

# Constitutional Law--Voting Rights Act of 1965-- Provisions Involved Held Constitutional as Appropriate Means for Implementing Fifteenth Amendment (South Carolina v. Katzenbach, 383 U.S. 301 (1966))

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his clients. The incipency doctrine and the test dealing with elimination of substantial competitors have been made presumptions of illegality rather than aids in determining whether there is a "reasonable probability" of adverse effects on competition. Undoubtedly, the Court will not allow the rationale of the instant case to be extended ad infinitum, but in the meantime, absent further clarification, the law has become doubtful. Perhaps the fault of this decision lies in the fact that it should have been tempered with considerations of other relevant economic factors.

The history of litigation under the Celler-Kefauver Amendment to Section 7 of the Clayton Act has demonstrated an increasingly antagonistic attitude on the part of the Supreme Court toward mergers and acquisitions which may have anticompetitive characteristics. The instant case led Mr. Justice Stewart to say in his dissent that the only underlying principle of the majority opinion must be that "in litigation under § 7, the Government always wins."<sup>36</sup>



CONSTITUTIONAL LAW — VOTING RIGHTS ACT OF 1965 — PROVISIONS INVOLVED HELD CONSTITUTIONAL AS APPROPRIATE MEANS FOR IMPLEMENTING FIFTEENTH AMENDMENT. — The State of South Carolina brought an action to enjoin the United States Attorney General from enforcing the provisions of the Voting Rights Act of 1965<sup>1</sup> which deal with the suspension of eligibility tests, the appointment of federal examiners, and the review of proposed changes in state voting qualifications. The Supreme Court, upholding the constitutionality of the provisions of the act before it, *held* that they were appropriate means for carrying out congressional responsibilities under the fifteenth amendment, and were consonant with all other relevant constitutional requirements. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

A major responsibility of Congress is to provide appropriate implementation of the guarantees of the fifteenth amendment. Adopted in 1870, this amendment provides that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."<sup>2</sup> In May 1870, immediately after ratification of the fifteenth amendment, a statute was enacted to enforce the right to vote in federal

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<sup>36</sup> *Supra* note 30, at 301.

<sup>1</sup> 79 Stat. 437, 42 U.S.C. §§ 1973-75 (hereinafter cited as Voting Rights Act of 1965).

<sup>2</sup> U.S. CONST. amend. XV, § 1.

and state elections.<sup>3</sup> This act restated the right of all citizens to vote without regard to race, color, or previous condition of servitude; subjected to criminal penalties state officials who denied any citizen the equal opportunity to qualify to vote; and penalized those who used force, threats, or other unlawful means to obstruct the free exercise of this right to vote. In 1871, Congress further provided for the appointment of Federal Supervisors who were to challenge any unqualified person offering to register, while causing to be registered any applicant possessing the necessary qualifications. Upon application by a specified number of citizens to the local circuit, the court was authorized to appoint supervisors for registration and election periods.<sup>4</sup>

In 1894, however, as "fervor for racial equality waned,"<sup>5</sup> Congress repealed most of the provisions of the Enforcement Acts,<sup>6</sup> thus returning to the states the primary responsibility for the conduct of elections. Several general voting rights provisions survived: (1) a statutory declaration of each citizen's right to vote without regard to race or color;<sup>7</sup> (2) two provisions creating civil liability on the part of persons<sup>8</sup> who conspire to interfere with a citizen's right to vote;<sup>9</sup> and (3) two sections<sup>10</sup> imposing criminal sanctions on persons who hinder a citizen in his attempt to exercise his right to vote.<sup>11</sup>

From 1871 to 1957, Congress failed to enact any additional legislation to enforce the provisions of the fifteenth amendment.<sup>12</sup> This eighty-year drought in federal civil rights legislation was ended with the passage of the 1957 Civil Rights Act.<sup>13</sup> The act

<sup>3</sup> 16 Stat. 140 (1870).

<sup>4</sup> 16 Stat. 433 (1871). This Act was held to be a constitutional exercise of congressional authority in *Ex parte Siebold*, 100 U.S. 371 (1879), wherein a conviction was upheld charging an election official with interfering with the appointed supervisors.

<sup>5</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966).

<sup>6</sup> 28 Stat. 36 (1894).

<sup>7</sup> REV. STAT. § 2004 (1875), 42 U.S.C. § 1971(a)(1) (1964).

<sup>8</sup> A person under this section does not include a state or a subdivision thereof acting in its sovereign as distinguished from its proprietary capacity. *Hewitt v. City of Jacksonville*, 188 F.2d 423 (5th Cir.), *cert. denied*, 342 U.S. 835 (1951).

