Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Orig

STATE OF OREGON, *Plaintiff,*

v.

JOHN N. MITCHELL, Attorney General of the United States, *Defenanda.*

No. 46, Orig.

UNITED STATES, *Plaintiff,*

v.

STATE OF ARIZONA, *Defendant.*

BRIEF OF YOUTH FRANCHISE COALITION, FIFTY INDIVIDUAL CITIZENS OF THE UNITED STATES OVER 18 YEARS OLD AND UNDER 21 YEARS OLD, AMERICANS FOR DEMOCRATIC ACTION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AMERICAN CIVIL LIBERTIES UNION, NATIONAL EDUCATION ASSOCIATION AND INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS, AMICUS CURIAE

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These amici curiae file this brief addressed only to the question of the validity of Title III of the Voting Rights Act Amendments of 1970, P. L. 91-285, 91st Congress, 1st Session.

[1]Names, addresses and birth dates of the individual amici are listed in attachment 1. They include at least one individual from each State (and the District of Columbia) in which 18 year old citizens have been denied the vote.

INTEREST OF AMICI

Amici are vitally interested in upholding the validity of Title III. The 50 individual amici are directly and personally interested—it is their right to vote which is at stake. Yough Franchise Coalition was the vehicle by which 13 organizations representing or interested in youth mounted the effort which resulted in the enactment of Title III, and its role was specifically recognized in the Congress. 115 Cong. Rec. H. 763, 764, 766, 767 (February 5, 1969, daily ed.). The Americans for Democratic Action, the National Association for the Advancement of Colored People, the American Civil Liberties Union, the National Education Association, and the International Union, United Automobile Workers, have long favored the concept of 18-year old voting and were active in support of the enactment of Title III. In addition to their dedication to the broadest possible exercise of the electoral franchise, these five organizations are specially interested, at this critical juncture in the nation's development, in bringing our young people into ever-increasing participation in political life. The lowering of the voting age to 18 is a major step towards strengthening democratic processes against the tensions that lie ahead.

JURISDICTION

The original jurisdiction of this Court is invoked under Article III of the Constitution and 28 U.S.C. § 1251(b)(2) and (3).

CONSTITUTIONAL PROVISION

AMENDMENT XIV

Section 1

. . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 5

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

STATUTE

P. L. 91-285

Title III—Reducing Voting Age to Eighteen in Federal, State, and Local Elections

Declaration and Findings

Sec. 301.(a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteeen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling state interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

Prohibition

Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or

in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

Enforcement

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

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, 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 any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

QUESTION PRESENTED

Does section 5 of the Fourteenth Amendment empower Congress to remedy invidious discrimination against and unjustified unequal treatment of citizens of the United States between 18 and 21 years of age by prohibiting States to deny to such citizens the right to vote?

STATEMENT OF THE CASE

On June 22, 1970, Congress enacted the Voting Rights Act amendments of 1970. Title III of the act prohibits the State to deny the vote to citizens 18 years of age. These cases present the question, *inter alia*, whether title III is

constitutionally valid. Texas and Oregon seek to enjoin the Attorney General from enforcing the Act. The United States seeks to compel Arizona and Idaho to obey the Act. The case is here within this court's original jurisdiction. There is no record.

SUMMARY OF ARGUMENT

I

Congress made findings that denial of the vote to 18 year old citizens was an invidious discrimination and in violation of the equal protection clause. These findings were based on volumimous evidence in hearings and debate. The evidence presented showed that citizens of 18 were now as mature and as capable of exercising the vote intelligently as are citizens of 21; that citizens of 18 have most of the other legal rights and responsibilities of citizens of 21; and that the right to vote was necessary to enable them to prevent discrimination against them in other respects.

II

Section 5 of the Fourteenth Amendment gave Congress the power to enforce equal protection by statute. That grant of power extends to the qualifications of voters and overrides contrary state legislation.

III

Title III is valid under the test of *Katzenbach v. Morgan,* 384 U.S. 641 (1966), that the Court need only perceive a basis for congressional action under Section 5. It also is valid under the test proposed by the dissent in *Morgan*, that such action is valid only if the Congress' findings are based on a record of legislative facts.

IV

Wise constitutional policy supports the Congressional role in enforcement of the Fourteenth Amendment. Such Congressional action eases the burden on the courts.

ARGUMENT

I. LEGISLATIVE HISTORY OF TITLE III OF THE VOTING RIGHTS ACT AMENDMENTS OF 1969

In enacting Title III the Congress made specific findings:

- –that denial of the vote to citizens 18 years old "denies and abridges . . . inherent constitutional rights . . .–a particularly unfair treatment of such citizens . . . ." P. L. 91-285, § 301(a)(1);
- –that denial of the vote to citizens 18 years old denies them "due process and equal protection of the laws . . ." *id.*, § 301(a)(2);
- –that denial of the vote to citizens 18 years old "does not bear a reasonable relationship to any compelling State interest." *id.*, § 301(a)(3);
- –that in order to secure the constitutional rights thus denied, "it is necessary to prohibit the denial of the vote to citizens" 18 years old.

In the following discussion we show the legislative background and history behind these findings.

1. Background: 1942-1970

The proposal to extend the franchise to citizens between the ages of 18 and 21 has a long history in Congress. In 1942, Senator Arthur Vandenberg introduced S. J. Res. 166, a constitutional amendment to lower the voting age to 18. 88 Cong. Rec. 8316 (1942); see "Lowering the Voting Age to 18", *Hearings before the Subcommittee on Constitutional Amendments*, Committee on the Judiciary, United States Senate, on S. J. Res. 8, 14, and 78 (May 14, 15, 16, 1968) (hereafter *Hearings, 1968*) at 79. A similar proposal was

offered in the House at the same time. H.J. Res. 352, 88 Cong. Rec. 8312 (1942) and the House Judiciary Committee held hearings in 1943, "Lowering the Voting Age to 18", *Hearings before the Committee on the Judiciary,* United States House of Representatives, on H.J. Res. 8 (1943). The Senate considered and voted on another such amendment in 1954. S.J. Res. 53, 100 Cong. Rec. 6911 (1954).

Senator Jennings Randolph of West Virginia, then a member of the House of Representatives, introduced a constitutional amendment to lower the voting age in 1942. 88 Cong. Rec. 8507 (1942). In 1969, as a Senator, he offered another, S.J. Res. 147; *see*, statement of Senator Randolph, 116 Cong. Rec. S.2940 (March 4, 1970, daily ed.). Senator Richard Schweiker introduced a similar amendment that same year, S.J. Res. 73, 115 Cong. Rec. S.2511 (March 10, 1969, daily ed.) and *Hearings, 1968* at 84. More than 71 Senators joined Senator Randolph as co-sponsors of his resolution. *See*, 116 Cong. Rec. S.3517 (March 11, 1970, daily ed.).

