NO. 22, ORIGINAL

In The

Supreme Court of the United States

October Term, 1965

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

NICHOLAS DEB. KATZENBACH,
ATTORNEY GENERAL OF THE UNITED STATES,
Defendant.

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA AMICUS CURIAE

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PRELIMINARY STATEMENT

On September 29, 1965, the State of South Carolina lodged in this Court a motion for leave to file its complaint against Nicholas deB. Katzenbach, Attorney General of the United States, attacking the constitutionality of the Voting Rights Act of 1965, Public Law 89-110. Annexed to the motion was South Carolina's complaint and its brief on behalf of the State. On November 5, 1965, this Court entered its order granting the above-mentioned motion, scheduling the filing of an answer and briefs by the respective parties and setting the cause for oral argument on January 17, 1966. In addition, the Court's order provided

(1) that any State might submit a brief, *amicus curiae,* on or before December 20, 1965, and (2) that any such State desiring to participate in the oral argument, as *amicus curiae,* should file with the Clerk of the Court a request for permission to do on or before the same date. Pursuant to the permission conferred by this order, the instant Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae,* is filed.

THE STATUTE INVOLVED AND THE INTEREST OF THE COMMONWEALTH OF VIRGINIA

Under consideration in this litigation is the Voting Rights Act of 1965, Public Law 89-110. Pertinent to a consideration of the positions taken by the Commonwealth of Virginia in the instant brief, *amicus curiae,* are the provisions of Section 4 of the Act which prescribe:

> SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United

States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection 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 any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The 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 the 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.

(c) 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.

(d) 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.

(e) (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that

> a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

The interest of the Commonwealth of Virginia in this litigation arises from the circumstance that the Attorney General of the United States has determined—pursuant to Section 4(b) of the Act—that Virginia maintained on November 1, 1964, a "test or device" as defined in Section 4(c) of the Act, and the Director of the Census has similarly determined that less than 50 per centum of the persons of voting age residing in Virginia voted in the presidential election of November, 1964. Under Section 4(a) of the Act, the effect of these determinations has been to deprive the Commonwealth of Virginia of the right to require each of her citizens—without regard to race, color or previous condition of servitude—to make application to register to vote *in his own handwriting* as required by Section 20 of the Constitution of Virginia. As such, the Act exceeds the powers vested in Congress by the Fifteenth Amendment and unconstitutionally deprives the Commonwealth of Virginia of the right to prescribe racially nondiscriminatory qualifications for exercise of the elective franchise, which right is secured to the Commonwealth by the provisions of Article I, Section 2, and the Tenth and Seventeenth Amendments of the Constitution of the United States.

SUMMARY OF ARGUMENT

In essence, the Voting Rights Act of 1965 provides that no person shall be denied the right to vote in any election (Federal, State or local) because of his failure to comply

with any voter qualification test established by State law, in any State (1) which maintained a voter qualification test on November 1, 1964, and (2) in which less than 50 per centum of the resident persons of voting age were registered on November 1, 1964, *or* in which less than 50 per centum of the resident persons of voting age voted in the presidential election of November, 1964. In effect, the Voting Rights Act of 1965 abolishes any voter qualification test (including racially nondiscriminatory tests) in certain States *only,* i.e., those States falling within the ambit of one or the other of the two "50 per centum" formulae mentioned above.

The only provision of the Constitution of the United States upon which its advocates attempt to justify enactment of the legislation in question is the Fifteenth Amendment. In its entirety, that Amendment prescribes:

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

The Commonwealth of Virginia submits that the Voting Rights Act of 1965 is constitutionally invalid because (1) in its direct operation and effect under the "50 per centum" formulae, the bill arbitrarily and unjustifiably includes within its terms States which are demonstrably free of any racial discrimination in the establishment or administration of their electoral processes and (2) in its direct operation and effect, the bill infringes the constitutional power of the individual States of the Union to impose such racially nondiscriminatory qualifications upon the exercise of the right

to vote as each State may select. In our brief we shall discuss these two fundamental objections to the challenged legislation *seriatim.*

It is well settled that Congress must have a rational basis for the findings upon which its legislation is predicated. However, no attempt to establish a valid factual premise for Congressional action with respect to voter discrimination in Virginia was made, other than to single out the completely unrelated circumstances that (1) Virginia maintained a voter qualification test on November 1, 1964, and (2) less than 50 per centum of the persons of voting age residing in Virginia *voted* in the presidential election of November, 1964. That more than 50 per centum of the resident persons of voting age in Virginia were *registered* on November 1, 1964, is incontrovertible, and the absence of any racial discrimination in Virginia with respect to the right to vote is established by other relevant evidence.

The power of Congress to enforce the guarantee of the Fifteenth Amendment is specifically limited to the enactment of "appropriate" legislation for this purpose; yet it is manifest that the "50 per centum" formulae which activate the legislation in question operate to include within the ambit of the Act the Commonwealth of Virginia, in which State no racially motivated voter discrimination exists. Clearly, Congress may not—under the guise of enforcing the Fifteenth Amendment prohibition against denial of the right to vote on account of race or color—enact legislation which suspends the electoral laws of a State in which racial discrimination in the exercise of the right to vote is known by Congress, as a matter of public record, to be nonexistent. Legislation having such an effect is clearly without reasonable classification or rational justification, amounts to no

more than a mere arbitrary fiat and cannot constitute "appropriate" legislation under the Fifteenth Amendment.

Consideration of the second stated objection to the constitutionality of the Act begins with the premise that the right to prescribe the qualification of electors is one constitutionally vested exclusively within the province of the individual States, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment), sex (Nineteenth Amendment) and the payment of a poll tax in Federal elections (Twenty-Fourth Amendment). Thus, Article I, Section 2, of the Constitution of the United States and the Seventeenth Amendment provide that electors for the House of Representatives and Senate, respectively, shall have the qualifications requisite for electors of the most numerous branch of each State legislature. Under these provisions, the qualifications of electors in Congressional elections must be those qualifications established by each State for electors of the most numerous branch of the State legislature. Moreover, this Court has repeatedly declared that a State is free to conduct its elections and limit its electorate as it may deem wise, except as its actions may be affected by the prohibitions of the Federal Constitution, and that the power of Congress to legislate at all the subject of racial discrimination in voting rests upon the Fifteenth Amendment and extends only to the prevention by appropriate legislation of the discrimination forbidden by that Amendment. The legislative history of the framing, adoption and ratification of the Fifteenth Amendment establishes beyond cavil the unassailable validity of the views so often and so consistently expressed by this Court on this subject.

