VOTING RIGHTS ACT OF 1965

The Voting Rights Act of 1965, with its triggering device and automatic remedies, not only provides an effective means to eradicate voting inequality but also accentuates the breadth and variety of congressional power under the fifteenth amendment.

THE FIFTEENTH amendment states in section one that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[1] It is primarily to enforce that provision and to supplement legislation previously enacted under the amendment that the Voting Rights Act of 1965[2] was passed. The pervasive ambit of federal power claimed under this act stands in contradistinction to that asserted under earlier legislation, which had proved ineffectual in curbing the abuses of voting discrimination.

PRIOR VOTING RIGHTS LEGISLATION

The fifteenth amendment became effective in 1870, and the Enforcement Act[3] was passed the same year. After repeating the affirmative declaration of the right to vote,[4] the act set forth civil and criminal penalties against those persons who, acting privately or under color of law, prevented qualified voters from casting their ballots.[5] It further declared that a person should not be deprived

[1] U.S. CONST. amend. XV, § 1.

[2] 79 Stat. 437 (1965), 42 U.S.C. §§ 1971, 1973a-p (Supp. I, 1964). Further references to the Voting Rights Act of 1965 shall be made without citation to *Statutes at Large* (Stat.) and *United States Code* (U.S.C.).

[3] 16 Stat. 140 (1870) (codified in scattered sections of REV. STAT. and 42 U.S.C.). The Enforcement Act was enacted pursuant to the fifteenth amendment, which provides that "the Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

[4] Enforcement Act of 1870, ch. 114, § 1, REV. STAT. § 2004 (1875), as amended, 42 U.S.C. § 1971 (a) (1) (1964).

[5] Enforcement Act of 1870, ch. 114, §§ 2-4, REV. STAT. §§ 2005-09, 5506 (1875).

While the Civil War amendments and the legislation thereunder may have been intended to have a very broad sweep, see United States v. Reese, 92 U.S. 214, 248-49 (1875) (Hunt, J., dissenting), the Supreme Court strictly construed the amendments and consequently invalidated much of the legislation enacted under their aegis. The Enforcement Act was held to be applicable only against state action and not private conduct. See James v. Bowman, 190 U.S. 127 (1903). Furthermore, only that state action which was directly aimed at denying the constitutional rights of Negroes solely because of their race, color or previous condition of servitude could be constitutionally prohibited by Congress. United States v. Reese, *supra*; see James v. Bowman, *supra*;

of his vote where an election officer had precluded the voter from fulfilling necessary registration conditions.[6] In 1871, the Enforcement Act was amended to add its most significant feature, a provision authorizing the use of voting supervisors to examine voter lists, to challenge voters, and to oversee physically the registration and voting process.[7] This facet of the act, however, was repealed in 1894,[8] and most of the other provisions were abandoned in 1909 and 1911.[9] The remaining sections are ineffective appendages which provide no viable basis for implementing the original purpose of the act.[10]

No additional voting rights legislation was forthcoming until the Civil Rights Act of 1957,[11] which authorizes the Attorney Gen-

Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1876). See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Kommers, *The Right to Vote and Its Implementation*, 39 NOTRE DAME LAW. 365 (1964); Maslow & Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363 (1953); Comment, 74 YALE L.J. 1448 (1965).

[6] Enforcement Act of 1870, ch. 114, § 3, REV. STAT. § 2007 (1875).

[7] Act of Feb. 28, 1871, ch. 99, §§ 2, 4-6, REV. STAT. §§ 2012, 2016-19 (1875).

[8] 28 Stat. 36 (1894).

[9] 35 Stat. 1153 (1909); 36 Stat. 1168 (1911).

One author has suggested that the enforcement acts generally were arbitrary and inconsistent with the concept of a peacetime democracy. Several reasons for the ineffectiveness of those acts were tendered. First, prosecutions under the acts not only were inherently difficult to prove, but also the courts generally were lenient to white citizens. Davis, *The Federal Enforcement Acts*, in STUDIES IN SOUTHERN HISTORY AND POLITICS 225 (1919). Second, the volume of cases which arose proved impossible for the courts to administer. *Id.* at 225-26. Third, the Supreme Court took a far more restrictive view of the Civil War constitutional amendments than had Congress, thus frustrating the broad plan of the Radical Republicans. *Id.* at 226-27. Fourth, general public opposition to the laws arose both in the South and the North. *Id.* at 227-28. See generally Maslow & Robison, *supra* note 5, at 369.

[10] Those sections still in force are: Enforcement Act of 1870, ch. 114, § 1, REV. STAT. § 2004 (1875), as amended, 42 U.S.C. § 1971(a)(1) (1964) (declaration of right to vote); Enforcement Act of 1870, ch. 114, § 9, REV. STAT. §§ 1982-83 (1875), as amended, 42 U.S.C. §§ 1987, 1989 (1964) (federal officers required to enforce the act); Enforcement Act of 1870, ch. 114, § 10, REV. STAT. §§ 1984-85, 5517 (1875), as amended, 42 U.S.C. §§ 1989-90 (1964) (penalties for marshals not executing warrants); Enforcement Act of 1870, ch. 114, § 12, REV. STAT. § 1987 (1875), 42 U.S.C. § 1991 (1964) (fees payable to persons executing process); Enforcement Act of 1870, ch. 114, § 16, REV. STAT. § 1977 (1875), 42 U.S.C. § 1981 (1964) (equal rights under law for all persons); Enforcement Act of 1870, ch. 114, § 18, REV. STAT. § 722 (1875), 42 U.S.C. § 1988 (1964) (district courts to apply that law most "suitable" to the case); Act of February 28, 1871, ch. 99, § 19, REV. STAT. § 27 (1875), as amended, 2 U.S.C. § 9 (1964) (written or printed ballots in elections for Representatives). See Kommers, *supra* note 5, at 369-70 & nn.22-24; Maslow & Robison, *supra* note 5, at 372 n.42.

[11] 71 Stat. 634 (1957) (codified in scattered sections of 5, 28, 42 U.S.C.), Comment, 56 MICH. L. REV. 619 (1958).

Jurisdiction under the 1957 act was entrusted to federal district courts. Civil Rights Act of 1957, § 131(d), 71 Stat. 637, as amended, 42 U.S.C. § 1971(c) (1964).

eral to seek preventive relief against any person who he reasonably believes has restrained or might restrain another from exercising his right to vote in a *federal* election.[12] While this act did represent an attempt to give some protection to voting rights, it was not until the Civil Rights Act of 1960[13] that Congress took broad action against voting deprivations. Title VI of this act seeks to strengthen previous law by providing for the utilization of federal voting referees.[14] These officers are appointed by a local federal district court after it has found, in an action brought by the Attorney General, that there is a pattern of discrimination.[15] The referees accept and evaluate registration applications from persons in the area affected by the finding and report to the court as to whether the applicants are qualified to vote on the basis of state statutory standards. The referees must also report any unsuccessful attempts by applicants to register or vote subsequent to the court's finding of a discriminatory pattern.[16] The court, upon the basis of the referees' determination,

Criminal penalties, not to exceed a $1000 fine or six months imprisonment, were imposed only in respect to "criminal contempt arising under the provisions" of the act. Civil Rights Act of 1957, § 151, 71 Stat. 638, as amended, 42 U.S.C. § 1995 (1964).

