AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Voting/The Voting Rights Acts

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Oregon v. Mitchell, 400 U.S. 112 (1970)

The Voting Rights Act of 1970 gave Americans three new voting rights. The measure lowered the voting age in state and national elections to eighteen, prohibited literacy tests for a five-year period, and prohibited state residency requirements for voting in presidential elections. Oregon, Texas, Arizona and Idaho, believing different provisions of the bill unconstitutional,[1] sought a Supreme Court decree forbidding the attorney general, John Mitchell, from implementing these measures. The position of the United States was supported by a coalition that included the NAACP, Americans for Democratic Action, the National Education Association, the United Automobile Workers, and the Brief of Youth Coalition. Their joint amicus brief declared:

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

Oregon v. Mitchell *exhibits a common pattern in Burger Court opinions. Eight justices believed no good constitutional distinction existed between federal laws governing the right to vote in state elections and federal laws governing the right to vote in federal elections. Justice Black, however, believed an important constitutional distinction existed. Because the other four justices divided evenly, Justice Black's view that Congress could lower the voting age to eighteen for federal, but not state, elections, temporarily became the law of the land. Do you find Black's distinctions plausible? Notice that none of the justices had any difficulty with the other provisions of the Voting Rights Act of 1975. Did any plausible grounds exist for striking down that measure, while sustaining the Voting Rights Act of 1970?*

JUSTICE BLACK, announcing the judgments of the Court in an opinion expressing his own view of the cases

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. . . In the very beginning, the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed it advisable to do so. This was done in Art. I, § 4, of the Constitution, which provides:

> 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 the Places of chusing Senators.

[1] Each state raised different constitutional objections.

(Emphasis supplied.) Moreover, the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause. . . .

. . . Any doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters, should be dispelled by the opinion of this Court in *Smiley v. Holm,* (1932). There, Chief Justice Hughes, writing for a unanimous Court, discussed the scope of congressional power under § 4 at some length. He said:

> The subject matter is the 'times, places and manner of holding elections for Senators and Representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections. . . .

In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that, if Congress became dissatisfied with the state laws, Congress could alter them. A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws. The Voting Rights Act Amendments of 1970, now before this Court, evidence dissatisfaction of Congress with the voting age set by many of the States for national elections. I would hold, as have a long line of decisions in this Court, that Congress has ultimate supervisory power over congressional elections. . . .

On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother HARLAN has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, [the power to regulate elections. . . . No function is more essential to the separate and independent existence of the States and their governments than the power to determine, within the limits of the Constitution, the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. . . .

Of course, the original design of the Founding Fathers was altered by the Civil War Amendments and various other amendments to the Constitution. The Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments have expressly authorized Congress to "enforce" the limited prohibitions of those amendments by "appropriate legislation." The Solicitor General contends in these cases that Congress can set the age qualifications for voters in state elections under its power to enforce the Equal Protection Clause of the Fourteenth Amendment.

. . . [[I]t cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

. . .

As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments, and may do so only by "appropriate legislation." . . .

. . .

In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence. Since Congress has attempted to invade an area preserved to the States by the Constitution

without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections. . . .

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. . . I would hold that the literacy test ban of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment. . . In enacting the literacy test ban of Title II, Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. Congress could have found that, as late as the summer of 1968, the percentage registration of nonwhite voters in seven Southern States was substantially below the percentage registration of white voters. Moreover, Congress had before it striking evidence to show that the provisions of the 1965 Act had had, in the span of four years, a remarkable impact on minority group voter registration. Congress also had evidence to show that voter registration in areas with large Spanish-American populations was consistently below the state and national averages. . . . And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests. . . .

Congress also had before it this country's history of discriminatory educational opportunities in both the North and the South. The children who were denied an equivalent education by the "separate but equal" rule of *Plessy v. Ferguson* . . . are now old enough to vote. There is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement. . . .

Finally, there is yet another reason for upholding the literacy test provisions of this Act. In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious *national* dilemma that touches every corner of our land.

In this legislation, Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation. Compare *South Carolina v. Katzenbach* (1966) and *Gaston County v. United States* (1966).