In this connection, Virginia does not make the broad

(indeed, too broad) assertion that each State has the power to prescribe *any* voting qualifications it may see fit. It is the power to prescribe *racially nondiscriminatory* qualifications that each State constitutionally possesses, and when a State establishes such nondiscriminatory qualifications, it exercises a constitutionally protected power with which no branch of the Federal government may permissively interfere. When a State establishes such nondiscriminatory voting qualifications, it exercises a power wholly within the domain of the State and is insulated not only from Federal *judicial* review but from Federal *legislative* interference. It avails nothing for advocates of the constitutionality of the Voting Rights Act of 1965 to suggest that such insulation is not available when State power is used as an instrument for circumventing a federally protected right, for when a State's voting standards are, in fact, nondiscriminatory, they cannot be an instrument for such purpose nor come within the reach of Congressional power. Congress cannot substitute its own voting standards for the nondiscriminatory voting qualifications prescribed by a State without infringing the constitutionally established and judicially protected power of the States in this field.

ARGUMENT

I.

The Voting Rights Act of 1965 As Applied To Virginia And Other States Similarly Situated Violates The Fifth and Fifteenth Amendments To The Constitution of The United States In That The Classification Established Therein Is Unreasonable And Irrational.

As already noted, Section 4 of the Voting Rights Act of 1965 provides that no person shall be denied the right to vote in any federal, state or local election because of his failure to comply with any voter qualification test estab-

lished by state law, in any State or political subdivision thereof (1) which maintained a voter qualification test on November 1, 1964, as determined by the Attorney General of the United States, and (2) in which less than fifty per centum of the persons of voting age were registered on November 1, 1964, *or* in which less than fifty per centum of the persons of voting age voted in the presidential election of November, 1964.

The Attorney General of the United States has determined that the Commonwealth of Virginia has a "test or device" as that phrase is defined in the Act even though there is no "literacy" test as such. Under the Constitution and election laws of Virginia prospective voters are required to fill out a simple form in their own handwriting. Section 20, Constitution of Virginia and Sections 24-68, 24-69 and 24-71 of the Code of Virginia.

On November 1, 1964, more than fifty per centum of the persons of voting age residing in Virginia were registered, but the Director of the Census determined that fifty per centum of such persons did not vote in the presidential election of November, 1964. Thus, the provisions of the Voting Rights Act of 1965 became applicable in Virginia.

The registration procedure for all elections, federal, state and local, has been abolished in the Commonwealth of Virginia for the sole reason that fifty per centum of the qualified voters of the State exercised their right not to vote in the presidential election held on November 1, 1964.

(A) There Is No Rationality Of Connection Between The Facts Proved And The Ultimate Fact Assumed In The Act.

As the title indicates, the purpose of the Voting Rights Act is to enforce the provisions of the Fifteenth Amendment. In its entirety, this amendment prescribes:

"Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

"Section 2.

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

For the purposes of this brief, the Commonwealth of Virginia is not concerned with the fifty per centum formula of registered voters since more than fifty per centum of the resident persons of voting age were registered in the State on November 1, 1964.

The Commonwealth of Virginia first contends that the classification or triggering provision of the Act, namely, voter qualification tests are abolished in all states wherein fifty per centum of the resident persons of voting age failed to exercise their right to vote in the 1964 presidential elections, is unconstitutional on its face since there is no rational basis for the findings upon which it is predicated.

The constitutionality of the Act must "depend upon the rationality of the connection 'between the fact proved and the ultimate fact assumed'." *United States* v. *Gainey,* 380 U.S. 63, 13 L. ed. (2d) 658, at p. 662 (1965) and *Tot* v. *United States,* 319 U.S. 463 at p. 466, 87 L. ed. 1519 at p. 1524 (1943). See also, *United States* v. *Romano,* No. 2, October Term, 1965, decided November 22, 1965.

The facts proved are that in Virginia, in South Carolina, and in certain other states, including Alaska, "literacy" tests exist and fifty per centum of the resident persons of voting age of those states did not vote in the presidential election held in November, 1964. From these proved facts it is presumed that the Negro citizens of the states in ques-

tion have been denied their right to vote contrary to the guarantee of the Fifteenth Amendment. The Congress thereupon abolishes voter qualification tests in the states falling within the ambit of the aforesaid fifty per centum classification.

There may or may not be a sufficient rational connection between "literacy" tests and low registration to constitutionally presume a violation of the Fifteenth Amendment but, there is no valid rational connection between "literacy" tests, light voting, and discrimination.

By the passage of the triggering provisions of the Voting Rights Act, the Congress has declared that "literacy" tests and low registration result in discrimination. However, it has also found that light voting does not result in discrimination unless it is coupled with a "literacy" test. The following table,[1] indicating voting experience of the presidential election held in November, 1964, shows the fallacy of this presumed discrimination:

State	*Negro Population*	*% of Negro Population*	*Literacy Test*	*% of Both Races Voting*
Georgia	1,122,596	28	Yes	43
Louisiana	1,039,207	31	Yes	47
Texas	1,187,125	12	No	44

The Act presumes that there is no discrimination in Texas since there is no "literacy" test even though only forty-four per centum of the voting age population voted. Yet, in Louisiana wherein forty-seven per centum voted, the "literacy" test is abolished on the ground that its existence violates the Fifteenth Amendment.

The percentage of voting age persons in Arkansas who cast votes in the 1964 presidential election was less than fifty, but no discrimination is found to exist in that state.

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[1] Source: Bureau of Census.

The evidence produced at the hearings before congressional committees, upon which the statutory presumption found in the Voting Rights Act are presumed to be based, indicated that discrimination was effected by the use of tests or devices in some five states, excluding Virginia, covered by the Act. No evidence was produced which would indicate that persons who were properly registered with or without voter qualification tests were discriminated against when they voted or attempted to vote.

In *Tot, supra,* which appears to be the leading case on the question of statutory presumptions, this Court stated the rule of rational connection to be as follows:

> "* * * Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.* * *" (319 U.S. at pp. 467-68).

Where, then, is the rational connection between "literacy" tests, voting after being properly registered and discrimination, which is required before this presumption of discrimination may be found valid? The Commonwealth of Virginia submits that there is none.

A "literacy" test and a light vote, as previously illustrated, do not necessarily go together. Light votes occur in the absence of "literacy" tests. Experience proves that apathy is the cause of a light vote. After registration, "literacy" tests, of course, cannot be the cause of light votes and, to repeat, there is no evidence that Negroes have been discriminated against when they exercise their right at the polls.

Under the rule of rational connection, a fact must have

more than mere relevance toward proving the existence of the ultimate fact presumed before the statutory presumption can be upheld. Here, the fact of a "literacy" test coupled with the fact of light voting is not even relevant in attempting to prove the existence of discrimination.

