Constitutional Law - Constitutional Bases for Upholding the Voting Rights Act Amendments of 1970

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The Voting Rights Act Amendments of 1970 had their roots in bills which sought to extend the literacy and related provisions of the 1965 Act. Initially, the House of Representatives enacted a bill which placed a nationwide ban on literacy tests, and provided for controls on state laws which imposed durational residency requirements in presidential elections. After extensive hearings and debate in the Senate, that body agreed with the House that literacy tests should be abolished on a nationwide basis, but added more restrictive limitations on state residency requirements and absentee-participation provisions than had been adopted by the House. The issue of voting age restrictions likewise arose, and in the ensuing debates, the Senate concluded that the state denial of franchise to those 18, 19 and 20 years old was unwarranted, and Congress had the power within the Constitution to establish the minimum age for voting in both state and federal elections. The Senate then passed and the House adopted the Voting Rights Act Amendment of 1970, hereinafter called the Voting Rights Act of 1970.

Specifically, the Voting Rights Act of 1970 abolished all forms of literacy tests as a condition precedent to voting in any federal, state, or

More significantly, the Voting Rights Act of 1970 abolished durational residency requirements as a pre-condition to voting for the offices of President and Vice President, and effectively reduced all state durational residency requirements to 30 days. Finally, the Voting Rights Act of 1970, in effect, franchises all 18, 19 and 20 year olds in federal and state elections.

The states of Oregon and Texas invoked the original jurisdiction of the Supreme Court to enjoin the United States Attorney General from enforcing the Voting Rights Act of 1970 with respect to the provision which franchises 18, 19 and 20 year olds in federal and state elections. The United States invoked the original jurisdiction of the United States Supreme Court to enjoin Arizona from enforcing its literacy statute, as well as its laws requiring an individual to be 21 years of age to vote in elections. The United States sought similar relief with respect to Idaho, but the injunction against enforcement referred to Idaho's laws pertaining to residency requirements and voting age, which also imposed an age requirement of 21 years.

Squarely presented, the states contested the power of Congress to legislate the provisions of the Voting Rights Act of 1970. In short, it was argued that the states have the power to establish voter qualifications within their jurisdiction under the United States Constitution. Thus, they contended that a state can establish reasonable voter qualifications, provided that such qualifications do not result in a denial of equal protection of the laws—and that their qualifications with respect to residency and age are not a denial of equal protection. With respect to literacy, it was argued that congressional restrictive power is limited to those situations in which Congress has a "special legislative competence" to determine that

13. Brief for Plaintiff, Oregon (No. 43) at 4-5, Oregon v. Mitchell, 400 U.S. 112 (1970); Brief for Defendant, Idaho (No. 47) at 10-11, Oregon v. Mitchell, 400 U.S. 112 (1970). Texas' summary of argument uses an approach slightly different from denial of equal protection: "As long as the qualifications set by the states are reasonable and nondiscriminatory, they are permissible." Brief for Plaintiff, Texas (No. 44) at 4, Oregon v. Mitchell, 400 U.S. 112 (1970); Texas does emphasize state power to set qualifications, id. at 4-5.
literate tests do in fact discriminate in the state in which the literacy test is used.  

Seven Justices held that the ban on literacy tests is a proper exercise of congressional power under the enforcement clause of the fifteenth amendment. This marks a more restrictive view of the Court, for few cases on literacy requirements rely exclusively on the fifteenth amendment. As to residency requirements, six justices upheld the uniform residency provisions on the basis that the right to interstate travel, which was specifically enumerated, among others, in the Voting Rights Act of 1970 as being hampered by durational residency requirements, is indeed a constitutional right, which Congress may protect and facilitate under the necessary and proper clause or section 5 of the fourteenth amendment. Because an individual, qualified to vote in his state of residence, could lose his right to vote by travelling to and establishing residence in another state before election time and not meeting that state's residency requirement, Congress has the power to remove this hindrance on an individual's right to travel freely from state to state. Justice Douglas, in his separate opinion, and Justices Brennan, White and Marshall in their opinion held that the eighteen year old enfranchisement as applied to both federal and state elections is within the scope of congressional power under section 5 of the fourteenth amendment. By virtue of Justice Black's interpretation of article I section 4 of the Constitution (which is that Congress' power under this clause to make or alter regulations includes the power to establish voter qualifications in federal elections), the 18, 19 and 20 year old enfranchisement was upheld in federal, but not state elections. Oregon v. Mitchell, 400 U. S. 112 (1970).

The significance of this decision is that the Court stamped an affirmative approval on congressional legislation which purports to protect the

15. Justice Black relied on the enforcement clauses in both the fourteenth and fifteenth amendment, while Justice Douglas relied on the enforcement clause in the fourteenth amendment only.
17. Justices Brennan, White, and Marshall relied on § 5 of the fourteenth amendment, while Justices Stewart, Burger, and Blackmun chose to rely on the necessary and proper clause. Justice Black used article I § 4, and Douglas used the right to vote as the privilege and then § 5 of the fourteenth amendment. Harlan dissented in part.
18. This was the issue everyone debated. Basically, the principle is based on Katzenback v. Morgan, 384 U.S. 641 (1966). The separate opinions in Oregon v. Mitchell, 400 U.S. 112 (1970), relate the pros and cons. See Black, id. at 126-127.
constitutional rights of individuals. Congress tailored legislation to abrogate state laws which, in their viewpoint, hinder an individual's right to vote, right to travel interstate, and right to the equal protection of the laws with respect to age-classification in voting. Since only four justices were willing to conclude that Congress has the power to forbid disenfranchisement of persons over the age of 18 in order to enforce the equal protection clause of the fourteenth amendment, it appears that the Court is reluctant to hand over the area of equal protection to Congress. However, as to the other bases used in sustaining the literacy and residency provisions of the Voting Rights Act of 1970, the Court appears receptive. Finally, Justice Black's interpretation of article I section 4, because of its uniqueness and consequences, is significant in itself.

The purpose of this casenote is: to analyze important judicial decisions and congressional action on literacy with respect to the fifteenth amendment only, in search of a consistent basis; to examine critically Justice Black's interpretation of article I section 4 of the Constitution, which has become the constitutional result of the Voting Rights Act of 1970 with respect to the 18 year old vote; and to investigate the historical flow of the constitutional right to travel interstate to determine the constitutional source of this right.

