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# CONGRESS' POWER TO ENHANCE THE CIVIL WAR AMENDMENTS\*

J. Terry Emerson\*\*

## Introduction

Seven years ago the Supreme Court began a fundamental reexamination of the power of Congress to expand upon the past interpretations of the Court defining what specific situations are covered by the thirteenth, fourteenth, and fifteenth amendments and what remedies Congress can use to enforce those amendments. This development has been accompanied by the related and growing trend of the Supreme Court to test the statutes and practices of state and local governments according to a much stricter standard of constitutionality generally known as the "compelling state interest" test.

Could the meteoric rise of the latter doctrine in the extensive field of equal protection and due process cases, combined with an expanded view of congressional power under the enforcement clauses of the above three Civil War amendments, engulf the very capacity of the states to govern themselves? It is the purpose of this article to test this fear against the actual trend of judicial and statutory developments and to suggest some guidelines by which the basic guarantees of the Civil War amendments can be effectively secured without danger of nullifying the separate political character of the states.

## I. Congress Acts, The Court Reacts

### A. *Prologue: Ex parte Virginia*

Though it was decided almost a century ago, the Supreme Court decision which enunciates the basic standard of judicial scrutiny called for in a modern case involving the enforcement powers of Congress under the Civil War amendments is *Ex parte Virginia*.<sup>1</sup> This landmark case, decided almost contemporaneously with the adoption of these amendments,<sup>2</sup> treats the specific question of whether an early congressional civil rights statute protecting the right of Negroes to serve as grand or petit jurors was warranted as appropriate legislation by the thirteenth and fourteenth amendments.<sup>3</sup> The Court held that the statute was

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1 100 U.S. 339 (1879).

2 The thirteenth amendment was certified by Secretary of State Seward on December 18, 1865, the fourteenth amendment was certified without reservation on July 28, 1868, and the fifteenth amendment was certified on March 30, 1870.

3 The statute provided that no citizen, otherwise qualified, shall be barred from service as grand or petit juror because of race, color, or previous condition of servitude. It imposed a penal sanction against any officer or person charged with any duty in the selection or summons of any citizen for such service who violated this mandate. 100 U.S. at 339.

indeed an appropriate exercise of Congress' enforcement power, saying that the Civil War amendments, "[w]ere intended to be, what they really are, limitations on the power of the states and enlargements of the power of Congress."<sup>4</sup> Redefining for purposes of the case the classic formulation by Chief Justice Marshall of the powers of Congress, as expressed in the necessary and proper clause of article I, § 8,<sup>5</sup> the Court described the reach of congressional power to enforce the Civil War amendments in broad terms:

Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.<sup>6</sup>

Either explicitly or implicitly, this analysis would prevail time and again throughout the Court's determination of a significant line of later cases initiated by the determined attack on racial discrimination which Congress launched in the 1960's.

### *B. Enforcing the Fifteenth Amendment*

One branch of the rule of *Ex parte Virginia* flows through a group of cases decided over the past decade which sustained an increasing breadth of federal legislation designed to deal with the fifteenth amendment's ban on discrimination in voting on grounds of race or color. The first pair of these cases<sup>7</sup> upheld a fledgling start in this field by Congress, which in a provision of the Civil Rights Act of 1957<sup>8</sup> had authorized the United States to obtain injunctions in the federal district courts against the continuation of discriminatory registration practices by state and local officials. Then, in *Hanah v. Larche*<sup>9</sup> the Court sustained the power of Congress in the same 1957 Act to create a Commission on Civil Rights to investigate alleged Negro voting deprivations.<sup>10</sup>

In *Alabama v. United States*,<sup>11</sup> the Court sustained the enactment by Congress of a totally new approach to its attack on racial discrimination with the Civil Rights Act of 1960.<sup>12</sup> The uniqueness of this law lay in its grant of authority to the United States Attorney General to apply for an order in a federal district court praying that the court should interpose itself in the state voter

<sup>4</sup> *Id.* at 345.

<sup>5</sup> 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. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>6</sup> 100 U.S. at 345-46.

<sup>7</sup> *United States v. Raines*, 362 U.S. 17 (1960); *United States v. Thomas*, 362 U.S. 58 (1960).

<sup>8</sup> Pub. L. 85-315, 71 Stat. 637 (Act of September 9, 1957), 42 U.S.C. §§ 1971 *et seq.* (1970).

<sup>9</sup> 363 U.S. 420 (1960).

<sup>10</sup> 42 U.S.C. § 1975 (1970).

<sup>11</sup> 371 U.S. 37 (1962).

<sup>12</sup> 42 U.S.C. §§ 1971 *et seq.* (1970).

qualification process by affirmatively ordering registration of Negro voters.<sup>13</sup> Three years later, in *United States v. Mississippi*,<sup>14</sup> the Court sustained the power of Congress by the same Act to authorize the Attorney General to file proceedings against a state for preventive relief in advance of actual discrimination so long as there are reasonable grounds for belief that any official is about to engage in any act or practice of racial discrimination in voting.<sup>15</sup> Moreover, this provision allows the Attorney General to prevent the application of state laws allegedly used as devices to keep Negroes from voting on account of their race.<sup>16</sup> The Court held that these provisions were passed by Congress under its authority to enforce the fifteenth amendment's guarantee "against any discrimination by a State, its laws, its customs, or its officials, in any way."<sup>17</sup> The Civil Rights Act of 1960 was again upheld in *Louisiana v. United States*,<sup>18</sup> where the Attorney General successfully brought an action striking down a state "citizenship" test which the Court found had been applied as part of a scheme to deprive Negroes of their voting rights.<sup>19</sup>

The landmark of recent fifteenth amendment cases is *South Carolina v. Katzenbach*.<sup>20</sup> Here the Court reviewed legislation more encompassing than any Congress had previously passed in the voting field—the Voting Rights Act of 1965.<sup>21</sup> Disappointed with the pace of human rights progress through individual court cases initiated by the Justice Department, Congress laid down a comprehensive formula applying new and broad remedies to entire states and political subdivisions. One remedy suspended all literacy tests and similar voting qualifications of covered states and localities for a period of five years.<sup>22</sup> A second suspended all new voting regulations pending advance review by federal authorities.<sup>23</sup> A third assigned federal examiners to assume the normally exclusive state function of listing qualified voters.<sup>24</sup> The Court rejected the argument that to allow Congress to so strike down state statutes and procedures would rob the judiciary of its rightful constitutional role. By adding section 2 of the fifteenth amendment, the Court found, "[t]he Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1."<sup>25</sup> Thus, the Court reaffirmed the conclusion reached in *Ex parte Virginia* that "[i]t is the power of Congress which has been enlarged."<sup>26</sup> The Court reasoned, "[a]ccordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."<sup>27</sup> The Court also

13 42 U.S.C. §§ 1971(e)(f) (1970); Cf. *Ex parte Siebold*, 100 U.S. 371 (1879).

14 380 U.S. 128 (1965).

15 42 U.S.C. § 1971(c) (1970).

16 42 U.S.C. §§ 1971(a)(c) (1970).

17 380 U.S. at 138.

18 380 U.S. 145 (1965).

19 *Id.* at 151-53.

20 383 U.S. 301 (1966).

21 42 U.S.C. §§ 1971 *et seq.* (1970).

22 42 U.S.C. § 1973(b) (1970).

23 42 U.S.C. § 1973(c) (1970).

24 42 U.S.C. §§ 1973(a)(d) (1970).

25 383 U.S. at 326.

