the Voting Rights Act authorized Congress to prohibit the states from adopting laws of their own choosing, requiring states instead to enact measures acceptable to the Attorney General or the United States District Court for the District of Columbia. The established principle that the states have the right to enact their own electoral laws, good or bad, and await a judicial determination of constitutionality was thus rejected. In effect, section 5 imposed an affirmative duty on the states and their political subdivisions to enact legislation conforming to guidelines laid down by the federal government, and placed a single District Court in the position of issuing advisory opinions on state proposed electoral changes.

Chief Justice Warren conceded that "[t]his may have been an uncommon exercise of power."¹⁸⁵ Instead of the *McCulloch* test, however, Warren invoked the emergency doctrine of the *Blaisdell*

184. 360 U.S. 45 (1959).

185. 363 U.S. at 334.

case¹⁸⁶ and insisted that "the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."¹⁸⁷ In this portion of the opinion Warren observed that Congress "knew" that the states in the South would "resort to the extraordinary strategem" of devising new laws to circumvent the fifteenth amendment, and in anticipation of this event "Congress responded in a permissibly decisive manner."¹⁸⁸ Do "exceptional conditions" create new legislative powers? And how can there be an "exceptional condition" justifying this "uncommon exercise of power" before the condition exists? The Chief Justice did not say. Nor did Warren satisfactorily answer South Carolina's objection that section 5 improperly required the District Court to issue advisory opinions. A state wishing to make use of a change in its own voting laws, Warren remarked, "has a concrete and immediate 'controversy' with the Federal government."¹⁸⁹

Justice Black, the one dissenter,¹⁹⁰ objected strongly to the Court's acceptance of section 5 of the Act as a valid exercise of Congressional power. In the first place, Black argued, a mere "desire" on the part of federal officials "to determine in advance what legislative provisions a state may enact"¹⁹¹ was hardly the kind of dispute that can give rise to a justiciable controversy. "By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to secure precisely the type of advisory opinion our Constitution forbids."¹⁹²

Secondly, continued Black, section 5 was clearly in conflict with

186. *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). Said the Court in *Blaisdell*: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted. . . ." *Id.* at 425. Warren also cited *Wilson v. New*, 243 U.S. 332 (1917), in support of his proposition. But there the Court held that: "[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." 243 U.S. at 348. It is not entirely clear from the opinion whether the "exceptional conditions" refer to past or future discriminatory practices. Do any "exceptional conditions" warrant Congressional usurpation of state power under the emergency doctrine?

187. 383 U.S. at 334.

188. *Id.* at 335.

189. *Id.*

190. Black agreed with the Court's holding that section 2 of the fifteenth amendment permitted Congress to suspend state literacy tests, but apparently not on the basis of the emergency doctrine. 383 U.S. at 355-56 (Black, J., dissenting).

191. *Id.* at 357.

192. *Id.* at 357-58.

the *McCulloch* test, which limits the enforcement powers of Congress to legislation that is not prohibited by the Constitution and is consistent with its letter and spirit.¹⁹³

Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws . . . without first sending their officials hundreds of miles away to beg federal authorities to approve them.¹⁹⁴

By prohibiting the states from enacting legislation without the consent of federal authorities, section 5 actually provided for a Congressional veto of state laws, a power that was considered and specifically rejected by the Founding Fathers in 1787.¹⁹⁵ "The judicial power to invalidate a law in a case or controversy after the law has become effective," concluded Black, "is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress, denied a power in itself to veto a state law, can delegate this same power to the Attorney General or the District Court for the District of Columbia."¹⁹⁶ Section 5 of the Voting Rights Act reduced the states to "little more than conquered provinces."¹⁹⁷

According to Justice Black, then, the enforcement powers of Congress, denied a power in itself to veto a state law, can delegate mandates of the Constitution, and in particular by the federal principle. The test of constitutionality, he implied, was not the emergency doctrine, as the Court seemed to think, but *McCulloch*. As a general principle, Black indicated, "appropriate legislation" under section 2 of the fifteenth amendment is that which conforms to the letter and spirit of the Constitution and is not prohibited, either explicitly or implicitly, by the Constitution. Why this test resulted in acceptance of section 4 of the Act and the rejection of section 5, Black did not explain. But his reading of the Enforcement Clause seemed to indicate that Congress enjoys a broad power "to protect this right to

193. *Id.* at 358.

194. *Id.* at 359. Black also contended that section 5 violated the Guarantee Clause of the Constitution. *Id.*

195. Such a proposal was presented by the Governor of Virginia, Edmund Randolph, in the Virginia Plan. "The proceedings of the original Constitutional Convention," noted Black, "show beyond all doubt that the power to veto or negative state laws was denied Congress." *Id.* at 360. See also Justice Black's remarks, *id.* at 361, n.3.

196. *Id.* at 361.

197. *Id.* at 360.

vote against any method of abridgement no matter how subtle,"¹⁹⁸ short of protection by means of a Congressional veto.

In subsequent cases involving the enforcement clauses of the thirteenth and fourteenth amendments, the Court has continued to render broad interpretations of Congress' remedial powers. In *Katzenbach v. Morgan*¹⁹⁹ (Katzenbach II) and in *Jones v. Alfred H. Mayer Co.*,²⁰⁰ for example, the Court upheld sweeping federal legislation on the basis of Congress' powers "to enforce" the Reconstruction Amendments, without venturing to define, except in summary fashion, the range of Congress' enforcement powers. *City of Rome* is no exception. The Court has made no investigative effort to determine the original intent of the enforcement clauses, and has yet to shed any light on the issue. As a result, Congress is presently in possession of inchoate powers under all of the Reconstruction Amendments. Barring a reversal of these decisions, which seems unlikely at this time, Congress has already acquired substantial new powers under the enforcement clauses at the expense of the states. How far Congress will be permitted to extend its powers in this direction and the extent to which the Court will permit Congress to define both the substantive content of the amendments and Congress' powers under them are the principal questions that remain unanswered.

Nevertheless, many students of the Constitution, particularly those who have worked their way through the farrago of opinions (i.e., *Katzenbach* I, II and *Jones*), are in agreement that these decisions and their progeny have produced a constitutional thicket of tangled precedents and conflicting interpretations that make it almost impossible to speak with any degree of confidence or certainty about the scope and meaning of Congressional power under the enforcement clauses of the Reconstruction Amendments. *Oregon v. Mitchell*, for example, which offers five different interpretations of the constitutionality of the Voting Rights Act Amendments of 1970, has been described by one commentator as a "constitutional law disaster area."²⁰¹

In view of these difficulties, as well as the perennial problems associated with the interpretation of the Reconstruction Amend-

198. *Id.* at 355.

199. 384 U.S. 641 (1966).

200. 392 U.S. 409 (1968).

201. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 609 (1975).

ments, one is astonished to find that no one—not a single member of the Court or any of the commentators—has inquired about the original intent of those who drafted the enforcement clauses. Congressional debates and legislative interpretations are not always completely reliable sources of understanding, of course, owing to the nature of the political process and the constitutional insufficiency of many participants. But a study of such debates, from the perspective of what was said and what was not said, can often clarify the meaning of a word or clause, thereby facilitating the task of judicial construction.