The 1957 act had little practical effect, largely because the Civil Rights Division of the Justice Department had difficulty both in getting favorable decisions in southern district courts and in securing essential data concerning state registration and voting records. See 1959 U.S. CIVIL RIGHTS COMM'N REP. 136-42; Kommers, *supra* note 5, at 377-81.

[12] Civil Rights Act of 1957, § 131 (c), 71 Stat. 637, as amended, 42 U.S.C. § 1971 (c) (1964).

The issue of congressional power to regulate purely private conduct under the authority of the fifteenth amendment was raised in United States v. Raines, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17 (1960), an action brought against the Terrell County, Georgia, registrar to enjoin voting discrimination. The district court held 42 U.S.C. § 1971 (c) unconstitutional because it purported to regulate private conduct. On appeal, the Supreme Court refused to follow United States v. Reese, 92 U.S. 214 (1875), which had struck down a similar provision under the 1870 act because it reached private conduct, and reversed the decision of the lower court. The Court found that inasmuch as Raines was a registrar and not strictly a private person, he could not raise the constitutional issue. 362 U.S. at 26. Thus, the entire question of state action was avoided and the Court indicated it could only be properly raised where the Justice Department institutes an action against a private person. *Cf.* United States v. McElveen, 180 F. Supp. 10 (E.D. La.), *aff'd sub nom.* United States v. Thomas, 362 U.S. 58 (1960). See Note, 58 MICH. L. REV. 925 (1960).

[13] 74 Stat. 86 (1960) (codified in scattered sections of 18, 20, 42 U.S.C.), Note, 46 VA. L. REV. 945 (1960).

[14] Civil Rights Act of 1960, § 601 (a), 74 Stat. 90, 42 U.S.C. § 1971 (e) (1964).

As the provision for federal voting referees was an amendment to existing law, the general jurisdiction of all federal district courts to hear cases arising out of § 1971 was continued. See note 11 *supra*. No criminal penalties for voting deprivations were specifically created by this act.

[15] Civil Rights Act of 1960, § 601 (a), 74 Stat. 90, 42 U.S.C. § 1971 (e) (1964).

[16] *Ibid.*

is then empowered to issue an order declaring those persons eligible to vote.[17]

In 1964, two measures emerged to restrict the use of discriminatory devices. The twenty-fourth amendment, which imposed an absolute ban on the use of poll taxes as preconditions to voting in federal elections,[18] became effective in that year. Further, the Civil Rights Act of 1964,[19] although not primarily voting rights legislation, con-

[17] The 1960 act eradicated two impediments to the success of the 1957 act by requiring the preservation of federal election records and by authorizing a state to be made a party to a voting rights action. See generally United States v. Alabama, 171 F. Supp. 720 (M.D. Ala.), *aff'd*, 267 F.2d 808 (5th Cir. 1959), *vacated and remanded*, 362 U.S. 602 (1960); 1959 U.S. CIVIL RIGHTS COMM'N REP. 137. However, while numerous actions brought under the act were successful, the entire litigation process took a great length of time. An action brought against discrimination in Dallas County, Alabama, for example, required four years from the filing of the complaint to the granting of effective relief. United States v. Atkins, 210 F. Supp. 441 (S.D. Ala. 1962), *rev'd and remanded*, 323 F.2d 733 (5th Cir. 1963). See generally Kommers, *supra* note 5, at 385-92. In addition, the Civil Rights Commission discerned two additional problems not corrected by the act: the use of discretionary power by county registrars to effect discrimination and the inability of the small Civil Rights Division staff to investigate and rectify all voting deprivations. 1963 U.S. CIVIL RIGHTS COMM'N REP. 24-26.

[18] The text of the amendment limits its applicability to "any primary or other election for President or Vice President, or for Senator or Representative in Congress . . . ." U.S. CONST. amend. XXIV. The practical effect of the amendment might be to abolish the poll tax in state elections as well, should a state be unwilling to separate the timing of elections and maintain two sets of records. State attempts to circumvent the amendment by imposing substitute burdens on voting bave failed. See Harman v. Forssenius, 380 U.S. 528 (1965) (Virginia statute granted option of paying poll tax or filing certificate of residence six months before election); Gray v. Johnson, 234 F. Supp. 743 (S.D. Miss. 1964) (statute imposing greater burden in obtaining poll tax receipts upon those exempt by Constitution).

The poll tax has long been a source of agitation. See Maslow & Robison, *supra* note 5, at 376-78. Transcending the general controversy over its abolition is the greater issue of whether poll taxes in any form *can* be abolished by statute alone or whether a constitutional amendment is required. See generally Christensen, *The Constitutionality of National Anti-Poll Tax Bills*, 33 MINN. L. REV. 217 (1949); Note, 28 CORNELL L.Q. 104 (1942); Note, 53 HARV. L. REV. 645 (1940); Note, 21 N.Y.U.L.Q. REV. 113 (1946). The poll tax amendment reflects a constitutionally valid but very limited approach, in that it applies only to federal elections. The controversy was rekindled during the passage of the Voting Rights Act of 1965 and was compromised rather than resolved. See note 45 *infra*.

[19] 78 Stat. 241 (1964) (codified in scattered sections of 5, 24, 42 U.S.C.), 78 HARV. L. REV. 684 (1965).

This act sought to correct two of the most significant shortcomings of prior legislation noted by the Civil Rights Commission: (1) the discretion given the registrar under state voting laws and (2) the excessive length of the litigation process. See 1963 U.S. CIVIL RIGHTS COMM'N REP. 24-26; note 15 *supra*. With respect to the length of litigation, the act provides that either party to a voting rights suit may request a three-judge district court panel. Civil Rights Act of 1964, § 101 (d), 78 Stat. 242, 42 U.S.C. § 1971 (h) (1964). The intent is to expedite the litigation process, H.R. REP. No. 914, 88th Cong., 2d Sess. 19-20 (1964), by affording immediate Supreme Court review and by decreasing the probability of an adverse judgment at the trial level. 28 U.S.C. § 1252 (1964).

tained provisions seeking to regulate the possible discriminatory use of state voting laws. Title I of the 1964 act requires the equal application of voting qualification standards to all persons participating in federal elections and forbids denial of the right to vote solely on the basis of nonmaterial errors and omissions in registration applications.[20] Furthermore, the act sanctions literacy tests only if they are administered in writing and if a certified copy of the test and the answers given thereto are subsequently made available to the prospective voter.[21] Where such literacy tests are used, the act creates a rebuttable presumption that a person is literate if he has completed the sixth grade in an English-speaking school and has not been adjudged incompetent.[22]

The general approach of voting rights legislation from 1957 through 1964 had been to allow a state to establish voting standards and then, by protracted litigation, to challenge and ultimately to nullify any discriminatory effect or use of those standards. Inherent in this approach was the interposition of the judiciary as the supervisor and guarantor of voting equality. With the passage of the 1964 act, the judicial correction of voting abuses appeared deceptively easy, for the only requisites were proof in a court that a pattern of discrimination existed and the subsequent use of federal referees whose findings would be the basis for a decision ordering that Negro applicants be registered. There were, however, significant weaknesses in this scheme. First, the litigation process was both long and discouraging.[23] The Government not only had difficulty

[20] Civil Rights Act of 1964, § 101, 78 Stat. 241, 42 U.S.C. § 1971 (a) (2) (A)-(C) (1964).