(Civil War amendments intended to prevent racial discrimination); Douglas, id. at 135-144, particularly at 141: quoting in part Katzenback v. Morgan, supra, at 650: "As we stated in that case, '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.' Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection." Harlan, id. at 154-200 (46 pages of historical analysis concluding that the fourteenth amendment was not intended to reach discriminatory voter qualifications); Brennan, White, and Marshall, id. at 246-250, note in particular 248: "Limitations stemming from the nature of the judicial process, however, have no application to Congress. Section 5 of the fourteenth amendment provides that '[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.' Should Congress, pursuant to that power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter;" see also id. at 250-278 historical counter to Harlan, and rationality of Congressional conclusion at 278-281; Stewart, the Chief Justice, and Blackmun, id. at 295-296 (Rationale of Morgan is being over extended). Notice that there is a fine distinction between Douglas and the other Justices supporting congressional enforcement. Douglas emphasizes power while the other Justices emphasize congressional fact-finding in determining discrimination. See Engdahl, Constitutionality of the Voting Age Statute, 39 Geo. Wash. L. Rev. (1970); Burt, Miranda and Title II; A Morganatic Marriage, 1969 The Supreme Court Review 81. See also Cox, Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966).
LITERACY AND THE FIFTEENTH AMENDMENT

How can the Supreme Court in 1959 decide that literacy tests as a condition of voting are not unconstitutional on their face as a violation of the fifteenth amendment, *Lassiter v. Northampton*,¹⁹ and, eleven years later, sustain a five-year nationwide ban on literacy tests as being within congressional power under section 2 of the fifteenth amendment, *Oregon v. Mitchell*?²⁰ Is this a change of philosophy or judicial consistency based on distinctions of fact and application of the fifteenth amendment?

To analyze the Voting Rights Act of 1970 as applied to the ban on literacy, the fifteenth amendment must be understood. The amendment provides:

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

Section 2. The Congress shall have power to enforce this article by appropriate legislation.²¹

It must be observed that the amendment contains two sections, one of which deals with rights of citizens, and the other, with congressional enforcement power.

In *Lassiter*, the application of this amendment involved a suit by a Negro citizen of North Carolina to have that state's literacy test as a condition to voting declared unconstitutional and void.²² The statute required that the prospective voter be able to read and write any section of the North Carolina Constitution in the English language.²³ The Court held that this was not a device to discriminate against a person on the basis of race or color, but rather a requirement designed to raise the standards of voters.²⁴

It must be noted that *Lassiter* was a judicial decision based on an individual's claim that the statutory literacy requirement violated the fifteenth amendment. Similarly, in *Davis v. Schnell*,²⁵ Negro citizens of Alabama brought an action to secure their right to register as electors, which is a prerequisite to voting.²⁶ The plaintiffs alleged that the literacy requirement, contained in the Alabama Constitution, that the voter under-

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²¹. U.S. Const. amend. XV.
²². *Supra* note 19, at 45.
²³. *Supra* note 19, at 53-54.
²⁴. *Supra* note 19, at 53-54.
²⁶. *Id.* at 874.
stand and explain any article of the Federal Constitution, was merely a scheme to prevent Negroes from exercising their right to vote.\textsuperscript{27} Evidence indicated that the Board of Registrars clearly discriminated racially in the administration of this provision by arbitrarily failing the Negro registrants tested.\textsuperscript{28} In addition, the legislative history of this amendment to Alabama’s Constitution was replete with evidence of its purpose to stop Negroes from voting.\textsuperscript{29} On the basis of this plan, the Court adopted the contention of the plaintiffs, and declared the Alabama amendment violative of the fifteenth amendment, since its overall scheme was to discriminate against Negroes attempting to exercise their right to vote.\textsuperscript{30}

\textit{Lassiter} and \textit{Davis} both illustrate the application of the fifteenth amendment. In each case, the question was whether the literacy test is a legitimate voter qualification, or whether it is simply a device to deny the right to vote because of race. The \textit{Davis} case can be further qualified by adding that the device must have some element of a plan. The fifteenth amendment clearly prohibits race as a voter qualification. Furthermore, it would prohibit a qualification which was intentionally designed to prohibit a particular race from voting. Two questions come to view as the law progresses to the \textit{Oregon} stage, upholding the nationwide ban on literacy requirements. First, is an intent or plan required? Second, is the question of whether a literacy test deprives a person of his right to vote on account of race necessarily a judicial question of law, or is it a question of fact?

The answer to these questions is significant, because if the intent or plan is not necessary to find unconstitutionality, the situation becomes one of fact. The result would then turn on whether the test or device in fact prevents a citizen’s right to vote because of his race. If the determination can be made on a factual basis, then can Congress under section 2 of the fifteenth amendment enforce legislation which removes the conditions which are in fact depriving the right to vote to citizens on account of their race?

Before these specific questions were answered, Congress passed the 1965 Voting Rights Act, which permitted the suspension of literacy tests for five years in certain areas.\textsuperscript{31} The factual basis for determining the

\textsuperscript{27} Id. at 874.
\textsuperscript{28} Id. at 880.
\textsuperscript{29} Id. at 880.
\textsuperscript{30} Id. at 880; see also United States v. Mississippi, 380 U.S. 128 (1965) and Louisiana v. United States, 380 U.S. 145 (1965). These cases involved a similar conclusion based on both the fourteenth and fifteenth amendments.
areas was a coverage formula, which provided for suspension of voter restrictions in any state or political subdivision of a state in which, according to a Director of the Census determination, less than fifty percent of persons of voting age who were residents were not registered on November 1, 1964, or less than fifty percent of such persons voted in the presidential election of November 1, 1964. When these provisions were contested by South Carolina, significant evolutions in the application of the fifteenth amendment to voting rights developed. First, the fifteenth amendment was applied as an affirmative tool of Congress under the enforcement section. The Court specifically rejected an argument that Congress must wait for a judicial determination that the literacy tests violated the fifteenth amendment. Secondly, although the Court specifically referred to the reliable evidence before Congress in determining that actual discrimination existed in the states and political subdivisions affected by the Act, it related that the formula was a rational one in dealing with voting discrimination. In other words, the facts were not judicially determined, but determined by Congress and reviewed only for rationality. The formula dealt with evidential problem areas, and Congress could infer that other areas included in the formula presented a danger. Thus, Congress did not have to seek any further justification under its express powers of the fifteenth amendment.