The enforcement clauses were only casually debated when the Reconstruction Amendments were proposed and adopted.²⁰² In fact, the meaning and purpose of the enforcement powers of Congress under the amendments were not subjected to a searching analysis until 1871, when Congress considered the Ku Klux Klan Act. The Ku Klux Klan Act was, to be sure, "the most extensive Congressional attempt during reconstruction to prevent racial and political crimes of violence pursuant to the fifth section of the fourteenth amendment."²⁰³ These debates, which consumed nearly the entire first session of the Forty-second Congress, offer the most fruitful source of understanding regarding Congress' intended role in guaranteeing the protection of civil rights. Most of the Senators and Congressmen who actively participated in the debates on the Ku Klux Klan Act had also taken part in the drafting of the Reconstruction Amendments. These spokesmen addressed their remarks to all three amendments, weighed their words carefully, and were conscious of the fact that they were making legislative and constitutional history.

"I hope you gentlemen will bear in mind," said one legislator, "that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause [section 5] of the amendment."²⁰⁴ He went on to declare that "not only

202. One of the few studies on this subject is R. HARRIS, *THE QUEST FOR EQUALITY* (1960), which deals in part with the debates on section 5 of the fourteenth amendment at the time of adoption. As Harris notes,

it is difficult to ascertain from the debates the specific purposes of the first section coupled with the fifth. The greater portions of the debates over the submission of the Fourteenth Amendment centered about the representation and suffrage provisions in Section 2 and the device for disfranchising former Confederates in Section 3.

Id. at 35.

203. Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 *ST. LOUIS L.J.* 331, 331-32 (1967).

204. *CONG. GLOBE*, 42d Cong., 1st Sess. app. 150 (1871) [hereinafter cited as *GLOBE*].

the words which we have put into law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country."²⁰⁵ These were the words of the Republican Representative from Ohio, James A. Garfield, who would later serve as the twentieth President of the United States. First elected to the Thirty-eighth Congress, in 1863, he was a staunch supporter of the Reconstruction Amendments. As Harris correctly observes, Garfield's perceptive address on the enforcement powers of Congress under the fourteenth amendment was "the most significant speech of the debate. . . ."²⁰⁶

Although a full and complete analysis of the House and Senate debates on the Ku Klux Klan Act is beyond the scope of this paper, it is nevertheless possible to pinpoint the principal issues, and distill the general themes of Congressional power presented by the participants. Garfield's hour long speech on April 4, 1871, is especially significant in a number of ways. First, this speech served as a focal point of discussion in the House of Representatives, where the issue of enforcement was more extensively debated. Senate debate on the Ku Klux Klan bill was not as thorough, owing to the distracting influence of John Sherman's resolution calling for a bill to suppress disorders in the South.²⁰⁷

Second, Garfield was one of the most informed members of the House on the subject. Not only had he personally taken a part in the framing and adoption of the fourteenth amendment, but he had also studied carefully the debates in Congress and the constitutional issues that had arisen under the Reconstruction Amendments. The introductory part of Garfield's well-prepared address, amply supported by references to earlier debates, Supreme Court cases, and the works of such eminent authorities as Madison, Kent and Story, covered both the constitutional history of civil rights litigation before the adoption of the Reconstruction Amendments and the legislative history since the introduction of the Civil Rights Act of 1866. Quoting frequently from the debates on the consideration of the fourteenth amendment, Garfield led his colleagues, step by step, through the process of adoption in an effort to determine the intended and proper relationship between the first and fifth sections of the fourteenth amendment. He also invited the comments of his colleagues concerning the accuracy of his interpretations as he pro-

205. *Id.*

206. R. HARRIS, *supra* note 202, at 47.

207. *Id.* at 49.

ceeded toward his conclusion that the Ku Klux Klan Act, as introduced, was unconstitutional.

Third, a number of key legislators who had also participated in the drafting of the fourteenth amendment were present at the time Garfield delivered this speech, including the confused and contentious author of section 1 of the fourteenth amendment, Representative John Bingham of Ohio, and Representative Samuel Shellabarger, another Ohio Republican and the sponsor of the Ku Klux Klan bill. Significantly, Bingham was the only member of the House who took issue with any of the points raised by Garfield. Moreover, not one member spoke in support of Bingham, suggesting that Bingham's views on section 5 may not have been representative of a very large segment of opinion in the House.

Garfield began by extolling the virtues of local self-government, correctly pointing out "that before the adoption of the last three amendments it was the settled interpretation of the Constitution that the protection of the life and property of private citizens within the States belonged to the State governments exclusively."²⁰⁸ This principle could be traced back to the *Federalist* 45,²⁰⁹ which Bingham had quoted approvingly, Garfield noted, when the fourteenth amendment was under consideration.²¹⁰ When the Civil Rights Act of 1866 was debated, Garfield continued, Bingham repeatedly endorsed this principle, as did Shellabarger, who assured his colleagues that the Civil Rights Act of 1866 did not "reach mere private wrongs, but only those done under color of State authority. . . . It meant, therefore, not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States. . . ."²¹¹

To what extent did the Reconstruction Amendments alter the states' exclusive control over civil liberties? Garfield's answer reflected the widespread uncertainty among the members as to the precise effect of the new amendments on the powers of Congress. Garfield could only say that the Reconstruction Amendments had "modified the Constitution," and that "[t]hey have to some extent

208. *GLOBE*, *supra* note 204, at app. 150.

209. "The powers reserved to the several States," said Madison, the author of this essay, "will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people. . . ." *Id.*

210. *Id.*

211. *Id.* (citation omitted). Garfield also quoted Representative Delano (R-Ohio), who in the same debate remarked that the Civil Rights Act of 1866 "was never designed to take away from the States the right of controlling their citizens in respect to property, liberty and life." *Id.* at app. 150.

enlarged the functions of Congress and, within prescribed limits, have extended its jurisdiction within the States."²¹² Focusing on section 1 of the fourteenth amendment, Garfield reminded his colleagues that Bingham's original proposal of January 12, 1866, which the House rejected and the Senate never debated at all,²¹³ provided that "Congress shall have power to make all laws necessary and proper to secure to all persons in every State within the Union equal protection in their rights of life, liberty, and property."²¹⁴ Had this first draft been adopted, said Garfield, it would have brought about a "radical change in the Constitution" by empowering "Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property."²¹⁵ In effect, Bingham's proposal would have nullified *Barron v. Baltimore*²¹⁶ and abolished the primary jurisdiction of the States over civil liberties. Garfield's point—a highly significant one—was abundantly clear: Congress' rejection of Bingham's original proposal in favor of the more restrictive language of section 1, which was a prohibition against the states rather than a grant of power to Congress, indicated that the framers intended to limit the scope of Congressional power under the fourteenth amendment by the federal principle, and to carve out an exception to the principle in *Barron*, not to overturn that principle. Comparing Bingham's rejected proposal with the first and fifth sections of the amendment as adopted, Garfield noted that the latter "exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations."²¹⁷ The theory of Congressional power which was rejected with Bingham's proposal, on the other hand,

would have brought the power of Congress to bear directly upon the *citizens*, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty and property within the States. The first limited but did not oust the jurisdic-

212. *Id.* at app. 150.