<sup>9</sup> REV. STAT. §§ 1979-81 (1875), 42 U.S.C. §§ 1983, 1985 (1964).

<sup>10</sup> 16 Stat. 141, 144, now 18 U.S.C. §§ 241-42 (1964).

<sup>11</sup> These five provisions did little to protect Negro voting rights. Between 1898 and 1908, eleven states enacted measures calculated to make the franchise exclusively white, the most common devices being literacy tests and poll taxes. 1959 CIVIL RIGHTS COMM'N REP. 31-32.

<sup>12</sup> In 1939, Congress did include as part of the Hatch Act a provision making it a crime to intimidate any person in the exercise of his voting rights in an election of federal officials. 53 Stat. 1147 (1939), 18 U.S.C. § 594 (1964). This provision has apparently never been used to combat racially motivated voter discrimination. See 1961 CIVIL RIGHTS COMM'N REP. 74.

<sup>13</sup> 71 Stat. 634 (1957), 42 U.S.C. §§ 1971(a)-(d), 1975(c), 1995 (1964).

empowered the Attorney General to institute suits to prevent any deprivation of the right to vote because of race or color, and prohibited the employment of threat and intimidation for the purpose of interfering with the right to vote in federal elections. The act, however, proved to be ineffective in protecting the rights of a significant number of people. It was hampered not only by the fact that its sanctions could be invoked only by court action against specified persons, but also by the inability to gain access to voting records.<sup>14</sup>

The Civil Rights Act of 1960 was enacted in an attempt to cure this latter problem. It provided the Attorney General with the power to inspect the documents in the custody of the local voting registrars.<sup>15</sup> Where a pattern or practice<sup>16</sup> of discrimination was found, the act permitted Negroes in the affected area, whose application had been rejected by local officials, to apply through the Attorney General to a federal court or to a federal voting referee, if one had been appointed, for an order certifying them as eligible to vote. The act further attempted to afford widespread relief by providing for joinder of the state as a party defendant in any suit involving voting rights. Although it was expected that the use of voting referees would be the most effective provision of the 1960 Act, in many instances where patterns of discrimination were obvious, the courts declined to make such a finding or appoint referees.<sup>17</sup> As a result, it would appear that the most significant innovation was the authority vested in the Attorney General to seek relief applicable to *many persons* in the context of a suit brought on the part of a few. Yet, litigation still had to be conducted separately in each registration district, and was thus vulnerable to the tactics of delay which are often utilized in civil rights litigation.<sup>18</sup>

In 1964, Congress again attempted to remedy the defects of existing legislation by passing an omnibus Civil Rights Act.<sup>19</sup> Title I provided for expedition of voting suits before a three-judge federal district court with direct appeal to the Supreme

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<sup>14</sup> 2 U.S. CODE CONG. & AD. NEWS 2544 (1965).

<sup>15</sup> 74 Stat. 86 (1960), 42 U.S.C. §§ 1971(e), 1974(e), 1975 (1964).

<sup>16</sup> For occasions when the courts have found a pattern or practice see *United States v. Crawford*, 229 F. Supp. 898 (W.D. La. 1964); *United States v. Manning*, 205 F. Supp. 172 (W.D. La. 1962). The court failed to find the required prerequisites in *United States v. Fox*, 211 F. Supp. 25 (E.D. La.), *aff'd*, 334 F.2d 449 (5th Cir. 1964).

<sup>17</sup> *Kommers, The Right to Vote And Its Implementation*, 39 NOTRE DAME LAW. 365, 388 (1964).

<sup>18</sup> See *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962), *cert. denied*, 371 U.S. 893 (1963), where the government's request for a temporary injunction was delayed for eight months by the use of dilatory motions.

<sup>19</sup> Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§ 1971, 1975a-d, 2000a-h(4) (1964).

Court. The statute also prohibited the states from establishing voting qualifications in federal elections different from those applied under prior law with respect to registration conducted under state law. The enactment also prohibited rejection of applicants because of immaterial errors in registration forms, and the use of literacy tests as a qualification for voting unless they were administered in writing and a copy given to the applicant.