[Justice Black then declared that under Article I, Congress had power to provide uniform national rules on absentee voting for federal elections and strike down state residency requirements]

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JUSTICE DOUGLAS.

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The grant of the franchise to 18-year-olds by Congress is, in my view, valid across the board.

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This case, so far as equal protection is concerned, is no whit different from a controversy over a state law that disqualifies women from certain types of employment, ... or that imposes a heavier punishment on one class of offender than on another whose crime is not intrinsically different. *Skinner v. Oklahoma* (1942). . . .

This "right to choose, secured by the Constitution" . . . is a civil right of the highest order. Voting concerns "political" matters; but the right is not "political" in the constitutional sense. Interference with it has given rise to a long and consistent line of decisions by the Court; and the claim has always been upheld as justiciable. Whatever distinction may have been made, following the Civil War, between "civil" and "political" rights, has passed into history. In *Harper v. Virginia Board of Elections* (1966), we stated: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." . . .

Hence, the history of the Fourteenth Amendment tendered by my Brother HARLAN is irrelevant to the present problem.

Since the right is civil and not "political," it is protected by the Equal Protection Clause of the Fourteenth Amendment which in turn, by § 5 of that Amendment, can be "enforced" by Congress.

. . .

The powers granted Congress by § 5 of the Fourteenth Amendment to "enforce" the Equal Protection Clause are "the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." *Katzenbach v. Morgan* (1966). . . . 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. The Act itself brands the denial of the franchise to 18-year-olds as "a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed" on them. . . . The fact that only males are drafted while the vote extends to females as well is not relevant, for the female component of these families or prospective families is also caught up in war, and hit hard by it. Congress might well believe that men and women alike should share the fateful decision.

. . .

. . . [V]oting is "a fundamental matter in a free and democratic society." Here, we are dealing with the right of Congress to "enforce" the principles of equality enshrined in the Fourteenth Amendment. The right to "enforce" granted by § 5 of that Amendment is, as noted, parallel with the Necessary and Proper Clause, whose reach Chief Justice Marshall described 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.

Equality of voting by all who are deemed mature enough to vote is certainly consistent "with the letter and spirit of the constitution." . . . . The manner of enforcement involves discretion; but that discretion is largely entrusted to the Congress, not to the courts. . . . The reach of § 5 to "enforce" equal protection by eliminating election inequalities would seem quite broad. Certainly there is not a word of limitation in § 5 which would restrict its applicability to matters of race alone. . . .

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. . . Congress in the present legislation need not make findings as to the incidence of literacy. It can rely on the fact that most States do not have literacy tests; that the tests have been used at times as a discriminatory weapon against some minorities, not only Negroes, but Americans of Mexican ancestry, and American Indians; that radio and television have made it possible for a person to be well informed even though he may not be able to read and write. We know from the legislative history that these and other desiderata influenced Congress in the choice it made in the present legislation; and we certainly cannot say that the means used were inappropriate.

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The Fourteenth Amendment provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Durational residency laws of the States had such effect, says Congress. The "choice of means" to protect such a privilege presents "a question primarily addressed to the judgment of Congress." . . .

The judgment which Congress has made respecting the ban of durational residency in presidential elections is plainly a permissible one in its efforts under § 5 to "enforce" the Fourteenth Amendment.

JUSTICE HARLAN, concurring in part and dissenting in part.

From the standpoint of this Court's decisions during an era of judicial constitutional revision in the field of the suffrage, ushered in eight years ago by *Baker v. Carr* (1962), . . . I would find it difficult not

to sustain all three aspects of the Voting Rights Act Amendments of 1970, . . . here challenged. From the standpoint of the bedrock of the constitutional structure of this Nation, these cases bring us to a crossroad that is marked with a formidable "Stop" sign. That sign compels us to pause before we allow those decisions to carry us to the point of sanctioning Congress' decision to alter state-determined voter qualifications by simple legislation, and to consider whether sound doctrine does not, in truth, require us to hold that one or more of the changes which Congress has thus sought to make can be accomplished only by constitutional amendment.

. . .