213. *Id.* at app. 151. Garfield had stated that Bingham's measure was "recommitted" to the Joint Committee of Fifteen on Reconstruction, to which Bingham replied that Garfield was "mistaken" because it had merely been postponed. Technically, Bingham was correct, Garfield agreed, but there was no doubt in anyone's mind that Bingham's original proposal "could not command a two-thirds vote of Congress, and for that reason the proposition was virtually withdrawn. Its consideration was postponed February 28 by a vote of 110 to 37." *Id.*

214. *Id.* at app. 150.

215. *Id.* at app. 151.

216. 32 U.S. (7 Pet.) 243 (1833).

217. GLOBE, *supra* note 204, at app. 151 (emphasis added).

tion of the State over these subjects. The second gave Congress plenary power to cover the whole subject with its jurisdiction, and, as it seems to me, to the exclusion of the State authorities.²¹⁸

This understanding was further supported, continued Garfield, by the late Radical Republican from Pennsylvania, Thad Stevens, the Chairman of the Joint Committee on Reconstruction in 1866 who reported the amendment in its final form. Stevens complained at the time, noted Garfield, that the amendment "'came far short of what he wished.'"²¹⁹ Interrupting Garfield at this point, Bingham rose to object, erroneously asserting that "[t]he remark of Mr. Stevens had no relation whatever to the provision. . . ."²²⁰ But Garfield had all of the documents at hand. He quickly responded by quoting Stevens at length, with the admonishment that Bingham could "make but he cannot unmake history. I not only heard the whole debate at the time, but I have lately read over, with scrupulous care, every word of it recorded in the Globe."²²¹ Informing members that the wording of the fourteenth amendment was the result of a compromise worked out in the Joint Committee, Stevens had stated: "'The proposition is not all that the Committee desired. It falls far short of my hopes. . . . [T]he Constitution limits only the action of Congress, and it is not a limitation on the States. This amendment supplies [corrects?] that defect and allows Congress to correct the *unjust legislation of the States*. . . .'"²²² Although Garfield did not elaborate further on the point, implicit in Stevens' statement to the members of the House was the recognition of a state action requirement in the amendment, and the grudging acceptance of the federal principle. According to Stevens, the power of Congress under the fourteenth amendment was not primary but corrective, and the object of Congressional legislation was not private discrimination but "the unjust legislation of the States."

Stevens' interpretation of section 1 of the amendment, continued Garfield, "was the one followed by almost every Republican who spoke on the measure. It was throughout the debate, with scarcely an exception, spoken of as a limitation of the power of the States to *legislate unequally for the protection of life and property*."²²³ Indeed, Representative John Farnsworth of Illinois, a prominent figure in

218. *Id.* (emphasis added).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (emphasis added). Garfield could find only two House members, Shankling of Kentucky and Rogers of New Jersey (both Democrats opposed to the amendment)

the debates, had "said that the first section might as well be reduced to these words: 'No State shall deny to any person within its jurisdiction the equal protection of the laws. . . .'"²²⁴

Thus, Garfield understood that the dominant theme of the amendment was the equal protection of the laws and not due process or the privileges and immunities of citizenship. This view, it should be noted, is fairly consistent with Harris' reading of the debates on the adoption of the fourteenth amendment. "A common theme of the discussion by the amendment's supporters," Harris observes, "was the mutual interdependence of the privileges and immunities, due process, and equal protection clauses, in contrast to the later practice of constitutional lawyers and historians of regarding the clauses as separate and independent. To Bingham, Jacob Howard and their cohorts . . . equality was an essential part of liberty."²²⁵ This interpretation of section 1, if correct, would, of course, narrow considerably further the scope of Congress' power to enforce the amendment as well as the scope of judicial review, since federal intervention into the affairs of the states respecting civil liberties would be limited to those instances where the states had legislated "unequally for the protection of life and liberty," and would not extend to cases where substantive rights had been curtailed or denied to all persons equally.

Turning to the enforcement clause itself, Garfield asserted that this clause empowered Congress to enforce the new guarantees in two ways. First, the enforcement clause gave Congress the power to enact legislation granting federal courts jurisdiction over disputes "where every law, ordinance, usage, or decree of any State in conflict with these provisions may be declared unconstitutional and void."²²⁶ Believing that the courts rather than Congress would be the principle enforcer of the amendment, Garfield also expressed the view that "[t]his great remedy [of conferring jurisdiction] covers nearly all the ground that needs to be covered in time of peace."²²⁷ Pointing to the Civil Rights Act of 1866 and the Enforcement Act of

who thought section 1 placed "the protection of the fundamental rights of life and property directly in the control of Congress," and their assaults against the amendment "were general and sweeping charges, not sustained even by specific statement." *Id.*

224. *Id.* The Due Process Clause, said Garfield, meant simply that each state was required to provide "an impartial trial according to the laws of the land." *Id.* at app. 153.

225. R. HARRIS, *supra* note 202, at 35-36.

226. GLOBE, *supra* note 204, at app. 153.

227. *Id.*

1870, Garfield further noted that "this ground has already been covered, to a great extent, by the legislation of Congress."²²⁸

Secondly, Congress had the power to enact legislation "for the punishment of all persons, official or private, who shall invade these rights, and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment. This is a part of that general power vested in Congress to punish the violators of its laws."²²⁹ As for the outrages being perpetrated by the Ku Klux Klan, which were the concern of the legislation under consideration, Garfield had "no doubt of the power of Congress to provide for meeting this new danger, and to do so without trenching upon those great and beneficent powers of local self-government lodged in the States and with the people."²³⁰

Unfortunately, Garfield's interpretation of Congress' power of enforcement at this crucial point of his analysis was not entirely clear. Apparently, Garfield was distinguishing between the power of Congress to prohibit the states from interfering with the rights protected under the amendment, which rested on section 5, and the power of Congress to provide for the punishment of individuals who violated those rights, which was based on "that general power vested in Congress to punish the violators of its laws." A cursory reading of his statement that this general power authorized Congress to enact legislation "for the punishment of all persons, official or private" suggests that Garfield may also have believed that Congress had the power to punish ordinary offenses by one individual against another. As will become evident from his objections to the second section of the proposed Ku Klux Klan Bill, however, and his position on the Cook-Shellabarger amendment to that section, Garfield apparently believed that Congress' authority to punish private offenses was limited to private acts of interference with state officials in their attempts to carry out constitutional duties imposed by federal statute.