To paraphrase Justice Black in his dissenting opinion in *United States* v. *Gainey, supra,* 380 U.S. 63, 13 L. ed. (2d) 658 at p. 667:

> "When matters of trifling moment are involved, presumptions may be more freely accepted, but when consequences of vital importance to * [states] and to the administration of * [their election laws] are at stake, a more careful scrutiny is necessary."

The statutory presumption of discrimination based on the fact of a "literacy" test coupled with a light vote in certain states found in the Voting Rights Act violates the rational connection rule and is invalid.

(B) States Which Are Free of Any Racial Discrimination In The Administration of Their Electoral Processes Are Arbitrarily Included Within The Terms of The Act.

An act, valid on its face, may be assailed by proof of facts demonstrating that the act as applied to a particular class is without support in reason. *United States* v. *Carolene Products Co.,* 304 U.S. 144 (1938).

The hearings before the Committee on the Judiciary of the United States Senate (1st Ses., 89th Cong.) on the Voting Rights Bill (S. 1564) do not, in fact, reveal the rationale of the classification found in the Act. Beginning on page 1447 of Part 2 of the report there is found an explanation of tables supposedly demonstrating the presump-

tion of voting discrimination where the use of tests or devices coincides with low voter participation.

1. The Department of Justice has uncovered evidence substantiated by court findings that in several states wherein the Act is applicable there has been a systematic effort to use "literacy" tests to disfranchise Negroes. (Report, p. 1450). *No such evidence has been found in Virginia.*

2. The registration data reveals a similar pattern in six of the seven states covered by the Act: a high percentage of white registration, a low percentage of non-white registration, a low voter turn out and the use of "literacy" tests. (Report, p. 1454). *Virginia does not have a high percentage of white registration and, by comparison, has a high percentage of non-white registration.*

This registration data, Table B-1, is found on p. 1472 of the said Senate report and is as follows:

"State	*White Voting Age Population 1964*	*White Registration*	*%*	*Non-White Voting Age Population 1964*	*Non-White Registration*	*%*
Alabama	1,413,270	935,695	66.2	501,730	92,737	18.5
Alaska	112,470			25,530		
Georgia	1,966,456	1,124,415	57.2	669,544	167,663	25.0
Louisiana	1,353,495	1,037,184	76.6	539,505	164,601	30.5
Mississippi	794,277	525,000	66.1	448,723	28,500	6.4
South Carolina	975,660	677,914	69.5	404,340	138,544	34.3
Virginia	2,060,751	1,133,702	55.0	480,249	177,321	36.9"

3. It is alleged that similarity exists among the states, excluding Alaska, caught under the Act's classification because all of them *within the past ten years* have had a general public policy racial segregation evidenced by statutes in force in the areas of travel, recreation, schools and hospital facilities. (Report, p. 1454). *As to Virginia, such*

allegations are utterly ridiculous. The Commonwealth of Virginia operates integrated schools, integrated hospitals and integrated recreational facilities. Furthermore, intrastate travel as well as interstate travel is integrated.

The Attorney General's attempt to establish a "valid factual premise" for Congressional action with respect to voter discrimination in Virginia is also completely refuted by the findings of the United States Civil Rights Commission.

In its 1961 Report on Voting, the Commission declared:

> "The absence of complaints to the Commission, actions by the Department of Justice, private litigation, or other indications of discrimination, have led the Commission to conclude that, with the possible exception of a deterrent effect of the poll tax—which does not appear generally to be discriminatory upon the basis of race or color—Negroes now appear to encounter no significant racially motivated impediments to voting in 4 of the 12 Southern States; Arkansas, Oklahoma, Texas, and Virginia." (Volume 1, p. 22).
>
> * * *
>
> "In three States—Louisiana (where there is substantial discrimination), Florida (where there is some), and Virginia (where there appears to be none) —official statistics are compiled on the State level by county and by race." (Volume 1, p. 102).

In view of the *facts,* it is unarguably apparent that no racial discrimination exists in Virginia with respect to the right to vote. This circumstance completely undermines the indispensable factual foundation upon which the Voting Rights Act is based. The power of Congress to enforce the guarantee of the Fifteenth Amendment is specifically limited to the enactment of "appropriate" legislation for this pur-

pose; yet it is manifest that the "light voting" formula which activates the Act operates to include within its ambit States in which no racially motivated voter discrimination exists. Clearly, Congress may not—under the guise of enforcing the Fifteenth Amendment prohibition against denial of the right to vote on account of race or color—enact legislation which would suspend the electoral laws of a State in which racial discrimination in the exercise of the right to vote is known by Congress, as a matter of public record, to be nonexistent.

This Court, in *United States* v. *Carolene Products Co.*, *supra,* said:

> "* * * the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.* * *" (304 U.S., at p. 153).

To repeat, the fact of voting discrimination does not exist in Virginia. Accordingly, the Act, when applied to Virginia, is clearly without a reasonable classification and amounts to no more than a mere arbitrary fiat which cannot meet the requirements of the Fifth Amendment or constitute "appropriate" legislation under the Fifteenth.

II.

The Voting Rights Act Of 1965 Exceeds The Authority Conferred Upon Congress By The Fifteenth Amendment And Infringes Powers Reserved To The States By Article I, Section 2, And The Tenth and Seventeenth Amendments Of The Constitution Of The United States.

As previously noted, the Voting Rights Act of 1965, in its direct operation and effect, completely abolishes the use

of any voter qualification test prescribed by State law (including racially nondiscriminatory tests) in those States falling within the scope of its activating provisions. In Argument I of this brief, the Commonwealth of Virginia has taken the position that these activating provisions are arbitrary, irrational and invalid *per se,* and that they are demonstrably so when viewed in light of the specific circumstances relating to Virginia. The argument there made would be equally applicable regardless of the nature of the substantive provisions of the Act purporting to provide a remedy for alleged violations of the guarantee of the Fifteenth Amendment.

In the present segment of our brief, counsel for the Commonwealth assert that the substantive provisions of the Act exceed the authority of Congress under the Fifteenth Amendment and infringe the power reserved to the States to prescribe racially nondiscriminatory qualifications for exercise of the elective franchise—specifically the power to impose literacy requirements, applicable to all citizens alike, as a precondition of the right to vote. This assertion, in turn, would be equally applicable regardless of the validity or invalidity of the activating provisions of the Act, *i.e.,* even if the challenged legislation applied throughout the length and breadth of the United States.

On this aspect of the instant case, the Commonwealth's position is fundamentally posited upon the premise that the right to prescribe the qualification of electors is one constitutionally vested exclusively within the province of the individual States, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment), sex (Nineteenth Amendment) and the payment of a poll tax in Federal elections (Twenty-fourth Amendment).

Thus, Article I, Section 2,[1] of the Constitution of the United States and the Seventeenth Amendment[2] provide that electors for the House of Representatives and Senate, respectively, shall have the qualifications requisite for electors of the most numerous branch of each State legislature, while the Tenth Amendment[3] reserves to the States all powers not conferred upon the Federal government.