Congressman Howard of New Jersey introduced a proposed constitutional amendment, H.J. Res. 18, in January 1969. *See*, 115 Cong. Rec. H.763 (February 5, 1969, daily ed.). He reviewed the facts:

- –that 18-year-olds marry
- –that 18-year-olds are prosecuted as adults in criminal court
- –that 18-year-olds make binding contracts
- –that 18-year-olds make valid wills
- –that 18-year-olds drive cars
- –that 18-year-olds own guns
- –that 18-year-olds hold jobs
- –that 18-year-olds pay taxes
- –that 18-year-olds are drafted into the armed forces
- –that 18-year-olds "are carrying out our country's policies, but have no voice in choosing those who make those policies." 115 Cong. Rec. H.764 (February 15, 1969, daily ed.).

Other Congressmen echoed Mr. Howard. 115 Cong. Rec. at 765-69. Presidents Dwight Eisenhower in 1954, John F. Kennedy in 1962, Lyndon B. Johnson in 1968, and Richard M. Nixon in 1970, expressed the opinion that a democratic nation could not in good faith continue to deny the vote to citizens between the ages of 18 and 21.[2]

The Senate Subcommittee on Constitutional Amendments (the Bayh Committee) held exhaustive hearings in 1968, *Hearings, 1968,* and 1970. "Lowering the Voting Age to 18", *Hearings before the Subcommittee on Constitutional Amendments, Committee on the Judiciary, United States Senate*, on S.J. Res. 147 and others (February 16, 17, and March 9, 10, 1970) (hereafter *Hearings, 1970*). The hearings focused on the responsibilities assumed by citizens between the ages of 18 and 21, their maturity and education, and the resulting injustice in denying them the franchise.

In 1968, the Bayh Committee heard from 49 witnesses, including 21 Senators, two Congressmen, 12 Governors, and the Vice President of the United States. With few exceptions, they supported extension of the vote to 18- to 21-year-old citizens.

Numerous witnesses referred to familar responsibilities of 18-year-olds–tax liability, treatment as adults for civil and criminal matters, service in the armed forces; to their familiar rights—to marry, to drive cars, to own guns, and to their education and maturity. In view of these legal rights and responsibilities, denial of the vote was, by clear implication, discriminatory. *See*, e.g., statements of Dennis Brinkmeyer, Chairman, State Conference of Committees to Lower Indiana's Voting Age, *Hearings, 1968* at 88; Roy Elson, Administrative Assistant to Senator Carl Hayden, *id.* at 72; Senator Vance Hartke, *id.* at 4; Senator Jacob Javits, *id.* at

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[2]Kennedy: see, *Hearings, 1968* at 80. Eisenhower: *Public Papers of the Presidents 1954, Dwight D. Eisenhower*, 22 (1954); Johnson: *Public Papers of the Presidents 1968, Lyndon B. Johnson*, 669, 751-53 (1968); Nixon: *Hearings, 1970* at 129-130.

12; Donald Lass, Chairman, National and State Committee for the 18-Year-Old Vote, *id.* at 85; Jack McDonald, Chairman, the Young Republican National Federation, *id.* at 43-44; Senator Mike Mansfield, *id.* at 4-6; Spencer Oliver, President, Young Democratic Clubs of America, *id.* at 21; Senator Jennings Randolph, *id.* at 62; Senator Joseph Tydings, *id.* at 9; Senator Ralph Yarborough, *id.* at 68-69; Senator Alan Bible, *id.* at 24; Governor Kenneth Curtis of Maine, *id.* at 101; Senator Peter Dominick, *id.* at 102; Senator Clifford Hansen, *id.* at 26; Senator Mark O. Hatfield, *id.* at 105; Governor Richard Hughes of New Jersey, *id.* at 106; Senator Gale McGee, *id.* at 107; Senator William Proxmire, *id.* at 38; Representative William St. Onge, *id.* at 108; Senator Stuart Symington, *id.* at 110.

Witnesses repeatedly stated that the age of 21 had come to have little relation to the age at which individuals assume the obligations of citizenship and that it was an anachronism to continue the age of 21 as the minimum voting age. Senator Mansfield, for instance, observed that:

> the age of 21 is not simply the automatic chronological door to the sound judgment and wisdom that is needed to exercise the franchise of the ballot, or for that matter, to assume any other responsibility. Indeed, it is the age of 18 that has long been regarded as the age when young people 'try it on their own' and become responsible for themselves and for others. *Hearings, 1968* at 4, 5.

These judgments were supported by statistics.

> As of September 1966, there were 12 million Americans who were 18, 19 or 20 years of age. Of these, 47 percent were degree candidates enrolled in colleges across our Nation; 6 percent of this number were serving in the armed services. The majority, 60 percent, with some overlap in the colleges, were working full-time and 12 percent were unemployed according to the U.S. Department of Labor. Amazing as it may seem, less than 4 percent of these American citizens had the right to vote . . *Hearings, 1968* at 21, statement of R. Spencer Oliver.

It was shown that citizens of 18 are as capable as citizens of 21 to exercise the vote intelligently.

> . . . [A]t no other time are the young so keenly interested and informed on political issues and political candidates. Educational psychologiests have urged that the ability to grasp new ideas reaches its peak at the age of 18, and then it proceeds on a plateau. This, of course, does not mean that wisdom does not increase throughout life—it does. But the capacity to grasp new ideas and developments readily in this so rapidly changing world was never more essential . . . . Without the wisdom of age, government would be chaotic and without the vision of youth, government would be stagnant. Not as a gesture but as a right, I urge the passage of Senate Joint Resolution 8. *Hearings, 1968* at 38, 39, statement of Senator William Proxmire.

The experience of the states that had lowered the voting age showed that no harm resulted. In the words of the Mayor of Fairbanks, Alaska, "18-year-old voting in the State of Alaska is something that we are proud of." Statements of Henry A. Boucher, Mayor, Fairbanks, Alaska; Edward A. Mendes, City Attorney; Harry J. Porter, Councilman; and Conrad Frank, Engineer, *Hearings, 1968* at 52-59. See also Statements of Senator Birch Bayh, *id.* at 3; R. Spencer Oliver, *id.* at 20, 22; Senator Howard Cannon, *id.* at 40; Jack McDonald, *id.* at 44; Paul McMillan, *id.* at 81.