Now the enforcement clause of the fifteenth amendment is receiving the same viability as the necessary and proper clause receives with respect to the express powers of Congress in relation to the reserved powers of the states. As stated in McCulloch v. Maryland:

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.

While the application of the fifteenth amendment has passed from a passive protective amendment to an active power amendment, there are still distinctions to be made before Oregon can be fully understood. The 1965 Voting Rights Act provided a coverage formula, which defined a formula for establishing a prima facie case of racial discrimination in voting. However, the statute provided a judicial method of review for a state

34. Id. at 325.
35. Id. at 329.
36. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); South Carolina v. Katzenback, supra note 33, at 326, applies this as the basic test of § 2 of the fifteenth amendment.
or subdivision which desired to rebut the presumption. Thus, the 1965 Voting Rights Act contained the element of actual racial discrimination in voting. Despite the force of the fifteenth amendment announced in *South Carolina*, this congressional act, itself, limited the principle, because it still ties the determination of a factual basis of discrimination to the judiciary—a state or county could rebut the coverage formula presumption.

In fact, this is what Gaston County, North Carolina attempted. Their offer of proof was that the test was fairly administered. The Government countered with substantial evidence to the effect that Gaston County for many years had deprived its Negro citizens an equal education, and consequently, they were unable to pass the literacy test. Significantly, the issue is beyond mere fairness of the test and proper administration of it. The Court found no problem with deciding whether unequal education could be a basis for discrimination by way of a literacy test. By reference to legislative history, the Court concluded that unequal education was a basis for discrimination in voting by way of a literacy test: The present proper administration of the test could not cure the systematic discrimination which made passage of the literacy requirement difficult for Negroes.

By reviewing two significant cases prior to the 1965 Voting Rights Act, the Act itself, and case law applicable to it, noticeable transitions in the use and application of the fifteenth amendment have taken place. The starting point was the *individual* v. state in a court of law to determine whether a literacy test violated his rights under the fifteenth amendment. It was noted that the Court would declare the provisions unconstitutional only if the literacy requirement was part of a plan to abridge the rights of Negroes to vote. Next, the 1965 Voting Rights Act abolished literacy tests in certain areas. The Act provided for a factual determination as to whether a state or subdivision discriminated against Negro voters by means of a coverage formula. If voter registration or voting in presidential elections was below the formula percentage, then a state or subdivision could rebut the factual determination in a court of law.

Thus, the fifteenth amendment was transformed into an affirmative power of Congress (as opposed to a standard of review by the judiciary).

39. *Id.* at 287.
40. *Id.* at 287.
41. *Id.* at 296-297.
However, in spite of this change, the legislation still tied factual determinations to the judiciary by means of allowing the state or subdivision an opportunity to rebut. The 1965 Act eliminated the need for a plan or intent as required in the *Davis* case, but, technically speaking, the 1965 Act did not go beyond actual discrimination. It took the initial power to decide factual voting discrimination from the Court, but only in a limited manner. It can also be said, as argued in the brief of Arizona in *Oregon*, that even the most extended case law on the Voting Rights Act (*Gaston County*) stood only for actual discrimination in voting for which the government bore some responsibility. There can be no doubt that the law as announced in *South Carolina* clearly gives Congress the power to enforce by appropriate legislation the provisions of the amendment. Under the Voting Rights Act of 1970, the ban is complete and nationwide for five years. There is no redress to the Courts as in the 1965 Voting Rights Act. Thus, the ban has progressed from a literacy test which was part of a plan to discriminate, to a literacy test which by its operation created in fact discrimination—to no literacy test, period.

Are these results consistent with the Constitution? To answer this question, reference must be made to a concept, previously mentioned, that voting discrimination is a matter of fact, and not of law. Adopting this view, Congress can be placed in as good a position as the courts. For one thing, Congress had before it reports and data indicating that literacy tests have a negative impact on blacks and other minorities in voter registration. Granted, this data cannot support a proposition that all literacy tests *per se* discriminate; but the point remains that the factual effect of literacy tests is tantamount to a denial of one's right to vote on account of race. Congress has gone beyond actual racial voting discrimination to enforce affirmatively the provisions of the fifteenth amendment. Congressional treatment of the problem by enforcement parallels the enforcement of the commerce clause by way of the necessary and proper clause.

In conclusion, it can be said that *Oregon* does not change the law or the


46. *Supra* note 14, at 10-11; *supra* note 38, at 293 n.8.

47. See, e.g., *Hearings on Amendments to the Voting Rights Act before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 91st Cong., 1st and 2d Sess. at 396-410 (Statement of Howard A. Glickstein, staff director of the U.S. Commission on Civil Rights who related the results of a study conducted by that commission on northern and western states based on Bureau of Census tabulations).

48. See *South Carolina v. Katzenbach*, *supra* note 33, for a brief history of the Southern problem, at 308-315.
facts. The enforcement clause of the fifteenth amendment was present at its inception. Likewise, racial discrimination in voting had been present in this country prior to the passage of the fifteenth amendment, and the purpose of the fifteenth amendment was to abrogate this factual situation. By implementing the enforcement clause of the fifteenth amendment, Congress interpreted an old factual situation on a nationwide scale and applied power granted to it in a 1870 amendment.

JUSTICE BLACK'S INTERPRETATION OF ARTICLE I SECTION 4

Because of the split by the Court on the equal protection question, Justice Black's opinion has become the constitutional result of the Voting Rights Act of 1970. Justice Black applied the same reasoning to both durational residency and the 18 year old vote. His decision, which in effect is the judgment of the Court, allows 18 year olds to vote in federal elections, but not in state elections. Since abrogation of durational residency was by an eight-to-one majority, his reasoning is not critical to the upholding of this section of the Voting Rights Act of 1970. Because his reasoning was decisive in sustaining the 18 year old provision of the Voting Rights Act of 1970, it deserves particular attention and analysis.

The view held by Justice Black, simply stated, is that article 1 section 4 of the Constitution, augmented by the necessary and proper clause, grants Congress general supervisory power over congressional elections. This supervisory power includes the power to establish voter qualifications if Congress is dissatisfied with the state voter qualifications. Likewise, Congress has no less control over presidential elections. Therefore, Congress can establish voter qualifications for presidential elections.