I am of the opinion that the Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit, and therefore that it does not authorize Congress to set voter qualifications, in either state or federal elections. I find no other source of congressional power to lower the voting age as fixed by state laws, or to alter state laws on residency, registration, and absentee voting, with respect to either state or federal elections. The suspension of Arizona's literacy requirement, however, can be deemed an appropriate means of enforcing the Fifteenth Amendment, and I would sustain it on that basis.

It is fitting to begin with a quotation from one of the leading members [Charles Sumner] of the 39th Congress, which proposed the Fourteenth Amendment to the States in 1866:

> Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers; and their authority increases in proportion to the evidence which they have left on the question.

. . . Believing this view to be undoubtedly sound, I turn to the circumstances in which the Fourteenth Amendment was adopted for enlightenment on the intended reach of its provisions. . . . I think that the history of the Fourteenth Amendment makes it clear beyond any reasonable doubt that no part of the legislation now under review can be upheld as a legitimate exercise of congressional power under that Amendment.

. . .

Many members of [Reconstruction] Congress accepted the jurisprudence of the day, in which the rights of man fell into three categories: natural, civil, and political. The privileges of citizens, being "civil" rights, were distinct from the rights arising from governmental organization, which were political in character. . . .

. . . [N]ot one speaker in the debates on the Fourteenth Amendment unambiguously stated that it would affect state voter qualifications, and only three, all opponents of the measure, can fairly be characterized as raising the possibility. . . .

The 40th Congress, not content with enfranchisement in the South, proposed the Fifteenth Amendment to extend the suffrage to northern Negroes. . . . This fact alone is evidence that they did not understand the Fourteenth Amendment to have accomplished such a result. . . .

. . .

The only sensible explanation of § 2 [of the Fourteenth Amendment] . . . is that the racial voter qualifications it was designed to penalize were understood to be permitted by § 1 of the Fourteenth Amendment. The Amendment was a halfway measure, adopted to deprive the South of representation until it should enfranchise the freedmen, but to have no practical effect in the North. It was politically acceptable precisely because of its regional consequences and its avoidance of an explicit recognition of the principle of Negro suffrage. . . .

. . .

Of the supporters of the [Fourteenth] Amendment, Garfield of Ohio, Kelley of Pennsylvania, Boutwell of Massachusetts (a member of the Joint Committee), Eliot of Massachusetts, Beaman of Michigan and Farnsworth of Illinois expressed their regret that the Amendment did not prohibit restrictions on the franchise. Other supporters of the Amendment obviously based their remarks on their understanding that it did not affect state laws imposing discriminatory voting qualifications, but did not

indicate that the omission was a drawback in their view. . . . The remaining members of the House who supported the Fourteenth Amendment either did not speak at all or did not address themselves to the suffrage issue in any very clear terms. In the opposition to the Amendment were only the handful of Democrats. Even they, with one seeming exception, did not assert that the Amendment was applicable to suffrage, although they would have been expected to do so if they thought such a reading plausible. . . .

[Senator] Howard, [who introduced the Fourteenth Amendment to the Senate], minced no words. He stated that

> the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [*sic*].

. . .

Howard's forthright attempt to prevent misunderstanding was completely successful insofar as the Senate was concerned; at least, no one has yet discovered a remark during the Senate debates on the proposed Fourteenth Amendment which indicates any contrary impression.

. . .

Small wonder, then, that, in early 1869, substantially the same group of men who three years earlier had proposed the Fourteenth Amendment felt it necessary to make further modifications in the Constitution if state suffrage laws were to be controlled even to the minimal degree of prohibiting qualifications which, on their face, discriminated on the basis of race. . . .

. . .

I must confess to complete astonishment at the position of some of my Brethren that the history of the Fourteenth Amendment has become irrelevant. . . .