Garfield had no quarrel with the first section of the Ku Klux Klan bill, which provided that any person who, under the color of a state law, deprived another of his rights under the Constitution, would be liable for an action of redress in the federal courts. "This," he asserted, "is a wise and salutary provision, and plainly within the power of Congress."²³¹ Indeed, said Garfield, Congress was even em-

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

powered to remedy injustice in those instances "where the laws are just and equal on their face, yet by a systematic maladministration of them, or neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them."²³²

But the second section of the bill, which a number of Republicans and Democrats had vigorously attacked in earlier debates,²³³ presented a serious difficulty for Garfield. This second section was not directed at state action, but instead, provided civil and criminal penalties for such private conspiratorial acts as "murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny" that were committed "in violation of the rights, privileges or immunities of any person, to which he is entitled under the Constitution and laws

232. *Id.*

233. In a major address on the scope of Congress' enforcement power, the Illinois Republican John Farnsworth denounced the second section as an unconstitutional usurpation of state authority. Quoting from the debates on the adoption of the fourteenth amendment, Farnsworth cited a number of Senators and Congressmen, including Thad Stevens, for the proposition that the amendment never "gave any power to Congress to legislation except to correct this unjust legislation of the States." *Id.* at app. 116. In essence, Farnsworth noted, the second section of the Ku Klux Klan bill simply punished murder and other crimes in derogation of state criminal jurisdiction. *See also* Representative Burchard's analysis in note 192, *supra*. In reply to Shellabarger's assertion that it only punished conspiracies to violate constitutional rights, Farnsworth observed that the inclusion of conspiracy did not correct the problem, since if Congress could punish a conspiracy it would also punish the same act done individually. *GLOBE, supra* note 204, at app. 113. Garfield, who was on the floor at the time Farnsworth and Shellabarger were engaged in this colloquy over the constitutionality of the second section, spoke up in support of Farnsworth, stating that there were only two members of the House in 1866, Shankland and Rogers, who thought that Congress had the authority that was now being claimed under the second section of the Ku Klux Klan bill. *GLOBE, supra* note 204, at app. 116.

Farnsworth was a veteran of the House. He had served as a Union general during the War and had avidly supported the fourteenth amendment. In a remarkable confession, he urged the members to exercise constitutional restraint, now that the war was over:

I have given votes and done things during my twelve years service in the House of Representatives which I cannot defend. . . . I know we have done things during the war and during the process of reconstruction to save the public which could not be defended if done in peace. . . . We passed laws, Mr. Speaker, and the country knows it, which we did not like to go to the Supreme Court for adjudication. And I am telling no tales out of school. . . . Sir, we have done some things under the necessity of the case . . . which may be a little beyond the verge of the Constitutional power possessed by Congress in time of peace. But, sir, this is not the time to overstep those bounds.

GLOBE, supra note 204, at app. 116.

of the United States."²³⁴ Accordingly, Garfield argued that this section of the bill needed to be amended in such a way that it would "employ no terms which assert the power of Congress to take jurisdiction of the subject *until such denial* [of equal protection] be clearly made, and [would] not in any way assume the original jurisdiction of the rights of private persons and of property within the States. . . ."²³⁵

Likewise, Garfield believed that the third section of the bill was in need of repair because it seemed to propose that citizens be punished for violating state laws. "If this be the meaning of the provision," said Garfield, "then whenever any person violates a State law the United States may assume jurisdiction of his offense. This would virtually abolish the administration of justice under State law."²³⁶ Garfield assured his colleagues that if these changes in the second and third sections of the bill were made, he would withdraw his objections to the bill and give it his support.

Representative Shellabarger, in response to Garfield's lengthy address, attempted to summarize Garfield's position as follows:

I understand that the effect of what he [Garfield] says is, that as the first section of the fourteenth amendment to the Constitution is a negation upon the power of the States, and that as the fifth section of that amendment only authorizes Congress to enforce the provisions thereof, therefore Congress has no power by direct legislation to secure the privileges and immunities of citizenship, because the provision in each section is in the form of a mere negation.²³⁷

While this short summary was an essentially accurate description of Garfield's interpretation, Shellabarger merely touched on one aspect of it. In Garfield's mind, the overarching principle structuring the

234. *GLOBE*, *supra* note 204, at app. 113.

235. *Id.* at app. 153.

236. *Id.* at app. 154.

237. *Id.* at app. 153. Shellabarger did not explain the nature of his disagreement with Garfield on this point, if any, but he wondered how Garfield could justify his vote on recently enacted legislation under the fifteenth amendment which declared "who shall vote at township and every other election," and then "punishes the man who deprives anyone of the right to vote, which he gets under Federal law, and in contravention of the constitutions of one half of the States," if Congress could not secure the right to vote by direct legislation. *Id.* at app. 154. Garfield replied that "[i]f the case stands in all respects exactly as my colleague [Shellabarger] puts it, it might push me to the conclusion that some of the provisions of the enforcement act are unconstitutional." But Garfield did not accept either the premise or the conclusion because Congress' power to regulate the time, place and manner of elections "carried with it the whole question of suffrage." *Id.*

enforcement power of Congress under the fourteenth amendment was federalism. His assumption—an appealing one—was that the framers of the amendments, among which he included himself, had never intended to uproot the basic design of the Constitution by transferring primary control over civil liberties from the states to the national government.

Garfield found support for this assumption in Congress' rejection of Bingham's original draft, which would have conferred direct authority on Congress to define the substance of due process and equal protection, and in the wording of section 1, which gave Congress only a narrow power to enforce a prohibition. Congress' enforcement power was necessarily corrective in nature, therefore, since Congress could not act "until such denial of equal protection be clearly made," that is, until the states had denied the guarantees of the amendment. This approach would seem to require some sort of prior determination that such a denial had occurred before Congress could step in and remedy the defect. Whether Garfield had a judicial determination in mind is not certain, although he did indicate in explaining his opposition to the Ku Klux Klan Act that "Congress . . . [may not] take jurisdiction of the subject until such denial be clearly made."²³⁸

Finally, on the question of state action, Garfield took the position that Congress' enforcement power was limited to remedying defects in state laws, "a systematic maladministration of them, or a neglect or refusal to enforce their provisions."²³⁹ Did this rule out the possibility of Congressional intervention in the absence of state laws, where the states had simply failed to pass any law and when there were no state statutory provisions to enforce in the first place? This limitation on the power of Congress would seem to be Garfield's understanding, although once again his remarks are not free of uncertainty. Still, Garfield did not doubt that Congress lacked the power under the fourteenth amendment to prescribe punishments for persons who violated state laws. Punitive measures against those who violated federal laws were appropriate, however, under the general powers of the federal government.

But Garfield, as well as nearly all the other Republicans in the House, also believed that the reach of Congressional enforcement power did not extend to offenses committed by one private in-

238. *Id.*

239. *Id.*

dividual against another.²⁴⁰ Confronting this reality, Shellabarger, the sponsor of the Ku Klux Klan bill, subsequently amended the controversial second section of his proposal, upon the suggestion of Representative Burton Cook, an Illinois Republican lawyer. As modified, section 2 of the bill was restricted to conspiracies to deprive any person of the equal protection of the laws or equal privileges and immunities under the laws, or for the purpose of preventing state authorities from securing equal protection to all persons or injuring them for enforcing equal protection.²⁴¹

In explaining the constitutional theory behind the Cook-Shellabarger amendment, Cook declared that a

combination of men by force and intimidation, or threat to prevent the Governor of a State . . . [from securing aid] to protect the rights of all citizens alike, or to induce the Legislature of a State by unlawful means to deprive citizens of the equal protection of the laws, or to induce the courts to deny citizens the equal protection of the laws . . . is the offense against the Constitution of the United States, and may be defined and punished by national law. And that, sir, is the distinct principle upon which this bill is founded.²⁴²

In brief, the Cook-Shellabarger amendment, as Alfred Avins has noted in his detailed analysis of the debates on the Ku Klux Klan Act concerning the issue of state action, "punished only conspiracies to obstruct state officials in performing their constitutional duty of affording all persons equal protection. It did not punish conspiracies

240. Representative Horatio Burchard, an Illinois Republican lawyer, spoke for most of his House colleagues when he stated that Shellabarger's first draft of the second section of the Ku Klux Klan Bill was an unconstitutional invasion of exclusive state criminal jurisdiction. On the other hand,

[w]hat more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violations by the State can only be consummated through the officers by whom it acts. May it not then equally punish the illegal attempts of private individuals to prevent the performance of official duties in the manner required by the Constitution and laws of the United States?