This reasoning will be examined in detail when analysis is made of the historical and case support, but first, it is appropriate to return to a more basic analysis of this reasoning. Fully accepting the Constitution as a living document in which the language is subject to living conditions, one must still read the express language contained in the Constitution. This will serve two purposes: First, it returns to the original source; second, it will provide a background for an historical and case law analysis of article I section 4.

The following Constitutional provisions are of importance in determining power over voter qualifications:


Article I section 2, in part,
The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature . . . 52

Amendment XVII, in part,
The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State legislatures. . . . 53

Article I Section 4 in part,
The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to Places of chusing Senators . . . . 54

In the context of this language, which specifies that the electors shall have the qualifications requisite for the most numerous branch of the state legislature, it is difficult to support Black's view that Congress is empowered to establish voting qualifications. For one thing, article I section 4 does not specify qualifications but only the times, places and manner. "Manner" is not a word of substance, but a word of procedure. 55 It does not refer to a substantive right, especially, when the word "manner" is read in the context of article I section 4, preceded by "times" and "places." Surely, time with respect to a date of election pertains to procedure. Likewise, one would consider the place of an election as only a procedural element of that election. Times and places convey the concept of when and where. What does the term "manner" convey? Manner is the how. It refers to how the elections are to be held.

On the other hand, "qualification" is a word of substance. 56 By its nature, qualification must occur before election. One must qualify to vote before exercising the right to vote. Qualified voters exercise their right to vote in what is generally called an election. An election requires certain procedures, but an election per se does not confer the qualification. For instance, if the age requirement is eighteen for federal elec-

53. U.S. Const. amend XVII.
55. Webster's New International Dictionary 1497 (1950) defines "manner" as: "1. A way of acting: a mode of procedure: the mode or method in which something is done or in which anything happens; way; mode; . . . ."
56. Id. at 2031: "1. Act or an instance of qualifying, or state or process of being qualified . . . 2b. A condition precedent that must be complied with for the attainment of a status, perfection of a right. . . ."
tions, then this means all eighteen year olds are qualified to vote. This event of qualifying does not occur because of the election, but upon his eighteenth birthday: A voter merely exercises his right to vote at the next election. A careful reading of article I section 4 indicates that it refers to elections and not to the prior event of selecting voters by means of voter qualification. Thus, congressional power to make or alter such regulations as to times, places, and manner of elections merely allows Congress procedural or administrative power over elections run by the states. Further, it can be noted that in article I section 2, the Constitution uses the term "qualification" with respect to electors. Why would the framers use "manner" in section 4 of the same article if they did not intend to imply a different meaning? It is difficult to visualize that the framers desired to reverse what they obviously intended in article I section 2 as to qualifications of electors for the House of Representatives by the use of the term "manner" in article I section 4.

Article I section 4 is limited to congressional elections. To extend the principle that Congress has the supervisory power to prevent corruption in presidential elections as well as congressional elections is within the bounds of the Constitution. However, this cannot support what article I section 4 cannot support for congressional elections: namely, that Congress can establish voter qualifications for congressional elections.

Having looked at the specific language of the Constitution pertaining to voter qualifications and control over elections, a review of the history behind the language is in order. An early draft of the Constitution indicates that the framers had considered allowing congressional control over voter qualifications with respect to what is presently article I section 2. This provision would have permitted the states to establish voter qualifications, but they could be "altered and superseded by the Legislature of the United States." Later, the framers struck this clause and inserted, in substance, that the qualifications shall be the same as for the most numerous branch of the state legislature. On August 6, 1787, a draft proposed to the Convention contained the above mentioned insertion, which at that time was article IV section 1 and article VI section 1. This article stated:

60. See text at supra note 52.
61. 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 153 (1911).
62. Id. at 163-164.
63. Id. at 178-179.
The times and place and [the] manner of holding elections of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States. 64

From this sequence of events alone, it would be difficult to infer that the framers intended the provision for altering the time, places, and the manner of elections to be a grant of congressional power over voter qualifications. Moreover, on August 7, 1787, Gouverneur Morris made a motion to restrict the right of suffrage to freeholders. 65 His motion proposed to change article IV section I and not article VI section 1. 66 During the ensuing debate, Mr. Wilson specifically made the point that voting qualifications had been well considered, but he did not think the situation could be improved, since it would be “disagreeable” to have a situation where voters could vote in the state legislature and be excluded in the national legislature. 67 Likewise, Mr. Elseworth noted that the right of suffrage was “guarded” by most of the states. 68 The ensuing debate on whether the insertion of a freehold limitation would create an aristocracy, although interesting, is not relevant. The debate on voter qualifications, centering on article IV section 1 rather than article VI section 1, demonstrates that the framers in no way intended article VI section 1 to grant congressional power over suffrage for federal elections. When the freehold limitation was rejected by a seven-to-one vote, no substantial changes took place in article IV section 1. 69

Further debate on article VI section 1, the predecessor of article I section 4, indicates that the framers were concerned with granting Congress a supervisory power over elections. On August 9, 1787, Mr. Pickney and Mr. Rutledge moved to strike the congressional power to alter the times, places and manner. 70 Madison in his reply defended the congressional power; his defense was not based on congressional enfranchisement powers, but rather on the need for Congress to have procedural control. An exclusive state control over items such as whether the electors should vote by ballot, where they should vote, the manner of districting, and whether an elector should vote for all representatives or only representatives allotted to the district could, he argued, be abused. 71 During this debate, nobody

64. Id. at 179; compare this with U.S. CONST. article I, § 4, reprinted in part in text at supra note 54.
65. FARRAND, supra note 61, at 201.
66. FARRAND, supra note 61, at 201.
67. FARRAND, supra note 61, at 201.
68. FARRAND, supra note 61, at 201.
69. FARRAND, supra note 61, at 206.
70. FARRAND, supra note 61, at 240.
71. FARRAND, supra note 61, at 240-241.
raised the issue of franchisement, the reason being that there was no issue, since this was decided at the time article IV section 1 had been discussed.

This leads into the real crux of Justice Black's argument: The article I section 4 grant to Congress of the power to apportion the districts within the states is actually a power over geographical voter qualification, because this geographical qualification is no less significant than an age qualification and of more importance to the framers, the framers must have intended to grant Congress complete control over federal elections including enfranchisement.