[21] Civil Rights Act of 1964, § 101, 78 Stat 241, 42 U.S.C. § 1971 (a) (2) (C) (1964).

It would seem that this provision serves two purposes: it discourages registrars from discriminatorily exercising their discretion and provides a ready means for proof of discrimination. See generally H.R. REP. No. 914, 88th Cong., 2d Sess. 19 (1964).

[22] Civil Rights Act of 1964, § 101, 78 Stat. 241, 42 U.S.C. § 1971 (c) (1964).

It would seem that the purpose of this section is merely to lessen the Government's burden of proof in a voting rights suit when the Attorney General is required to show that a rejected applicant was indeed literate. Apparently, a complete prohibition on literacy tests was not politically possible in 1964.

[23] "Experience has shown that the case-by-case litigation approach will not solve the voting discrimination problem." Committee on the Judiciary; *Joint Views of 12 Members of the Judiciary Committee Relating to the Voting Rights Act of 1965*, S. REP. No. 162, 89th Cong., 1st Sess., pt. 3, at 6 (1965).

"[R]eliance upon judicial remedies has not succeeded." 111 CONG. REC. 8184 (daily ed. April 16, 1965) (remarks of Senator Bayh).

The example of Clarke County, Mississippi, is illustrative. In 1961, none of the county's 3000 Negroes of voting age was registered, although 76% of the white population was registered. The Government filed suit in July, 1961, seeking a broad injunction against a pattern of discrimination allegedly practiced by the registrar. The

proving discrimination; it was often unable to convince the court to grant the particular relief sought.[24] Second, there was a corollary problem posed by the fact that the surveillance of voting practices was placed in the courts and not in an administrative body able to act quickly and decisively in the face of discriminatory practices. Third, there was no provision proscribing the practice of preserving the effects of prior discrimination by imposing more stringent voting standards which would be applied equally to all *subsequent* applicants. Indeed, some courts met this deficiency,[25] but there was no legislative recognition or solution of the problem. Fourth, the whole approach was the piecemeal progeny of a succession of provisions conceived by political realities and unrealistic appraisals of their ultimate effect.

THE VOTING RIGHTS ACT OF 1965

To correct the failings of prior legislation, the Voting Rights Act of 1965 presents a single, unified program to achieve voting equality. It provides an administrative process which operates independently of the judiciary in locating and terminating discriminatory practices, thus assuring immediate registration of Negroes heretofore deprived of their right to vote.[26] Moreover, the

court was specifically requested to order the registrar to register those Negroes whose qualifications were at least equal to those of the least qualified white person already registered. The trial commenced a year and a half later, and judgment was entered in February 1963. The district court found that discrimination had been practiced but not in accordance with any pattern. The court issued a general injunction against the registrar but failed to order the affirmative relief sought by the Government. United States v. Ramsey, 8 RACE REL. L. REP. 156 (1963), *amended and remanded,* 331 F.2d 824 (5th Cir. 1964). On appeal, the Fifth Circuit court in February 1964, slightly modified the decision of the trial court. Upon rehearing in April 1964, however, the appellate court amended the decision and remanded the case, holding that the district court finding of no pattern or practice of discrimination in registering voters was erroneous. United States v. Ramsey, 331 F.2d 824 (5th Cir. 1964). In the lower court the Government did not, however, achieve the specific relief it had requested nearly three years earlier when the suit was first filed. For an exposition of the above facts see 111 CONG. REC. 9461-62 (daily ed. May 6, 1965) (memorandum offered by Senator Hart). Finally, in November of 1965, the Fifth Circuit reversed the trial court and granted the Government its desired relief. United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965).

[24] *E.g.,* United States v. Atkins, 323 F.2d 733 (5th Cir. 1963) (court refused to apply freezing); United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd and remanded,* 380 U.S. 128 (1965).

[25] *E.g.,* United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd,* 380 U.S. 145 (1965).

[26] "[T]he main thrust of the measure is to provide administrative procedures—as well as judicial processes—to permit rapid and extensive registration of persons

act circumvents the problem of policing state practices by simply suspending those requirements which have been used discriminatorily.

The most significant feature of the Voting Rights Act is that certain remedies automatically arise upon the coincidence of (1) the use of a voting test[27] by any state or political subdivision[28] on November 1, 1964, and (2) either a total registration on November 1, 1964 of less than fifty per cent of those of voting age or a total participation in the 1964 presidential election of less than fifty per cent of those of voting age.[29] Where these conditions exist, literacy tests and other devices become ineffective as prerequisites to registration and voting.[30] Further, federal examiners can be utilized upon

heretofore denied the right to vote because of their color." 111 CONG. REC. 15081 (daily ed. July 6, 1965) (remarks of Representative Celler).

See Address by President Johnson to a Joint Session of the House and Senate, March 15, 1965, 111 CONG. REC. 4924 (daily ed. March 15, 1965); 111 CONG. REC. 8183-84 (daily ed. April 16, 1965) (remarks of Senator Bayh); 111 CONG. REC. 9461-62 (daily ed. May 6, 1965) (remarks of Senator Hart); 111 CONG. REC. 15089 (daily ed. July 6, 1965) (remarks of Representative McCulloch).

Even before the Civil Rights Act of 1960, the Civil Rights Commission had recommended the type of legislation incorporated in the Voting Rights Act of 1965. It suggested that a system be created whereby the President could authorize the use of federal registrars to register voters for federal elections. 1959 U.S. CIVIL RIGHTS COMM'N REP. 141-42. Then in both 1961 and 1963, the Commission recommended federal legislation to curb severely the preconditions to voting which a state could impose. It wanted to limit allowable state standards to those regarding residency, legal confinement or felony conviction, mental incompetency, and persons with less than six years education. 1961 U.S. CIVIL RIGHTS COMM'N REP.—BOOK 1: VOTING 139; 1963 U.S. CIVIL RIGHTS COMM'N REP. 28-29.

[27] "The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." Voting Rights Act of 1965, § 4(c).

[28] While the term "political subdivision" has no specific denotation, it apparently is used in this legislation to refer only to a county, parish or independent city, especially since the voting statistics upon which Congress relied are given in this form. See, *e.g.*, S. REP. No. 162, 89th Cong., 1st Sess., pt. 3, at 55-70 (1965).

[29] Voting Rights Act of 1965, § 4(b). The formula reaches the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia as well as forty counties in North Carolina, three in Arizona, one in Idaho and one in Hawaii. 30 Fed. Reg. 9897, 14505 (1965); 31 Fed. Reg. 19, 982, 3317, 5080-81 (1966). See generally S. REP. No. 162, 89th Cong., 1st Sess., pt. 3, at 41-70 (1965).

[30] Voting Rights Act of 1965, § 4(a).