Id. at app. 314. See the remarks of the Republican from Vermont, Representative Luke Poland, who was a member of the Senate in 1866 and a supporter of the fourteenth amendment. *Id.* at app. 514. See also the statement of Republican Senator Lyman Trumbull of Illinois, the veteran Chairman of the Senate Judiciary Committee, who avowed that he was "not willing to undertake to enter the States for the purpose of punishing individual offenses against their authority committed by one citizen against another." *Id.* at app. 577-78.

241. *Id.* at app. 477-78.

242. *Id.* at app. 486.

to commit crimes against individuals, even if such crimes were motivated by a desire to deprive them of equal protection."²⁴³ The Cook-Shellabarger amendment was adopted along with a few additional amendments of lesser significance, and the bill passed the House on a party-line vote of 118 to 91, with such critics of the first draft as Farnsworth and Garfield voting in favor of the bill.²⁴⁴

Senator Allen Thurman, an Ohio Democrat who had opposed the bill, proved to be right, however, that the second section of the Act was too vaguely worded. In *United States v. Harris*,²⁴⁵ the Supreme Court declared that a section of revised statutes derived from the second section of the Ku Klux Klan Act was unconstitutional. "As, therefore, the section of the law under consideration is directed exclusively against the action of private persons," said the Court, "without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution."²⁴⁶ In other words, the Court, apparently unaware of the intent of the Act, invalidated section 2 precisely on the grounds Garfield and others had criticized Shellabarger's first draft. "[A]lthough the theory ultimately adopted was that the violence would have to direct its force against a public official to deter him or prevent him from affording protection, the statutory language did not make this clear, but instead proscribed conspiracies to deny protection generally."²⁴⁷ Thus, as Avins astutely observes, "[t]he anti-Klan statute was not a Congressional excursion into unconstitutional territory, but was merely the victim of poor legislative drafting."²⁴⁸

In the final analysis, poor draftsmanship may also explain the

243. Avins, *supra* note 203, at 353.

244. GLOBE, *supra* note 204, at app. 522. The vote for final passage in the Senate was also based on party alignment: 36 to 13. *Id.* at app. 831.

245. 106 U.S. 629 (1882).

246. *Id.* at 639-40.

247. Avins, *supra* note 203, at 379.

248. *Id.* Avins notes that in *United States v. Guest*, 383 U.S. 745 (1966),

one opinion of Justices Clark, Black and Fortas, and another of Justices Brennan, Douglas and the Chief Justice, held that the federal government, under the Fifth section of the fourteenth amendment, could punish private conspiracies or private violence designed to interfere with the exercise of rights under the first section of the amendment, regardless of what state officials may or may not do. This is the precise theory which in 1871 was disavowed by every Republican who voted for the fourteenth amendment. . . . It is nothing more than the creation by Congress of a general criminal code, providing only that an intent is present to deprive a man of his fourteenth amendment rights.

Id. at 381.

endless confusion and controversy that have traditionally accompanied the enforcement clauses of the Reconstruction Amendments. That the members of the Reconstruction Congresses and the Supreme Court have expressed so many divergent points of view on the enforcement powers of Congress suggests the presence of a fundamental flaw in the design. In reading over the debates on the Ku Klux Klan Act, for example, one senses a feeling of frustration among the members of Congress, many of whom participated in the drafting of the amendments but seem unable to articulate in a clear and precise manner Congress' role under them. At least three separate and distinct theories of congressional power were defended by the members of the Forty-second Congress,²⁴⁹ and even a skilled lawyer such as James A. Garfield, who obviously studied the issue with great care, experienced difficulty in weaving the principle of congressional enforcement into the fabric of the Constitution.

Under the original Constitution, the powers of Congress are expressed as affirmative grants of power to carry out stated objectives. In general, these are powers which were delegated to Congress by the states. Most of them are enumerated in article I, section 8 of the Constitution. This section of the Constitution also authorized Congress to pass all laws which are necessary and proper to carry into execution both the enumerated powers in article I, section 8 "and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." These are the implied powers of Congress.

Article I, section 10, on the other hand, deals with powers that are denied to the states, and in effect declares that the states did not reserve certain specified powers such as the power to enter into a treaty, pass a bill of attainder, or impair the obligation of contracts. No implication has ever been seriously considered that these prohibitions against the states simultaneously conferred any power on Congress to define or enforce the prohibitions. In fact, the President has the power to make treaties and Congress itself is prohibited under article I, section 9 from passing a bill of attainder. Only the courts, therefore, may enforce the prohibitions against the states that are contained in article I, section 10.

Like article I, section 10, the fourteenth amendment is also a prohibition against the states; but unlike that article, the amendment empowers Congress to enforce the prohibition. In this respect, the fourteenth amendment represents a radical departure from the

249. R. HARRIS, *supra* note 202, at 45.

basic design of the Constitution, since the amendment authorizes Congress, concurrently with the courts, to enforce certain restrictions against the states. Thus, an inherent problem of separation of powers and conflict between the courts and Congress is built into the amendment, in that the fundamental power to enforce, which is not a legislative power, is conferred on the legislature. Indeed, the power to enforce the Constitution is actually an executive power, although the courts accomplish this same end indirectly through their power to interpret and apply constitutional provisions. In sum, the fourteenth amendment introduces an alien principle into the Constitution that is wholly inconsistent with the basic system of separation of powers upon which the Constitution is built.

These difficulties become all the more perplexing when one considers the thirteenth and fifteenth amendments, which are prohibitions against the states and the national government. The fifteenth amendment, for example, declares that "[t]he right . . . to vote shall not be denied or abridged by the United States or by any State . . .," and then stipulates that Congress is empowered to enforce the prohibition. In other words, the amendment empowers Congress to enforce a prohibition against itself. No historical evidence exists to support the assumption that the framers of the fifteenth amendment intended for Congress to be the final interpreter of its own powers, in derogation of the principles of separation of powers and judicial review. The wording of the amendment, however, seems to invite such an interpretation.

In the *Civil Rights Cases*,²⁵⁰ Justice Bradley attempted to resolve these incongruities by reverting to the basic principles of the Constitution. Bradley observed that:

[where] Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States . . . Congress has power to pass laws for regulating the subjects specified in every detail. . . . But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and

250. 109 U.S. 3 (1883).

redress the operation of such prohibited State laws or proceedings of State officers."²⁵¹

Lacking a general and hence an implied power under the Enforcement Clause of the fourteenth amendment, the application of the *McCulloch* test to acts of Congress to determine their legitimacy would seem to be an improper rule of measurement since the scope of the enforcement power is far more limited than that of a delegated power under article 1, section 8. But these distinctions offered by Justice Bradley in 1883 have not been repeated and seem to have been forgotten by the modern Court.