Again in the 1970 hearings many witnesses testified to the legal rights and legal obligations of citizens of 18, which make denial of the vote an unjustified discrimination. *See*, e.g., statements of Senator Jennings Randolph, *Hearings, 1970* at 5; Theodore E. Sorenson, *id.* at 15-16; Dr. Walter Menninger, *id.* at 22; Dr. S. I. Hayakawa, *id.* at 36; Deputy Attorney General Richard Kleindienst, *id*, at 78-79; John Lumley, National Education Association, *id.* at 93; former Attorney General Ramsey Clark, *id.* at 102-103; Private Gerald Springer, *id.* at 111; Representative Allard K. Lowenstein, *id.* at 114-115; Carl J. Megel, Director of Legislation,

American Federation of Teachers, *id.* at 125-126; Senator Barry Goldwater, *id.* at 131-134; Philomena Queen, National Association for the Advancement of Colored People, *id.* at 152-153; Senator Edward M. Kennedy, *id.* at 156-158; Dr. Margaret Mead, *id.* at 223.

Witnesses repeatedly referred to the icnreased maturity and educational attainments of 18-year-old citizens in comparison with earlier times. Only 15 percent of the nation's 18-year-olds had a high school diploma in 1940; in 1969, the figure was approximately 80 percent. Senator Marlow Cook, *Hearings, 1970* at 128. Senator Hruska quoted President Nixon:

> The younger generation today is better educated, it knows more about politics, more about the world than many of the older people. This is why I want them to vote, not because they are old enough to fight but because they are smart enough to vote. *Hearings, 1970* at 83.

Deputy Attorney General Kleindienst stated:

> America's 10 million young people between the ages of 18 and 21 are better equipped today than ever in the past to be entrusted with all of the responsibilities and privileges of citizenship. Their well-informed intelligence, enthusiastic interest, and desire to participate in public affairs at all levels exemplify the highest qualities of mature citizenship. *Hearings, 1970* at 78.

Margaret Mead, the famed anthropologist, testified "that in the last 100 years the age of physical maturity has been dropping over three years." *Hearings, 1970* at 223.

Many witnesses testified that grant of the vote was necessary to remedy discrimination against the nation's youth. *See*, e.g., statements of Senator Goldwater, *Hearings, 1970* at 133; Senator Kennedy, *id.* at 157; and comments by Senator Cook, *id.* at 245, 246. Ramsey Clark's statement was typical:

> Elemental fairness dictates inclusion of eighteen year olds and above in the system . . . . Sixty per cent within the age group find some employment. Their income is taxed at the same rates as their grandfathers with the same income. The young have no wealth unless it was given to them. College or trade school is expensive. So are food and clothing, an old apartment, a car, and babies . . . . We permit them to marry, and over one million have . . . . We hold them responsible for crime if they were adults and some now wait on death row to see whether this Nation still takes human life in the name of justice. We emancipate them to contract and hold them liable for their debts. We trust them to drive automobiles that kill tens of thousands annually and hold them liable for their negligence, and to own and possess guns which vastly increase the climate of violence of America . . . . Twenty-nine per cent of our war dead are under 21 years of age. Twelve thousand young men sent into deadly combat gave their lives but were never permitted to participate in the only democratic process by which we determine whether any shall go . . . . Can we deny that young people in our society reaching 18 years of age today have been subjected to more interpersonal relationships, experienced a greater and more difficult range of social pressures, been more alone in making more critical personal decisions, been drilled more relentlessly in educational processes and received more communications through mass population and advanced technology than the average American in a lifetime heretofore?
>
> These young men and women are the best educated generation to date . . . . [A] constant bombardment of TV, radio, newspapers, magazines and books make our young the most informed people in history and experienced beyond their age group in any other time. *Hearings, 1970* at 102-103.

Once again the experience of the four states that have lowered the voting age was relied upon. Deputy Attorney General Kleindienst said:

> The experiences of the four states which have voting age requirements lower than 21 make it clear that such a course may now be taken for the nation at large. Georgia in 1943 was the first state to permit 18-year-olds to vote; Kentucky followed in 1955. Alaska and Hawaii, upon their admission to the union, permitted 19 and 20-year-olds, respectively, to vote. Officials of these states agree that their experience with young voters has been constructive and positive. To my knowledge none of these states has any regrets about its policy; none has advocated that the minimum voting age be raised to age 21. *Hearings, 1970* at 79.

See also statement of Theodore Sorenson, *id.* at 17.

2. The Voting Rights Act Amendments–Title III

The matter of grant of the right to vote to 18 to 21 year old citizens by statute was broached by Senator Edward M. Kennedy at hearings before the Senate Subcommittee on Constitutional Rights on February 24, 1970. "Amendments to the Voting Rights Act of 1965", *Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate*, on S.818, 2456, 2507 and Title IV of S.2029 (July 9, 10, 11 and 30, 1969, February 18, 19, 24, 25 and 26, 1970) at 322-30 (cited as *Voting Rights Hearings*). At the hearings, Senator Kennedy submitted an exhaustive memorandum on lowering the voting age to 18.

The memorandum argued that the higher educational achievement of today's youth, together with their deep involvement in public issues and their increased service to the nation through agencies such as the Peace Corps and VISTA, made 18- to 21-year-olds much more mature than previous generations and equipped to accept the responsibility of the vote. Lowering the voting age would "encourage civil responsibility" and "promote greater social involvement and political participation for our youth." *Voting Rights Hearings* at 323. On the other hand, denial of the vote at

18 made citizens uninterested in government. The memorandum referred to the 1963 report of President John F. Kennedy's Commission on Registration and Voting Participation:

> '[B]y the time they have turned 21 . . . many young people are so far removed from the stimulation of the educational process that their interest in public affairs has waned. Some may be lost as voters for the rest of their lives.' *Ibid.*

Moreover, "in many important respects and for many years, we have conferred far-reaching rights on our youth, comparable in substance and responsibility to the right to vote." *Ibid.* As examples, the 18-year-old can marry, pay taxes, be drafted into the armed forces, own a gun, and be criminally responsible for his conduct. Experience with voting by persons under 21—in Georgia, Kentucky, Alaska and Hawaii—"justifies its extension to the entire Nation." *Id.* at 324.

Therefore, the memorandum argued:

> Congress could reasonably find that the reduction of the voting age to 18 is necessary in order to eliminate a very real discrimination that exists against the Nation's youth in the public services they receive. By reducing the voting age to 18, we can enable young Americans to improve their social and political circumstances . . . . The many discriminations worked against millions of young Americans are . . . real . . . . We know, for example, that increasing numbers of Federal and State programs, especially in areas like education and manpower, are directed toward our youth. We can no longer discriminate against them by denying them a voice in the political process that shapes these programs. *Id.* at 327.

Hence, "Congress could reasonably find that the disenfranchisement of 18- to 21-year-olds constitutes on its face the sort of unfair treatment that outweighs any legitimate state interest in maintaining a higher age limit . . . ." *Ibid.*

3. Introduction of Title III: The Debates

On March 4, 1970, Senator Mansfield, with the co-sponsorship of eight other Senators, offered Amendment No. 545, to add a new Title III to the Voting Rights Act, granting the right to vote in Federal, state and local elections to citizens 18 years old. 116 Cong. Rec. S.2938 (March 4, 1970). Senator Mansfield relied on the Kennedy Memorandum as "an excellent factual basis upon which the Senate should proceed to give the franchise to our younger citizens" and "ample foundation" for the amendment. 116 Cong. Rec. S.3392 (March 10, 1970).