26 *Id.*

27 *Id.*

repeated the fundamental ruling first announced in *Ex parte Virginia* that the basic test to be applied in a case involving the enforcement clause of the fifteenth amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the states, the analysis of *McCulloch v. Maryland* tailored for the particular context of the fifteenth amendment.<sup>28</sup> Finding that the statutory scheme of Congress conformed to this criteria, the Court upheld the basic constitutionality of the 1965 Act and sustained the power of Congress to fashion specific remedies without any need for prior adjudication of state voting practices and legislation.<sup>29</sup>

The applicability of the 1965 Act to a broad range of state election laws, although not specified in the law itself, was established by the Court in *Allen v. State Bd. of Elections*<sup>30</sup> based on the mass of legislative history articulating the purposes of the Act.<sup>31</sup> The Court next sustained application of the ban on literacy tests against a county where there was no evidence the test had been openly administered in a discriminatory manner, but where it actually operated to disenfranchise racial minorities who had suffered previous governmental discrimination in education.<sup>32</sup>

Then in *Oregon v. Mitchell*,<sup>33</sup> the Court unanimously upheld Congress' latest effort in this field, section 201 of the Voting Rights Act Amendments of 1970.<sup>34</sup> This provision prohibits the use of any test or device resembling a literacy test in all federal, state or local elections across the entire United States, not just selectively in only a few states.

Thus, step-by-step, Congress had encouraged the Court by increasingly more expansive legislation to adopt increasingly broader interpretations of the scope of Congress' power under the enforcement clause of the fifteenth amendment. From the initiation of civil actions by the Attorney General and the utilization of court orders in specific cases and localities, Congress has moved to the supplanting of state laws and procedures on its own and the substitution of federal personnel for state voting officials. For all intents and purposes, Congress has over the past decade effectively caused the Supreme Court to expand its past interpretations of the situations which are covered by the fifteenth amendment, if, in the doing, Congress itself cannot be said to have expanded upon such judicial interpretations.

## II. The Court Guides; Congress Follows

### A. *The Rule of Katzenbach v. Morgan*

If the Supreme Court has been moved to a more expansive view of congress-

28 *Id.*

29 *Id.* at 327-37.

30 393 U.S. 544 (1969). *Accord*, *Perkins v. Matthews*, 400 U.S. 379, 387 (1971), deciding that a change in the location of polling places constitutes a "standard, practice, or procedure with respect to voting," covered by the Voting Rights Act of 1965; *Georgia v. United States*, 411 U.S. 526 (1973), confirming the reach of such Act to state reapportionment statutes.

31 *Id.* at 563-71.

32 *Gaston County v. United States*, 395 U.S. 285 (1969).

33 400 U.S. 112 (1970).

34 42 U.S.C. § 1973b (1970).

ional enforcement power under the fifteenth amendment by a progression of federal civil rights statutes, each broader than its predecessor, it is the Court who has encouraged Congress to take a view of its powers under the fourteenth amendment going beyond what past decisions have reached in specific factual situations. Congress was stirred into this action primarily by reason of a single decision, *Katzenbach v. Morgan*,<sup>35</sup> it also was influenced by a growing line of other fourteenth amendment cases which, for over a decade, have been steadily eroding the general authority of the states to legislate on subjects historically resting within their separate domain.

*Morgan*, which was the true catalyst for new departures in congressional protection of civil rights, will be discussed first. On the surface, *Morgan* treated the constitutionality of section 4(e) of the Voting Rights Act of 1965,<sup>36</sup> a provision which prohibits enforcement of the New York State English language literacy test against New York residents from Puerto Rico. It might have been regarded as just one more link in a chain of decisions overturning state practices with racially discriminatory overtones. But the decision was not so limited.<sup>37</sup> The Court repeated the well settled principle that Congress' power to enforce the fourteenth amendment can be measured by reference to its powers under the necessary and proper clause.<sup>38</sup> It then broke new ground of its own by holding: "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>39</sup> The Court applied this conclusion to the facts of the case in an equally broad manner. In determining whether the federal statute is "plainly adapted" to furthering the aims of the equal protection clause, as required by the reformulation of Chief Justice Marshall's analysis, the Court declared that it is for Congress to assess and weigh the various conflicting considerations involved in legislating.<sup>40</sup> The Court specifically included, among the considerations so reserved for Congress, an appraisal by it of the risk of discrimination that arose from the state statute and the effectiveness of the various remedies available by which Congress might eliminate this risk.<sup>41</sup> The Court also deferred to the judgment of Congress as to the nature and significance of the state interest that would be affected by the remedy Congress selected, stating, "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."<sup>42</sup>

Thus, *Morgan* verges on the brink of holding that Congress can be its own judge of what situations are prohibited by the equal protection clause of the fourteenth amendment and of what remedies are appropriate to enforce these

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35 384 U.S. 641 (1966).

36 42 U.S.C. § 1973b (e).

37 *Morgan* has since been described by Justice Stewart, with Chief Justice Burger and Justice Blackmun joining, as giving congressional power under section 5 of the fourteenth amendment "[t]he furthest possible legitimate reach." *Oregon v. Mitchell*, 400 U.S. 112, 296 (1970).

38 *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

39 *Id.* at 651.

40 *Id.* at 653-56.

41 *Id.* at 653.

42 *Id.*

prohibitions. In addition, the Court bodes close to saying that Congress can second-guess a state government with respect to the factual determinations which serve as the basis for a state's law and can make its own binding conclusions even as to how substantial a state's interest is in passing the law which Congress would regulate or contravene.

### B. The "Compelling State Interest" Test

Of equal importance with the scope of its ruling in *Morgan* is that the Court had applied to the New York literacy law a higher standard for review of state determinations than was traditional.<sup>43</sup> This more exacting standard has come to be known as the "compelling state interest" test although it has appeared under different labels. By whatever name it is called, it is directly related to the deference which the Court gives to congressional legislation under the enforcement clauses of the Civil War amendments and thereby to Congress' power to effectively expand the Court's interpretations of those amendments. Under this test Congress can override any state statute which affects important rights unless the state can demonstrate the statute is necessary to promote a compelling governmental interest.<sup>44</sup> In contrast, under traditional analysis a state legislative device or classification will be sustained unless it is patently "arbitrary" or "invidious" and bears no rational relationship to a legitimate governmental interest.<sup>45</sup>

The "compelling interest" test appears to stem from two kinds of cases, one in which the stricter standard is used because a state statute affects "fundamental rights" and the other in which it is used because the statute is based upon "suspect" criteria.<sup>46</sup> But there is a growing effort within the Court to explain its past cases, not on the basis of "two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality,"<sup>47</sup> but rather on the basis of the Court's judgment as to the relative importance of the right affected and invidiousness of the state action.<sup>48</sup> Whichever way the standard of review is cast its application will extend the possibilities for congressional intrusion on state interests. Under either test, the presumption of constitutionality normally afforded state statutory schemes is discarded and the burden is shifted to the

43 *Id.* at 654 n.15; 660-61 (dissenting opinion of Harlan, J., with whom Stewart, J., joined).

44 *E.g.*, statement of Justice Brennan that "[o]nce it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden." *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (dissenting in part and concurring in part).

45 *E.g.*, *United States Dept. of Agriculture v. Moreno*, — U.S. —, 93 S. Ct. 2821, 2825 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972), both relating to the field of social welfare. The traditional equal protection analysis appears to have its origin in the context of commercial regulation cases which involved state regulation of business and industrial practices. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-89 (1955).

46 *See Shapiro v. Thompson*, 394 U.S. 618, 658-62 (1969) (opinion of Harlan, J., dissenting).

47 *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (opinion of Marshall, J., with whom Douglas, J., concurs, dissenting); *id.* at 62 (opinion of Brennan, J., dissenting).

48 *Vlandis v. Kline*, 412 U.S. 441, 456 (1973) (opinion of White, J., concurring in the judgment).

state to show that there is no alternative which results in less impact upon the individual interest at stake, be it a "fundamental" constitutional right or an interest of constitutional "importance."