When one remembers—as this Court pointed out in *United States* v. *Cruikshank,* 92 U. S. 542, 551—that:

> " 'The government of the United States is one of delegated powers alone, its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be granted or secured are left under the protection of the States.' "

it necessarily follows that Congress has no power to suspend the racially nondiscriminatory voting qualifications of any State, unless that power is conferred upon Congress by the Fifteenth Amendment. That such authority is conferred upon Congress by the Fifteenth Amendment we emphatically deny.

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[1] The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2] The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

[3] The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

A. Legislative History Of The Fifteenth Amendment

An appeal to history is in order here. Such an appeal would be appropriate in any litigation in which this Court was called upon to test the power of Congress to enforce any of the Civil War Amendments. It is especially appropriate in the instant case when so vast and revolutionary a power is asserted by Congress as that contained in the Voting Rights Act of 1965, with no suggestion of constitutional warrant for such action other than the forty-six words which comprise the Fifteenth Amendment in its entirety.

Of course, no lengthy citation of decisional authority to support the propriety of such an appeal is required. On numerous occasions this Court has not only sanctioned such an approach to the consideration of delicate and important constitutional questions, but has confirmed the indispensability of such research to the proper resolution of grave constitutional issues. Clear, succinct and irrefutable support for such a resort to history is readily available in the decisions of this Court in *Adamson* v. *California,* 332 U. S. 46; *Ullmann* v. *United States,* 350 U. S. 422; and *Bell* v. *Maryland,* 378 U. S. 226.

In the *Adamson* case, Mr. Justice Black pointed out that (332 U. S. at 72):

> "In construing other constitutional provisions, this Court has almost uniformly followed the precept of Ex parte Bain, 121 U. S. 1, 12, 30 L ed 849, 853, 7 S Ct 781, that 'It is never to be forgotten that 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.*'" (Italics supplied)

Moreover, in the *Ullmann* case, Mr. Justice Frankfurter —speaking for the Court—declared (350 U. S. at 428):

> *"Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."* (Italics supplied).

Finally, in the recent case of *Bell* v. *Maryland, supra,* Mr. Justice Goldberg approached the consideration of an analogous situation with the following admonition (378 U. S. at 288-289):

> "Of course, our constitutional duty is 'to construe, not to rewrite or amend, the Constitution.' Post, page 865 (dissenting opinion of Mr. Justice Black). Our sworn duty to construe the Constitution *requires,* however, *that we read it to effectuate the intent and purposes of the Framers. We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve."* (Italics supplied).

In the case at bar, the Commonwealth of Virginia has undertaken to document the history of the framing and adoption of the Fifteenth Amendment, so far as that history relates to the central issue now under discussion. The relevant data available from the records of the Fortieth and Forty-First Congress on this point are enlightening and, we submit, determinative in favor of the position taken by the Commonwealth. So copious has the available material proved to be that the Commonwealth has collected it in an appendix to this brief entitled "The Legislative History Of The Framing And Adoption Of The Fifteenth Amendment With Respect To The Power Of The States To Prescribe Qualifications For Exercise Of The Franchise, With Special Reference To The Establishment By The States Of Literacy

Requirements As A Pre-condition Of The Right To Vote." Counsel for the Commonwealth believe that it would be inappropriate to burden the body of this brief with a synopsis of the above-mentioned document; indeed, we seriously question whether such a synopsis would be permissible in view of the over-riding importance of this litigation. We respectfully invite the Court's attention to the study contained in this appendix, for on the basis of it the Commonwealth makes the following unqualified assertions:

(1) It was clearly understood and repeatedly acknowledged by the Framers of the Fifteenth Amendment—not only those in favor of the amendment in the form in which it was adopted, but those who favored a broader amendment and those opposed to any amendment at all—that:

(a) The only limitation imposed by the Fifteenth Amendment upon the States was that prohibiting the States from conditioning the right to vote on race, color or previous condition of servitude; and

(b) The power of the States to regulate the right of suffrage upon any other grounds applicable to all citizens alike—particularly upon the grounds of property and educational qualifications—remained with the States unfettered by the amendment; and such qualifications, regardless of their impact upon any particular class of citizens, might be established by each State without violating either the letter or the spirit of the Fifteenth Amendment.

(2) The validity of the above-stated propositions is so clearly and incontrovertibly established by the

legislative history of the framing and adoption of the Fifteenth Amendment that no impartial mind—whether of litigant, lawyer or jurist—could either dissent from these propositions or fabricate from the relevant historical material any argument to the contrary.

B. Judicial Decisions.

Thoroughly consistent with the propositions irresistibly derived from an analysis of the legislative history of the Fifteenth Amendment has been an uninterrupted line of decisions of this Court. These decisions, rendered in cases considered since the adoption of the Fifteenth Amendment, dispel in conclusive fashion any doubt concerning the validity of the fundamental position of the Commonwealth of Virginia that each State is free to limit its electorate as it may deem wise, except as its actions may be affected by the prohibitions of the Federal Constitution, and that the power of Congress to legislate at all upon the subject of racial discrimination in voting rests upon the Fifteenth Amendment and extends only to the prevention by appropriate legislation of the specific discrimination forbidden by that Amendment.

Minor v. *Happersett,* 88 U. S. (21 Wall.) 162 (1875) provides an appropriate point of departure for demonstrating the ancient lineage and current vitality of the law supporting this position. The ultimate question presented in that case was whether or not a provision of the Constitution of Missouri which excluded females from the right of suffrage was violative of the Fourteenth Amendment to the Constitution of the United States. Resolution of this question entailed consideration of the subordinate inquiry of whether or not the right of suffrage was one emanating

from the United States Constitution. Holding that the Constitution did "not confer the right of suffrage upon anyone," this Court declared (21 Wall., at 177-178):

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be."

United States v. *Reese,* 92 U. S. 214 (1876) involved consideration of the validity of §§ 3 and 4 of the Enforcement Act of 1870 (16 Stat. 140) under which indictments had been laid against certain inspectors of a municipal election in Kentucky for refusing to receive and count the vote of a Negro citizen of the United States. Invalidating the provisions of law there in question, this Court stated (92 U. S. at 217-218, 220):

> "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color or previous condition of servitude. . . . If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be.
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> "This leads us to inquire whether the Act now under consideration is 'appropriate legislation' for that

purpose. *The power of Congress to legislate at all upon the subject of voting at state elections rests upon this Amendment.*

* * *

"In view of all these facts, we feel compelled to say that, in our opinion, the language of the 3d and 4th sections *does not confine their operation to unlawful discrimination on account of race, etc.*

* * *

"Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if *it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts* are authorized to, and when called upon in due course of legal proceedings *must, annul its encroachments upon the reserved power of the States and the people.*" (Italics supplied).