This view is, to some extent, consistent with the Supreme Court holding in *Wesberry v. Sanders*, a Justice Black opinion, holding that [construed in its historical context, the command of Article I § 2 that Representatives be chosen “by the people of the several States” means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another's.Originally, when the problem of apportionment in congressional elections was presented to the Court in *Colegrove v. Green*, Justice Frankfurter related that the remedy of this problem rested exclusively with Congress under article I section 4. If *Wesberry* is a correct historical interpretation, then Justice Black does have some logical basis for his conclusion that the term “manner” must mean more than just procedural control, if the procedure (one man-one vote) with respect to apportionment was already established in article I section 2. To refute the historical analysis of the term “people” in article I section 2 is not within the scope of this historical analysis of article I section 4. The previous historical search of the federal records on article I section 4 indicated a conclusion contra to Justice Black, and in accord with Justice Frankfurter in *Colegrove*—that the power to apportion congressional districts is vested solely in Congress.

The significant case law dealing with congressional supervisory power over elections does not refute the conclusions previously drawn from the express language and history of article I section 4. Congressional supervisory power can be traced back to the Enforcement Acts of 1870. In

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72. FARRAND, supra note 61, at 240-241.
76. Id. at 7-8.
78. Id. at 554.
79. See Justice Harlan's dissenting opinion in Wesberry v. Sanders, supra note 75.
80. Act of May 31, 1870, ch. 114, 16 STAT. 140.
United States v. Reese, two inspectors in a municipal election refused the vote of a qualified black and were indicted under the Act. The United States conceded that congressional power to legislate this provision could come only from the fifteenth amendment. In other words, article I section 4 was interpreted as it reads: Supervisory power extends only to congressional elections.

When similar statutory violations under the Enforcement Acts were presented to the Court in the context of a congressional election, the Court had no difficulty in asserting congressional supervisory power over congressional elections. Likewise, Congress could prevent individuals, by statute, from conspiring to deprive a person from his right to vote. The Court specifically admitted that states have the power to establish voter qualifications, but these qualifications are the same qualifications adopted by the Constitution and thus protected by the Constitution under article I section 4, and are an implied power of self-protection to protect elections from corruption. To extend this supervisory principle to presidential elections and to state primaries which control the individual who is to be sent to Congress develops the express provisions of article I section 4 and the implied powers of self-protection for Congress to regulate federal elections. In holding that Congress could protect voters from fraud and corruption in primary elections, the Court noted that article I section 2 provides that Congressmen shall be chosen by the people; but the Court carefully used the term “qualified voters” in referring to congressional supervisory power: “Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at congressional elections.”

81. 92 U.S. 214, 215 (1875).
82. Id. at 216.
83. Ex Parte Siebold, 100 U.S. 371 (1880).
84. United States v. Mosley, 238 U.S. 383 (1915); Ex Parte Yarbrough, 110 U.S. 651 (1884).
85. Ex Parte Yarbrough, supra note 84. Although the Court could have relied exclusively on article I § 4, the Court did relate that congressional control over federal elections was necessary for the function of government: “If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.” Id. at 657-658.
86. Burroughs v. United States, supra note 50.
88. Id. at 315.
voter qualifications. They merely announce the law as the language and the
history of the Constitution had provided: namely, that Congress has pro-
cedural control over federal elections. Therefore, in light of the language
of the Constitution, the underlying intent of the framers, and existing case
law, Justice Black's position is at best tenuous, if not totally unwarranted.

CONSTITUTIONAL RIGHT TO TRAVEL INTERSTATE

Six justices based their reason for upholding the ban on durational resi-
dency requirements in presidential elections on the right to travel freely
from state to state. Justices Brennan, White, and Marshall related that
the right to travel interstate was enforceable by Congress under section 5
of the fourteenth amendment. With similar reasoning, Justices Stewart,
Burger, and Blackmun, while admitting this right was enforceable under
section 5 of the fourteenth amendment, used the necessary and proper
clause as their basis for congressional enforcement. One can certainly
conjecture that an alternative basis for the Court would have been the com-
merce clause.

But straying away from congressional enforcement of this right leads
to a more interesting area: From where does this right to travel from state
to state come? There is no dispute as to its existence, but it does appear
that this basic right is simply taken for granted. For instance, in Shapiro
v. Thompson, in discussing the right to interstate travel, the Court stated:
"We have no occasion to ascribe the source of this right to travel inter-
state to a particular constitutional provision." 89 In Oregon, the Court used
similar language: "From whatever constitutional provision this right
may be said to flow . . ." 90 Possibly, it makes little difference where
the constitutional right was derived, but for the sake of precision, an attempt
to pinpoint the right in terms of a provision of the Constitution follows.

Article IV of the Articles of Confederation expressly provided that
the free inhabitants of each of these states . . . shall be entitled to all privileges and
immunities of free citizens in the several states; and the people of each state shall
have free ingress and regress to and from any other state. . . . 91

As to why the framers adopted the more simple language of article IV sec-
tion 2 of the Constitution which provides, in clause one, "The Citizens of
each State shall be entitled to all Privileges and Immunities of Citizens
in the several States," 92 the reason appears to be that the provision avoids

91. ARTICLES OF CONFEDERATION art. IV.
92. U.S. CONST. art. IV, § 2.
Article IV of the Articles of Confederation contained the terms *free inhabitants* in one part; *free citizens* in another; and *people* in still another.\(^9\) Thus, the plain and simple language approach of the Constitution was not a denial of those enumerated in article IV of the Articles of Confederation, but an elimination of ambiguity.\(^9\) Article IV section 2 has been considered the direct descendant of article IV of the Confederation\(^9\) and the purpose of each has been considered the same.\(^9\)

There is no express provision in the Constitution which specifically states that citizens are entitled to travel interstate. The reason for the difficulty in establishing the source of this right is that, any time this right is at issue, it is usually accompanied by another issue involving either the fourteenth amendment or the commerce clause. The only way of investigating the source is to separate the law from dicta in the primary cases which acknowledge this right.