The amendment was exhaustively debated in the Senate and House. *See* 116 Cong. Rec. S.2938-40, 2968, 3001-02 (March 4, 1970);[3] S.3057-65, 3088 (March 5, 1970); S.3185-86, 3197 (March 6, 1970); S.3214-20, 3261 (March 9, 1970); S.3391-96, 3405, 3411-19 (March 10, 1970); S. 3474-3525, 3544-48, 3552-57 (March 11, 1970); S.3572-78, 3581-86 (March 12, 1970); S.3724-25 (March 13, 1970); H. 3977-84 (May 6, 1970); S.7277-85 (May 18, 1970); H.5639-79 (June 17, 1970). In the debates there was virtually no opposition to the 18-year-old vote on its merits. *Cf.* Senator Spessard Holland, 116 Cong. Rec. S.3186 (March 6, 1970). The day before the vote in the Senate, Senator Mansfield observed that "so far as I am aware, not a Member of this body, to my knowledge, has spoken during this floor debate against extending the voting franchise to those 18 and above." 116 Cong. Rec. S.3501 (March 11, 1970). The controversy centered around whether the vote should be granted by statute or by constitutional amendment. See part 4, *infra*.

Much of the Senate and House debate on the Mansfield Amendment delved into the role of youth in the nation's political and socio-economic structures and the denial of the vote as discrimination. The *Record* is replete with data con-

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[3] All 1970 references are to the daily edition of the Congressional Record.

cerning the responsibilities of youth. Senator Cook pointed out, for example, that almost 30 percent of the 3.5 million men in the armed forces are under 21, and that approximately 50 percent of those who died in Vietnam were under 21. 116 Cong. Rec. S.3214 (March 9, 1970). Senator Cook introduced into the Record the statement of Senator Goldwater submitted to the Bayh Committee Hearings. Senator Goldwater's position doubtless persuaded many conservative Members of Congress that denial of the vote to 18-year-olds is discriminatory. He said:

> . . . [T]here are . . . impressive arguments which demonstrate that eighteen-year-olds have reached maturity. Insurance companies hold a person to be an adult when he is eighteen. Eighteen-year-olds are treated as adult by penal codes. Eighteen-year-olds are allowed to obtain unrestricted automobile operator's licenses in every State. Young Americans can enter the Federal Civil Service at 18, be taxed at 18, and marry in any State at 18. Indeed, almost 50% of girls between 18 and 21 are married . . . . And yet they are not allowed to vote . . . . [T]his attitude is outmoded and archaic. It is literally based on a tradition which dates back to medieval times.
>
> Perhaps, in the days around the turn of the century, it once had meaning. In 1900 only 6% of Americans who had reached 18 were high school graduates. In fact, as late as 1940, only one-half of all 18-year-olds had completed high school.
>
> But this is 1970. This is the age of instant communications, all-news radio stations, T.V. news, and the most avid political concern on the part of young Americans that I have ever witnessed.
>
> Today fully 81% of Americans have graduated from high school before they reach 18. Almost 50% of 18-, 19- and 20-year-olds are enrolled in college. And the education which they are receiving is more advanced and intense than in any time in our history.
>
> In short, youth today is better informed and better equipped than any previous generation. They are

> without a doubt equally mature, both mentally and physically, as the average citizen who had reached 25 when I was growing up. In fact, they may be better able to comprehend the dramatic technological advances and changing perspectives of modern life than many of their parents.
>
> Therefore, I hold that there is no sensible reason for denying the vote to 18-year-olds. What's more, I think we have studied the issue long enough. The voting age should be lowered and lowered at once across the entire nation. 116 Cong. Rec. S.3216 (March 9, 1970).

Senator Goldwater's statement presents, in summary form, the evidence before Congress demonstrating that denial of the vote at age 18 is discrimination in violation of the equal protection clause: that at 18 they incur myriad legal responsibilities of citizenship; they acquire myriad legal rights of citizenship; and by maturity and education they are as qualified to vote as are persons 21 years of age. This evidence was referred to by Senator after Senator and Congressman after Congressman in the debates cited on p. 14, *supra.*

Thus persuaded, many Senators and Representatives explicitly stated that by lowering the voting age Congress could remedy unfair discrimination against the nation's youth. *See*, e.g., statements of Senator Warren Magnuson, 116 Cong. Rec. S.2939 (March 4, 1970); Senator Frank Moss, 116 Cong. Rec. S.3088 (March 5, 1970); Senator Marlow Cook, 116 Cong. Rec. S.3214 (March 9, 1970); Senator Edward Kennedy, 116 Cong. Rec. S.3478 (March 11, 1970); Senator Fred Harris, *id.* at S.3493; Senator Ralph Yarborough, *id.* at S.3496; Senator Gale McGee, *id.* at S.3496; Senator Vance Hartke, *id.* at S.3497; Senator Joseph Tydings, *id.* at S.3497-98; Senator Howard Cannon, *id.* at S.3499; Senator Stephen Young, *id.* at S.3499-3500; Senator Alan Bible, *id.* at S.3500-01; Senator William Fulbright, *id.* at S. 3506; Senator Birch Bayh, *id.* at S.3510; Senator Mike Mansfield, 116 Cong. Rec. S.3577 (March 12, 1970); Senator Walter Mondale, *id.* at S.3584; Senator Joseph Montoya, *id.* at S.3583; Representative William McCulloch, 116 Cong. Rec.

H.5643 (June 17, 1970); Representative Spark Matsuaga, *id.* at H.5639-40; Representative John Anderson, *id.* at H. 5643-44; Representative Abner Mikva, *id.* at H.5644; Representative Robert McClory, *id.* at H.5645; Representative Carl Albert, *id.* at H.5645; Representative Paul McCloskey, Jr., *id.* at H.5654; Representative Richard Ottinger, *id.* at H.5656; Representative Donald Edwards, *id. at* H.5660; Representative Bertram Podell, *id.* at H.5656, 5659; Representative Peter Rodino, *id.* at 5657; Representative Louis Stokes, *id.* at H.5661; Representative Melvin Price, *id.* at 5664; Representative John Tunney, *id.*, at H. 5667; Representative Howard Robinson, *id.* at H. 5671-72; Representative Charles Vanik. *id.* at H.5670; Representative John McCormack, *id.* at H.5675.