Referring to the *Reese* case, *supra,* in its subsequent decision in *United States* v. *Harris,* 106 U. S. 629 (1882), this Court pointed out (106 U. S. at 637):

"The attempt was made by the counsel for the United States to sustain the law as warranted by the Fifteenth Amendment to the Constitution of the United States. But this court held it not to be appropriate legislation under that amendment. *The ground of the decision was that the sections referred to were broad enough not only to punish those who hindered and delayed the enfranchised colored citizen from voting, on account of his race, color, or previous condition of servitude, but also those who hindred or delayed the free white citizen. . . .*" (Italics supplied).

In *Pope* v. *Williams,* 193 U. S. 621 (1904), this Court sustained the validity of a voting registration statute of the State of Maryland and during the course of its opinion observed (193 U. S. at 632, 633-634):

"The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett,* 21 Wall. 162, 22 L. ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. *In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.*

* * *

"The right of a state to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, *and this court has no concern with them."* (Italics supplied).

Thereafter, commenting upon the validity of an Oklahoma literacy test statute in *Guinn* v. *United States,* 238 U. S. 347 (1915), this Court asserted (238 U. S. at 362, 366):

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage *which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority*

> *of the nation and the state would fall to the ground.* In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.
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> * * *
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> "No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, *its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted.*" (Italics supplied).

Subsequently, in *Breedlove* v. *Suttles,* 302 U. S. 277 (1937), this Court sustained the validity of a poll tax requirement of the State of Georgia in the following language (302 U. S. at 283):

> "To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. *Privilege of voting is not derived from the United States, but is conferred by the State and,* save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the State may condition suffrage as it deems appropriate.*" (Italics supplied).

Recently, this Court reaffirmed the validity of State prescribed literacy tests in *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45 (1959). Validating a statute of the State of North Carolina imposing such a test, the Court stated (360 U. S. at 50-51):

> *"The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . .* So while the

> right of suffrage is established and guaranteed by the Constitution . . . *it is subject to the imposition of state standards which are not discriminatory* and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. . . . While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote,' *the right protected 'refers to the right to vote as established by the laws and constitution of the State.'* " (Italics supplied).

Finally, during this very year, in *Carrington* v. *Rash,* 380 U. S. 89 (1965), this Court confirmed (380 U. S. at 91):

> *"There can be no doubt either of the historic function of the States to establish, on a non-discriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise.* Indeed, the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . . 'In other words, the privilege to vote in a State *is within the jurisdiction of the State itself, to be* exercised as the State may direct, and upon such terms, as to it may seem proper, provided, of course, no discrimination is made between individuals in violations of the Federal Constitution.' " (Italics supplied).

See also, *United States* v. *Cruikshank, supra; Davis* v. *Beason,* 133 U. S. 333; *Ex Parte Yarbrough,* 110 U. S. 651; *McPherson* v. *Blacker,* 146 U. S. 1; *Wiley* v. *Sinkler,* 179 U. S. 58; *Mason* v. *Missouri,* 179 U. S. 328 *James* v. *Bowman,* 190 U. S. 127.

Of course, the foregoing canvass of prior decisions of this Court does little more than rehearse the obvious and particularize the uncontroverted. So uniform has been the course of these decisions, so consistest the voice and so constant the teachings of this Court on the subject under consideration, as to compel invalidation of Section 4(e) of the Act on the very first occasion of a challenge to the constitutionality of the statute in a Federal court. This was the conclusion reached by the United States District Court for the District of Columbia in *Morgan* v. *Katzenbach,* C. A. No. 1915-65 (decided November 15, 1965). So recent is this decision and so pertinent its reasoning to the position taken by the Commonwealth of Virginia in this case as to merit extended quotation of its language in the body of this brief:

> "The question presented in this case is whether *the Congress has constitutional power to regulate by statute the qualifications of voters and to supersede the requirements prescribed by the States.* Specifically the issue is the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which in effect provides that no person who has been educated in an American school in which the predominant language is other than English, shall be disqualified from voting under any literacy test. As a corollary, the ultimate problem is whether *this provision of the Act of Congress supersedes the literacy test for voters prescribed by the constitution and statutes of the State of New York,* which impose the ability to read and write English as a requirement for voting.
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> * * *
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> *"Traditionally and historically the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate.* Thus Article I, Section 2,

of the Constitution of the United States, provides as follows:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article I, Section 4, provides as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

It will be observed that this Section does not include the power to prescribe requisites for the right of suffrage. Power to make or alter regulations concerning 'the times, places and manner of holding elections' does not comprise authority to regulate qualifications for voters. No express or implied power is conferred by the Constitution on Congress to legislate concerning requirements for voters in the several States. The matter is within the purview of the Tenth Amendment, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right conferred by the States. In *Minor* v. *Happersett,* 21 Wall. 162, 177, Mr. Chief Justice Waite, in speaking for a unanimous bench, stated:

> For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

In that case it was held that the States had the power of excluding women from the right to vote. It required a Constitutional amendment to grant suffrage to women.

In *Pope* v. *Williams,* 193 U. S. 621, 632, the same theory was again enunciated:

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett,* 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, *the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.* (Emphasis supplied).

The doctrine that the right to vote is not a privilege derived from the United States, but is conferred by the State, was reiterated in *Breedlove* v. *Suttles,* 302 U. S. 277, 283, in the following manner:

> Privilege of voting is not derived from the United States, but is conferred by the State and, save

> as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the State may condition suffrage as it deems appropriate.* (Emphasis supplied).

In that case the Supreme Court unanimously held that the States had power to impose a poll tax as a prerequisite for voting. It required a Constitutional Amendment to eliminate the exaction of poll taxes as a condition precedent to voting in Federal elections.

Only within the past year the Supreme Court again restated the same propositions in *Carrington* v. *Rash,* 380 U. S. 89, 91, as follows:

> Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. *Pope* v. *Williams,* 193 U. S. 621. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton Election Bd.* 360 U. S. 45, 50. Compare *United States* v. *Classic,* 313 U. S. 299; *Ex parte Yarbrough,* 110 U. S. 651. "In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." *Pope* v. *Williams, supra,* at 632.
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> * * *

The case of *Lassiter* v. *Northampton Election Bd.,* 360 U. S. 45, decided in 1959, is practically on all fours with the case at bar. The State of North Caro-

line prescribed a literacy test for voters in the English language. A voter brought suit in the Federal court for a declaration that the requirement was unconstitutional. The Supreme Court unanimously upheld the validity of the test and the power of the State to impose it. In its opinion, which was written by Mr. Justice Douglas, the Court discussed the authority of the States *vis-a-vis* the power of the Congress in this field, in the following illuminating manner, p. 50:

> The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope* v. *Williams,* 193 U. S. 621, 683; *Mason* v. *Missouri,* 179 U. S. 328, 335, absent of course the discrimination which the Constitution condemns. Article 1, § 2 of the Constitution in its provision for the election of Members of the House of Representatives and the Seventeenth Amendment in its provision for the election of Senators provide that officials will be chosen "by the People." Each provision goes on to state that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough,* 110 U. S. 651, 663-665; *Smith* v. *Allwright,* 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic,* 313 U. S. 299, 315. While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not

> taxed), speaks of "the right to vote," the right protected "refers to the right to vote as established by the laws and constitution of the State." *McPherson* v. *Blacker,* 146 U. S. 1, 39.