Fortunately the problem has a solid basis in history. In 1820, the New Jersey legislature passed a law which regulated oyster fishing in its rivers.\(^9\) It provided that no person could fish for oysters in particular rivers between May 1 and September 1.\(^9\) Furthermore, it completely excluded persons who were not inhabitants and residents from oyster fishing at any time unless the vessel was owned by an actual inhabitant and resident. When this was contested, the privileges and immunities of article IV section 2, *inter alia*, were specifically addressed to the Court in *Corfield v. Coryell*.\(^10\) The Court asked: “The inquiry is, what are the privileges and immunities of citizens in the several states?”\(^10\) Justice Washington, speaking for the Court, related the difficulty of enumerating these fundamental principles, but mentioned, as one of them, the right of a citizen to pass through or reside in another state.\(^10\) Further, he notes that these and possibly others belong to citizens of one state with respect to all other states.\(^10\)

In disposing of the particular facts of the case, the Court held

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94. *Id.* at § 1805.
95. *Id.* at § 1806.
96. *See id.* at §§ 1805-1806; *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872).
97. *Slaughter House Cases*, *supra* note 96, at 75.
99. *Id.* at 547.
100. *Id.* at 548.
101. *Id.* at 551.
102. *Id.* at 552.
103. *Id.* at 551.
that the citizens of New Jersey have a property interest in the fisheries, and this property right grants the Sovereign this right of control. Thus, the matter in controversy was not a privilege and immunity of citizens of the several states. Strictly speaking, this case stands for the proposition that the right to fish for oysters within a state is not a privilege and immunity which is to be shared by the citizens of the several states.

Although the Corfield case did not hold that the right to travel interstate was secured by article IV section 2, it is essentially the interpretations of this case from two different perspectives which have created much of the confusion as to the source of this constitutional right. Before proceeding to the perspectives themselves, some historical notes are in order. First, the Passenger Cases dealt with this problem by dicta. The Court was confronted with state statutes, e.g., the New York Statute which entitled the state to $1.50 for every cabin passenger and $1.00 for each steering passenger from every vessel from a foreign port; and from a coasting vessel subject to limitations for neighboring states 25Penn for each person on board. Although the tax was imposed on the master of the ship, the Court said it was in substance a tax on the passengers, and was invalid as an interference with the Federal Government's commerce and other powers. Of more significance is the dissenting opinion. Chief Justice Taney disagreed with the result, but contended that the statute was unconstitutional with respect to American citizens coming from the port of an American state. Without anchoring to any one specific provision in the Constitution or to any prior case law, he states:

We are all citizens of the United States; and as member of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States, and a tax imposed by a State for entering its territories or harbours is inconsistent with rights which belong to the citizens of other States as members of the Union, and with the objects which that Union was intended to attain.

Apparently, Justice Taney implies the right to interstate travel from the nature and purpose of the United States Government as formed by the Constitution.

In an identical fact pattern (except that this time the state of Nevada was using common carriers as tax collectors for a tax imposed on pas-
sengers taken in or out of the State), the Court in *Crandall v. Nevada* avoided the commerce power issue and relied directly on the dissent in the *Passenger Cases*. Thus, as early as 1867, when *Crandall* was decided, there was a constitutional right to travel interstate by way of case law. However, this case must still be limited to its facts. Of particular importance is that a state was involved—a state was hindering the right of interstate travel. *Crandall* does not aid in attempting to pinpoint this right; the rationale is simply that the right is derived from the nature of government itself. Since the United States is a common government, every citizen of the United States has the right of free access to that government. This right is not limited to Washington, because this free access extends to judicial tribunals and other offices of the government wherever they are located.

After *Crandall*, two cases of interest specifically dealt with article IV section 2, which *Corfield v. Coryell* by dicta used as a source for the right to travel interstate. Both involved discrimination against non-residents. In *Paul v. Virginia*, a state statute required a non-resident corporation to acquire a license to do business within the state. First, the Court held that a corporation was not a citizen for purposes of this article; and secondly, that this was in the nature of a special privilege, since the grant of a corporation was a special privilege to the incorporators. The Court by dictum did, however, state that the right to free ingress and egress was included in this provision.

Following this, in 1871, a statute which required a license fee for the sale of non-agricultural products within the state was declared unconstitutional in *Ward v. Maryland*, because it charged a higher rate to non-residents. Besides finding a violation of the commerce clause, the Court related that the right of non-residents to sell their goods within that state without being subjected to a higher tax is a privilege and immunity protected by article IV section 2. Here, the separation between law and dictum as to the basis for the decision is not clear because the opinion of the

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110. 73 U.S. (6 Wall.) 35 (1868).
111. *Id.*
112. *Id.* at 44, 48.
113. *Id.* at 48.
114. *Supra* note 98.
116. *Id.* at 180, 181.
117. *Id.* at 180.
119. *Id.* at 430.
Court says: "Viewed in any light . . . the statute is repugnant to the federal constitution." ¹²⁰ However, the facts themselves place it in dictum, because, although the Court related that the right to pass from state to state is a privilege and immunity, the actual decision involved non-discriminatory taxes. ¹²¹

In spite of the strong dicta to the effect that the right to free ingress and egress stems from article IV section 2, the only case law is Crandall, which, as stated before, did not anchor the constitutional right to interstate travel to any specific provision. Briefly, Crandall implied the right from the nature of government—United States citizenship requires freedom of access to and fro.

Although, thus far, the right has not been found to flow from any specific provision of the Constitution, there is still another inquiry of equal significance. By limiting Crandall to its facts, there is no basis for finding that the right to travel interstate protects one from interference by a private individual. In other words, it has been established that an individual can assert against a state that he has a constitutional right to pass through that state; but can the same assertion be made against an individual?

To answer this question requires association with the fourteenth amendment. The Slaughter House Cases¹²² determined the meaning of "privilege and immunity" for purposes of the fourteenth amendment. The Court referred to the prior decisions of Corfield, Ward, and Paul.¹²³ Agreeing with the basic premise that privileges and immunities are fundamental rights, the Court concluded, however, that the privileges and immunities of article IV section 2 enunciated in those decisions are not within the domain of federal protection.¹²⁴ Article IV section 2 does not spell out who would enforce these rights, as was the case of article IV of the Articles of Confederation.¹²⁵ This clause did not vest rights in the individual, but its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more or less, shall be the measure of the rights of citizens of other States within your jurisdiction.¹²⁶

In brief, the Slaughter House Cases decided that the rights enunciated in

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¹²⁰ Id. at 432.
¹²¹ Id. at 430.
¹²² Slaughter House Cases, supra note 96.
¹²³ Slaughter House Cases, supra note 96, at 75-77.
¹²⁴ Slaughter House Cases, supra note 96, at 76, 77.
¹²⁵ Slaughter House Cases, supra note 96, at 75.
¹²⁶ Slaughter House Cases, supra note 96, at 77.
those cases, accompanied by others, embraced civil rights in general. These rights are protected by the state, and the fourteenth amendment did not transfer the enforcement of these civil rights to the Federal Government. With this interpretation, the privilege of interstate travel as interpreted from article IV section 2 by dictum in *Corfield*, *Ward*, and *Paul* is not a distinct individual constitutional right.