Early in the debates on the Ku Klux Klan Act, John Bingham, in his colloquy with Congressman Farnsworth concerning the significance of Congress' rejection of his first draft of section 1 of the fourteenth amendment, explained that he redesigned the amendment to place it in conformity with *Barron v. Baltimore*.²⁵² In re-examining the case of *Barron*, said Bingham,

after my struggle in the House in February 1866 . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution and have expressed that intention."²⁵³

Continuing, Bingham revealed that:

Acting upon this suggestion I did imitate the framers of the original constitution. As they had said 'no State shall emit bills of credit, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts,' imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands. . . .²⁵⁴

251. *Id.* at 18. To illustrate this principle further, he noted that:

The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be countenanced and corrected: and this power was exercised [under section 25 of the Judiciary Act of 1789].

Id. at 12.

252. 32 U.S. (7 Pet.) 243, 250 (1833).

253. *GLOBE*, *supra* note 204, at app. 84 (citation omitted).

254. *Id.*

According to Bingham, then, the fourteenth amendment was derived in part from article I, section 10 of the Constitution.

Bingham did not correctly "imitate" article I, section 10 and obviously misunderstood the constitutional principles he was endeavoring to apply, as well as the Court's holding in *Barron*. What Bingham bequeathed to the nation was not the sense of the Constitution but his own inimitable confusion. In light of these considerations, it behooves both Congress and the courts to confine the enforcement clauses of the Reconstruction Amendments to the general framework of the Constitution or more specifically the basic principles of federalism and separation of powers. We have no indication that the framers of these amendments intended to overthrow these principles, even though their choice of wording clearly invites such an interpretation.

Upon reflection, one must conclude that the theory of Congressional power enunciated by Garfield is directly contrary to that announced by the Court in *Katzenbach I* and *II*. If Garfield's interpretation is correct, then the Supreme Court has improperly expanded the scope of the enforcement power far beyond proper limits. According to Harris,

Garfield's speech on the Ku Klux Klan Bill is most persuasive. He had supported the Civil Rights and Freedmen's Bureau bills and the proposal for the Fourteenth Amendment in the Thirty-Ninth Congress. He displayed, as did many other supporters of these proposals, a solicitude for preserving federalism in its essential features. His interpretation of the first and fifth sections is the only interpretation that is compatible with the maintenance of federalism and simultaneously gives meaning to the equal protection clause and the fifth section vesting power in Congress to enforce the Amendment.²⁵⁵

A number of Justices, particularly Brennan, have borrowed liberally from Harris' work and cited him often. That these Justices have ignored Garfield's key speech in particular and the debates on the Ku Klux Klan Act in general indicates a continuing lack of interest among the Justices in seeking out the original intent of the framers regarding the enforcement power of Congress. That these Justices have chosen to ignore Harris' contribution, while at the same time lifting neighboring conclusions from Harris' work—in one instance

255. R. HARRIS, *supra* note 202, at 53. It should be noted, however, that Harris' interpretation of Garfield's address is partly incorrect in that he assumes Garfield and the Forty-second Congress accepted in principle the right of Congress to legislate against wholly private offenses of one person against another. *Id.* at 48, 56.

from the same page where Harris evaluates Garfield's speech—raises the presumption that they would not defer to that intent even if it was presented to the court.²⁵⁶

CONCLUSION

"[A] Senator rising to attack the constitutionality of the so-called Voting Rights Act finds himself in a veritable quandary. He does not know where to begin."²⁵⁷ These words of Senator Herman Talmadge (D-Ga.), in Senate debate more than fifteen years ago, reflect the general frustration of Congressional opponents of the Act when they confronted legislation which presented seemingly interminable constitutional violations. Since that time, the Supreme Court has added its own perceptible imprint, thereby compounding the problem of constitutional analysis. Resisting the temptation to examine every ostensible constitutional flaw and judicial embellishment, this essay has attempted merely to identify some of the more salient issues, principally within the context of legislative intent.

The basic argument against the Voting Rights Act, as originally enacted and presently interpreted, is that it departs frequently and substantially from established principles of federalism and separation of powers. This argument is essentially consistent with the position taken by Senator Sam Ervin (D-N.C.), who led the Congressional attack against the Act when it was first proposed. The "overriding defect" of the bill, he charged, was "that it degrades certain States and subdivisions to the point where they are denied fundamental rights. . . ."²⁵⁸ Ervin enumerated six major objections to the bill to demonstrate this proposition—and then proceeded to expound on countless other evils contained in the legislation. Arguing primarily from general principles rather than specific constitutional provisions, Ervin contended that the bill (1) was repugnant to the constitutional principle that the United States is a union of states with equal power and dignity, (2) improperly suspended literacy tests and sought to compel the designated states to change their electoral laws, (3) prostituted the juridical process by denying the states access to local federal courts and subjecting them to specially created rules of evidence and procedure, in contravention of due

256. In his oral argument before the Supreme Court in *Katzenbach II*, the embattled Alfred Avins, who also appeared as counsel in the *Mayer* case, declared that "it would be necessary for the Department of Justice to burn the Congressional Globe debates if they were to convince anybody that the original understanding was in accordance with this statute." Avins, *supra* note 178, at 381 n.249.

257. H. B. SCHWARTZ, *supra* note 27, at 1567.

258. *Id.* at 1557.

process, and (4) conferred "arbitrary and tyrannical power upon the Attorney General of the United States," thereby promoting rule of men and not of law.²⁵⁹ Further, Ervin argued that the law was unnecessary because federal statutes already on the books were sufficient to secure registration and the right to vote. Turning finally to a specific prohibition in the Constitution, the Senator from North Carolina asserted that the Act punished certain states without a judicial trial, and was therefore a bill of attainder within the meaning of article I, section 9 of the Constitution. That the Act sought to punish states on the basis of past events also rendered it an *ex post facto* law.

Such was the warp and woof of the argument advanced against the Voting Rights Act by the Southern delegation.²⁶⁰ In the days of Henry St. George Tucker, Alexander H. Stephens, and John C. Calhoun, when Southerners distinguished themselves as constitutional scholars, a better case might have been made. But Ervin stood almost alone; and although his constitutional critique was perceptive, it overlooked obvious defects and emphasized dubious points of law. Surprisingly, none of the Congressional opponents challenged the Act as an improper exercise of the enforcement power or contended that it was inconsistent with the original intent of those who drafted the Reconstruction Amendments. Particularly distracting was Senator Ervin's futile attempt to confer due process rights on the states, and his drumming insistence that the Act constituted a bill of attainder. This untenable theory, relied upon by other congressional opponents, was even repeated by counsel when they appeared before the Supreme Court, and it was not laid to rest until

259. *Id.* at 1558-59.