The strict standard of equal protection review appears prominently in the voting rights field. Since 1965 there have been at least seven decisions upsetting state or local election schemes based upon exacting judicial scrutiny under the fourteenth amendment of the state or local governmental objectives and methods.<sup>49</sup> A strict review is also dictated for state statutes providing for federal congressional redistricting, but the rationale of these decisions is founded upon article I, § 2, of the Constitution, not the equal protection clause of the fourteenth amendment.<sup>50</sup>

One may have thought the Court first developed a new formulation of the equal protection test in *Reynolds v. Sims*<sup>51</sup> where it disapproved of an apportionment scheme of Alabama;<sup>52</sup> but this reading has not been accepted by a majority of the Court.<sup>53</sup> Instead, the true forebearer of the new standard occurs not in the legislative redistricting field, where the Court has maintained a dichotomy between the two lines of congressional districting under article I and state legislative reapportionments under the fourteenth amendment,<sup>54</sup> but rather in the area of the selective distribution by a state of the franchise. Here the Court has unequivocally determined that state voter qualification laws which exclude otherwise qualified citizens from the franchise must be tested by the stricter standard.<sup>55</sup> Similarly, state administrative regulations which deny to citizens their right to participate in elections on an equal basis with other citizens must be examined

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49 *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Phoenix v. Kolodziejewski*, 399 U.S. 204, 205 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Kramer v. Union School Dist.*, 395 U.S. 621, 628 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965).

50 Under the rigid standard of congressional districting cases, only those population variances among districts that are "unavoidable" are permitted. *White v. Weiser*, 412 U.S. 783 (1973); *Wells v. Rockefeller*, 394 U.S. 542, 546 (1969); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

51 377 U.S. 533 (1964).

52 In striking down Alabama's plan the Court stressed that "the right of suffrage is a fundamental matter in a free and democratic society" and held that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 561-62.

53 The test actually enunciated by the Court in *Reynolds* was the traditional "rational state policy" standard. *Id.* at 579. This more lenient standard has subsequently been applied in other state districting cases apparently on the basis that state legislative districts are so intertwined with strictly local interests that the rigor of the stricter standard is inappropriate to these predominantly state matters. Moreover, there is a significantly larger number of seats in state legislative bodies to be distributed within each state than its congressional seats, and it may be feasible for a state to use political subdivision lines in drawing state districts while still affording adequate statewide representation. *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973).

54 *Mahan v. Howell*, 410 U.S. 315, 322 (1973).

55 *E.g.*, *Carrington v. Rash*, 380 U.S. 89 (1965). In *Carrington*, the Court overturned the use by Texas of an irrebuttable statutory presumption that absolutely excluded servicemen from the vote by classifying them as nonresidents. The Court tested the classification according to its necessity to carrying out a state purpose of substantial importance, rather than its merely serving a convenient state interest.



by strict scrutiny.<sup>56</sup> Exceptions to these generalized rules for voting cases fall into four categories. The stricter "equal protection" standard is not applicable (1) if the Court finds the state statute cannot pass even the lenient traditional test,<sup>57</sup> (2) where the state does not absolutely disenfranchise the members of any definable class,<sup>58</sup> (3) when a state elects functionaries whose duties are far removed from what might be thought of as "normal governmental" authority and whose actions disproportionately affect the delineated class accorded the vote,<sup>59</sup> and (4) in federal congressional redistricting situations which are gov-

56 *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). The Court stressed the fundamental nature of the right to vote. *Id.* at 670. Fifteen years earlier, using the traditional "rational basis" test, the Court had upheld the same Virginia poll tax it struck down under the new standard applied in *Harper*. *Butler v. Thompson*, 341 U.S. 937 (1951).

A parallel situation occurred in *Dunn v. Blumstein*, 405 U.S. 330 (1972) striking down the Tennessee one-year durational waiting period. Referring to *Drueding v. Devlin*, 380 U.S. 125 (1965), decided only seven years earlier, which had upheld Maryland's similar one-year residence requirement, the Court commented that "if it was not clear then, it is certainly clear now that a more exacting test is required for any statute that 'place[s] a condition on the exercise of the right to vote.'" 405 U.S. at 337.

57 Included among the first category of exceptions should be *Williams v. Rhodes*, 393 U.S. 23 (1968). Here the Court struck down as creating an "invidious discrimination" Ohio's election laws which made it virtually impossible to be placed on the state ballot in presidential elections. *Id.* at 34. While the Court's opinion, written by Justice Black, would apply a "compelling interest" standard to the restrictions of Ohio law, five members of the Court, including two concurring and three dissenting, did not agree with this proposition. Thus, *Williams* correctly stands for no more than an application of the "invidious discrimination" test.

The same appears true of *Evans v. Cornman*, 398 U.S. 419 (1970), where a Maryland statute was overturned which created a presumption that persons living on a federal enclave within the state did not meet the residency requirement for voting in Maryland. The Court found no reasonable basis for accepting the state's contention that these residents were substantially less interested in state affairs than other residents of the state. *Id.* at 426. The Court did not openly reach the question of whether the stricter test should apply because the classification was plainly lacking in any rational justification.

*Eisenstadt v. Baird*, 405 U.S. 438 (1972), is akin to this principle in the area of personal privacy. In it the Court struck down a Massachusetts statute which denied unmarried persons access to contraceptive devices on the same basis as married persons, finding that the law failed "to satisfy even the more lenient equal protection standard." *Id.* at 447 n.7.

58 *McDonald v. Bd. of Election*, 394 U.S. 802 (1969); and *Jenness v. Fortson*, 403 U.S. 431 (1971), are instances of the second reason for declining to use the more rigid test. In *McDonald*, the right to vote in person was not absolutely precluded in fact or by law. 394 U.S. at 807. And in *Jenness*, the Georgia system of placing the names of candidates on the ballot was found not to have insulated a single potential voter from new political voices. 403 U.S. at 442.

A recent application of this rule is *Rosario v. Rockefeller*, 410 U.S. 752 (1973), where the Court upheld a provision of New York's election law imposing a time deadline on the enrollment of voters for primary elections. The Court concluded the statute did not prohibit any class from voting in any election had they chosen to meet the reasonable deadline established by the law. The complaining persons clearly could have registered and enrolled in the party of their choice before the deadline but chose not to do so by their own failure to take timely steps. *Id.* at 762.

59 The third area in which the Court has declined to apply the strict test in franchise cases appears in *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719. *Salyer* refused to extend the popular election of *Kramer v. Union School Dist.*, 395 U.S. 621 (1969), discussed in notes 61-62 *infra*, to a California statute limiting the vote for directors of a water storage district to landowners. The exception was based on the fact that the water district has relatively limited authority far removed from normal governmental activities and that its actions disproportionately affect landowners as a group. *Id.* at 728. By "affect" the Court appears to refer to the direct costs of district projects since under the state scheme landowners as a class were to bear the entire burden of the district's costs. *Id.* The Court kept its

erned under the special standards applicable to reapportionment of congressional seats.<sup>60</sup>

Perhaps the voting case in which the rule has been most fully articulated is *Kramer v. Union School Dist.*<sup>61</sup> where the Court held that the equal protection clause prohibited New York from limiting the vote in school district elections to parents or guardians of school children and property owners or lessees. The Court took pains to articulate why it was setting aside the normal presumption of constitutionality afforded state statutes:

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.<sup>62</sup>

A more recent case in which the stricter test appears, but under a different label, is *Bullock v. Carter*.<sup>63</sup> Here the Court openly discussed at length when the stricter standard applies and when it does not. The case arose out of the Texas filing fee scheme which prevented some potential candidates from seeking the nomination of their party due to their inability to pay the fee. Concluding that the Texas laws had a real and appreciable impact on the exercise of the franchise and that this impact was related to the resources of the voters supporting a particular candidate, the Court held "that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."<sup>64</sup> Given the exacting standard it required, the Court found the Texas laws unnecessary to pursue even the substantial state interest in financing the cost of its primaries.

Although the stricter equal protection test has most often been applied in the "fundamental right" area to state classifications which limit the franchise, the Court has also used the stricter standard of review in safeguarding other fundamental rights such as the right to travel,<sup>65</sup> freedom of speech,<sup>66</sup> and freedom to procreate.<sup>67</sup> Moreover, it is well settled that under the equal protection clause the basic presumption of the constitutional validity of a state law "disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently 'suspect.'"<sup>68</sup> Consistent with the central purpose of the fourteenth amendment to

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decision within the guidelines of its general rule insofar as lessees who farm the land are concerned by noting that this group was not totally disenfranchised. The California law provides for voting by proxy and the lessee has a free opportunity to bargain for the right to vote at the time he negotiates his lease. *Id.* at 733.