However, as mentioned previously, the privileges and immunities as related by Justice Washington in *Corfield* could be interpreted from two perspectives. They could be privileges and immunities as a citizen of the United States or as a citizen of a state. *Slaughter House* decided that these are rights belonging to a citizen of a state. However, *Slaughter House*, although reserving itself from defining the privileges and immunities of United States citizenship until the cases arise, did suggest some. The Court indicated that the privilege of the writ of habeas corpus was a privilege of the United States citizenship, which had also been listed by Justice Washington. Thus, the dicta of prior opinions may contain privileges which can be recognized as privileges vested in the individual by the Federal Constitution. More importantly, *Slaughter House* recognized, by way of their suggestion *Crandall* or at least *Crandall's* rationale, as a privilege or immunity of United States citizenship:

One of these is well described in the case of *Crandall v. Nevada*. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States' and quoting from the language of Chief Justice Taney in another case, it is said "that for all the great purposes for which the Federal government was established, we are one people, with one common country, we are all citizens of the United States:" and it is, as such citizens, that their rights are supported in this court in *Crandall v. Nevada*. This is an extremely significant quote, because if *Slaughter House* has not reduced the right to travel interstate to a civil right to be protected by the state, nothing has.

What *Slaughter House* has done, certainly, was to obliterate any contention that right to interstate travel can be derived from article IV section 2, because this article is merely a command to the states.

127. Slaughter House Cases, supra note 96, at 78-79.
128. Slaughter House Cases, supra note 96, at 79.
129. *Supra* note 98 at 552.
130. Slaughter House Cases, supra note 96, at 79.
131. See text at supra note 126; United States v. Harris, 106 U.S. 629 (1882).
spite this clarity with Crandall and article IV section 2, Slaughter House created in another suggestion the possibility that the fourteenth amendment provides a right to interstate travel. In 1904, a federal court in United States v. Moore discussed the privileges and immunities described in Slaughter House. The court held that the right of citizens to organize labor unions was a fundamental right in a free government, but was not a right secured under the Constitution or the laws of the United States; therefore, its protection with respect to private individuals rests with the states.\(^{132}\) By dictum, the court stated that among the rights of U.S. citizens is the right to become a citizen of a state by establishing a bona fide residence therein.\(^{133}\) Once again, this principle comes directly from the Slaughter House suggestions of unique rights as United States citizens. This suggestion by Slaughter House was totally distinct and unrelated to the Crandall suggestion. It flowed directly from the fourteenth amendment.\(^{134}\) This is, perhaps, the one new federal right which Slaughter House by dictum said that the fourteenth amendment did create\(^{135}\)—the right to become a citizen of a state by establishing a bona fide residence therein. The rationale is that, for the first time, the Constitution clearly defined how a person could become a citizen of a state.\(^{136}\) There is a fine distinction between the manner in which one becomes a citizen of a state and the mere right to pass through that state, and Slaughter House made the proper distinction.

The Court temporarily breached its own logic in United States v. Wheeler,\(^{137}\) presented with the necessary facts to do so. Private individuals were indicted under a federal statute which protected citizens from conspiracies to "injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . ."\(^{138}\) Specifically, the conspiracy involved was to deprive citizens of their right to remain in a particular state.\(^{139}\) The alleged overt acts of this conspiracy consisted of actual deportation and threats of death or great bodily harm if the citizens returned.\(^{140}\) Thus, present in the facts of this case were both a denial of the right to reside and remain a citizen of a

\(^{132}\) United States v. Moore, 129 F. 630 (1904).
\(^{133}\) Id. at 633.
\(^{134}\) Slaughter House Cases, supra note 96, at 72-74.
\(^{135}\) Slaughter House Cases, supra note 96, at 80.
\(^{136}\) Slaughter House Cases, supra note 96, at 72-74.
\(^{139}\) Supra note 137, at 292.
\(^{140}\) Supra note 137, at 292.
state and a denial of the right to travel freely back into that state. Essentially, the Government based its claim solely on Crandall, and argued that the right delineated in the indictment is similar to the right to free ingress and egress from state to state; the fourteenth amendment was not utilized. With these particular facts, both Crandall and the fourteenth amendment privilege could have been argued. The indictment could have been couched in terms that the conspiracy deprived him of his right to become a citizen of this particular state in violation of the fourteenth amendment, because the conspiracy would ultimately deprive them of an opportunity to take up a bona fide residency within that state. Secondly, the indictment could have clearly stated that the conspiracy entailed a denial of the right of ingress and egress from state to state.

Even this latter language in the indictment would have been of little avail, for the Court specifically referred to the Slaughter House Cases and failed to adopt either the Crandall suggestion or the fourteenth amendment suggestion, both contained in Slaughter House. Instead, the Court concluded that the interstate travel privilege was part of the general body of civil rights announced in Slaughter House. Therefore, congressional power extended only to interference by the states. Crandall was distinguished, because the facts in Crandall involved only state interference with this right. Perhaps this is a legitimate interpretation based on proper respect for law and dicta. However, it is equally correct to question the Court's act of ignoring the recognition of Crandall's rationale, if not the right to travel interstate, and the right to become a citizen of a state by a bona fide residence therein, especially when the facts were conducive and the very case which they used as a basis for their decision suggested that both of these were privileges and immunities of United States citizenship.