The effect of the automatic waiver of literacy tests is the immediate and complete prohibition of such testing as a voting registration factor. Hence, persons can qualify for registration merely by meeting residency requirements and other state standards not set aside by the act. For a survey of the standards allowed in Alabama, Louisiana, Mississippi and South Carolina, see 30 Fed. Reg. 9915-16, 14046 (1965), adding 45 C.F.R. § 801.204, App. B (1965). The suspension of voting tests is absolute in

order of the Attorney General to list voters qualified to vote under state standards not inconsistent with the Constitution and laws of the United States.[31] Also, new voting tests which a state may seek to adopt are barred unless approved by the Attorney General or by the District Court for the District of Columbia.[32]

These remedies are automatic in that they become operative by the triggering formula alone. Hence they were immediately effective when the Voting Rights Act was adopted. Thus, those states or counties which fell within that formula were immediately subjected to the act's sanctions without the cumbersome court proceeding necessary under previous statutes. These automatic remedies, however, may be partially avoided or mitigated. For example, the Attorney General is to appoint federal examiners only if he receives twenty meritorious written complaints[33] from residents of a given area or if, upon his own analysis and following criteria set forth in the act, he believes their use necessary in the particular locality.[34]

terms; yet it is only temporary, since a state may regain its power to administer tests if it can show a complete lack of discrimination in the five years preceding the filing of declaratory judgment proceedings. See note 35 *infra* and accompanying text.

[31] Voting Rights Act of 1965, § 7 (b).

The use of federal examiners is technically not a substitute for the state registration system, although it has that effect. On the basis of the state voting laws which can be applied, the federal examiner determines which applicants are qualified to vote. He then prepares a list of those qualified applicants and submits it to the appropriate county official, who adds the names to the state voter rolls. The listing procedure itself is not automatic, for it must be set into operation by order of the Attorney General. However, the Attorney General is automatically authorized to use examiners in the states coming within the triggering formula. See text accompanying notes 27-29 *supra*.

[32] Voting Rights Act of 1965, § 5. This preclusion of new voting tests represents the statutory adoption of the "freezing doctrine." The problem foreseen is simple: Negroes are largely unregistered because of discriminatory treatment at that point in time at which a state having permanent registration seeks to establish new and more difficult standards which, it declares, will be administered equally to whites and Negroes not previously registered. Although fairly administered, the tests may disenfranchise those Negroes who were previously subjected to arbitrary denial of voting rights although they could meet the same standards as applied to whites. To prevent the continuing result of past discrimination, voting standards are frozen until all Negroes are allowed to register on the same basis as previously registered whites. See generally 16 HASTINGS L.J. 440 (1965); 63 MICH. L. REV. 932 (1965).

[33] The Attorney General determines what complaints are meritorious. Voting Rights Act of 1965, § 6 (b).

[34] *Ibid.* In exercising his own judgment the Attorney General is to consider, "among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment . . . ." *Ibid.*

Federal examiners have been authorized for eleven Alabama counties, five Louisiana

In addition, the state or political subdivision affected can obtain in the District Court for the District of Columbia a declaratory judgment which removes the suspension of voting tests. Such judgment is to be granted, however, only upon a finding that there has been no voting discrimination in the area for the previous five years.[35] Similarly, new tests may be utilized by the states if they are approved by the Attorney General or if in an action for a declaratory judgment they are found to be nondiscriminatory.[36] Finally, listing of qualified voters by the federal examiners can be terminated upon order of the Attorney General or upon an order of the court.[37] Significantly,

parishes, nineteen Mississippi counties and two South Carolina counties. 30 Fed. Reg. 9970-71, 10863, 12363, 12654, 13849-50, 15837 (1965); 31 Fed. Reg. 914 (1966).

[35] Voting Rights Act of 1965, § 4(a). A declaratory judgment is not to be granted if within the preceding five years there has been a final judgment in any court determining that tests and devices were being used discriminatorily within the plaintiff's territory. For a tabulation of counties in Alabama, Louisiana and Mississippi to which this provision may apply, see S. REP. No. 162, 89th Cong., 1st Sess., pt. 3, at 46-48 (1965).

Section 4(d) gives the three-judge panel sitting in the District of Columbia some additional guidelines in determining whether there has been a discriminatory use of the tests:

"For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future." Voting Rights Act of 1965, § 4(d).

In these proceedings the Attorney General is authorized to consent to a judgment. This provision is seemingly intended to allow an easy restoration of state powers over voting standards to those political subdivisions which although within the scope of the formula have not in fact practiced discrimination. See 111 CONG. REC. 8187 (daily ed. April 26, 1965) (colloquy between Senators Tydings and Ervin). If the Attorney General believes that there is in fact no discrimination, it would seem that the county would need do little more than file a petition for a declaratory judgment. By provision of the act, however, the court will retain jurisdiction for five years, Voting Rights Act of 1965, § 4(a), thus allowing the Attorney General by judicial proceeding to suspend state powers again if discrimination subsequently occurs.

[36] Voting Rights Act of 1965, § 5.

The declaratory judgment provision of this section is essentially the same as that provided to restore state power to use old tests under § 4; it must be brought before the District Court for the District of Columbia, sitting as a three-judge panel under 28 U.S.C. § 2284 (1964). The Attorney General is not authorized to consent to a judgment, but under this section he can approve the new qualifications and allow their applicability without the formality of the state or political subdivision filing the petition for a declaratory judgment. Voting Rights Act of 1965, § 5.

[37] Voting Rights Act of 1965, § 13. An affected area can petition the Attorney General for such termination. It can also seek such termination from the District Court for the District of Columbia in an action for declaratory judgment if the Bureau of Census has determined that more than 50% of the non-white persons of voting age are registered in the particular political subdivision and

action to effectuate any of these avoidance or mitigation provisions can be brought only in the District Court for the District of Columbia.[38]

The act is not limited to the imposition of automatic remedies and their triggering devices. It also authorizes *judicial* invocation of the same remedies upon application by the Attorney General in a proceeding brought under statutory authority created by previous voting rights legislation.[39] Further, the scope of this authority is extended by the act to apply to voting discrimination in *state* as well as federal elections.[40] It also establishes appropriate criminal

if the court determines that all persons listed by an examiner are registered and that no reasonable likelihood of further voting discrimination exists. The affected area can request the Attorney General to cause the census to be made, and if he refuses arbitrarily and unreasonably, the District Court for the District of Columbia may entertain a petition requesting an order that such a survey be made. *Ibid.*

[38] "No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act of any action of any Federal officer or employee pursuant hereto." Voting Rights Act of 1965, § 14(b).

The use of a single court to hear all cases arising out of a statute was previously upheld in connection with the Emergency Price Control Act of 1942. See Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943).

Two early actions sought to enjoin a particular board of elections from applying the act; in each instance the case was brought in a district court other than the District of Columbia. The exclusive jurisdiction of the District of Columbia court was upheld, and thus the suits were dismissed for lack of jurisdiction. O'Keefe v. New York City Bd. of Elections, 246 F. Supp. 978 (S.D.N.Y. 1965); McCann v. Paris, 244 F. Supp. 870 (W.D. Va. 1965).

The reason given for this restriction is a desire for uniformity of interpretation. *Hearings on S. 1564 Before the Senate Committee on the Judiciary,* 89th Cong., 1st Sess., pt. 1, at 69 (1965) (testimony of Attorney General Katzenbach). Senator Ervin disagrees and alleges that the actual reason is the dislike for the judicial independence of southern judges. 111 CONG. REC. 8960-61 (daily ed. May 3, 1965) (remarks of Senator Ervin). See also Hamilton, *Southern Judges and Negro Voting Rights: The Judicial Approach to the Solution of Controversial Social Problems,* 1965 WIS. L. REV. 72.

[39] Voting Rights Act of 1965, § 3.

42 U.S.C. § 1971 (1964) contains the fundamental voting rights provisions enacted in the three recent civil rights acts of 1957, 1961 and 1964.