60 See notes 50 and 53, *supra*.

61 395 U.S. 621 (1969).

62 *Id.* at 628.

63 405 U.S. 134 (1972).

64 *Id.* at 144.

65 *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

66 *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972).

67 *Skinner v. Oklahoma*, 316 U.S. 535, 538-42 (1942).

68 *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (opinion of Stewart, J., concurring).

eliminate official racial discrimination, the Court has decided that a classification based upon race is one such "suspect" category.<sup>69</sup> Other classifications determined to create "suspect" categories include those based upon alienage,<sup>70</sup> national origin,<sup>71</sup> illegitimacy,<sup>72</sup> wealth,<sup>73</sup> and arguably, sex.<sup>74</sup>

The special standard for testing state laws also is found in fourteenth amendment due process cases dating back at least to *Schneider v. State*,<sup>75</sup> which upheld the freedoms of speech and press "as fundamental personal rights and liberties." Subsequent due process cases in which the Court has held that the state interest needed to justify the infringement of fundamental rights must be "compelling," and not merely rationally related, to the accomplishment of a legitimate governmental purpose fall into at least six subject areas:<sup>76</sup> (1) academic liberty and political freedom of the individual,<sup>77</sup> (2) the freedom of association,<sup>78</sup> (3) the

69 *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

70 *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

71 *Oyama v. California*, 332 U.S. 633, 646 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

72 *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

73 *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

But according to the Court's majority opinion in *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973), wealth discrimination *alone* does not provide an adequate basis for invoking strict scrutiny. Rather, the precedents of the Court require that two distinguishing characteristics of wealth classification must be found: (1) because of their indigency, the persons discriminated against are completely unable to pay for some desired benefit, and (2) as a consequence, they sustain an absolute deprivation of a meaningful opportunity to enjoy that benefit. Justice Marshall, dissenting in the same case, contends these decisions are actually premised on the fundamental importance of the state service involved, but his analysis is clearly rejected by the Court's majority. *Id.* at 102 n.61.

74 *Frontiero v. Richardson*, 411 U.S. 677 (1973), struck down the statutory distinction made by Federal law which deprived servicewomen of the right to claim their spouses as a "dependent" for purposes of obtaining certain allowances and benefits. Justice Brennan, joined by Justices Douglas, White, and Marshall, concluded that classifications based on sex are inherently suspect and must be subjected to strict judicial scrutiny. *Id.* at 682. They found at least "implicit support" for this approach in *Reed v. Reed*, 404 U.S. 71 (1971). Though *Frontiero* presented a question of a violation of the due process clause of the fifth amendment, this characterization is equally applicable to state classifications challenged under the equal protection clause of the fourteenth amendment.

Whether sex is indeed now included as a "suspect" classification is uncertain since Justice Stewart, concurring in the judgment, 411 U.S. at 691, reached only the point of agreeing the discrimination was "invidious," and Justice Powell, joined by Chief Justice Burger and Justice Blackmun, expressly reserved for the future any decision on adding sex to the suspect category. Justice Powell's opinion specifically argued *Reed* "did not add sex to the narrowly limited group of classifications which are inherently suspect." *Id.* Mr. Justice Rehnquist would have sustained the constitutionality of the statutes in question.

75 308 U.S. 147, 161 (1939).

76 The minority in *Vlandis v. Kline*, 412 U.S. 441 (1973), would argue that the Court has applied the stricter test to a seventh area, the right of obtaining a higher education, but the Court's opinion, written by Justice Stewart, is narrowly drawn along the lines of past traditional due process cases. *Id.* (*Contra*, Burger, C. J., dissenting).

77 *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (opinion of Frankfurter, J.).

78 *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

free exercise of religion,<sup>79</sup> (4) the right of free expression,<sup>80</sup> (5) the right of personal privacy,<sup>81</sup> and (6) the right to vote in both federal and state elections.<sup>82</sup> The extension of the "compelling interest" test to these several classes of fundamental rights, both in the equal protection and due process fields, and to the field of "suspect" classifications could foreshadow the supervention of the states by Congress in virtually every field where a state traditionally governs itself and its people. The question has been raised by members of the Court whether every state statute might not affect some basic human right<sup>83</sup> or create classifications permanent in duration which are less than perfect.<sup>84</sup>

### III. The Court Applies a Brake

#### A. Congressional Use of the "Compelling Interest" Test

*Oregon v. Mitchell*<sup>85</sup> heralds the first strong brake by the Court on the "compelling interest" test and the intrepid slide toward making Congress the judge of its own enforcement powers under the Civil War amendments. In a near unanimous decision, but with no single rationale enjoying a majority, the Court's judgment upheld Congress' power in the Voting Rights Act Amendments of 1970<sup>86</sup> to set uniform residency requirements and absentee balloting standards in elections for presidential and vice presidential electors. In the same decision and again with no single reasoning prevailing, the Court held that Congress cannot interfere with the age set for voters by the states for state and local elections but can control age qualifications in federal elections alone. The only reasoning supported by a majority of the Court was that Congress has ample power under the enforcement clause of the fifteenth amendment to prohibit the use of literacy tests or other devices to discriminate against voters on account of their race in all elections, state and national.

The previously discussed literacy test provision aside, the statutory schemes considered in *Oregon* represent the first legislative enactments by Congress to expressly utilize the "compelling interest" doctrine as a means for expanding Congress' power under the Civil War Amendments. Both section 202 of title II,

79 *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

80 *NAACP v. Button*, 371 U.S. 415, 438 (1963).

81 As to marital privacy, see *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (opinion of Goldberg, J., with whom Warren, C. J., and Brennan, J., joined). As to the right of a woman to decide whether or not to terminate her pregnancy by abortion, subject to compelling state interests with respect to protection of health, medical standards and potential life, see *Roe v. Wade*, 410 U.S. 113, 153-55. (1973).

82 *United States v. Texas*, 252 F. Supp. 234, 251 (W.D. Tex.), *aff'd*, 384 U.S. 155 (1966).

83 Justice Harlan, dissenting from the Court's application of strict scrutiny to a law penalizing the right of interstate travel, complained that "[v]irtually every state statute affects important rights." *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969).

84 *Vlandis v. Kline*, 412 U.S. 441, 459 (1973) (opinion of Chief Justice Burger, joined by Justice Rehnquist, dissenting).

85 400 U.S. 112 (1970). For a brief note on the development of the compelling state interest doctrine in voting rights cases and an analysis of *Oregon*, see Weller, *Oregon v. Mitchell and the Compelling State Interest Doctrine — The End of An Era?*, 22 SYRACUSE L. REV. 1123 (1971).

86 42 U.S.C. §§ 1973 *et seq.* (1970).

setting presidential elector regulations,<sup>87</sup> and title III, providing for the 18-year-old vote,<sup>88</sup> include specific findings by Congress that the application of restrictive state laws does not bear a reasonable relationship to any compelling state interest.

### B. Section 202 — Presidential Election Reforms

Since § 202 was introduced first and literally served as a drafting model for the Congressional findings made in title III, this provision will be examined first. Section 202 clears away a broad range of technical barriers which had previously impeded the right to vote for President of nearly ten million Americans.<sup>89</sup> The incredible mishmash of disorganized state and local regulations that formerly had existed, kept fully-qualified citizens away from the polls for no reason other than their failure to meet some unwarranted and outmoded legal technicality.<sup>90</sup> Some citizens could not vote because they had been residents of

87 42 U.S.C. § 1973aa-1 (1970), which reads in pertinent part:

The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections —

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) *does not bear a reasonable relationship to any compelling State interest* in the conduct of presidential elections. (Emphasis added.)

88 42 U.S.C. § 1973bbb (1970), which reads in pertinent part:

(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 right of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

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

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

For a pre-Oregon discussion of the relationship between the compelling interest test and title III, see Engdahl, *Constitutionality of the Voting Age Statute*, 39 GEO. WASH. L. REV. 1 (1970).