For those interested in consistency, disposition of the right to travel hinges on the interpretation of Slaughter House's recognition of this right. After Wheeler, interstate travel becomes buried as an independent right by use of the commerce power, or if recognized as an independent constitutional right, the Court indicates its confusion as to where or how the right was derived. But one thing is clear: The right to interstate travel is a constitutional right vested in the individual, and is subject to protec-

141. See supra note 137, at 282-289.
142. Supra note 137.
143. Supra note 137, at 299.
144. Prior to United States v. Wheeler, supra note 137, but after the Slaughter House Cases, supra note 96, the right to interstate travel was observed in dicta: Twining v. New Jersey, 211 U.S. 78 (1908).
tion by the Federal Government, per United States v. Guest.\footnote{146} In that case, indictment under the same statute charged six individuals with depriving citizens of the United States the free exercise and enjoyment of rights secured to them by the Constitution and laws of the United States.\footnote{147} One count in the indictment alleged as a violation was the right freely to engage in interstate travel.\footnote{148} The Court sustained this count against the individuals, relying on Crandall, and again adopted the language of Chief Justice Taney in the Passenger Cases.\footnote{149} The Court also reaffirmed the dictum in United States v. Moore. However, this is not as significant, because of the logical distinction between passing through a state and becoming a citizen of a state. This is especially applicable in Guest, because the indictment alleged a violation of the constitutional right to travel interstate.\footnote{150} After the large body of dicta concerning this individual right, this is the first case to hold such specifically on the facts. The Court did not expressly overrule Wheeler. According to the Court, Wheeler did not directly involve interstate travel, because the alleged conspiracy was to compel residents to move out of the state.\footnote{151} Possibly this is an exercise in judicial precision, but in any event there is no doubt after Guest that interstate travel is a constitutional right of the individual, and is subject to federal enforcement.

To bring the right to travel up to date, it is only necessary to take notice of Shapiro v. Thompson. Shapiro does nothing more then Crandall. It is merely a judicial decision that a state one-year residency requirement is a hindrance on one's right to travel interstate.\footnote{152} Finally, Oregon merely relates that Congress can enforce this privilege or right by voiding state statutes which interfere with the privilege or right. The Court is not adjudicating the issue of durational residency as being a hindrance, but, in effect, is saying that the means are appropriate to protect the privilege.

In summary, first, the right to travel interstate does not flow from a specific provision, but is derived from the nature of Government and United States citizenship as developed in Crandall. When Slaughter House took the dicta of prior decisions with respect to definitions of privileges and immunities and as a broad proposition referred to them as a general body of civil rights, the Court also made some qualifications. For example,
habeas corpus mentioned by Corfield and no matter how strict the interpretation the rationality of Crandall. More consistently, the language really provides that Slaughter House, in its suggestive list, was reaffirming the principle of Crandall. Thus, the Court considered the right to ingress and egress as a right of United States citizenship. On this basis, Wheeler should be disregarded, because it misconstrued the very case it relied upon for its decision. Therefore, Crandall and its rationality are as good today as they were in 1868.

**CONCLUSION**

The Voting Rights Act of 1970 is a creature of an active Congress using constitutional powers granted it effectively to enforce certain provisions of the Constitution designed to protect individual constitutional rights. With the nationwide literacy ban, the purpose of the 1965 Voting Rights Act to assure that no individual is denied the right to vote on account of race or color by means of a literacy device is continued.153 Clearly, the purpose of this literacy ban is to enforce section 1 of the fifteenth amendment.154 Likewise, Congress eliminated, as one of their purposes, durational residency requirements as a precondition to voting, because the right to interstate travel was abridged by this requirement.155 Finally, Congress contended that the denial of enfranchisement to 18, 19 and 20 year olds "denies and abridges the inherent Constitutional rights" of such citizens156 and effectively denies these citizens "the due process and equal protection of the laws."157 In this final aspect, the purpose turns toward rights secured by the fourteenth amendment.

When the Court was presented in Oregon with determining the constitutionality of the Voting Rights Act of 1970, it found the affirmative action employed by Congress appropriate under its enforcement power of the fifteenth amendment with respect to the abrogation of literacy requirements. As the separate discussion on literacy and the fifteenth amendment indicated, the nationwide ban on literacy requirements as a precon-

154. Compare the language of id., at § 1973: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color," with § 1 of the fifteenth amendment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."
dition to voting was actually the final elimination of de facto racial discrimination in voting by means of a literacy test or device. This marked the end to a struggle which began in the court room with an individual asserting his fifteenth amendment right to non-racial voting discrimination under section 1 of the fifteenth and ended with broad congressional legislation under section 2 of the fifteenth to assure such an individual that he need not have to file a complaint.

Again, Congress took the initiative in protecting the right to interstate travel by abrogating durational residency requirements in presidential elections. Although Congress found durational residency requirements a hindrance to other individual constitutional rights, a majority of the justices sustained the provision of the Voting Rights Act of 1970 on this basis. In the previous discussion, concentration was based on the source of this right, because of the Court's general reluctance to anchor this right to a specific provision. Briefly, analyzing the historical flow and separating law from dicta revealed that this right was implied from the nature of the United States Government as formed by the Constitution. Once the constitutional right is established, Congress can use its power, under either section 5 of the fourteenth amendment or the necessary and proper clause, to protect this right.

This congressional initiative is to be admired, but does this mean that Congress is to interpret the Constitution? How would the Supreme Court have ruled if an individual asserted that durational residency requirements in voting for presidential elections violated his Constitutional rights? It can be safely said that the Court will limit congressional initiative with respect to legislation protecting individual constitutional rights as evidenced by their failure to support the eighteen, nineteen and twenty year old enfranchisement for both state and federal elections under congressional enforcement power contained in section 5 of the fourteenth amendment. This, however, has not affected the active spirit of Congress. On March 23, 1971, Congress passed a joint resolution providing for

164. Supra note 162; supra note 17 indicates how each Justice ruled.
165. See supra note 18.
a constitutional amendment which would enfranchise 18, 19 and 20 year olds. The proposed amendment was subsequently ratified by the states, and became the twenty-sixth amendment to the United States Constitution.

To evaluate this affirmative congressional action in the form of specific legislation and the initiation of a Constitutional amendment, an analogy can be derived from Justice Black's interpretation of article I section 4 in relation to the problem of apportionment. As previously concluded, the term "manner" in article I section 4 was designed to deal with procedural problems in elections and not to establish voting qualifications. Congressional dormancy by failure to exercise their power under article I section 4 to apportion districts created a situation under which the Supreme Court eventually was forced to determine that one man's vote was as good as another in congressional elections. Perhaps if Congress would have acted affirmatively to the apportionment problem under article I section 4, the Supreme Court would not have been required to enter this area independently on the basis of individual rights. Similarly, the Voting Rights Act of 1970, coupled with nearly full approval by the Supreme Court in Oregon of this congressional power, may well have eliminated the need for future action by the Supreme Court to protect a voter's constitutional rights. If this congressional activity continues, the Supreme Court may become less prone to stretch its power to secure an individual right, when, under the same Constitution, there exists an adequate remedy afforded by a different branch of the government.

Frank Foster

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