Prior to the 1965 statute, of course, a court could accord equitable relief similar to the remedies here authorized. See United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd,* 380 U.S. 145 (1965). Nonetheless, the apparent intent of this section is to insure that the act's remedies will also be available against areas not covered by the triggering formula but which may practice discrimination. In essence, it provides a method for eliminating "pockets" of discrimination.

[40] Voting Rights Act of 1965, § 15.

Until this legislation, 42 U.S.C. § 1971 (1964) had been applicable only to voter discrimination in federal elections. The effect of this amendment is to extend existing voting rights protection to deprivations relating solely to state elections. Such an extension follows from the broadened view Congress has taken of its power under the fifteenth amendment, as reflected in other aspects of the Voting Rights Act.

sanctions and preventive remedies[41] and provides a general criminal sanction against vote-buying in federal elections.[42] Further, the act allows the use of voting supervisors to see whether registered voters are actually permitted to vote and whether their votes are counted.[43]

The Voting Rights Act also contains several miscellaneous provisions which are directed at certain abuses related generally to the voting rights issue. It authorizes the Attorney General to challenge in the federal courts[44] the constitutionality of poll taxes which are used in state elections as preconditions to voting.[45] Further,

[41] The essential criminal sanction under the act is a fine of not more than $5000 and/or imprisonment for not more than five years. It reaches failure by officials to comply with the act, intimidation and coercion aimed at voting rights deprivation, destruction or alteration of ballots, and conspiracy to violate the act. Voting Rights Act of 1965, §§ 11 (a)-(b), 12 (a)-(c). Another provision establishes a maximum fine of $10,000 and/or a maximum prison term of five years for anyone found guilty of committing a fraudulent act in regard to a listing or a challenge. Voting Rights Act of 1965, § 11 (d). The preventive civil remedies provide for the issuance of an injunction or restraining order against any person who has violated or is about to violate various provisions of the act, Voting Rights Act of 1965, § 12 (d), and for an order authorizing persons listed by the examiner to vote and have their votes counted although they were denied that privilege by state election officials, Voting Rights Act of 1965, § 12 (e). See note 50 *infra*.

[42] Voting Rights Act of 1965, § 11 (c). For an explanation of this "Clean Elections" provision, see 111 CONG. REC. 8766-67 (daily ed. April 30, 1965) (remarks of Senator Williams).

[43] Voting Rights Act of 1965, § 8. Whenever an examiner is used, these supervisors may be appointed by the Attorney General and the Civil Service Commission acting together. They are authorized to enter and observe in places where the voting and counting are being done. Thereafter, they are to report to the federal examiner, to the Attorney General, or to a federal court if the examiners were judicially authorized. *Ibid.* It is to be noted that the supervisor and the examiner are different officers serving different functions, although the appointment of supervisors is apparently contingent on the use of examiners.

[44] "The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and appeal shall lie to the Supreme Court." Voting Rights Act of 1965, § 10 (c).

[45] The poll tax provision of this legislation reflects a compromise between those who advocated an absolute statutory ban on the poll tax as a precondition to voting and those who merely sought to prevent the discriminatory application of such a precondition. The essential reason for the difference in approach was the divided opinion on the fundamental question of whether the poll tax could be abolished by legislation alone or whether it could be accomplished only by constitutional amendment. The effect of the compromise measure is to refer that question to the judiciary. See generally 111 CONG. REC. 8530-33 (daily ed. April 18, 1965) (remarks of Senators Javits and T. Kennedy); 111 CONG. REC. 8763 (daily ed. April 30, 1965) (remarks of Senator Mansfield).

Immediately after the adoption of the act, the Attorney General brought actions attacking the poll tax in those four states still using it as a precondition to voting—Alabama, Mississippi, Texas and Virginia. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT . . . THE FIRST MONTHS 74 & n.1 (1965). In both the Alabama and Texas cases, the poll tax was declared unconstitutional. United States v. Alabama, 252

it forbids denial of the vote to Spanish-speaking Americans having received at least a sixth grade education in American-flag schools.[46] Finally, the act calls for a study of voting discrimination against military personnel.[47]

CONSTITUTIONAL RAMIFICATIONS

The constitutional foundation of the Voting Rights Act of 1965 lies in section 2 of the fifteenth amendment, which provides that "the Congress shall have power to enforce this article by appropriate legislation."[48] Reading this section much as Mr. Chief Justice Marshall read the necessary and proper clause,[49] the Supreme Court

F. Supp. 95 (M.D. Ala. 1966); United States v. Texas, 252 F. Supp. 234 (W.D. Tex. 1966). The Virginia poll tax was found unconstitutional in Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), in which the Court held "that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Ibid.* While that case was a private action, it would seem to render moot any further proceedings under § 10 of the Voting Rights Act.

[46] Voting Rights Act of 1965, § 4(e). This provision was intended "to cure a very serious situation which exists in the State of New York," where an English-language literacy test, N.Y. ELECTION LAW § 168(1), is employed but may be circumvented under New York law, N.Y. ELECTION LAW § 168(2), by showing an eighth grade education in an English-speaking school. 111 CONG. REC. 10675 (daily ed. May 20, 1965) (remarks of Senator R. Kennedy). While § 4(c)(2) of the Voting Rights Act stipulates that a sixth grade education is in effect presumptive of literacy, it does not prohibit a state from imposing a higher level but only requires that the equivalent level in the American-flag, Spanish-speaking school be accepted for the same purpose. The obvious intent of this measure is to enfranchise those Puerto Ricans now in New York who are literate only in Spanish.

[47] Voting Rights Act of 1965, § 16. This section does not necessarily anticipate any specific legislation but does call for an investigation of what can be a serious problem for some servicemen. 111 CONG. REC. 11016-17 (daily ed. May 24, 1965) (remarks of Senator Tower). Carrington v. Rash, 380 U.S. 89 (1965), pinpointed one aspect of the problem: a state law allowing military men to vote only in the county from which they were inducted.

[48] U.S. CONST. amend. XV, § 2.

[49] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist [*sic*] with the letter and spirit of the constitution are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315, 420 (1819). Previous fifteenth amendment cases have adopted a similar construction: "Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879). "The sweep of the 'appropriate legislation' clause is no less than the sweep of the 'necessary and proper' clause." United States v. Louisiana, 225 F. Supp. 353, 396 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

See generally *Hearings on S. 1564 Before the Senate Committee on the Judiciary,*

in *South Carolina v. Katzenbach*[50] recently upheld the important provisions of the act.[51] Rejecting the argument that this constitutional provision authorizes Congress only to set out general proscriptions to be applied to specific voting deprivations by the judiciary, the Court held that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[52]

89th Cong., 1st Sess., pt. 1, at 18-23 (1965) (statement of Attorney General Katzenbach); H.R. REP. No. 439, 89th Cong., 1st Sess. 16-19 (1965); 111 CONG. REC. 15082-88 (daily ed. July 6, 1965) (remarks of Representative Celler); Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1 (1965), Cox, *Constitutionality of the Proposed Voting Rights Act of 1965*, 3 HOUS. L. REV. 1 (1965). See also Maggs & Wallace, *Congress and Literacy Tests: A Comment on Constitutional Power and Legislative Abnegation*, 27 LAW & CONTEMP. PROB. 510, 515-34 (1962); Note, 46 MINN. L. REV. 1076 (1962).