89 See detailed explanation cataloguing the numbers of citizens disqualified from voting in presidential elections, at 116 CONG. REC. 6990-91 (1970). A survey by the author supports a high estimate of the prospective absentee voting population. Based on statistics from all states reporting absentee ballot totals, and replies from the office of the Secretary of State in selected states, 4,135,466 presidential absentee votes were cast in 1972. This is an increase of 26% over 1968.

90 See tables of restrictive state laws applicable to registration and balloting procedures and eligibility in presidential elections at 116 CONG. REC. 6994-96 (1970).

the state for only eleven months and could not meet the one year residence requirement. Others were ineligible because they were traveling outside the state on election day and were not allowed to obtain absentee ballots. Another category of disenfranchised citizens included nearly a million visitors, students, civil service employees, and businessmen who were overseas and found themselves among the three out of every five civilian citizens who could not register absentee.<sup>91</sup>

Section 202 made a dramatic overhauling of residency and absentee regulations in presidential elections. Enacted in substantive form exactly as introduced, the legislation abolished the durational residency requirement as a precondition to voting for President and Vice President, both for citizens who move from state-to-state or within the same state;<sup>92</sup> established a uniform national right of registering and voting by absentee process in presidential elections;<sup>93</sup> and

91 A possible setback for overseas citizens seeking the vote under section 202 is *Hardy v. Lomenzo*, 349 F. Supp. 617 (S.D.N.Y. 1972). Hardy moved from New York to Brazil in 1964 because of business obligations, intending to return at some indefinite time in the future. His request for absentee registration was rejected on the basis of a New York law which requires "a fixed, permanent and principal home" in the state as a condition of "residence." The district court upheld New York's refusal to permit Hardy to register on the basis that each state can determine for itself who is a bona fide resident. *Id.* at 620.

On reargument, the court allowed Senator Goldwater to intervene *amicus curiae* and agreed that the Senator's purpose as author of section 202 shows "a clear intent to provide the broadest possible opportunity to citizens to register to vote in a Presidential election. . . ." Nevertheless, the Court held that in this case the state was "entitled to stronger evidence of allegiance than that here presented." *Id.* at 621-22.

To the extent the court's opinion means a state can go behind a citizen's application and insist on reasonable supporting evidence of his statements of facts and intent, section 202 permits each state to determine who is among its true residents. But to the extent the court's language leaves open the possibility that a state may require as a precondition of residence the maintenance of a fixed, physical home in the state, the court erred in its construction of the federal law.

Section 202 is intended to prohibit the discriminatory application of state laws against citizens on the basis of their physical presence or absence from a particular state or political subdivision. However, in the words of the Secretary of State of New York, the state "definition of residency demands that there be a claim to a specific physical location *before* any supporting indicia may be considered." (Emphasis added.) Letter from John P. Lomenzo to Barry Goldwater, Nov. 17, 1972. This means that regardless of the citizen's financial inability to maintain two separate physical homes, one abroad and one in the state, at the same time, the state forecloses alternative means of proving his residence. Thus, the test absolutely precludes some actual residents from voting on the basis of their wealth. Moreover, the state penalizes the right to travel by forcing upon a person, who wishes to travel and work abroad, the choice between travel and his basic right to vote, unless he is affluent enough to own or rent two homes. See *Amicus Curiae Brief in Behalf of Overseas Voters of Senator Barry Goldwater*, 118 CONG. REC. 17894-99 (daily ed. Oct. 13, 1972).

The failure of the court in *Hardy* to reach this specific question leaves the matter in doubt and further congressional action will most surely be taken in the near future to erase that doubt. See *Hearings on S. 2102 and S. 2384, Before the Senate Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 93d Cong., 1st Sess. (1973).

92 42 U.S.C. § 1973aa-1(c) (1970), reads in pertinent part:

No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President . . . in such election because of the failure of such citizens to comply with any durational residency requirement of such State or political subdivision. . . .

93 42 U.S.C. § 1973aa-1(c) (1970), lays down the general prohibition:

[Nor] shall any citizen of the United States be denied the right to vote for electors

mandated that the polls be kept open at reasonable times for registration by both new and long-time residents of a state until at least 30 days before the election.<sup>94</sup>

In making these sweeping changes in state laws and practices, Congress relied upon at least four distinct grounds for the exercise of congressional authority.<sup>95</sup> In *Oregon* the Supreme Court was to seize upon each of these justifications in upholding § 202. First, § 202 rested upon Congress' power to secure the rights inherent in national citizenship,<sup>96</sup> which include the right to vote for federal officers.<sup>97</sup> Since these rights adhere to United States citizenship, rather than citizenship of a state, Congress believed it could give them protection under the

for President and Vice President . . . because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

42 U.S.C. § 1973aa-1(d), (f) (1970), prescribes the minimum standards which a state shall put into practice:

(d) For the purpose of this section . . . each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President . . . by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election. . . .

(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President . . . in such election because of any requirement of registration that does not include a provision for absentee registration.

That part of section 202(d) allowing the return of absentee ballots as late as the close of polls was upheld against a contrary provision of New York state law in *Herschopf v. Lomenzo*, 350 F. Supp. 156 (S.D.N.Y. 1972).

94 42 U.S.C. § 1973aa-1(d) (1970), provides in pertinent part:

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President . . . in such election. . . .

This provision has correctly been construed to require that registration be provided at reasonable periods of time during crucial pre-election weeks, although the statute itself does not specify the precise number of days during which registration facilities should be kept open. Acting on the underlying concern of Congress "to provide the broadest possible opportunity to citizens to register to vote in a Presidential election," a three-judge Federal Court held that section 202 must prevail over a related section of the New York Election Act to the extent the latter would prohibit a voter from being afforded the opportunity to register personally at reasonable pre-election times. *Bishop v. Lomenzo*, 350 F. Supp. 576 (E.D.N.Y. 1972).

95 Section 202(a) note 87 *supra*.

96 Rights belonging to national citizenship "arise from the relationship of the individual with the Federal government" and are directly dependent on the Constitution: *United States v. Williams*, 341 U.S. 70, 77-80 (1951); *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430-31 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868).

97 The right to vote for national elective officers, including members of Congress and presidential electors, has been expressly recognized as a right directly secured to citizens by the Constitution: *United States v. Classic*, 313 U.S. 299, 314, 315 (1941); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Wiley v. Sinkler*, 179 U.S. 58, 62 (1900); *In Re Quarles*, 158 U.S. 532, 538 (1895); *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884).

necessary and proper clause of article I.<sup>98</sup> A related basis for Congress' action was its design to protect the fundamental and national right or privilege of travel by a citizen, without sacrificing his right to vote.<sup>99</sup>

As an alternative ground, Congress used its reading of the then recent case of *Katzenbach v. Morgan* to assert an exercise of power under the fourteenth amendment.<sup>100</sup> Viewed as a fourteenth amendment matter, § 202 protected against a discriminatory classification in voting between citizens who were new or long-time residents and between those who were physically present or absent at the time of registration or voting.<sup>101</sup> In light of similar state laws which indicated states could satisfy their legitimate interests by the rules it was legislating, Congress saw no compelling reason why a state should condition the right to vote for President on the duration of a citizen's residence or a resident's physical presence or absence at the polls. For example, 40 states then allowed certain classes of their residents to register until 30 days or sooner before each presidential election. State practice itself had demonstrated that the 30-day rule of § 202 would not be administratively impracticable.<sup>102</sup> Moreover, 37 states allowed application for absentee voting by certain persons within a week of the election, and 40 permitted the marked ballot of absentee voters to be returned as late as on election day,<sup>103</sup> both standards were incorporated into § 202 as national criteria.<sup>104</sup> The fact that so many states had been able to satisfy their administrative needs for part of their citizens by providing for these several exceptions from their general regulations demonstrated that more restrictive rules were not necessary to serve any compelling interest.<sup>105</sup>

The fourth basis of Congress' power to adopt legislation creating uniform standards for voting in presidential elections is its authority to enforce the privileges and immunities guaranteed to citizens of all the states. Here it was Congress' purpose of correcting the incredible system of conflicting state and local requirements applicable to presidential elections which created a serious inequality of treatment as among citizens of one state compared with citizens of other states.