260. Only a handful of senators and congressmen, all from the South, opposed that Act, and it passed both houses of Congress by overwhelming majorities: 79-18 in the Senate and 328-74 in the House. Senator Ervin was the only member of Congress who presented a case against the Act based on constitutional analysis. Senator Talmadge inveighed against the Act as an "immoral and vicious bill drawn for the punishment of carefully selected sovereign States." *Id.* at 1550. Senator A. Willis Robertson (D.-Va.) complained that the Voting Rights Act was reminiscent of "the time when Congress declared Virginia, the mother of States, to be incapable of self-government, and we were named Federal District No. 1, and Federal officials and carpetbaggers took charge of our States." *Id.* at 1543. In 1975, Senator James Allen (D.-Ala.) broadened Ervin's constitutional attack against the Act, arguing that it also violated the Guarantee Clause of article IV, section 4, that every state have a republican form of government, the ninth and tenth amendments, and the Full Faith and Credit Clause on the ground that the Act made it impossible for each state to give full faith and credit to the acts of other states. 1975 *Senate Hearings, supra* note 32, at 32-37. Altogether, congressional opponents have alleged that more than ten principles or provisions of the Constitution are violated under the Act.

Chief Justice Warren dismissed it out of hand in *South Carolina v. Katzenbach*.²⁶¹

Confronted by discriminatory legislation which subverted the inherent electoral powers of seven states, congressional opponents of the Voting Rights Act were seemingly at a loss for a constitutional argument. That a Congressional majority, backed by the President, would be so imperious as to single out a handful of states for repressive legislation was an outrage for which these opponents were unprepared; for not since the darkest hours of Radical Reconstruction had the South been subjected to such an arbitrary exercise of federal power. In vain, the opponents of the Act anxiously searched the Constitution for a clause that would protect their rights and interests. They cited sections of article I and article II for the proposition "that the States have the power to prescribe qualifications for voting,"²⁶² but could find nothing prohibiting discriminatory treatment of the states. The founding fathers, though mindful of sectional conflict and interstate rivalries, were reasonably satisfied that the system of representation established under the Constitution, which included equality in the Senate, was sufficient to prevent or at least discourage the sustained despotism of any single-minded faction, and accordingly wrote no explicit guarantee of equality among the states into the Constitution; nor had the framers of the Reconstruction Amendments granted any future protection to the states in anticipation of a recurrence of the abuses that the states of the Confederacy experienced under the Radical Republicans. Groping for a constitutional peg on which to hang their plea, the opponents of the Act rallied around the Bill of Attainder Clause apparently more out of desperation than certainty of their position. If the Bill of Attainder Clause protected individuals against punishment without a trial, why shouldn't it also protect the states?

261. 383 U.S. at 324. The Bill of Attainder Clause, noted Warren, protects individuals and groups, not states. Alexander Bickel thought Ervin's argument was "weird." Bickel, *The Voting Rights Cases*, SUP. CT. REV. 87 (1966). Much of Ervin's presentation, it has been said, "was amazingly weak from a constitutional view. . . . thus, his consistent attacks on the bill as an ex post facto law and bill of attainder would scarcely be made even by a law school neophyte—so contrary is it to all the law on the subject." II B. SCHWARTZ, *supra* note 27, at 1470.

262. In a colloquy on the Senate floor, Senators Ervin and Talmadge referred to section 2 of article I and the seventeenth amendment which provide that the states shall determine the qualifications of those who vote in elections for members of Congress, and article II, which states that presidential and vice presidential electors shall be selected in such a manner as the legislatures of the states shall direct. *Id.* at 1568.

Though never developed in their bill of particulars, a more persuasive argument might have been made had the opponents of the Act rested their case on the doctrine of equal footing. Since 1796, when Tennessee was admitted to the Union as the third new state, admission acts have uniformly declared that the state in question shall be admitted "on an equal footing with the original States." Indeed, "every new State," as a general rule, "is entitled to exercise all the powers of government which belong to the original States of the Union."²⁶³ This principle is so firmly established in American constitutional law that it has long ceased to be debatable.²⁶⁴

"Again and again, in adjudicating the rights and duties of States admitted after 1789," notes Corwin, "the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union."²⁶⁵ Thus in *Coyle v. Smith*,²⁶⁶ the leading case on the subject, the Court invalidated a restriction that Congress had imposed upon Oklahoma as a condition of the state's admission to the Union. Insisting that Oklahoma should locate its capital in Guthrie, Congress required in its enabling act that the new state irrevocably agree not move the capital to a new location before 1913. The people of Oklahoma ratified this agreement and Oklahoma was admitted to the Union; but in 1910 they promptly initiated a bill, which the voters approved, providing that the capital should be moved to Oklahoma City. In sustaining the right of a state to place its capital where it chooses, the Court enunciated the principle of state equality, declaring that the admission power of Congress is limited by the principle of equal sovereignty among the states. The power of Congress in question, said the Court,

is to admit "new States into *this* Union." "This Union" was and

263. E. CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 844 (1973).

264. Disdainful of the notion that the new Western states should enjoy the rights and prerogatives of those already established, a majority of the states at the Constitutional Convention voted to delete the requirement of equality. See II M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 454-55 (1937). Earlier, however, Georgia and Virginia had ceded vast territories to the national government on the condition that new states formed from such lands be admitted as equal partners in the Union. This principle was extended to states created out of territory purchased from a foreign government with the admission of Louisiana in 1812. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845).

265. E. CORWIN, *supra* note 262, at 843. Said the Court in *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883): "Equality of constitutional right and power is the condition of all the States of the Union, old and new."

266. 221 U.S. 559 (1911).

is a union of States equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power. . . .²⁶⁷

Thus the power of Congress to admit new states into the Union under article IV, section 3 is limited not only by the requirement that the new state not be formed within the jurisdiction of another state, or by joining two or more states or parts thereof, without the consent of the state legislatures involved, but also by the unwritten principle inherent in the federal system of the constitutional equality of the states. Without this equality, the Union is reduced to a unitary state, held together by force rather than mutual consent, with the stronger, more populous states suppressing the weaker. "[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."²⁶⁸

Opponents of the Voting Rights Act finally put together a case against the Act using the equal footing doctrine when *South Carolina v. Katzenbach* was litigated, but the Court summarily dismissed the argument, asserting that it "applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."²⁶⁹ The issue has not been raised in subsequent decisions under the Act. While the holding in *Coyle v. Smith* was limited to the question of whether Congress had the authority to impose unequal conditions upon a state at the time of admission, a careful reading of the opinion suggests that the theory of federalism upon which the Court based its decision extends not merely to the states' rights to constitutional equality at the time of entry into the Union, but forever. If equality is required for admission, then *a fortiori* equality is required after admission, at the more meaningful period of full membership in the family of states. To be sure, the doctrine of equal footing is meaningless if Congress, having once admitted a state into the Union on the basis of equality, is thereafter free to deny that equality after the state has become a permanent member. The Court's position in *South Carolina v. Kat-*

267. *Id.* at 567.

268. *Id.* at 580.

269. 383 U.S. at 328-29 (citing *Coyle v. Smith*, 221 U.S. 559 (1911)).

zenbach leads to the peculiar result that a state has a stronger claim to equal rights when it is a territory seeking admission as a state than when it has already acquired statehood. Reason dictates that Congress has no greater authority today to strip an individual state of its electoral powers than it does to compel Oklahoma to move its capital back to Guthrie.