Despite this more extensive legislation, its aims were never fully achieved due to the intransigence of state and local officials and the delays inherent in the judicial process. Between 1957 and 1964, the Department of Justice instituted seventy-one voting rights cases to which an incredible amount of time was devoted—often as much as six thousand man-hours per case.<sup>20</sup> This case-by-case litigation approach afforded those who were determined to resist congressional sanction plentiful opportunity to do so.<sup>21</sup> Even where some registration had been achieved, Negro voters were sometimes discriminatorily purged from voter registration rolls.<sup>22</sup>

The need for stronger measures is amply demonstrated by the voting record in Dallas County, Alabama, of which Selma is the county seat.<sup>23</sup> Dallas County has a voting-age population of approximately 29,500, of whom about 14,500 are white persons and about 15,000 are Negroes. In 1961, 9,195 whites—64 per cent of the white voting-age total, and 156 Negroes—1 per cent of their total—were registered to vote. The Department of Justice brought an action against the County Board of Registrars.<sup>24</sup> Thirteen months later the suit reached trial. Although the Department of Justice proved discrimination on the part of the registrars who were no longer in office,<sup>25</sup> the court found that the board of registrars then in office had not engaged in discriminatory acts and practices and refused to issue an injunction.<sup>26</sup> Two and one-half years after the suit was originally filed, the court of appeals<sup>27</sup> reversed the district court and ordered it to enter an injunction against discriminatory practices by the present board and its successors. The court refused to hold that Negro applicants must be

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<sup>20</sup> 2 U.S. CODE CONG. & AD. NEWS 2441 (1965).

<sup>21</sup> *United States v. Mississippi*, 229 F. Supp. 925, 974 (1964) (dissenting opinion), *rev'd*, 380 U.S. 128 (1965).

<sup>22</sup> *United States v. McElveen*, 180 F. Supp. 10 (E.D. La.), *aff'd sub nom. United States v. Thomas*, 362 U.S. 58 (1960).

<sup>23</sup> The case study is taken from 2 U.S. CODE CONG. & AD. NEWS 2441-42 (1965).

<sup>24</sup> *United States v. Atkins*, 210 F. Supp. 441 (S.D. Ala. 1962), *rev'd*, 323 F.2d 733 (5th Cir. 1963).

<sup>25</sup> Fourteen Negroes were registered between 1954 and 1960. 2 U.S. CODE CONG. & AD. NEWS 2441 (1965).

<sup>26</sup> *Supra* note 24, at 443-44.

<sup>27</sup> *United States v. Atkins*, 323 F.2d 733 (5th Cir. 1963).

judged by the same lenient standards that had been applied to white applicants for the eight-year period during which these discriminatory practices had prevailed.<sup>28</sup>

Between 1962 and 1964, registrars in Dallas County attempted to continue discrimination by slowing down registration. Finally, in 1964, the local officials devised a new test whereby applicants were required to demonstrate their ability to spell and understand.<sup>29</sup> Applicants in Selma were required both to spell such words as "emolument," "despotism" and "apportionment," and "to give a satisfactory interpretation of one of a number of excerpts from the Constitution . . . ."<sup>30</sup>

In March 1964, the Department of Justice filed a motion in the original Dallas County case initiating a second full-scale attempt to end discriminatory practices in the registration process in that county.<sup>31</sup> On February 4, 1965, nearly four years after the suit was brought, the district court finally enjoined the use of the complicated literacy and knowledge-of-government tests, and entered orders designed to deal with the serious problem of delay.<sup>32</sup>

The difficulties which were experienced in Dallas County are typical of such discrimination on a broader scale. Many states have violated the fifteenth amendment by the use of tests and devices, the most common of which is the literacy test.<sup>33</sup> For example, in *United States v. Louisiana*, where the Government challenged the validity of the state's constitutional interpretation test, the three-judge court found "massive evidence" that registrars discriminated against Negroes in a pattern based on unequal application of tests.<sup>34</sup> In *United States v. Alabama*,<sup>35</sup> the court invalidated

<sup>28</sup> *Id.* at 741-45.

<sup>29</sup> 2 U.S. CODE CONG. & AD. NEWS 2442 (1965).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Even after four years of litigation, only 383 out of 15,000 eligible Negro voters were registered, *i.e.*, an increase of 227 voters. 2 U.S. CODE CONG. & AD. NEWS 2442 (1965). Similar situations existed in Mississippi and Louisiana:

State	% Increase in Negro Registration	Years
Alabama	5.2 to 19.4	1958-64
Mississippi	4.4 to 6.4	1954-64
Louisiana	31.7 to 31.8	1956-65

*Id.* at 2441.

<sup>33</sup> See generally Maggs & Wallace, *Congress and Literacy Tests: A Comment on Constitutional Power and Legislative Abnegation*, 27 LAW & CONTEMP. PROB. 510 (1962); Note, *The 1965 Voting Rights Act and State Literacy Tests*, 30 ALBANY L. REV. 112 (1966); Note, *The Constitutionality of Federal Legislation To Abolish Literacy Tests: Civil Rights Commission's 1961 Report on Voting*, 30 GEO. WASH. L. REV. 723 (1962).