Eight members of the Court upheld Congress' power to adopt the uniform regulations of § 202. Justice Brennan, joined by Justices Marshall and White,

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98 As stated by Chief Justice Waite in *United States v. Reese*, 92 U.S. 214, 217 (1875), the "rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress." See also *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

99 The freedom to travel across state lines has long been held to occupy a position fundamental to "the nature of our Federal union and our Constitutional concepts of personal liberty." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); *United States v. Guest*, 383 U.S. 745, 757 (1966); *Grandall v. Nevada*, 73 U.S. (6 Wall.) 35, 47 (1867). Travel abroad has also been held to be a basic aspect of each citizen's liberty: *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 505 (1964).

100 It was noted that *Morgan* had upheld a congressional ban against an English language literacy test similar to one which the Court had found constitutional five years earlier in *Lasiter v. Northampton Election Bd.*, 360 U.S. 45 (1959).

101 *Oregon v. Mitchell*, 400 U.S. 112, 284-89 (1970).

102 *Id.* at 282, 291.

103 *Id.* at 283, 292.

104 Section 202(d) note 94 *supra*.

105 400 U.S. at 238-39.



rested his opinion squarely upon the "compelling interest" doctrine and Congress' power to enforce the fourteenth amendment by "eliminating an unnecessary burden on the right of interstate migration."<sup>106</sup> Justice Douglas also upheld § 202 as a means to enforce the fourteenth amendment, but related his opinion to section 1 of that amendment, the privileges and immunities clause.<sup>107</sup> Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, sustained § 202 on the ground of the authority of Congress to protect and facilitate the exercise of privileges of United States citizenship under the necessary and proper clause of article I without regard to section 5 of the fourteenth amendment.<sup>108</sup> He wrote that the freedom to travel from state to state without loss of the franchise is one of the privileges "that finds its protection in the Federal Government and is national in character."<sup>109</sup> Consequently, as against the reserved power of the states, it was enough for these Justices that the objective of § 202 to guarantee the privilege to travel was a legitimate one and that Congress had chosen a rational means to achieve that end.<sup>110</sup> Justice Black, who announced the judgment of the Court, also rejected the fourteenth amendment as a basis for Congress' action, but agreed that Congress could enact § 202 pursuant to the necessary and proper clause. He based his view on the final authority which Congress has to make laws over federal elections.<sup>111</sup> Only Justice Harlan believed § 202 was invalid on any ground.<sup>112</sup>

The precision with which § 202 was drafted may explain the broader support it received among the Court than did the voting age change. The three Justices who, as shall be discussed, ruled for the authority of Congress to enact the residence provision, but against its power to legislate an age qualification, remarked:

The power that Congress has exercised in enacting § 202 is not a general power to prescribe qualifications for voters in either federal or state elections. It is confined to federal action against a particular problem clearly within the purview of congressional authority.<sup>113</sup>

In this sense, a majority of the Court united on the proposition that the power of the states over matters normally within their general jurisdiction is subject to the power of Congress to vindicate the personal rights or privileges which the Court has determined to be secured to the citizen by the Federal Constitution. If Congress acts with the objective of protecting these rights or privileges in a narrowly drawn manner, rather than with the purpose of passing general legislation over a state-reserved field, congressional power exists to establish specific regulations attacking a particular problem in the field.

But even the application of this conservative rule illustrates that Congress

106 *Id.* at 239.

107 *Id.* at 147-50.

108 *Id.* at 285-92.

109 *Id.* at 287.

110 *Id.* at 286.

111 *Id.* at 120, 134.

112 *Id.* at 213-16.

113 *Id.* at 292 (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.).

can "expand" the protection of the Civil War amendments previously defined by Supreme Court decisions. Section 202 abolished the durational waiting period for new residents in presidential elections two years before the Supreme Court narrowed the same practice in state and local elections<sup>114</sup> and six years after it had upheld the same requirements as applied in presidential elections absent an act of Congress.<sup>115</sup>

### C. Title III—The 18-Year-Old Vote

The major check on congressional power under the enforcement clauses was reached with the Court's consideration of title III of the Voting Rights Act of 1970, which sought to extend the vote to 18-year-olds in all elections. The holding was closely decided with four Justices agreeing that Congress could enforce the right of voting under the equal protection clause of the fourteenth amendment against limitations by state laws which Congress concluded were unfair or unnecessary voting restrictions;<sup>116</sup> but five members of the Court found no such power resting in Congress.<sup>117</sup>

Justices Brennan, Marshall, and White concluded that proper regard for the special function of Congress in making determinations of legislative fact compelled the Court to respect those determinations independent of any state finding argued in support of a given state discrimination. Under the doctrine of the supremacy clause, Congress could make its own determination of whether or not the factual basis necessary to support a state legislative discrimination actually exists. Thus, Congress could conclude on its own that 18-year-olds are not substantially less capable of a responsible exercise of the vote. Once having made this finding, it could remove the age discrimination under the enforcement clause of the fourteenth amendment so long as it could rationally find that the discrimination was unnecessary to promote any legitimate state interest.<sup>118</sup> Justice Douglas' separate opinion on the 18-year-old vote provision conforms with this same analysis.<sup>119</sup>

Three members of the Court, Justices Stewart and Blackmun, and Chief Justice Burger, sharply criticized the view "[t]hat Congress has the power to determine what are and what are not 'compelling state interests' for equal protection purposes."<sup>120</sup> These Justices wrote that the voting age provision:

is valid only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are "compelling."<sup>121</sup>

114 *Dunn v. Blumstein*, 405 U.S. 330 (1972).

115 *Drueding v. Devlin*, 380 U.S. 125 (1965).

116 *Oregon v. Mitchell*, 400 U.S. 112, 134-44 (1970) (opinion of Douglas, J.); *id.* at 239-81 (Part III of opinion of Brennan, J., joined by White and Marshall, J. J.).

117 *Id.* at 119-31 (opinion of Black, J.); *id.* at 212-13 (opinion of Harlan, J.); *id.* at 293-96 (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.).

118 *Id.* at 246-50 (opinion by Brennan, J.).

119 *Id.* at 135-44 (opinion by Douglas, J.).

120 *Id.* at 295.

121 *Id.* at 296.

And they wrote, "to test the power to establish an age qualification by the 'compelling interest' standard is really to deny a State any choice at all. . . ." <sup>122</sup> Even so, these members allowed in somewhat ambiguous language

that Congress could impose on the States a remedy for the denial of equal protection that elaborated upon the direct command of the Constitution, and that it could override state laws on the ground that they were in fact used as instruments of invidious discrimination *even though a court in an individual lawsuit might not have reached that factual conclusion.* <sup>123</sup> (Emphasis added.)

The swing Justice, Mr. Black, upheld the power of Congress to enfranchise 18-year-old citizens in national elections only on the ground that Congress can control voter qualifications in federal elections. <sup>124</sup> Justice Harlan disagreed that title III could be supported on any conceivable ground. <sup>125</sup>

That a conservative could comfortably adopt the stricter test as a means to support Congressional action over the age standard is evident in the position taken by Senator Goldwater in support of the uniform age provision. Arguing on the basis of *Texas v. United States*, <sup>126</sup> which had sustained the power of Congress to prohibit the use of the poll tax as a prerequisite to voting in state elections, the Senator contended the right to vote in both state and federal elections was a fundamental right which can be secured against any state law not promoting a compelling governmental interest. <sup>127</sup> From the outcome of *Oregon*, this view misjudged the Court's position by a single vote. While there is a right to vote in state elections "[o]n an equal basis with other citizens in the jurisdiction," <sup>128</sup> the right to vote in state elections itself has not become firmed in the law. <sup>129</sup> Nevertheless, it was a fair reading of the Court's past cases and one that may yet prevail.