[50] 383 U.S. 301 (1966).

[51] The Court found that only §§ 4(a)-(d), 5, 6(b), 7, 9, 13(a), and part of § 14 of the Voting Rights Act were properly before the Court. *Id.* at 316. It noted that §§ 11 and 12(a)-(c) were prematurely raised since "no person has yet been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize." *Id.* at 317. Thus, the question of whether these provisions are valid under present concepts of state action remain unresolved.

As a general proposition, constitutional restrictions are imposed on the exercise of governmental power rather than individual conduct. "Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment." Civil Rights Cases, 109 U.S. 3, 11 (1883). Sections 11 and 12 enumerate criminal offenses for certain acts antithetic to the right to vote and thus clearly proscribe conduct of an individual not acting under authority of the state. See note 41 *supra*.

A provision similar to § 12(e) was struck down in a court test of the first legislation under the fifteenth amendment. See United States v. Reese, 92 U.S. 214 (1875). A similar provision in the Civil Rights Act of 1957 was challenged unsuccessfully in United States v. Raines, 362 U.S. 17 (1960). The action was dismissed without a decision on the merits of the constitutional claim, the court ruling that the registrar-defendant had no standing to raise the state action issue. See note 12 *supra*. See generally Bell v. Maryland, 378 U.S. 226 (1964). See also Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219.

United States v. Harvey, 250 F. Supp. 219 (E.D. La. 1966), held that the criminal sanctions imposed by §§ 11(b) and 12(a) were void inasmuch as they attempt to reach private conduct. The court also held that the Government failed to sustain its burden of proof; consequently the holding respecting the state action question seems to be little more than dictum.

Final resolution of the constitutionality of § 4(e), the American-flag school provision which makes a sixth grade education presumptive of literacy regardless of inability to read, write or understand English, note 46 *supra*, also remains unsettled. This section was held unconstitutional in Morgan v. Katzenbach, 247 F. Supp. 196 (D.D.C. 1965), *prob. juris. noted*, 383 U.S. 903 (1966). The court reasoned that the Congress lacked the constitutional power to regulate state voting standards. A subsequent case, United States v. Board of Elections, 248 F. Supp. 316 (W.D.N.Y. 1965), refused to follow *Morgan* and upheld § 4(e), declaring that "Congress pursuant to the Fourteenth Amendment was empowered to correct what it reasonably believed to be an arbitrary state-created distinction." *Id.* at 321. *South Carolina v. Katzenbach* did not adjudicate this issue. See generally note 52 *infra*.

[52] 383 U.S. at 326. See generally *Hearings on S. 1564 Before the Senate Com-*

This broad view of legislative powers under the fifteenth amendment, however, is limited by the express language of section 2, which requires any legislation thereunder to be "appropriate." Both in the Congress and before the Court the Voting Rights Act was attacked as inappropriate, primarily because the formula which activated the remedies allegedly bore no rational connection with voting discrimination.[53] The Court, however, was impressed by the massive findings adduced in legislative, administrative, and judicial proceedings which reflected the persistence of voter discrimination.[54]

mittee on the Judiciary, 89th Cong., 1st Sess., pt. 1, at 251-58 (1965) (statement of Charles Bloch); *Hearings on S. 1546, supra* at 664-77 (statement of Thomas J. Watkins); H.R. REP. No. 439, 89th Cong., 1st Sess. 67-83 (1965) (individual views of Representatives Willis and Tuck); 11 CONG. REC. 15639-42 (daily ed. July 9, 1965) (remarks of Representative Matthews).

See also United States v. Reese, 92 U.S. 214 (1875): "It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment." *Id.* at 218. It must be noted that when the Supreme Court subsequently construed a statute similar to that in *Reese*, it explicitly refused to follow that decision. United States v. Raines, 362 U.S. 17, 24 (1960).

The Court also set to rest three other arguments which had been directed at the Voting Rights Act. It held that the proscription on bills of attainder applied only to natural persons and that the Voting Rights Act did not therefore constitute "a legislative trial" of a state or political subdivision. 383 U.S. at 324. See generally Brief for Plaintiff, pp. 35-44; 111 CONG. REC. 8538-42 (daily ed. April 28, 1965) (remarks of Senator McClellan). Similarly, it was held that the fifth amendment guarantee of due process was not extended to the states, for they are not persons. 383 U.S. at 323-24. Finally, the Court held that the concept of equality of statehood concerned only the admission of the states into the union and did not restrain congressional power otherwise. *Id.* at 328-29.

[53] In disputing the validity of the congressional presumptions underlying the formula, other reasons for low voting participation have been advanced. In those areas which are predominantly rural, polling places may not be easily accessible. Further, a low educational standard among Negroes may clearly contribute to low voter interest and participation. See Brief for Plaintiff, pp. 15-33; 111 CONG. REC. 8022-25 (daily ed. April 22, 1965) (discussion among Senators Hart, Irvin, and Long); 111 CONG. REC. 11050-51 (daily ed. May 25, 1965).

[54] For an extensive presentation of the congressional findings of voting discrimination, see *Hearings on S. 1564 Before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., pt. 2, at 1447-1534 (1965); S. REP. No. 162, 89th Cong., 1st Sess., pt. 3, at 41-45 (1965).

See generally *Address by the President of the United States to a Joint Session of the House and Senate*, H.R. DOC. No. 117, 89th Cong., 1st Sess. (1965); 111 CONG. REC. 4923-26 (daily ed. March 15, 1965); 1959 U.S. CIVIL RIGHTS COMM'N REP. 55; 1961 U.S. CIVIL RIGHTS COMM'N REP.—BOOK 1: VOTING 21; 1963 U.S. CIVIL RIGHTS COMM'N REP. 22; Marshall, *Federal Protection of Negro Voting Rights*, 27 LAW & CONTEMP. PROB. 455, 460 (1962); *Equality Before the Law: A Symposium on Civil Rights*, 54 NW. U.L. REV. 330, 367 (1959); Comment, 22 OHIO ST. L.J. 390 (1961).

Much of the pattern of voting discrimination has been revealed in recent voting rights suits. See, *e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (alteration of municipal boundaries so as to exclude Negro from city elections); United States v. Louisiana, 225 F. Supp. 453 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965) (literacy test);

It recognized that previous legislative schemes had failed to correct this "insidious and pervasive evil," and held that no more than a *relevant* relationship with voting discrimination was necessary to sustain the automatic triggering device of the act.[55] Significant in this approach is an apparent shift away from the rational basis test widely used to sustain other legislation.[56] While this change in terms might be viewed as representing the adoption of a lesser test, it seems more reasonable to assume that the Court has merely restated the essence of the test that it has applied under the rational basis rubric.[57]

Approval of the Voting Rights Act by the Court has sanctioned several legislative devices which, although advancing the legislative purpose, challenge existing limitations on congressional power. The use of a formula which automatically triggers the remedies of the act allows immediate eradication of state abuses which heretofore have been attacked only in the courts.[58] The act also expressly precludes direct judicial review of those findings by the Attorney General and Census Bureau which determine the application of the formula.[59] This latter technique is contrary to the general practice of affording judicial review of administrative decisions, and the Court's imprimatur may be limited to administrative determinations of a purely objective character "unlikely to arouse any plausible dispute."[60] In the majority opinion, however, Mr. Chief Justice

Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949) (literacy test and good character requirement).