Senator Moss of Utah, for example, noted that a careful analysis of political conditions warranted the conclusion that persons between the ages of 18 and 21 had, in fact, been subject to discrimination. He then stated, "I believe that this discrimination against 18- to 21-year-olds is invidious and that Congress should so find." 116 Cong. Rec. S. 3088 (March 5, 1970). Senators Cook and Kennedy frequently referred to the discrimination issue during the debates. 116 Cong. Rec. S.3214 (March 9, 1970); 116 Cong. Rec. S.3478 (March 11, 1970); 116 Cong. Rec. S.3576 (March 12, 1970). Senator Yarborough of Texas observed that "we are demanding of young men and women from the age of 18 to 21 all the duties of citizenship, yet we deny them the most basic right—the right to vote." 116 Cong. Rec. S.3496 (March 11, 1970). Senator Mansfield commented that "the youngsters of today are being discriminated against just as women were until a few decades ago, just as the slaves were until a century ago." 116 Cong. Rec. S.3577 (March 12, 1970). Senator Montoya of New Mexico added, "I shall support that amendment (No. 545), and any other effort to rectify what I consider one of the great wrongs of our society." 116 Cong. Rec. S.3583 (March 12, 1970).

Congressmen such as Robert McClory of Illinois and Sherman Lloyd of Utah expressed the opinion that this legislation

could well mitigate, if not eliminate, the discrimination which had been practiced against youth. 116 Cong. Rec. H. 5645, 5665 (June 17, 1970). Many other Congressmen referred to the responsibilities conferred on youth and stated that it was unfair to expect youth to perform obligations of citizenship without allowing them the corollary rights of citizenship.

Representative Paul McCloskey, Jr. of California declared:

> If equal protection of the laws is to have any real meaning at this point in our history, it would seem reasonable to conclude that the obligation to fight and die in a war against people whom a man does not hate, in a cause in which he does not believe, justifies the protection of law that such a man and the loved ones of his age be entitled to vote for or against such cause. 116 Cong. Rec. H.5654 (June 17, 1970).

Congress was made particularly aware of the experience of the states that had lowered the voting age. This experience had shown nothing but benefits and none of the harms to the electoral process feared from immaturity. As Senator Cook stated:

> We have had the benefit of 14 years experience with responsible voter participation by this block. Contrary to the allegations of many of my conservative friends, there has not been any discernable pattern of voting behavior. In fact, it could be strongly contended that the growth of the Republican Party in Kentucky, generally considered to be the more conservative of the two parties, has directly paralleled the enfranchisement and increase in participation of this age group.
>
> Every major statewide candidate in recent memory has had a fulltime youth chairman whose sole function it was to seek out and secure the support of this block of roughly 100,000 potential voters. For those who attend a college in Kentucky, politics is a way of life. Some argue we should keep politics off the

> campuses. I agree to the extent that that means political interference by State officials or even Federal officials with academic and political freedom of thought and expression. I most emphatically do not agree if it means college people should not be allowed to vote and in a meaningful way support the candidates of their choice.
>
> Politics on the campus in Kentucky means that for a candidate to be credible he must appear and subject himself to the intelligence and insight of today's politically sagacious youth. Our bright young Kentuckians are a great force against the hypocritical handshaking, backslapping, baby kissers of the old school of politics. In fact, it could be argued very persuasively that their participation has significantly up-graded both the caliber and the campaigns of the Kentucky politician of today.
>
> In summary, the Kentucky experience has been a complete success, and I would venture a wager that one could not find 1 percent of Kentuckians, whether liberal or conservative, mountaineer or farmer, city dweller or tobacco grower, who would advocate raising the age. 116 Cong. Rec. S.3215 (March 9, 1970).

See also statements of Senator Cook, 116 Cong. Rec. S. 5657 (June 17, 1970), Representative Bill Burlison, *id.* at H.5668-69, and Representative Ken Hechler, *id.* at H.5647.

Finally, near the close of the debate, Speaker of the House John McCormack stepped down from his chair and made an unusual speech on the floor of the House. He implored his colleagues to support Title III: "We are not conferring citizenship, because they are citizens once they are born. The question is the assumption of the fullness of citizenship, to wit, the vote." 116 Cong. Rec. H.5675 (June 17, 1970).

Both Houses of Congress adopted Title III by overwhelming vote: the Senate by 64-17, 116 Cong. Rec. S.3585 (March 12, 1970), and the House by 272-132, 116 Cong. Rec. H.5679 (June 17, 1970).

4. The Question of Constitutionality

The constitutionality of Title III under the implementing clause of the 14th Amendment was given a great deal of consideration in the debates. Congress was aware of the legal issues involved, and was conscious of the arguments against its constitutional authority. Congress focused explicitly on whether Section 5 of the 14th Amendment was a sufficient grant of power to limit the power of the states to determine voting qualifications. Having fully considered these legal issues, Congress believed that its authority under the Constitution extended to the power to lower the voting age by statute.

Senator Ervin, a respected authority in the Senate on constitutional law, had argued that legislation to lower the voting age was inconsistent with the power delegated to the Congress by the Constitution. 116 Cong. Rec. S.2940, 3001-02 (March 4, 1970); S.3477 (March 11, 1970). Senator Ervin relied on four provisions of the Constitution: Article I, section 2; Article II, section 1; and the Tenth and Seventeenth Amendments.

Other authorities, like Congressman Celler, Chairman of the House Judiciary Committee, referred to these provisions as well. 116 Cong. Rec. H.2737 (April 27, 1970). Congressman Celler had reservations about the constitutionality of Title III, but nevertheless supported enactment.

President Nixon, in a letter to Speaker McCormack, referred to section 2 of the Fourteenth Amendment as authority for the age of 21 as refuting Congress' power to lower the voting age. H. R. Doc. No. 91-326 (91st Cong., 1st Sess.).

Most of the controversy centered on the conflicting opinions of legal scholars. The most prominent opponent of the statute was Louis Pollak, then dean of the Yale Law School. 116 Cong. Rec. S.3494 (March 11, 1970). Dean Pollak's arguments were cited frequently in the debates. Representative Clark MacGregor of Minnesota inserted in

the *Record* letters from eleven lawyers and law professors, expressing an opinion that Title III was unconstitutional. 116 Cong. Rec. H.5647-53 (June 17, 1970).

