



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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Chapter 8: The New Deal/Great Society Era – Powers of the National Government

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

During the final debates over the Voting Rights Act of 1964, Senator Robert Kennedy of New York proposed and Congress accepted an amendment permitting barring states from denying the vote to any person who had completed at least the sixth grade in Puerto Rico merely because that person could not read English. This provision presented more constitutional difficulties than the provisions at issue in South Carolina v. Katzenbach. To begin with, unlike the evidence of racial discrimination in the South, Congress did not determine whether states were unconstitutionally discriminating against Spanish speakers when distributing the franchise. Second, the Supreme Court had never ruled that discrimination against Spanish speakers was unconstitutional.

A 7-2 judicial majority in Katzenbach v. Morgan overcame these difficulties. Justice Brennan's majority opinion clearly held that Congress could prohibit otherwise constitutional laws when doing so might prevent unconstitutional action. Permitting Spanish speakers to vote, he observed, might prevent Puerto Ricans in New York from being discriminated against in violation of the equal protection clause. More controversial, Brennan's opinion may have ruled that Congress could interpret as well as enforce the post-Civil War Amendments that Congress determine whether the Constitution prohibited discrimination against non-English speakers. Justice Harlan's dissent maintained that Justice Brennan made that claim. Was Harlan correct? If Brennan did make that claim, is that claim correct?

JUSTICE BRENNAN delivered the opinion of the Court.

These cases concern the constitutionality of § 4 (e) of the Voting Rights Act of 1965. That law . . . provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. . . . We hold that, in the application challenged in these cases, § 4 (e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment. . . .

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 The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4 (e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides -- even with the guidance of a congressional judgment -- that the application of the English literacy requirement prohibited by § 4 (e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction. . . . A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.

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By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18. The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland* (1819). . . .

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

. . . . 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. . . .¹ There can be no doubt that § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause. . . . More specifically, § 4 (e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government -- both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

Section 4 (e) may be readily seen as “plainly adapted” to furthering these aims of the Equal Protection Clause. The practical effect of § 4 (e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is “preservative of all rights.” . . . This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4 (e) thereby enables the Puerto Rican minority better to obtain “perfect equality of civil rights and the equal protection of the laws.” It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations -- the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4 (e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.

The result is no different if we confine our inquiry to the question whether § 4 (e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English. . . . Here again, it is enough that we perceive a basis upon which Congress might predicate a

¹ Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact “statutes so as in effect to dilute equal protection and due process decisions of this Court.” We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be -- as required by § 5 -- a measure “to enforce” the Equal Protection Clause since that clause of its own force prohibits such state laws.



judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

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JUSTICE HARLAN, whom JUSTICE STEWART joins, dissenting.

Worthy as its purposes may be thought by many, I do not see how § 4 (e) of the Voting Rights Act of 1965 can be sustained except at the sacrifice of fundamentals in the American constitutional system -- the separation between the legislative and judicial function and the boundaries between federal and state political authority. . . .

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. . . . The Court declares that since § 5 of the Fourteenth Amendment gives to the Congress power to "enforce" the prohibitions of the Amendment by "appropriate" legislation, the test for judicial review of any congressional determination in this area is simply one of rationality; that is, in effect, was Congress acting rationally in declaring that the New York statute is irrational? Although § 5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action. . . . I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. . . . But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all. Thus, in *Ex parte Virginia* (1879), involving a federal statute making it a federal crime to disqualify anyone from jury service because of race, the Court first held as a matter of constitutional law that "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color." . . . Only then did the Court hold that to enforce this prohibition upon state discrimination, Congress could enact a criminal statute of the type under consideration. . . .

A more recent Fifteenth Amendment case also serves to illustrate this distinction. In *South Carolina v. Katzenbach* (1966), . . . decided earlier this Term, we held certain remedial sections of this Voting Rights Act of 1965 constitutional under the Fifteenth Amendment, which is directed against deprivations of the right to vote on account of race. In enacting those sections of the Voting Rights Act the Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise. . . . In passing upon the remedial provisions, we reviewed first the "voluminous legislative history" as well as judicial precedents supporting the basic congressional finding that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges. . . . Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative.

Section 4 (e), however, presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine. Were the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone those under other provisions of the Constitution, by resorting to congressional power under the Necessary and Proper Clause. In view of this Court's holding in *Lassiter v. Northampton County Board of Elections* (1959) that an English literacy test is a permissible exercise of state supervision over its franchise, I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by § 4 (e).



In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 “discretion” by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

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In assessing the deference we should give to this kind of congressional expression of policy, it is relevant that the judiciary has always given to congressional enactments a presumption of validity. . . . However, it is also a canon of judicial review that state statutes are given a similar presumption. . . . Whichever way this case is decided, one statute will be rendered inoperative in whole or in part, and although it has been suggested that this Court should give somewhat more deference to Congress than to a state legislature, such a simple weighing of presumptions is hardly a satisfying way of resolving a matter that touches the distribution of state and federal power in an area so sensitive as that of the regulation of the franchise. Rather it should be recognized that while the Fourteenth Amendment is a “brooding omnipresence” over all state legislation, the substantive matters which it touches are all within the primary legislative competence of the States. Federal authority, legislative no less than judicial, does not intrude unless there has been a denial by state action of Fourteenth Amendment limitations, in this instance a denial of equal protection. At least in the area of primary state concern a state statute that passes constitutional muster under the judicial standard of rationality should not be permitted to be set at naught by a mere contrary congressional pronouncement unsupported by a legislative record justifying that conclusion.