There are indeed constitutional limitations on the power of the States to prescribe qualifications for voters. Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States. Thus, the Fifteenth Amendment, which became effective in 1870, bars the States from denying or abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

By the Nineteenth Amendment, which took effect in 1920, the States are precluded from denying the right of suffrage to women. That Amendment reads as follows:

> 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 sex.

The latest Constitutional Amendment in this field is the Twenty-Fourth Amendment, which prevents the States from imposing a poll tax as a condition for voting in Presidential and Congressional elections. That Amendment reads as follows:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in

> Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Thus whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States. *So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evident, therefore, that it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment.* If Congress had the authority to take such action by legislation, the use of the laborious process of amending the Constitution would have been an exercise in futility or at least unnecessary surplusage.

* * *

We have given due consideration to the presumption of validity which attaches to every Act of Congress. *That presumption, however, is completely overcome and destroyed by the inescapable conclusion that we have reached from the foregoing discussion* to the effect that Section 4(e) of the Voting Rights Act of 1965, *transgresses the powers granted to Congress* and, therefore, is repugnant to the Constitution and invalid." (Italics supplied).

In light of these decisions, it is manifest that for almost a century this Court has consistently and repeatedly proclaimed the power of each State under the Federal Constitution to establish racially nondiscriminatory criteria governing the exercise of the elective franchise of its citizens. The language in which this fundamental power of the indi-

vidual States has been declared, reaffirmed and protected consists of such plain English words that he who runs may read and the ingenuity of man cannot evade them. The legislative history of the framing and adoption of the Fifteenth Amendment and the decisions of this Court to this day echo without dissonance the voices of the Founding Fathers as exemplified by the writings of both Madison and Hamilton in various portions of The Federalist:

> "The first view to be taken of this part of the government, relates to the *qualifications of the electors,* and the elected.
>
> "Those of the former, are to be the same, with those of the electors of the most numerous branch of the state legislatures. The definition of the right of suffrage, is very justly regarded *as a fundamental article of republican government.* It was incumbent on the convention, therefore, to define and establish this right in the constitution. *To have left it open for the occasional regulation of the congress, would have been improper for the reason just mentioned.* . . . To have reduced the different qualifications in the different states to one uniform rule, would probably have been as dissatisfactory to some of the states, as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every state; *because it is conformable to the standard already established, or which may be established by the state itself.* It will be safe to the United States; because, being fixed by the state constitutions, it is not alterable by the state governments, and it cannot be feared that the people of the states will alter this part of their constitutions, in such a manner as to abridge the rights secured to them by the federal constitution." (No. 52).
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> * * *
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> *"Suppose an article had been introduced into the constitution, empowering the United States to regulate*

the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the state governments? The violation of principle, in this case, would have required no comment; . . ." (No. 59).

* * *

"The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. *But this forms no part of the power to be conferred upon the national government.* Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. *The qualifications of the persons who may choose* or be chosen, as has been remarked upon another occasion, *are defined and fixed in the constitution; and are unalterable by the* [*National*] *legislature." (No. 60).* (Italics supplied).

Clearly, the prescription of racially nondiscriminatory qualifications upon the right to vote is the exercise of a power vested in each State by the Constitution of the United States. If this power rests with the States under the Constitution—as is unarguably true—then its exercise may not be interdicted by the Congress or any department of the Federal government, under the Fifteenth Amendment or any other provision of the Constitution. If the *constitutional* powers of the States could be thus manipulated out of existence by the *legislative* action of Congress, the guarantees of our Constitution are illusory indeed.

C. The Voting Rights Act of 1965.

Against the background of the legislative history of the Fifteenth Amendment and the judicial exposition of that amendment reviewed in Section A and Section B, respective-

ly, of this portion of our brief, counsel for the Commonwealth submit that the Voting Rights Act of 1965 manifestly exceeds the authority conferred upon Congress by the Fifteenth Amendment and clearly encroaches upon the powers reserved to the States to regulate the right of suffrage by prescribing racially nondiscriminatory qualifications as a precondition of the right to vote. In its direct operation and effect, the Act suspends the racially nondiscriminatory requirement of Section 20 of the Constitution of Virginia that every citizen of the Commonwealth who wishes to exercise the elective franchise must register to vote in his own handwriting. The ultimate result of the operation of the Act is to compel Virginia to engage in *the indiscriminate registration of illiterates* and to afford illiterates as a class, whether of the white or the colored race, the right to vote in all elections.

Within narrow compass, the Act would clearly be unconstitutional upon the authority of the *Reese* and *Harris* cases alone. As this Court stated in the latter case, the "sole object" of the Fifteenth Amendment was "to protect from denial or abridgement . . . *on account of race, color, or previous condition of servitude,* the right of citizens of the United States to vote." *United States* v. *Harris, supra,* at 637. (Emphasis supplied). At the same time the Court pointed out that it had invalidated §§ 3 and 4 of the Enforcement Act of 1870 in the *Reese* case because those provisions were so "broad" that they punished not only those "who hindered and delayed the franchised *colored* citizen from voting, on account of his race, color or previous condition of servitude, but also those who hindered or delayed the free *white* citizen." *Id.* at 637. (Emphasis supplied). Thus, to the extent that Congressional legislation predicated upon the Fifteenth Amendment has the effect of enfranchising the citizens of a State without regard to their race,

or protecting the right of citizens to vote from any discriminaion other than race, such legislation transcends the limitations of the Fifteenth Amendment. How can it possibly be intimated that legislation which has the inescapable effect of affirmatively enfranchising illiterates of the *white* race constitutes "appropriate" legislation under a constitutional provision "whose sole object" was to prevent the disenfranchisement of *colored* citizens *because of their race?* To the extent that the Act requires Virginia to register illiterates of the white race, it obviously collides with the rationale of the *Reese* and *Harris* decisions and is invalid.