When the Constitution, with its original Amendments, came into being, the States delegated some of their sovereign powers to the Federal Government, surrendered other powers, and expressly retained all powers not delegated or surrendered. Amdt. X. The power to set state voting qualifications was neither surrendered nor delegated, except to the extent that the guarantee of a republican form of government may be thought to require a certain minimum distribution of political power. The power to set qualifications for voters for national office, created by the Constitution, was expressly committed to the States by Art. I, § 2, and Art. II, § 1. By Art. V, States may be deprived of their retained powers only with the concurrence of two-thirds of each House of Congress and three-fourths of the States. No one asserts that the power to set voting qualifications was taken from the States or subjected to federal control by any Amendment before the Fourteenth. The historical evidence makes it plain that the Congress and the States proposing and ratifying that Amendment affirmatively understood that they were not limiting state power over voting qualifications. The existence of the power therefore survived the amending process, and, except as it has been limited by the Fifteenth, Nineteenth, and Twenty-fourth Amendments, it still exists today. Indeed, the very fact that constitutional amendments were deemed necessary to bring about federal abolition of state restrictions on voting by reason of race (Amdt. XV), sex (Amdt. XIX), and, even with respect to federal elections, the failure to pay state poll taxes (Amdt. XXIV), is itself forceful evidence of the common understanding in 1869, 1919, and 1962, respectively, that the Fourteenth Amendment did not empower Congress to legislate in these respects.

It must be recognized, of course, that the amending process is not the only way in which constitutional understanding alters with time. The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change the Constitution in a sense changes as well. But when the Court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers. [This is necessarily so; the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general

authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.

As the Court is not justified in substituting its own views of wise policy for the commands of the Constitution, still less is it justified in allowing Congress to disregard those commands as the Court understands them. Although Congress' expression of the view that it does have power to alter state suffrage qualifications is entitled to the most respectful consideration by the judiciary, coming as it does from a coordinate branch of government, this cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers. The reason for this goes beyond Marshall's assertion that: "It is emphatically the province and duty of the judicial department to say what the law is." It inheres in the structure of the constitutional system itself. Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. . . .

. . .

Judicial deference is based not on relative factfinding competence, but on due regard for the decision of the body constitutionally appointed to decide. Establishment of voting qualifications is a matter for state legislatures. Assuming any authority at all, only when the Court can say with some confidence that the legislature has demonstrably erred in adjusting the competing interests is it justified in striking down the legislative judgment. . . .

The same considerations apply, and with almost equal force, to Congress' displacement of state decisions with its own ideas of wise policy. The sole distinction between Congress and the Court in this regard is that Congress, being an elective body, presumptively has popular authority for the value judgment it makes. But since the state legislature has a like authority, this distinction between Congress and the judiciary falls short of justifying a congressional veto on the state judgment. The perspectives and values of national legislators on the issue of voting qualifications are likely to differ from those of state legislators, but I see no reason *a priori* to prefer those of the national figures, whose collective decision, applying nationwide, is necessarily less able to take account of peculiar local conditions. . . .

. . . It seems to me that the notion of deference to congressional interpretation of the Constitution . . . is directly related to this higher standard of constitutionality which the Court intimated in *Harper v. Virginia Board of Elections* (1966) . . . . When the scope of federal review of state determinations became so broad as to be judicially unmanageable, it was natural for the Court to seek assistance from the national legislature. If the federal role were restricted to its traditional and appropriate scope, review for the sort of "plain error" which is variously described as "arbitrary and capricious," "irrational," or "invidious," there would be no call for the Court to defer to a congressional judgment on this score that it did not find convincing. Whether a state judgment has so exceeded the bounds of reason as to authorize federal intervention is not a matter as to which the political process is intrinsically likely to produce a sounder or more acceptable result. It is a matter of the delicate adjustment of the federal system. In this area, to rely on Congress would make that body a judge in its own cause. The role of final arbiter belongs to this Court.

It is difficult to see how words [in Article I, Section 4] could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress. . . .

. . .

With these major contentions resolved, it is convenient to consider the three sections of the Act individually to determine whether they can be supported by any other basis of congressional power.

A. Voting Age

The only constitutional basis advanced in support of the lowering of the voting age is the power to enforce the Equal Protection Clause, a power found in § 5 of the Fourteenth Amendment. For the reasons

already given, it cannot be said that the statutory provision is valid as declaratory of the meaning of that clause. Its validity therefore must rest on congressional power to lower the voting age as a means of preventing invidious discrimination that is within the purview of that clause.