Proponents of Title III also relied on the opinions of scholars. *See*, e.g., letters from 18 lawyers and law professors addressed to and inserted in the *Record* by Senator Kennedy, 116 Cong. Rec. S.7277-7285 (May 18, 1970). The most prominent were professors Archibald Cox and Paul Freund of the Harvard Law School. Professor Cox argued that Congress has ample power under section 5 of the Fourteenth Amendment to lower the voting age, and that any reasonable finding by Congress in this matter was a sufficient basis to uphold its constitutionality under the reasoning of *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *Voting Rights Hearings* at 330; also 116 Cong. Rec. S.3062-3063 (March 5, 1970) and *id.* at S.3481 (March 11, 1970). Professor Cox's opinion was referred to frequently in both the Senate and House debates. *See*, e.g., statements of Senator Magnuson, 116 Cong. Rec. S.2939 (March 4, 1970); Senator Cook, 116 Cong. Rec. S.3215 (March 9, 1970); Senator Kennedy, 116 Cong. Rec. S.3478 (March 11, 1970); Senator Harris, *id.* at S.3493; Senator Fulbright, *id.* at S.3506; Senator Bayh, *id.* at S.3509; Representative Matsunaga, 116 Cong. Rec. H. 5640 (June 17, 1970); Representative McCulloch, *id.* at H. 5643; Representative Carl Albert, *id.* at H.5645; Representative Podell, *id.* at H.5659; Representative McCormack, *id.* at H.5675.

Professor Cox's view was supported by Professor Freund, 116 Cong. Rec. S.3060-62 (March 5, 1970). In response to a telegram from Senator Mansfield, Professor Freund outlined in greater detail the power of Congress to extend the franchise to 18-year-olds. 116 Cong. Rec. S.3502-03 (March 11, 1970). In particular, Professor Freund referred to the Supreme Court's decision in *Harper v. Virginia Board of Elections*, 388 U.S. 663 (1966), where, Professor Freund commented, even the dissenting justices agreed that any legislation designed to remedy discrimination violative of the

Equal Protection Clause was appropriate legislation under section 5.

In the final analysis, the persuasiveness of the proponents' legal arguments is suggested by Senator William Fulbright's statement shortly before the Senate vote on Title III:

> I have long favored lowering the voting age to 18, . . . I have, nevertheless, listened to the questions raised about whether it would be constitutionally correct for the Congress to enact a statute to this effect in view of the constitutionally based premise that voter qualifications shall be set by the several states. However, as this issue has been developing in the Senate, and especially with regard to the new amendment just offered,[4] I have been most impressed with the arguments made by such eminent legal authorities as Professors Freund and Cox, not to mention those made by the distinguished majority leader and the assistant majority leader. The reasoning supporting the amendment has been most eloquently expressed in the Chamber today and I need not elaborate upon it at this time. I am persuaded by these arguments and, accordingly, I shall vote for this amendment [No. 545]. 116 Cong. Rec. S.3506 (March 11, 1970).

To conclude—the findings the Congress made in § 301(a) of the Voting Rights Act Amendment are supported by a legislative record as full as that of any act of Congress declaring fundamental rights.

II. THE GOVERNING LEGAL PRINCIPLES

1. The Fourteenth Amendment forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." State power to prescribe voting qualifi-

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[4]The amendment was one offered by Senator Allen, adding to section 302 of Title III, "Except as required by the Constitution, . . ." 116 Cong. Rec. S. 3503 (March 11, 1970).

cations is limited by the equal protection clause; states may not constitutionally prescribe qualifications that are "not germane to one's ability to participate intelligently in the electoral process." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965).

2. The standards of equal protection are not static, but move with the times. ". . . the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality . . . . Notions of what constitutes equal treatment for the purposes of the equal protection clause *do* change." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966) (emphasis in original). Thus a classification that might have been lawful in 1870 may be unlawful in the changed circumstances of 1970.

3. Voting rights are fundamentally important; the right to vote is basic to participation in the political process, on which many other rights depend. It is the right that is "preservative of all rights." *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886). State voting classifications are therefore to be closely scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). States may exclude persons from voting only "to promote a compelling state interest." *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). This is a stricter standard than that applied to other state legislation. *Kramer v. Union Free School District, supra,* 395 U.S. at 627-28.

4. Section 5 of the Fourteenth Amendment provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This implementing section is virtually identical to section 2 of the Thirteenth Amendment and section 2 of the Fifteenth Amendment. By these sections "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in" the Amendments. *South Carolina v. Katzenbach,* 383 U.S.

301, 326 (1966) (referring to section 2 of the Fifteenth Amendment).

These sections were, then, a grant to Congress of new legislative power to intervene in matters theretofore confided exclusively to the states. "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibition by appropriate legislation." *Ex Parte Virginia*, 100 U.S. 339, 345 (1880). Moreover, wide latitude was granted to Congress to define violations of equal protection. "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view . . . is brought within the domain of Congressional power." *Ex Parte Virginia, supra*, 100 U.S. at 346. And "the extent to which Congress shall exercise this power must depend on its discretion in view of the circumstances of each case." *United States v. Hall*, 26 Fed. Cas. 79 (No. 15, 282) (C.C.S.D. Ala. 1871). "[A] majority of the members of [the Framing Congresses] believed that the equal protection clause . . . vested Congress at the very least with primary power to set aside unequal State laws . . . ." Harris, *The Quest for Equality* 53 (1960).

5. National legislation implementing the equal protection clause pursuant to this grant of power prevails even though it "may interfere with the full exercise and enjoyment of rights [a state] would have had if those powers had not thus been granted." *Ex Parte Virginia, supra,* 100 U.S. at 346-47. This principle applies to State legislation respecting voting, which may not conflict "with Congressional legislation enacted in the exercise of those powers [delegated to the National Government]." *Parker v. Brown,* 317 U.S. 341, 359-60 (1943), cited in *Smith v. Allwright,* 321 U.S. 656, 657 (1944).

III. *KATZENBACH v. MORGAN*

These principles were applied by the Supreme Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), to decide the constitutionality of section 4(e) of the Voting Rights Act of 1965. In section 4(e) Congress declared it "necessary" 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 . . . 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.

Section 4(e) goes on to provide that states may not deny the vote on the ground of illiteracy in English to any person who shows that he has successfully completed the sixth grade in a primary school accredited by the states or the Commonwealth of Puerto Rico in which the language of instruction was other than English.

1. In *Morgan* the Supreme Court upheld this enactment by a 7-2 majority as "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment . . . ." 384 U.S. at 646. The Court specifically rejected a contention that the power of Congress to act under section 5 was conditioned upon an independent determination of the judicial branch "that the enforcement of the state law precluded by Congress violated the Amendments . . . ." 384 U.S. at 648. Such an analysis, the Court asserted,

> would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment. 384 U.S. at 648-49.

The critical question in *Morgan*, therefore, was not whether the Court was itself prepared to strike down English literacy

tests as constitutionally invalid. It was whether section 4(e) was, within the meaning of section 5 of the Fourteenth Amendment, "appropriate legislation to enforce the Equal Protection Clause". 384 U.S. at 650. Looking to the decisions that followed enactment of the Amendment, *Ex Parte Virginia*, 100 U.S. 339 (1880), *Strauder v. West Virginia*, 100 U.S. 303 (1880) and *Virginia v. Rives*, 100 U.S. 313 (1880), the Court found that the criteria applied to decide this question were three: whether the statute was intended to enforce the guarantees of the Fourteenth Amendment; whether it was "plainly adapted" to that end; and whether it was consistent with other provisions of the Constitution. 384 U.S. at 650-51. The post-Civil War Court had derived these criteria from Chief Justice Marshall's construction of the necessary and proper clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1820):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. 384 U.S. at 650-51.