<sup>34</sup> 225 F. Supp. 353, 381 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1964).

<sup>35</sup> 304 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962).

application procedures which were used in a plan to discriminate against Negroes. Often, whites were not required to take the tests at all.<sup>36</sup> The registrars have also utilized a voucher requirement to effect discrimination. They have required Negroes, but not whites, to produce supporting witnesses to vouch for them,<sup>37</sup> and in some instances they have required Negroes to produce whites to vouch for them.<sup>38</sup> In sum, it was the history of repeated legislative frustration in the attempt to correct voting imbalances, joined with the prevalence of new and more subtle discriminatory devices, which led to the enactment of the Voting Rights Act of 1965.

The Act provides for limited administrative regulation of voter registration and elections in a certain restricted class of states and political subdivisions. In such states and subdivisions, the government can insure and enforce voting rights without initial recourse to litigation. This is accomplished by the automatic suspension of literacy tests and other devices in certain areas and, if necessary, the appointment of federal examiners to register applicants. Section 4 provides that the specific provisions of the Act apply to those states and subdivisions in which (1) discriminatory tests or devices were maintained on November 1, 1964 and (2) less than 50 per cent of the residents of voting age were registered for or voted in the presidential election of 1964. The Attorney General is vested with the power to determine which states and subdivisions maintained such tests or devices. The Director of Census reports those states in which less than 50 per cent have registered or voted.<sup>39</sup> When the determinations of the Attorney General and the Director of Census have been published in the *Federal Register*, a state or subdivision covered thereby will be prohibited from denying any person the right to vote because of his failure to comply with a literacy test or any other device. To prevent the use of voter qualification tests other than those specifically mentioned in the Act, a section 4(b) state or subdivision is further prohibited from enforcing or using any qualification for voting different from those in effect on November 1, 1964, without first receiving administrative or judicial approval.<sup>40</sup>

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<sup>36</sup> See *United States v. Clement*, 231 F. Supp. 913 (W.D. La. 1964) wherein it was stated: "Professionally trained Negroes were rejected on the basis of the oral tests, while white persons with sixth grade education and less were registered without taking the test at all." *Id.* at 915.

<sup>37</sup> *United States v. Ward*, 222 F. Supp. 617 (W.D. La. 1963), *rev'd on other grounds*, 349 F.2d 795 (5th Cir. 1965), *modified on rehearing*, 352 F.2d 329 (5th Cir. 1965).

<sup>38</sup> *United States v. Manning*, 205 F. Supp. 172 (W.D. La. 1962).

<sup>39</sup> Under Section 4(b) of the Voting Rights Act of 1965, these decisions are not judicially reviewable.

<sup>40</sup> Voting Rights Act of 1965, § 5.

The Court in the instant case was faced with the task of answering South Carolina's contention that the Voting Rights Act of 1965 exceeded the powers of Congress and encroached on an area reserved to the states by the Constitution.<sup>41</sup> The Court noted that the ground rules for resolving the question were clear.

The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.<sup>42</sup>

Congress derives its power to enact this legislation from section 2, the enforcement provision, of the fifteenth amendment.<sup>43</sup> The Court noted that the basic test of constitutionality to be applied was the one espoused by Chief Justice Marshall in *McCulloch v. Maryland*.<sup>44</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 consistent with the letter and spirit of the constitution, are constitutional."<sup>45</sup> Therefore, the Court rejected the argument that under the fifteenth amendment Congress could do no more than forbid violations of the amendment.<sup>46</sup>

In evaluating the actions of Congress, the Court employed a twofold approach: (1) was there a need for legislation, and (2) were the specific remedies prescribed in the Act appropriate for combating the evil? The Court reasoned that Congress had found that case-by-case litigation was inadequate, because of the amount of time and energy required to eliminate voter discrimination. Therefore, "Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims."<sup>47</sup>

In considering the specific remedies afforded by the Act, the Court, drawing on the history of discrimination against the Negro, concluded in all instances that the remedies provided were legitimate responses "for which there is ample precedent in fifteenth amendment cases."<sup>48</sup>

Mr. Justice Black dissented from the holding of the majority as to section 5 of the Act. He objected to the provision that a section 4(b) state could not amend its laws as to voting qualifica-

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<sup>41</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).

<sup>42</sup> *Id.* at 324.

<sup>43</sup> Preamble, Voting Rights Act of 1965.

<sup>44</sup> 17 U.S. (4 Wheat.) 316 (1803).

<sup>45</sup> *Id.* at 421.

<sup>46</sup> *South Carolina v. Katzenbach*, *supra* note 41, at 326.

<sup>47</sup> *Id.* at 328.