. . . [T]he suggestion that members of the age group between 18 and 21 are threatened with unconstitutional discrimination, or that any hypothetical discrimination is likely to be affected by lowering the voting age, is little short of fanciful. I see no justification for stretching to find any such possibility when all the evidence indicates that Congress—led on by recent decisions of this Court—thought simply that 18-year-olds were fairly entitled to the vote and that Congress could give it to them by legislation. . . .

B. Residency

. . . As the Court has consistently held, the Privileges and Immunities Clauses do not react on the mere status of citizenship to enfranchise any citizen whom an otherwise valid state law does not allow to vote. . . . Minors, felons, insane persons, and persons who have not satisfied residency requirements are among those citizens who are not allowed to vote in most States. . . .

The right to travel across state lines . . . is likewise insufficient to require Idaho to conform its laws to the requirements of § 202. . . . I find it impossible to square the position that § 5 authorizes Congress to abolish state voting qualifications based on residency with the position that it does not authorize Congress to abolish such qualifications based on race. Since the historical record compels me to accept the latter position, I must reject the former.

C. Literacy

. . .

Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

. . .

In conclusion, I add the following. The consideration that has troubled me most in deciding that the 18-year-old and residency provisions of this legislation should be held unconstitutional is whether I ought to regard the doctrine of *stare decisis* as preventing me from arriving at that result. For, as I indicated at the outset of this opinion, were I to continue to consider myself constricted by recent past decisions holding that the Equal Protection Clause of the Fourteenth Amendment reaches state electoral processes, I would . . . be led to cast my vote with those of my Brethren who are of the opinion that the lowering of the voting age and the abolition of state residency requirements in presidential elections are within the ordinary legislative power of Congress.

After much reflection, I have reached the conclusion that I ought not to allow *stare decisis* to stand in the way of casting my vote in accordance with what I am deeply convinced the Constitution demands. In the annals of this Court few developments in the march of events have so imperatively called upon us to take a fresh hard look at past decisions, which could well be mustered in support of such developments, as do the legislative lowering of the voting age and, albeit to a lesser extent, the elimination of state residential requirements in presidential elections. Concluding, as I have, that such decisions cannot withstand constitutional scrutiny, I think it my duty to depart from them, rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis*.

. . .

JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL dissent from the judgments insofar as they declare § 302 unconstitutional as applied to state and local elections, and concur in the judgments in all other respects, for the following reasons.

. . .

Since, in our view, congressional power to enact the challenged Amendments is found in the enforcement clauses of the Fourteenth and Fifteenth Amendments, and since we may easily perceive a rational basis for the congressional judgments underlying each of them, we would [sustain all provisions in the Voting Rights Act of 1970].

. . .

. . . Congressional power to remedy the evils resulting from state-sponsored racial discrimination does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred. . . . The legislative history of the 1970 Amendments contains substantial information upon which Congress could have based a finding that the use of literacy tests in Arizona and in other States where their use was not proscribed by the 1965 Act has the effect of denying the vote to racial minorities whose illiteracy is the consequence of a previous, governmentally sponsored denial of equal educational opportunity. . . .

. . .

Whether or not the Constitution vests Congress with particular power to set qualifications for voting in strictly federal elections, we believe there is an adequate constitutional basis for [the durational requirements] in § 5 of the Fourteenth Amendment. For more than a century, this Court has recognized the constitutional right of all citizens to unhindered interstate travel and settlement. . . .

By definition, the imposition of a durational residence requirement operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration. . . .

In the present case, Congress has explicitly found both that the imposition of durational residence requirements abridges the right of free interstate migration and that such requirements are not reasonably related to any compelling state interests. . . .

All parties to these cases are agreed that the States are given power, under the Constitution, to determine the qualifications for voting in state elections. . . . But it is now settled that exercise of this power, like all other exercises of state power, is subject to the Equal Protection Clause of the Fourteenth Amendment. . . .

The right to vote has long been recognized as a "fundamental political right, because preservative of all rights." . . . Consequently, when exclusions from the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the State. . . . "A more exacting standard obtains." *Kramer v. Union School District* (1969). . . In such cases, "the Court must determine whether the exclusions are necessary to promote a compelling state interest." . . .