The only one of the three criteria that the Court analyzed at length in *Morgan* was the "plainly adapted" test. The proper approach to this test, in the Court's view, was for it to ask whether it could "perceive a basis upon which Congress might predicate a judgment" that a prohibition of English literacy tests would further the aims of the Equal Protection Clause. It was able to perceive two such bases: (a) the "enhanced political power [afforded by section 4 (3)] will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community . . . . It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal instrusion upon any state interests served by the English literacy requirement." 384 U.S. at 652-653; (b) on the other hand, section 4(e) may have been "merely legislation aimed at the elimination of an invidious discrimina-

tion in establishing voter qualifications." 384 U.S. at 653-54. On either hypothesis, section 4(e) had a rational basis and therefore was "plainly adapted" to furthering the aims of the equal protection clause.

2. Title III of the Voting Rights Act Amendments of 1970, reducing the voting age to eighteen in federal, state and local elections, is valid under the principles set forth by the Court in *Morgan*. Like Section 4(e) of the 1965 Voting Rights Act, Title III is "predicated" on an express congressional "judgment" that it is necessary, in order to protect Fourteenth Amendment rights, to enact a federal statute superseding and prohibiting certain state laws governing voting qualifications. As in *Morgan*, a court could perceive reasonable bases for Title III *either* in the desire of Congress to enhance the political power of persons of age 18 to 21 in order that such persons may gain nondiscriminatory treatment by government *or* in a congressional desire to cure an irrational discrimination in the right to vote itself. And like section 4(e), Title III is perfectly consistent "with the letter and spirit of the Constitution,"[5] for like section 4(e) it extends the franchise to persons who otherwise would be denied it by state law. 384 U.S. at 657.

[5]It has been suggested that Title III may be inconsistent with section 2 of the Fourteenth Amendment, which imposes a penalty of loss of congressional representation on states that deny the vote to persons "being twenty-one years of age." The argument is apparently that this section assumes that state laws may validly limit the vote the persons of age 21 or older. But section 2 is a very specific provision for a certain remedy for a particular evil. There is no reason to believe that the assumption made by the section is anything more than a reflection of the age test for voting that prevailed generally when the Fourteenth Amendment was proposed to the states for ratification. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669, p. 26, *supra*, demonstrates that the content of equal protection may change and that a classification valid at one point in time may not withstand scrutiny at another. In these circumstances, it is hard to see why Title III violates the "letter" of section 2. And since Title III of the 1970 Voting Rights Act is aimed like section 2 at protection of the franchise, it is even harder to see how the "spirit" of the section is violated by the statute.

3. Title III is also valid within the criteria argued for by the dissent in *Morgan*. The dissenting opinion, written by Mr. Justice Harlan with Mr. Justice Stewart concurring, argued that leaving aside section 4(e), state English literacy tests had to be considered "reasonably designed to serve a legitimate state interest". Such tests were therefore valid under the equal protection clause. 384 U.S. at 661. The dissent recognized that in *Morgan* "the pivotal question . . . is what effect the added factor of a congressional enactment has on the straight equal protection argument . . . ." 384 U.S. at 665, but disputed the majority's holding that "the test for judicial review of any congressional determination in this area", *id.* at 666, was whether the court could "perceive a basis" for the Congressional enactment. The test instead should be whether there had been an "infringement" of the Equal Protection Clause, and this "question is one for the judicial branch ultimately to determine." *Id.* at 667.

In making that determination, however, the dissent continued, the Court could not find the "legislative judgment" incorporated in the statute to be "without any force whatsoever." It was entitled to respect based upon what was in the record the Congress had made:

> Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect. 384 U.S. at 668.

In three recent cases, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); and *Katzenbach v. McClung*, 379 U.S. 294 (1964) the dissent noted, there had been legislative findings adequate to support congressional enactments pursuant to the Fifteenth Amendment and the commerce power, and the Court had deferred to such findings.

For section 4(e), however, there was "simply no legislative record supporting such hypothesized discrimination [suggested by the majority] of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns." 384 U.S. at 669. In the dissenters' view the congressional declaration on which section 4(e) was based, that it is "necessary" for the protection of constitutional rights to abolish state English literacy laws, was nothing more than "a legislative announcement" which was "unsupported by a legislative record" and hence "mere *ipse dixit*." 384 U.S. at 669, 679-71.

The dissenters recognized the "presumption of validity" to which all Acts of Congress, including section 4(e), are entitled. 384 U.S. at 670. But, they argued, the presumption alone was insufficient to overcome the "similar presumption" give to state statutes:

> At least in the area of primary state concern a state statute that passes constitutional muster under the judicial standard of rationality should not be permitted to be set at naught by a mere contrary congressional pronouncement unsupported by a legislative record justifying that conclusion.[6] 384 U.S. at 670-71.

The *Morgan* dissent recognizes that legislative facts compiled by the Congress in support of an enactment under the Fourteenth Amendment are "of course entitled to due respect" by the Court. 384 U.S. at 668. More significantly,

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[6]Justice Harlan's test for State legislation, that it not be "arbitrary or irrational", is no longer applicable in connection with state classifications fencing certain citizens out of the franchise. The test is now (see part II 3, *supra*) "whether the exclusions are necessary to promote a compelling state interest", *Kramer v. Union Free School District*, 395 U.S. 621, 627, 628 (1969). Whether the higher standard state enactments must now meet lowers the burden on Congress to marshal facts in order to support contrary legislation under section 5 of the Fourteenth Amendment, perhaps like a see-saw, is a refinement we need not pursue.

the dissent admits that the conclusion reached by Congress on the basis of such facts must be given "deference" and that the "congressional estimate . . . bearing upon the validity *vel non* of a statute", 384 U.S. at 669, gains in stature to the extent that a court is satisfied of the adequacy of the supporting record and the rationality of the specific conclusions reached on the basis of that record. If Congress has compiled a comprehensive record and drawn rational conclusions from the facts before it, the judiciary must defer to such conclusions. Thus the difference between majority and dissent in *Morgan* boils down to this: the dissent would require Congress to *have demonstrated*, while for the majority it is enough for the courts to *perceive*, a rational basis for congressional enactments.[7]

The dissent's approach would seem to be the same approach adopted by the Court earlier in *Katzenbach v. McClung*, 379 U.S. 294, 303-304, to test Congress' authority to reach discrimination by legislation under the commerce clause.