In broader compass, the Act is unconstitutional to the extent that it abolishes the racially nondiscrimination literacy requirements of any State and mandates the enfranchisement of illiterates generally. No one suggests that Congress has been delegated the authority to protect citizens of the United States from discrimination in the exercise of the right to vote upon the ground of literacy. On the contrary, the right of a State to limit its electorate upon this ground has been expressly confirmed in the *Guinn* and *Lassiter* cases. In the latter case, this Court pointed out that a literacy test may be unconstitutional on its face, or that a literacy test—fair on its face—may be employed to achieve the racial discrimination condemned by the Fifteenth Amendment. However, with respect to the literacy test of North Carolina there under consideration, the Court observed (360 U. S. at 53-54):

> "The present requirement, *applicable to members of all races,* is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person be literate, not a calculated scheme to lay springes for the citizen." (Italics supplied).

Just such a situation exists in the Commonwealth of Virginia. Under Virginia law, a prospective voter is required to fill out in his own handwriting a form indicating the applicant's age, date and place of birth, residence and occupation at the time of registration and for one year next preceding, whether or not he has previously voted, and if so, the State, county and precinct in which he last voted. These requirements are not only reasonable but are utterly devoid of any racial connotation whatever, and their imposition neither denies nor abridges anyone's right to vote because of race or color. Under the Constitution of the United States, Virginia has the power to impose these nondiscriminatory voter qualifications upon its citizens, and the Congress has no authority whatever to suspend them or vary these requirements in the slightest degree.

Let us attempt to clarify the position of the Commonwealth on this point and emphasize its validity by reference to an analogy with which, we venture to suggest, no one will disagree. Section 2 of the Fourteenth Amendment authorizes Congress to reduce the basis of representation of States in the House of Representatives whenever the right to vote in a State is denied or abridged except upon stated grounds. By contrast, the right of a State to equal representation in the Senate of the United States by two Senators, each of whom shall have one vote, is a right guaranteed to each State without qualification by Article V of the Constitution. If the Congress of the United States—purporting to act under the Fifteenth Amendment—should enact a law diminishing Senate representation in those States in which the right to vote has been denied or abridged upon the ground of race, would such a law be constitutional? Manifestly not, and we do not believe that anyone would have the temerity to suggest that it would be. In enacting appropriate legislation under the Fifteenth

Amendment, it simply does not lie within the power of Congress to violate other provisions of the Federal Constitution which expressly guarantee certain rights to, and confer certain powers upon, the States or other independent coordinate branches of the Federal government. *Yet the right to prescribe racially nondiscriminatory voting qualifications is one no less vested in the States by the Federal Constitution than the right to equal representation in the Senate. If the latter right of the States cannot be infringed by Congress under the Fifteenth Amendment, the former right equally cannot be.*

Other analogies readily lend themselves to the support of Virginia's position in the case at bar. The Fourteenth Amendment prohibits a State from excluding its citizens from jury service upon the ground of race or color, and Congress is empowered to enforce the guarantees of the Fourteenth Amendment by appropriate legislation. If it should be conclusively established to the satisfaction of Congress, and the world at large, that a particular State was, in fact, so discriminating, would it lie within the power of Congress to suspend the right of trial by jury in such State under the guise of enforcing the guarantees of the Fourteenth Amendment? Similarly, if it should be conclusively established to the satisfaction of Congress, and the world at large, that a State was altering the boundaries of its political subdivisions along racial lines for the purpose, and with the effect, of infringing the right of the colored citizens of such subdivisions to vote—as, indeed, it was established to the satisfaction of this Court in *Gomillion* v. *Lightfoot,* 364 U. S. 339—would it lie within the power of Congress to suspend by statute the right of that State to alter the boundaries of its political subdivisions under any circumstances? It needs no argument to demon-

strate that the powers of Congress are not so sweeping and unlimited.

With respect to the considerations which determine the propriety of Congressional action under the powers delegated to that body by the United States Constitution, the recent decision of this Court in *Aptheker* v. *Secretary of State,* 378 U. S. 500, is highly relevant to, and consistent with, the contentions made by Virginia in the instant litigation. In that case, the Court invalidated Section 6 of the Subversive Activities Control Act of 1950 which forbade members of certain Communist organizations from making application for, or using, or attempting to use a passport issued under the authority of the United States. Enunciating the principles governing judicial consideration of the exercise of Congressional power there in question, this Court declared (378 U. S. at 508, 509, 512, 514):

> "It is a familiar and basic principle, recently reaffirmed in NAACP v. Alabama, 377 US 288, 307, 12 L ed 2d 325, 338, 84 S Ct 1302, that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation *may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.*'
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> * * *
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> "In applying this principle the Court in NAACP v. Alabama, supra, referred to the criteria enunciated in Shelton v. Tucker, supra, 364 US at 488, 5 L ed 2d at 237:
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> > " 'Even though the governmental purpose be legitimate and substantial, *that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.* The breadth of legislative abridgment must be viewed in the light of less

drastic means for achieving the same basic purpose.'

* * *

"At the same time the Constitution requires that the powers of government *'must be so exercised as not,* in attaining a permissible end, *unduly to infringe' a constitutionally protected freedom.*

* * *

"In determining the constitutionality of § 6, *it is also important to consider that Congress has within its power 'less drastic' means of achieving the congressional objective* of safeguarding our national security.

* * *

"In our view the foregoing considerations compel the conclusion that § 6 of the Control Act is unconstitutional on its face. The section, judged by its plain import and by the substantive evil which Congress sought to control, *sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. . . . The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil,'* cf. Cantwell v. Connecticut, 310 US at 307, 84 L ed at 1219, yet here, *as elsewhere,* precision must be the touchstone of legislation so affecting basic freedoms." (Italics supplied).

See also, *Griswold* v. *Connecticut,* 381 U. S. 479; *NAACP* v. *Button,* 371 U. S. 415.

Surely, no one will suggest that judicial protection of the constitutional powers of the States from unwarranted encroachment by the Federal government is a matter of less concern to this Court than the protection of the constitutional rights of citizens from such encroachment. Nor can it be contended that the criteria for testing the validity of Congressional action which affects State powers are less severe or apply less stringently than those which determine the propriety of Congressional action touching personal liberties. Thus, a constitutional purpose to enforce the pro-

visions of the Fifteenth Amendment may not be achieved by enactments "which sweep unnecessarily broadly and thereby invade" an area constitutionally reserved exclusively for State regulation; nor may such Congressional purpose "be pursued by means that broadly stifle fundamental" State powers "when the end can be more narrowly achieved." *Aptheker* v. *Secretary of State, supra,* at 508. Moreover, in determining the constitutionality of Congressional action to enforce the Fifteenth Amendment, it is important to consider whether "Congress has within its power 'less drastic' means of achieving" its objective. *Id.* at 512.