#### IV. The Thirteenth Amendment Revisited

Lest it be thought the thirteenth amendment is dormant, the Supreme Court has recently defined a new breadth of authority in Congress under this amendment. In *Jones v. Mayer Co.* <sup>130</sup> the Court held that a century-old act of Congress banning racial discrimination in the rental and sale of property could be enforced against private, as well as public, racial discrimination. <sup>131</sup> Applying

<sup>122</sup> *Id.* at 294.

<sup>123</sup> *Id.* at 296.

<sup>124</sup> *Id.* at 125-26. Justice Black argued that the case cannot properly be decided under the equal protection clause since this clause "was never intended to destroy the State's power to govern themselves. . . ." *Id.* at 126.

<sup>125</sup> *Id.* at 200-13 (opinion by Harlan, J.).

<sup>126</sup> 384 U.S. 155 (1966).

<sup>127</sup> *Hearings on S. J. Res. 7 and Others Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 136-38 (1970).

<sup>128</sup> *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

<sup>129</sup> *Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>130</sup> 392 U.S. 409 (1968).

<sup>131</sup> *Id.* at 437-44. Another recent decision imbuing new vigor into the thirteenth amendment is *Griffin v. Breckenridge*, 403 U.S. 88 (1971). Here Negro citizens filed a damages action under a century-old statute, 42 U.S.C. § 1985(3) (1970), charging a private conspiracy

the now standard reformulation of the analysis of *McCulloch v. Maryland* to the question of the appropriateness of the measure, the Court ruled that the authority of Congress to enforce the thirteenth amendment "by appropriate legislation" includes the power to eliminate *all* racial barriers to the acquisition of real and personal property.<sup>132</sup> Heralding a vast and rejuvenated scope for independent judgment by Congress under the original Civil War amendment, the Court emphasized that Congress itself can determine what are the badges and incidents of slavery and can translate that determination into effective legislation.<sup>133</sup> The Court added that the badges and incidents of slavery which Congress may attack encompass restraints on all the fundamental rights which make up "the essence of civil freedom."<sup>134</sup> This language appears to foretell a broad area for future legislative enhancement of the Court's prior interpretations of what kinds of discrimination are reached by the thirteenth amendment, should Congress choose to act.<sup>135</sup>

### V. Postscript: Congress May Not Dilute Rights

The same standard of review which bodes an expanding role for Congress does not signal a like authority for Congress to weaken constitutional rights. The Supreme Court has not only forewarned Congress that the "compelling interest" doctrine in no way supports restrictions on human rights, but the Court has applied this very rule against the validity of congressional enactments which have infringed on personal freedoms. For example, in *Aptheker v. Secretary of State*<sup>136</sup> the Court was called upon for the first time to directly consider the constitutionality of a federal restriction upon the right to travel abroad. The Court held that the law, which effectively prohibited travel outside the Western Hemisphere by members of the Communist party, failed to satisfy the strict rule of necessity which was applicable to such restrictions. Even though the governmental interest asserted might be legitimate and substantial, the Court indicated, that purpose cannot be achieved by means which stifle fundamental

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to interfere with their rights as citizens. The Court held that the statute encompasses the conduct of private persons as well as conspiracies under color of state law and ruled that Congress may, by the thirteenth amendment, create a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights of free men.

132 392 U.S. at 443-44.

Almost simultaneously with the Court's decision of *Jones*, Congress enacted title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1970), providing detailed means for securing fair housing throughout the United States. These provisions, applicable to a broad range of discriminatory practices, have been sustained under the thirteenth amendment by lower courts. *E.g.*, *United States v. Mintzes*, 304 F. Supp. 1305 (D. Md. 1969); *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776 (N.D. Miss. 1972).

133 392 U.S. at 440.

134 *Id.* at 441.

135 *See also* *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *decree modified*, 380 F.2d 385 (1967, *cert. denied*, 389 U.S. 840 (1967)). Title VI of the Civil Rights Act of 1964 was upheld as appropriate legislation under the thirteenth amendment in circumstances where the law constituted a plain congressional alternative to court desegregation remedies and in fact accelerated school desegregation beyond the pace theretofore set by the judicial branch itself.

136 378 U.S. 500 (1964).

personal liberties when the end can be more narrowly achieved.<sup>137</sup> Similarly, in *United States v. Jackson*<sup>138</sup> a provision of the Federal Kidnaping Act was invalidated because the element of necessity was absent.<sup>139</sup> And, in *Shapiro v. Thompson*<sup>140</sup> the Court held that it would be unconstitutional for Congress to permit the states to impose a one-year waiting period which denied public assistance to poor persons otherwise eligible. Rejecting the dissent by Chief Justice Warren and Justice Black, the Court's majority stated, "Congress may not authorize the States to violate the Equal Protection Clause."<sup>141</sup> *Shapiro* squarely presented a situation where the Court used the "compelling interest" standard to invalidate a state regulation and yet in the identical case refused to give a federal statute any broader scope under that standard where to do so would have meant allowing Congress to infringe on human rights.

Thus, the Court has proven in practice the admonishment it gave by dictum in *Katzenbach v. Morgan*: the fourteenth amendment "does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this court.'"<sup>142</sup> From this, it may be said that the Court will use the stricter standard and its more expansive view of Congressional power under the enforcement clauses only to protect personal rights and liberties, not in any way to restrict, abridge, or weaken these guarantees.<sup>143</sup>

## VI. Some Proposed Limits on Congressional Action

The limits on Congressional sallies under the enforcement clauses of the three Civil War amendments must stem from the good sense of Congress and a healthy respect by both Congress and the judiciary for the maintenance of the federal system as a viable feature of the unique American political experiment. Before venturing into new situations which abrogate long-standing state procedures which the judiciary itself has not been ready to judge improper, Congress should consciously and conscientiously examine the precedence for what it is proposing among the usage of the states themselves. Congress should ask itself whether a sizable body of states had ever put into practice the requirements Congress is about to ask all states to implement. Were these same rules proven feasible in the complex realities of everyday administration? Did the new rules actually achieve the remedies sought by Congress when they were tried among the states already living with them? Congress also should make a deliberate appraisal of the nature and significance of the interests which states may have in retaining their present procedures. This is not to say that Congress has power to make a constitutionally superior judgment on the matter, but that Congress ought to explore the subject out of a respect and fairness toward state governments as important institutions in their own right.

137 *Id.* at 508.

138 390 U.S. 570 (1968).

139 *Id.* at 582.

140 394 U.S. 618 (1969).

141 *Id.* at 641.

142 384 U.S. 641, 651 n.10 (1966).

143 See *Oregon v. Mitchell*, 400 U.S. 112, 249 n.31 (1970) (opinion of Brennan, J.).

For its part, the Court should plainly recognize when it is applying the "compelling interest" standard to test a state statute and when it is not. It should not be sloppy in using the exacting test and should develop clearcut precedents for the guidance of Congress in this relatively new dimension of enforcement legislation. Merely by closely observing the difference between the standard test and the rigid one, as was done in *Bullock v. Carter*,<sup>144</sup> the Court may place some self-restraint on its exercise of the unusually stringent rule. Even more necessary, the Court, prodded by a lively discussion within the legal profession and in the public forum, must shape its own delimiting boundaries on using the stricter standard. In carrying on this review, it is suggested that the Court should pay more than lip service to the prominent theme which runs through all of these cases, the element of necessity. By examining whether a state law really is necessary—whether there truly is any other reasonable and practical means of accomplishing the goal of the statute under attack without infringing a protected freedom—the Court can guard against totally abrogating the authority of a state over a particular subject. Obviously, the states would retain a far greater scope for governing their own affairs if they were to be actually left with the choice of using an alternative means of pursuing their valid interests, instead of being left with no choice at all. More basically, the Court should make an effort to explain why the strict scrutiny test is applicable in the particular setting and to provide an analytic basis for the result reached. This is the prescription of Chief Justice Burger, joined by Justice Rehnquist, in the former's dissent in *Vlandis v. Kline*,<sup>145</sup> and it offers much food for thought. The Court's task, according to the Chief Justice, is not routinely to see whether there is some conceivably "less restrictive" alternative to the state statute under review, but to explain why the statute impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny.