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have

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[7]On this analysis, there should be no special reason to fear the danger suggested in Justice Harlan's dissent of Congress "enacting statutes so as in effect to dilute equal protection and due process decisions of this Court." 384 U.S. at 668. First, it is for the courts to define the zone of reasonableness within which Congress may act. Second, the situation posited by Justice Harlan will be rare: Since Congress may act under section 5 of the Fourteenth Amendment only to enforce other provisions of the Amendment, a conflict with the judiciary will only arise when Congress claims that a particular classification is invalid. See *Developments in the Law–Equal Protection*, 80 Harv. L. Rev. 1065, 1075-76 (1969). Finally, the danger perceived by Justice Harlan is not limited to the area of the Fourteenth Amendment. The possibility of a similar problem arising under the commerce clause or the necessary and proper clause did not prevent the Supreme Court from deciding, e.g., *Katzenbach v. McClung, supra*.

> a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

The *McClung* approach accords with Justice Harlan's view that "it is a judicial question whether the condition with with Congress has . . . sought to deal is in truth an infringement of the Constitution . . . ." 384 U.S. at 666. It would only mean that in deciding that judicial question the courts must accept congressionally determined facts and defer to the presumption of validity that is given to a rational congressional conclusion based on such facts.[8]

5. There is ample basis in the legislative history of Title III of the Voting Rights Act Amendments of 1970 to satisfy the test of *McClung* and of the dissenters in *Morgan*. In part I, *supra*, we have set forth the exhaustive legislative record supporting the Congress' findings.

In that legislative record Congress had before it evidence that the requirement constitutes *invidious discrimination*

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[8]In this connection, the Supreme Court in *Morgan* could not avoid the choice between deferring to state legislatures and deferring to Congress, since a rational argument could be mustered either to support state English literacy tests or to find them objectionable. Alfange, Congressional Power and Constitutional Limitations, 18 J. Pub. L. 103, 126-27 (1969). As Alfange points out:

> [W]hile there is every reason why the Court should normally defer to a reasonable judgment of a state legislature, it is not clear why Congress must grant such deference also. The underlying basis for the judicial deference is that courts are not legislatures and must, therefore, allow legislative bodies wide scope for the establishment of public policy. Congress, however, is a legislature. It has been delegated unequivocal constitutional authority to enforce the demands of the fourteenth amendment. Surely in exercising this authority, it must have some freedom to decide what is a violation of that amendment and need not bow, as courts do, to every arguably rational conclusion of state legislatures.

Although Alfange makes the point in support of the Morgan majority, it would apply with even greater force if a court's standard of review allowed it to assure itself of the legislative process leading to "establishment of public policy."

because: (a) most important rights and obligations of citizenship devolve upon American citizens at age 18, not age 21; (b) today's citizens of age 18 to 21 are far more mature, educated, and politically interested than citizens of that age group have been in the past; (c) there is reason to believe that this increasing maturity and awareness of citizens of age 18 to 21 will continue in the future, given educational opportunities in the United States and the influence of our communications media; (d) there is no sound reason or compelling state interest, in light of the above factors, to discriminate between citizens of age 18 to 21 and citizens of age 21 and older; (e) the experience of those states that have taken the initiative to lower the voting age has produced no negative effects and disclosed no reason why the voting age should not be lowered throughout the country.

Further, Congress had before it facts showing that the *enhanced political power* that will be gained by citizens of age 18 to 21 if they are granted the right to vote will enable them to achieve nondiscriminatory treatment with respect to the numerous laws and programs that affect them directly: laws relating, for example, to the criminal responsibilities of such citizens, to their tax obligations, to their selective service responsibilities, and laws relating to their rights to marry, to drive automobiles, and to contract. In addition, the right to vote will enable citizens of age 18 to 21 to have a voice in the "increasing numbers of Federal and State programs, especially in areas like education and manpower (which) are directed toward . . . youth." See Memorandum of Senator Kennedy, Part I. 2, *supra.*

In light of such findings, the declaration of Congress that state laws limiting the vote to persons of age 21 and older must be abolished cannot be viewed as "mere *ipse dixit.*" The record shows the ample "legislative facts" on which Congress rested its conclusion. Compare *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *South Caro-*

lina v. Katzenbach, 383 U.S. 301 (1966); *United States v. Carolene Products Company*, 304 U.S. 144 (1938).[9]

CONCLUSION

This case ultimately presents the question whether the responsibility for making essential judgments regarding the interpretation of the Fourteenth Amendment should be borne exclusively by the judiciary, or should be shared with the national elected representatives of the people. Title III of the 1970 Voting Rights Act Amendments can only be stricken down on a finding that the power of the Congress under section 5 of the Fourteenth Amendment is merely a "power" to follow and embroider upon the determinations of courts and the even more trivial "power" of offering opinions which the judiciary is free to reject.

The statute can be upheld, on the other hand, on either of two grounds: the tests of *Morgan* that the judiciary must be able to "perceive a basis" for Congress's finding of a need to act to achieve equal protection of the laws; or the analysis of *McClung* and the *Morgan* dissent that the judgment of Congress, if it is supported by an adequate legislative record and is rationally derived from that record, obligates the judiciary to come to a similar conclusion. Both of these approaches recognize a role for Congress in determining the meaning of the Fourteenth Amendment. Neither, on the other hand, forecloses the judiciary from reviewing the action of the legislature and ultimately supervising Fourteenth Amendment adjudication.

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[9]Indeed, Congress has gone further—it has solicited and studied the views of the most eminent constitutional scholars in the United States with regard to the constitutional propriety of enacting Title III. See part I. 4, *supra*. From the standpoint of "legislative facts", a "legislative record" and "legislative conclusions", the task performed by Congress in considering this statute would seem to be a model of responsible legislative action.

One of the arguments offered to the Congress in support of Title III, by Professor Paul Freund, was that "[a]n Act of Congress would provide the court with a strong underpinning for a judgment of unreasonableness [of the 21-year-old requirement] . . . ." that such an act would constitute a "welcome service to the Court." Letter of June 4, 1970, to Representative Carl Albert. It would appear to be no service to the judiciary for the courts to turn away from the aid that has been offered by Congress in Title III of the 1970 Voting Rights Act and to claim a "monopoly of wisdom" in interpreting the command of the equal protection clause. *Kramer v. Union Free School District*, 395 U.S. 621, 638 (1969) (Stewart J., dissenting). As Justice Harlan declared in a different but related context "[t]hose who consider that continuing national respect for the [Supreme] Court's authority depends in large measure upon its wise exercise of self restraint and discipline in constitutional litigation, will view [such a] . . . decision with deep concern." *Baker v. Carr*, 369 U.S. 186, 340 (dissenting opinion).

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