Tested in the light of these principles, the Voting Rights Act of 1965 falls to the ground on all counts. Congressional legislation which openly and admittedly suspends the power of the States to prescribe racially nondiscriminatory voting qualifications obviously sweeps "too widely and too indiscriminantly" across the powers constitutionally reserved to the States. *Id.* at 514. Moreover, that Congress has within its power "less drastic means" of achieving its purpose is too apparent to be questioned. In the *Aptheker* case, this Court made reference to a "Message from the President—Issuance of Passports" as indicating the view of the Executive Branch of the government that our national security could be protected by means "more discriminately tailored" to the constitutional liberties of individuals. *Id.* at 514. One has only to read the Minority Report of the Committee on the Judiciary accompanying H. R. 6400 (which bill became, in substance, the Voting Rights Act of 1965) to see clearly one of the available means for enforcing the Fifteenth Amendment which is "more discriminately tailored" to the constitutionally protected powers of the States with respect to the establishment of racially nondiscriminatory voting qualifications.

Enactment of legislation which would effectively enforce the guarantees of the Fifteenth Amendment without im-

permissibly trespassing upon the reserved powers of the States involves no exercise in legislative legerdemain. In its simplest form, such a statute need only provide that when a specified number of citizens allege in a Federal district court that they have been denied the right to register to vote because of their race or color, and that State officials have not taken prompt steps to remedy this situation, the district court shall hear the matter as expeditiously as possible. If the district court finds that the allegations of the complaint are supported by evidence, it may appoint an examiner to receive the application of the complainant—and others similarly situated—and review the acceptability of such person under qualifications upon the right to vote imposed by State law. If the court appointed examiner finds any such person qualified to vote under State law, he shall transmit the name of such person to the appropriate State official, who shall place such name upon the voting rolls, and such person shall thereafter be permitted to vote. Additional provisions for review of the Federal examiner's decision could be made, with the right to vote protected during the pendency of review. A statute enacted within this framework would effectively enforce the provisions of the Fifteenth Amendment and still leave intact the constitutional power of the States to prescribe voting qualifications.

Surely, in light of these and other options available to it, Congress possessed less drastic means of achieving its purpose in this instance. Equally manifest is it that—in an area where "precision must be the touchstone" of legislation affecting so fundamental a power of the States—the Act in question is not a regulation "narrowly drawn to prevent the supposed evil. . . ." *Id.* at 514. On the contrary, the Act uproots the most fundamental power of the States in this field and, in effect, repeals the relevant provisions of Article 1, Section 2, and the Tenth and Seventeenth Amendments to the Constitution of the United States.

CONCLUSION

On March 29, 1965, the Attorney General of Virginia testified before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives of the United States in opposition to H. R. 6400 which, in substance, became the Voting Rights Act of 1965. On that occasion, he began his testimony with the statement that the proposed bill was:

> ". . . among the most dangerous pieces of legislation ever offered in the Congress of the United States. I make this statement advisedly, for I earnestly believe it goes further than any step yet attempted to erode the basic concepts of constitutional government in which the individual States are acknowledged to be sovereign. The legislation is not only patently unconstitutional, but it is shockingly discriminatory."

Consistent with this statement, counsel for the Commonwealth of Virginia now submit that upon mature consideration and analysis it will be seen that the enactment of the Voting Rights Act of 1965 presents a deplorable example of Congress at its worst. Ambitious of result but reckless of means, Congress has enacted legislation which is utterly without constitutional foundation and destitute of judicial support. With respect to the definition of the right of suffrage—a subject everywhere regarded as fundamental to representative government and one over which the powers of the Nation and the States were precisely allocated by the Constitution—the Congress has now destroyed that balance of power by enacting a statute which "runs a plow-share through all the State Constitutions and overturns the most important State regulations that can be found." Appendix, p. 17. This "plow-share"—now legislative in character—is

precisely the implement which was repeatedly sought, *without success,* to be legally placed in the hands of Congress by constitutional amendment. That power which the framers of the Fifteenth Amendment and the ratifying States were unwilling to confer upon Congress is now attempted to be exercised by Congress without pretense of constitutional warrant.

Thus, the issues presented in this litigation reach far beyond and rise high above the mere validity or invalidity of Congressional action, for the legislation here under consideration involves the fundamental structure of the Union and seeks to undermine the very form of government under which we live. The importance of the maintenance of the framework of government established by the Constitution to the protection of individual liberty was recently made clear by Mr. Justice Harlan in his address dedicating the Bill of Rights Room in New York City on August 9, 1964, when he emphasized that the framers of the Constitution:

> ". . . staked their faith that liberty would prosper in the new Nation not primarily upon declarations of individual rights *but upon the kind of government the Union was to have.* And they determined that in *a government of divided powers* lay the best promise for realizing the free society it was their object to achieve." (Italics supplied).

Of course, on that occasion, Mr. Justice Harlan did not single out for consideration the right of suffrage and the division of powers between the Federal and State governments over this subject. But the power of the States to define the right of suffrage is a basic structural element of the governmental edifice erected by the Constitution and one indispensable to our federalism. Speaking of it, and of the inevitable results of any trespass upon it by the Congress,

Mr. Chief Justice White long ago declared in *Guinn* v. *United States,* 238 U. S. 347, 362, that the power was one:

> ". . . which has belonged to those governments from the beginning, and *without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground.* (Italics supplied).

Clearly, all history teaches what the decisions of this Court confirm—that the power of the States to regulate the right of suffrage and to prescribe racially nondiscriminatory qualifications for voting is original and independent, not derivative or subordinate. This power is not granted to the States by any law, but remains with the States where it has existed since the formation of the Union, and it has never been lodged anywhere else. If this power may be suspended by the Congress today under the guise of enforcing one provision of the Constitution, what other powers of the States may not also be suspended tomorrow upon a similar pretext? If the revolutionary assertion of Congressional authority embodied in the Voting Rights Act of 1965 should receive the sanction of this Court, the original landmarks of liberty in this land will have been irretrievably lost, and this Court will have placed its imprimatur upon a present day manifestation of that doctrine against which it warned a century ago in *Ex Parte Milligan,* 71 U. S. (4 Wall.) 2, 120, 121:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of

men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.*" (Italics supplied).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia, as *amicus curiae,* in the above-captioned matter, hereby certify that copies of the Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae,* have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first class postage prepaid, this 17th day of December, 1965, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Daniel R. McLeod, Esq., Attorney General of South Carolina, Wade Hampton Building, Columbia, South Carolina, and David W. Robinson, Esq. and David W. Robinson, II, Esq., Special Counsel, P. O. Box 1942, Columbia, South Carolina, counsel for plaintiff State of South Carolina; and upon Nicholas deB. Katzenbach, Esq., Attorney General of the United States, and Thurgood Marshall, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, defendant and counsel for defendant respectively.

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Assistant Attorney General