[55] 383 U.S. at 329.

[56] *E.g.*, Katzenbach v. McClung, 379 U.S. 294, 302-05 (1964) (public accommodations provisions of the Civil Rights Act of 1964); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 95-97 (1961) (Subversive Activities Control Act); United States v. Darby, 312 U.S. 100, 121 (1941) (Fair Labor Standards Act of 1938).

Under the rational basis approach, the Supreme Court accords deference to legislative judgment as long as there is at least a reasonable connection between a problem within the cognizance of congressional power and the ostensibly ameliorative legislation.

[57] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964); Katzenbach v. McClung, *supra* note 56, at 302-04.

[58] Voting Rights Act of 1965, § 4(b). This device is valuable when Congress wishes only to reach specific areas of the country wherein evils exist. Under the general pattern of legislation previously practiced, Congress would issue a blanket prohibition of certain conduct. This traditional approach may in some instances be politically impossible or constitutionally objectionable if valid state interests as well as illegitimate ones were proscribed. The selective device utilized in the Voting Rights Act allows a direct attack on the harm where it exists while preserving the status quo in other areas.

[59] *Ibid.* See note 72 *infra* and accompanying text.

[60] 383 U.S. at 333.

Administrative decisions are generally reviewable. See Administrative Procedure

Warren noted that there was a partial substitute for direct judicial review in that an affected area contesting the application of the act can seek exemption from its operation.[61] Further, the Court has accepted a technique which shifts the burden of proving lack of discrimination from the Government to the affected political entity.[62] Thus, the state must show that its tests or devices are constitutionally valid, and the Attorney General need not prove the invalidity of those statutes. Finally, the conditional suspension of new tests prescribed by section 5 creates a significant precedent for lodging in the Attorney General or some other federal officer a veto power over state laws. Congress could possibly utilize this extraordinary provision to require all state legislators to be elected at large unless the Attorney General approves in advance a state redistricting plan.[63]

Circumscribing approval of each of these legislative devices, as well as the adoption of the "relevancy" approach, is the Court's observation that "exceptional conditions can justify legislative measures not otherwise appropriate."[64] Presumably the Court was referring to the situation created by the practice of some states, contrary to the clear mandate of the fifteenth amendment, of initiating and perpetuating various discriminatory devices and the inability of previous plans to arrest this problem.[65] To the extent that these conditions were prerequisites to the approval of the act by the Court, the decision has a more limited precedential effect.

Finally, a tangential but significant question arose out of the act's prohibition of new voter qualification tests. Article III of the Constitution, as interpreted, allots to the federal courts jurisdiction over "cases and controversies" and precludes advisory opinions.[66] Section 5 of the Voting Rights Act pro-

Act, § 10(c), 60 Stat. 243 (1946), 5 U.S.C. § 1009(c) (1964). *But see* DAVIS, ADMINISTRATIVE LAW TREATISE §§ 28.02-.07, .09, .13, .18 (1958).

[61] 383 U.S. at 333. See notes 35-36 *supra.*

[62] See note 35 *supra.* The Court believed the burden to be "quite bearable." 383 U.S. at 332.

[63] Presumably, the source of power for such legislation would be § 5 of the fourteenth amendment, which is essentially identical to the language of § 2 of the fifteenth amendment. See *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879).

[64] 383 U.S. at 334-35. In support of this proposition, the Court relied on Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), which asserted that while an emergency will not create any new powers, it may authorize the exercise of existing powers. *Id.* at 425-26.

[65] The "exceptional conditions" which precipitated the passage of the act were, in the Court's eyes, exemplified by the unrest in Selma, Alabama, in the summer of 1965. See 383 U.S. at 314-15; notes 15, 21-23 *supra.*

[66] See Muskrat v. United States, 219 U.S. 346 (1911).

vides that an affected state may enforce new voting legislation only if found to be nondiscriminatory either by the Attorney General or by the District Court for the District of Columbia.[67] By thus according the judiciary power to strike down a discriminatory state law before it has been rendered operable, the act seemingly authorizes the federal court to issue advisory opinions on the legality of nascent, unenforced statutes.[68] The Court, however, held that a case or controversy does exist when the state's desire to enforce a new statute is impeded by the federal legislation.[69] As an alternative approach to the article III issue, section 5 could be construed to preclude court proceedings unless an adverse determination by the Attorney General has been made. While the Court apparently deemed any limiting construction of section 5 unnecessary, the suggested interpretation would limit court involvement to situations where a controversy clearly exists.[70]

The Possibility of Avoidance

The fear of emerging Negro political power may cause southern communities to continue their efforts to avoid any law purporting to guarantee voting equality.[71] However, the act practically rules out the use of any techniques of legal avoidance since the prescribed remedies are applied automatically under the voting formula in the most notorious areas of voting discrimination. Moreover, applicability of the automatic remedies is a closed issue since decisions of the Attorney General concerning the existence

[67] See note 36 *supra* and accompanying text.

[68] Mr. Justice Black dissented to the Court's resolution of this question, for he could find no case or controversy in § 5. 383 U.S. at 357-58 (dissenting opinion).

[69] *Id.* at 335.

Judicial power to make such premature determinations may be analogized to the power to strike down a statute as void on its face. See Dombrowski v. Pfister, 380 U.S. 479 (1965).

[70] While this construction would insure that the court would decide only a controversy and not render an advisory opinion, it would seem more detrimental to federal-state relationships. Under the present construction, the veto power does not initially reside solely with an administrative official but is shared with a court, which presumably will be more concerned with the constitutional limitations than with the success of the legislation.

[71] One source of discrimination that the act seeks to reach but possibly cannot is intimidation, both physical and economic. Criminal and civil sanctions are indeed provided under the act as well as under state laws. However, they will be effective only if adequate federal or responsible police protection is provided. Defeating this threat to voting equality will fall largely to responsible white citizens and fearless Negroes. For an example of the type of intimidation that does occur, see United States v. Bruce, 353 F.2d 474 (5th Cir. 1965).

of tests and those of the Bureau of the Census concerning voting percentages are nonreviewable.[72] By requiring the use of the District of Columbia for all declaratory judgment actions, Congress has reduced the possibility of a delay in the application of the act by the rendering of a specious initial judgment against its validity. However, the effort to thwart this avoidance technique has not proved wholly successful.[73] It would appear, nonetheless, that the affected states are bound by the act and must work within it.[74]

On the other hand, in situations where the remedies do not arise automatically they may be applied by the court in any suit brought "to enforce the guarantees of the fifteenth amendment."[75] The relative effectiveness of this part of the act is dubious since the experience of prior legislation has shown that proof of discrimination is at best difficult[76] and since those areas for which discrimination could most easily be proved have been subjected to the automatic remedies.[77] Further, it is unlikely that the courts are anxious to invoke these remedies since they have previously been reluctant to use the milder federal referee system.[78] Finally, courts may not

[72] Voting Rights Act of 1965, § 4(b).

[73] Prior cases in which this jurisdictional technique has been successful are: United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965); United States v. Raines, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17 (1960); United States v. Alabama, 171 F. Supp. 720 (M.D. Ala. 1959), *vacated and remanded*, 267 F.2d 808 (5th Cir.), *aff'd*, 362 U.S. 602 (1960).