Though it did not involve an act of Congress and the distinct matter of congressional prerogative under the enforcement clauses, the recent case of *San Antonio School District v. Rodriguez*<sup>146</sup> provides exactly the kind of narrowed analysis advanced by the Chief Justice. This case involved the Texas system of financing public elementary and secondary education significantly out of locally assessed property taxes.<sup>147</sup> A majority of the Court rejected a class action brought by Mexican-American parents on behalf of members of minority groups and poor persons who reside in school districts with a low property tax base. For several reasons given in a lengthy analysis,<sup>148</sup> the Court's majority was unpersuaded that the case could be fitted into previous decisions in which strict scrutiny was required. The five member majority concluded that the Texas system does not discriminate against a "suspect" class<sup>149</sup> nor does it interfere with a "funda-

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144 405 U.S. 134 (1972).

145 412 U.S. 441, 459 (1973).

146 411 U.S. 1 (1973).

147 For the 1970-1971 school year local taxation contributed 41.1% of all public school funds.

148 *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17-44 (1973) (Part II of opinion of Powell, J., joined by Burger, C. J., and Stewart, Blackmun, and Rehnquist, J. J.).

149 *Id.* at 28.

mental" constitutional right.<sup>150</sup> Probing the hard threshold questions which it indicated must be focused on before a state's laws are subjected to strict judicial scrutiny, the Court found that children in the poorer property districts were not denied an adequate education and could not be fairly defined as suffering the loss of such an education because of their indigency.<sup>151</sup> Therefore, the two distinguishing characteristics of wealth discrimination found in the Court's previous cases were not present. First, the Texas school financing system did not operate to the peculiar disadvantage of any definable category of "poor" people; and second, the lack of wealth did not result in an *absolute* deprivation of public education.<sup>152</sup>

Even if the case were to be examined from the standpoint of "district" wealth discrimination, rather than on the basis of "individual income characteristics," the Court declined to extend its most exacting scrutiny with respect to such "a large, diverse, and amorphous class," which had none of the traditional indicia of suspectness.<sup>153</sup> Justice Powell's opinion for the Court reasoned that:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.<sup>154</sup>

Thus, the Court formulated an important guide for defining what nature of groups could claim the special protection accorded "suspect" classes and charted a new limit on the difficult "compelling interest" doctrine. Further, the Court refined its analysis of what constitutes a "fundamental" right and thereby sought to underline the limits of this part of the rationale employed in the Court's strict scrutiny decisions. Justice Powell's majority opinion expressly rejected the idea that the "importance" of a service or benefit provided by the state should determine whether it must be regarded as fundamental.<sup>155</sup> His statement argued that if the Court picked out particular human activities and characterized them as fundamental depending on a majority's view of the importance of the interest affected, it would indeed be assuming a legislative role and one for which it lacks both authority and competence.<sup>156</sup> On the contrary, all the Court had done in its earlier decisions was to recognize as being fundamental those rights which were already established constitutional rights, such as the right to interstate travel.<sup>157</sup>

The majority position held that the Court did not in its other strict scrutiny

150 *Id.* at 37-38.

151 *Id.* at 24. The Court found there was no basis on the record for assuming that the poorest people are concentrated in the poorest districts. In fact, it observed that the poor may be found to be clustered around commercial and industrial centers which provide the most attractive tax bases. *Id.*

152 *Id.* at 25.

153 *Id.* at 28.

154 *Id.*

155 *Id.* at 30.

156 *Id.* at 31.

157 *Id.* at 32.

cases invoke an ad hoc determination as to the social or economic importance of human rights.<sup>158</sup> The lesson of its prior cases, stated Justice Powell, plainly revealed that "it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."<sup>159</sup> Rather, the key to discovering whether a service or interest is "fundamental" lies in assessing whether it is among the rights "explicitly or implicitly guaranteed by the Constitution."<sup>160</sup> Applying this principle to the Texas property tax situation, the Court held that there is no guarantee of a right to obtain more than a basic education.<sup>161</sup> Where the state law does not cause an absolute denial of educational opportunities to any of its children, the mere fact that education may be related to the effective exercise of first amendment freedoms and to the intelligent exercise of the vote does not mean that education is itself a fundamental personal right.<sup>162</sup> Justice Powell concluded that the Court does not possess "[t]he ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice."<sup>163</sup> These are goals to be pursued by legislatures, not by judicial intrusion.

Moreover, Justice Powell indicated the strict scrutiny rule was inappropriate to the property tax scheme because it differed in one further respect from the earlier fundamental right line of cases. Texas was not endeavoring to deprive anyone of a right to an education. Its system was utilized in an effort to *extend* public education and to improve its qualities. Since the thrust of the Texas system is affirmative, it "should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."<sup>164</sup> Consistent with this theme, the Court also revealed that for once it was granting more than a rote genuflection to the principles of federalism. Justice Powell's admonition for judicial restraint against circumscribing or handicapping continued research and experimentation by the states in the educational financing area proves that a true respect for federalism contributed to the Court's

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158 *Id.*

159 *Id.* at 33.

160 *Id.* The Court found support for its holding that social importance is not the critical determinant for subjecting state legislation to strict scrutiny in two of its recent decisions. In *Lindsey v. Normet*, 405 U.S. 56 (1972), the Court had decided against the claim by tenants in suits by landlords that the statute should be examined under "a more stringent standard than mere rationality." *Id.* at 73. While recognizing the importance of "decent, safe, and sanitary housing," the Court stated it was "unable to perceive any Constitutional guarantee of access to dwellings of a particular quality" or any recognition of the right of the poor to occupy housing beyond the term of their lease, without the payment of rent. *Id.* at 74.

Similarly, in *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court had reversed the application by a federal district court of the stricter standard of review to Maryland's maximum family grant provision under its Aid to Families with Dependent Children program. Though the Court explicitly recognized that public welfare assistance "involves the most basic economic needs of impoverished human beings," *id.* at 485, it held this central importance of welfare benefits was *not* an adequate foundation for requiring the state to support its law by a compelling state interest. *See also* *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971).

161 411 U.S. at 35.

162 *Id.* at 36.

163 *Id.*

164 *Id.* at 39.



determination not to apply the strict test.<sup>165</sup> In Justice Powell's words, "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State."<sup>166</sup> Here is a strong indication the Court will pay more attention in the future to the actual degree to which feasible alternatives may exist and the extent to which precedents comparable to the practice being hoisted by Congress may have been successfully tested among the states before the Court applies the stricter judicial test.

### *Conclusion*

A view is beginning to take shape among the Court which sets some rough but recognizable boundaries on the application of the strict test. Inherent in this trend is a distinct and serious concern for the survivability of the federal system. Both developments have an important nexus with the Court's disposition to uphold congressional enforcement legislation under the Civil War amendments and indicate that the pause in this area which the Court began with *Oregon v. Mitchell* is still very much alive. If, as seems likely,<sup>167</sup> the Court continues its recent inclination to consider questions of federalism closely and to draw a clearer analysis for its application of the stricter test, reliance on this test by the national Congress should not have the dire effects upon state power feared by some. The "compelling state interest" standard is a legitimate and useful tool which Congress may properly use in advancement of personal rights and liberties. Used wisely, Congress can, by tying this doctrine to its broad discretion for action under the Civil War amendments, further enhance the lives of millions of the nation's citizens, be they members of racial minority groups striving to achieve a more equal position in society or part of "middle America" seeking relief from archaic election disabilities. Bound by the strictures of a newly developing majority on the Court, the twin doctrines of stricter scrutiny and enforcement clause legislation raise hope and opportunity for disadvantaged Americans without doing violence to the fundamental division of power between state and national governments.

<sup>165</sup> *Id.* at 40.

<sup>166</sup> *Id.* at 44.

<sup>167</sup> Predictions as to how the Court's present membership would view future congressional enactments buttressed by the "compelling interest" principle are clouded by the fact that all Justices except for Mr. Rehnquist have endorsed the stricter standard in one or more settings.