<sup>48</sup> *Id.* at 334.

tions without judicial approval, arguing that no justiciable controversy could arise from the desire of the United States government to determine in advance what legislative enactments a state could adopt.

By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to secure precisely the type of advisory opinion our Constitution forbids.<sup>49</sup>

Mr. Justice Black also maintained that the means used to enforce the fifteenth amendment were not appropriate and therefore invalid. By requiring the states "to beg" federal authorities to approve their legislation, our constitutional structure of government becomes so distorted "as to render any distinction drawn in the Constitution between state and federal power almost meaningless."<sup>50</sup> This federal law, in Mr. Justice Black's view, "approaches dangerously near to wiping the States out as useful and effective units in the government of our country."<sup>51</sup>

The majority reasoned that exceptional conditions can justify legislative measures not otherwise appropriate.<sup>52</sup> Congress knew that some of the states covered by section 4(b) had resorted to extraordinary new rules for the purpose of perpetuating discrimination, and had reason to suspect that the states might attempt similar tactics to avoid the remedies of the voting act. "Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."<sup>53</sup>

Although the federal constitution contains several provisions concerning elections,<sup>54</sup> the only provisions establishing voter qualifications are found in Article I, section two and in the seventeenth amendment. It is provided that the qualifications for electors of representatives and senators respectively shall be the same as those for electors of the most numerous branch of the state legislature. The effect of these provisions is to vest in the states the power to set voter qualifications for federal elections.<sup>55</sup> Under the Voting Rights Act of 1965, Congress has, for the first time, expressly affected state voter qualifications.<sup>56</sup> In the past, Congress had

<sup>49</sup> *Id.* at 357-58 (dissenting opinion).

<sup>50</sup> *Id.* at 358.

<sup>51</sup> *Id.* at 360.

<sup>52</sup> See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

<sup>53</sup> *Supra* note 41, at 335.

<sup>54</sup> U.S. CONST. art. I, §§ 2, 4; U.S. CONST. amends. XIV, XV, XVII, XIX, XXIV.

<sup>55</sup> *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959); *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>56</sup> Note, *The 1965 Voting Rights Act and State Literacy Tests*, 30 ALBANY L. REV. 112, 116 (1966).

acknowledged the validity of state regulations and had simply sought their proper and impartial enforcement.<sup>57</sup> Since it is clear that the current legislation has gone beyond this, it could be argued that Congress has exceeded its enumerated powers. It would seem clear, however, that the power of Congress is not limited to punitive measures for proven wrongs. In fact, the grant of power in section 2 of the fifteenth amendment includes not only the power to strike down the strictly illegal but also the power to eliminate any substantial risk of violation of this amendment.<sup>58</sup> In addition, therefore, even though a state may cease to discriminate, it still may validly be subjected to the "suspension" provisions of the Act.<sup>59</sup>

The impact of this decision and the Voting Rights Act has already been felt in the South. Prior to 1965, 2.8 million of the approximately 5 million voting age Negroes still remained unregistered after eight years of litigation.<sup>60</sup> Indeed, only slightly more than 36,000 Negroes have been registered in those counties where suits had been brought by the Justice Department.<sup>61</sup> In contrast, by October 30, 1965, 56,789 Negro voters had already been listed by federal examiners in 20 counties. In the same ten-week period, an additional 110,000 Negroes were registered by local officials where examiners had not been assigned.<sup>62</sup> The emergence of substantial Negro voting power in the South should have an incalculable effect on Southern politics in the future.

The historic struggle for the realization of the constitutional guarantee of freedom to vote indicates clearly that our national achievements in this area have fallen far short of our aspirations. The history of fifteenth-amendment litigation in the Supreme Court reveals *both* the variety of means used to bar Negro voting and the durability of such discriminatory policies. The instant case introduces the possibility of major changes in the present distribution of state and federal responsibility for elections. Unless those states and the officials of those states affected by the Act forcefully uphold the commands of the fifteenth amendment, the federal government will be compelled to intervene to insure that *everyone* qualified be allowed to vote. Congress has not attempted to substitute federal for state law, but, on the contrary, has merely attempted to guarantee the citizens of the various states an equal voice in the making of those laws.

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<sup>57</sup> *Ibid.*

<sup>58</sup> Cox, *Constitutionality of the Proposed Voting Rights Act of 1965*, 3 HOUSTON L. REV. 1, 5 (1966).

<sup>59</sup> *Ibid.*

<sup>60</sup> N.Y. Times, Oct. 31, 1965, § E, p. 4, col. 4.

<sup>61</sup> U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT 9 (1965).

<sup>62</sup> *Id.* at 2.