The South's constitutional claim of the right of the states to secede from the Union was finally answered by the Supreme Court in the landmark decision of *Texas v. White*.²⁷⁰ In that case, the Court rejected the doctrine of secession, holding that the State of Texas never left the Union. "[T]he Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."²⁷¹ Thus the theory of the nature of the Union adopted by the Court in the *Coyle* and *White* cases is incompatible with the position taken by the Court in *South Carolina v. Katzenbach*, for if the states are equal at the time of admission, and thereafter acquire the attribute of "indestructibility" in an "indestructible Union," they are necessarily equal in all respects under the Constitution. The power to discriminate against a state or group of states is the power to destroy—to destroy that which is supposedly "indestructible." The argument for the constitutional equality among the states is thus not only an argument for states' rights but also for the preservation of the Union.

This serious, if not fatal, flaw might be corrected, of course, if sections 4 and 5 of the Act were to be extended to all the states. Corrective amendments to this effect have been under consideration since the Act was drafted, and will surely reappear in the Ninety-seventh Congress now that the question of whether to re-extend the Act is once again on the legislative agenda. While the extension of coverage to all the states would cure one constitutional defect, it would surely open the door to new problems. From an administrative standpoint, it would place an onerous burden on the Justice Department, which is already at the breaking point in overseeing compliance and processing applications under section 5. Moreover, such a sweeping extension would bring about a radical transformation of American politics throughout the nation, spreading the *City of Rome* doctrine and the right of minority groups to hold office to the four corners of the continent. Full extension of the Act would pose a grave threat to American democracy and the system of ma-

270. 74 U.S. (7 Wall.) 700 (1869).

271. *Id.* at 725 (emphasis added).

majority rule as we know it, by laying the foundation for proportional representation of racial and ethnic minorities, with all its attendant dangers in terms of political disruption, racial confrontation, and polarization of interests. That the "melting pot" substructure of the American political tradition has already been dangerously weakened by current public policies encouraging racial and ethnic separatism is a factor that should be carefully weighed in any reconsideration of the Act's coverage formula.²⁷² At bottom, the Voting Rights Act rests upon the presumption that the targeted states and their political subdivisions are perpetually discriminating against voters, a presumption that no longer has much validity. These states, as Senator James Allen pointed out in 1975, "have long since met and exceeded fifty percent voter registration and participation standards set out in section 4."²⁷³ They have not administered a literacy test in more than 15 years.

Barring repeal of the Act, numerous improvements might be made to alleviate its more deleterious constitutional consequences and discriminatory features. These improvements would include (1) outright repeal of sections 4 and 5, or at the very least modifications thereof to allow states or their political subdivisions to "bailout" as an incentive or reward; (2) transferring the burden of proof to the federal government; (3) revision of the coverage formula in recognition of the fact that voter participation and voter discrimination are not invariably interrelated;²⁷⁴ (4) elimination of the "effects" test; (5) exemption of political subdivisions such as those of north Georgia where racial minorities constitute a small fraction of the population;²⁷⁵

272. In the Ninety-seventh Congress, 1st Session, Senator S.I. Hayakawa (R.-Calif.) and Representative Robert McClosky (R.-Calif.) have introduced S. 53 and H.R. 1407 to repeal the prohibitions against voting qualifications, tests and devices for language minorities, and the requirement that states and their political subdivisions make available registration and voting materials and voting assistance in languages other than English. See n.33, *supra*.

273. 1975 Senate Hearings, *supra* note 32, at 27.

274. Despite the increase in primaries and easing of voter registration requirements, presidential elections in the 1970's revealed increasing apathy among the voters. In 1972 participation of the voting age population in presidential elections fell from 60.6 percent in 1968 to 55.6 percent, and dropped again in 1974. See K. PHILLIPS & P. BLACKMAN, ELECTORAL REFORM AND VOTER PARTICIPATION (1975). In the 1980 Presidential election, only 51 percent of the voting age population cast a vote. Bureau of the Census, Voting and Registration in Election of November, 1980, Advance Report (1981).

275. One attorney in the Civil Rights Division of the Justice Department has suggested "that political subdivisions which have a relatively small racial minority, perhaps below five or ten percent . . . [should] be exempt from compliance with section 5." This change is appropriate because "the reasonable expectancy of fifteenth amendment violations is very slight where the minority group constitutes such a small percent-

and (6) the repeal of the congressional regulation on the jurisdiction of lower federal courts which grants exclusive jurisdiction to the District Court in the District of Columbia. Also worthy of consideration is the formulation of federal standards of literacy, which the states might adopt at their option. While changes such as these would not satisfy many constitutional objections to the Act, they might have the salutary effect of eliminating its more egregious and discriminatory provisions.

Frequently hailed as "the most successful piece of civil rights legislation ever enacted,"²⁷⁶ the Voting Rights Act has also been candidly acknowledged to be "the most drastic civil rights statute ever enacted by Congress, going even beyond the far-reaching provisions of the Force Act of 1871, upon which it is in certain respects, modeled."²⁷⁷ With only scattered protests, the Act has repeatedly received the blessings of Congress, the courts, and the offices of four Presidents. During the past fifteen years the Act has enjoyed such immense support as to be practically immune from searching analysis; and surprisingly few constitutional critics have surfaced to challenge the Supreme Court's expansive interpretation of its provisions. Except for the lonely dissents of Mr. Justice Black,²⁷⁸ no member of the Court has contended that any section of the Act is unconstitutional. That the Voting Rights Act, one of the most far-reaching civil rights statutes ever enacted by Congress, has provoked so little controversy or constitutional debate in the literature of the law is a telling commentary on the influence of result-oriented jurisprudence and the concomitant decline of federalism and separation of powers. As a cross-current in the unremitting flow of praise, this essay subscribes to the minority view expressed by Senator Sam Ervin that the Voting Rights Act "is utterly repugnant to the basic principles upon which our system of justice rests."²⁷⁹

age of the total population." Important to the Justice Department is the need for "balance . . . between this possibility and the onerous burden of compiling the multitude of documents, maps and census information which section 5 places on covered jurisdictions." Roman, *Section 5 of the Voting Rights Act: The Formulation of an Extraordinary Federal Remedy*, 22 AM. U.L. REV. 132 (1972).

276. Nicholas Katzenbach, cited in 1975 *Senate Hearings*, *supra* note 32, at 121. President Lyndon Johnson praised the Act as "one of the most monumental laws in the entire history of American freedom." 111 CONG. REC. 19649 (1965).

277. II B. SCHWARTZ, *supra* note 27, at 1469. At least one high-ranking official of the Justice Department has conceded that "[s]ection 5 represents a substantial departure . . . from ordinary concepts of our federal system." Stanley Pottinger (Assistant Attorney General, Civil Rights Division), cited in 1975 *Senate Hearings*, *supra* note 32, at 536.

278. *Allen v. State Bd. of Elections*, 393 U.S. at 595 (1969); *South Carolina v. Katzenbach*, 383 U.S. at 355 (1966).

279. II B. SCHWARTZ, *supra* note 27, at 1565.