Actions to enjoin the act were successfully brought in state courts against state officials in Mississippi, Alabama, and Louisiana. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT . . . THE FIRST MONTHS 76 & n.5 (1965). The decisions in Alabama were rendered void by a subsequent decision of a three-judge federal district court. Reynolds v. Katzenbach, 248 F. Supp. 593 (S.D. Ala. 1965). *Cf.*, Perez v. Rhiddlehouse, 247 F. Supp. 65 (E.D. La. 1965).

[74] In the affected area where voting examiners are being used, it seems that a state or political subdivision can do little to thwart the administration of the act. The community can harass an examiner, but short of defying the law it could not impede his work. The procedures the examiners are required to follow and the acceptable state standards they are to apply have been set out by the Civil Rights Commission. 30 Fed. Reg. 9859-61 (1965), adding 45 C.F.R. § 801 (1965); see note 30 *supra*. Thus, the routine process of listing eligible voters will apparently not be slowed by administrative delays caused by uncertainty as to functions to be performed or procedures to be implemented.

[75] Voting Rights Act of 1965, § 3.

[76] See notes 11, 23 *supra*.

[77] The Civil Rights Commission in 1961 found that there were one hundred counties in eight southern states practicing discrimination. Those states included Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. 1961 U.S. CIVIL RIGHTS COMM'N REP.—BOOK 1: VOTING 135. In the 1963 report, the Commission declared that Tennessee could no longer be so classified. 1963 U.S. CIVIL RIGHTS COMM'N REP. 21.

[78] 111 CONG. REC. 8014 (daily ed. April 22, 1965) (remarks of Senator Mansfield).

deem these severe remedies justifiable in those localities not brought under the scope of the formula.

However, once any remedy has been invoked, either automatically or by order of the court, its impact should be substantial, given the minimization of opportunities for avoidance. When the examiners are ordered into an area by the Attorney General they are to remain until he recalls them. If he refuses to do so a state or political subdivision can have the examiners removed by order of the District Court for the District of Columbia if that court finds that more than fifty per cent of the Negroes in the area are registered and that voting discrimination there has been abolished.[79] When examiners are court-appointed, they will withdraw only upon judicial order.[80]

Further, the prohibition on new tests appears effective as a means of preventing a perpetuation of previous discrimination. Without a complete re-registration of all voters, a state probably cannot raise its voting standards because any alteration in qualifications, although applied nondiscriminatorily, would have the effect of excluding from the voter rolls some Negroes who would be registered voters but for the earlier discrimination. While *complete* re-registration might provide a means of circumventing the provision which forbids new voting tests or devices, it would exclude numerous whites as well as Negroes. The feasibility of re-registration under such circumstances may thus be politically impossible as well as administratively impractical.[81]

"Even though there has been a long history of discrimination in voter registration in Montgomery County, Alabama, and even though the pattern and practice of discrimination has continued to exist since the issuance of the original injunction in this case, this Court does not, as yet, see any need to appoint federal voting referees for Montgomery County, Alabama." United States v. Parker, 236 F. Supp. 511, 518 (M.D. Ala. 1964). See also United States v. Scarborough, 348 F.2d 168 (5th Cir. 1965).

[79] Voting Rights Act of 1965, § 13. The fifty per cent escape clause arose out of a desire to allow a county in a state affected by the bill to continue state-supervised registration if no actual discrimination had been practiced there. To prevent counties within affected states having no meritorious claims from petitioning the District Court for the District of Columbia, the fifty per cent requirement was added. See 111 CONG. REC. 11073-78 (daily ed. May 25, 1965) (remarks of Senators Long and Hart).

Once the examiners have been withdrawn it is always possible that discrimination could recur. If that situation were to arise, the Attorney General would not be precluded by any express language of the act from again certifying the need for examiners.

[80] Voting Rights Act of 1965, § 13. If the examiners have been appointed by the court and subsequently withdrawn, that court may nonetheless retain jurisdiction as long as it deems appropriate. Voting Rights Act of 1965, § 3(c).

[81] Attorney General Katzenbach has argued against attempting such a full scale re-registration inasmuch as the goal of the act is to increase the electorate whereas re-registration coupled with a literacy test equally applied would reduce the elec-

Finally, the means set up in the act to challenge the qualifications of those persons listed by a federal examiner[82] do not appear to suggest fruitful forms of avoidance.[83] When an examiner has listed any person as an eligible voter, any other person can challenge that determination before a hearing officer, whose authority is created by the act for this purpose.[84] Significantly, appeal from the decision of the hearing officer by-passes the local district court and lies in the court of appeals. Upon such an appeal, the hearing officer's determination is to be reversed only when it is obviously erroneous. Moreover, a challenged voter remains eligible to vote until the challenge is upheld.[85]

CONCLUSION

The Voting Rights Act of 1965 was enacted nearly one hundred years after the promise of voting equality was first tendered. Intervening, there have been several sincere but unsuccessful attempts to effectuate that promise. Whether this legislation will in fact

torate, although not on a discriminatory basis. *Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Committee on the Judiciary,* 89th Cong., 1st Sess., pt. 1, at 17 (1965).

While he has not expressly asserted that such a re-registration would be invalid, the Attorney General has raised the further question of whether such reduction would not in fact discriminate against the Negro, whose inability to pass the literacy test has arguably arisen out of the deprivation of his fourteenth amendment right to equal education. *Id.* at 16. Compare Carrington v. Rash, 380 U.S. 89 (1965), which applied the equal protection clause to void a Texas constitutional provision which denied the right to vote to military personnel who moved into the State after their induction into the armed forces, a voting deprivation unrelated to race. For a comment upon Mr. Justice Harlan's dissent in that case, see Van Alstyne, *The Fourteenth Amendment, the Right to Vote, and the Understanding of the Thirty-Ninth Congress,* 1965 SUP. CT. REV. 33.

[82] Voting Rights Act of 1965, § 9(a).

[83] For a review of the experience under the challenging process, see U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 73, at 19-20.

[84] 30 Fed. Reg. 9860 (1965), adding 45 C.F.R. § 801.302 (1965). The challenge must be made within ten days of the date when the applicant's listing is made available for public inspection and must be supported by affidavits of two persons having knowledge of the grounds for the challenge. Further, a copy of the challenge and affidavits must be served on the challenged person. Finally, petition for review must be made within fifteen days of the hearing officer's decision. Voting Rights Act of 1965, § 9(a).

[85] Voting Rights Act of 1965, § 9(a). The alternate bill proposed by Republican congressmen would have accorded a challenged voter a provisional right to vote: he would be allowed to vote, but subsequent objections if found to be correct, could invalidate the ballot. See 111 CONG. REC. 15091 (daily ed. July 6, 1965); 111 CONG. REC. 15089-90 (daily ed. July 6, 1965) (remarks of Representative McCulloch); 111 CONG. REC. 15653 (daily ed. July 9, 1965) (remarks of Representative Edwards).

remove all voting discrimination remains to be seen,[86] but the adoption of automatic remedies and the supplemental use of an administrative process to supervise voting rights should alleviate the basic weaknesses of prior legislation. The impact of this act upon the federal system of American government is significant in a wider sense, for it may foreshadow a similar congressional approach to other civil rights abuses under the mantle of the fourteenth amendment.

[86] For an appraisal of the early results of this act, see U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 73. See also Davis v. Gallinghouse, 246 F. Supp. 208 (E.D. La. 1965).