. . .

. . . [R]ecognition that age is not in all circumstances a "capricious or irrelevant factor," . . . does not insure the validity of the particular limitation involved here. . . . Every State in the Union has concluded for itself that citizens 21 years of age and over are capable of responsible and intelligent voting. Accepting this judgment, there remains the question whether citizens 18 to 21 years of age may fairly be said to be less able.

State practice itself in other areas casts doubt upon any such proposition. Each of the 50 States has provided special mechanisms for dealing with persons who are deemed insufficiently mature and intelligent to understand, and to conform their behavior to, the criminal laws of the State. Forty-nine of the States have concluded that, in this regard, 18-year-olds are invariably to be dealt with according to precisely the same standards prescribed for their elders. This at the very least is evidence of a nearly unanimous legislative judgment on the part of the States themselves that differences in maturity and intelligence between 18-year-olds and persons 21 years of age and over are too trivial to warrant specialized treatment for any of the former class in the critically important matter of criminal responsibility. Similarly, every State permits 18-year-olds to marry, and 39 States do not require parental consent for such persons of one or both sexes. State statutory practice in other areas follows along these lines, albeit not as consistently.

Uniform state practice in the field of education points the same way. No State in the Union requires attendance at school beyond the age of 18. Of course, many 18-year-olds continue their education to 21 and beyond. But no 18-year-old who does not do so will be disenfranchised thereby once he reaches the age of 21.

Whether or not a State could in any circumstances condition exercise of the franchise upon educational achievements beyond the level reached by 18-year-olds today, there is no question but that no State purports to do so. Accordingly, that 18-year-olds as a class may be less educated than some of their elders cannot justify restriction of the franchise, for the States themselves have determined that this incremental education is irrelevant to voting qualifications. And finally, we have been cited to no material whatsoever that would support the proposition that intelligence, as opposed to educational attainment, increases between the ages of 18 and 21.

. . .

Limitations stemming from the nature of the judicial process . . . 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. . . . It should hardly be necessary to add that, if the asserted factual basis necessary to support a given state discrimination does not exist, § 5 of the Fourteenth Amendment vests Congress with power to remove the discrimination by appropriate means.

. . .

. . . The core of dispute over the constitutionality of Title III of the 1970 Amendments is a conflict between state and federal legislative determinations of the factual issues upon which depends decision of a federal constitutional question—the legitimacy, under the Equal Protection Clause, of state discrimination against persons between the ages of 18 and 21. Our cases have repeatedly emphasized that, when state and federal claims come into conflict, the primacy of federal power requires that the federal finding of fact control.

. . .

. . . [O]ur Brother HARLAN's historical analysis is flawed by his ascription of 20th-century meanings to the words of 19th-century legislators. In consequence, his analysis imposes an artificial simplicity upon a complex era, and presents, as universal, beliefs that were held by merely one of several groups competing for political power. We can accept neither his judicial conclusion nor his historical premise that the original understanding of the Fourteenth Amendment left it within the power of the States to deny the vote to Negro citizens.

It is clear that the language of the Fourteenth Amendment, which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws," applies on its face to all assertions of state power, however made. More than 40 years ago, this Court faced for the first time the question whether a State could deny Negroes the right to vote in primary elections. Writing for a unanimous Court, Justice Holmes observed tartly that "[w]e find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."

. . .

Our own reading of the historical background, on the other hand, results in a somewhat imperfect picture of an era of constitutional confusion, confusion that the Amendment did little to resolve. . . .

. . .

The key provision on the suffrage question was, of course, § 2, which was to have the effect of reducing the representation of any State which did not permit Negroes to vote. Section 1 also began, however, as a provision aimed at securing equality of "political rights and privileges"—a fact hardly surprising in view of Republican concern with the question. In their earliest versions in the Joint Congressional Committee on Reconstruction, which framed the Fourteenth Amendment, §§ 1 and 2 read as follows:

> [Sec. 1.] Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property.

. . . The question that must now be pursued is whether § 1 of the Amendment ever lost its original connection with the suffrage question.

. . .

[Senator] Howard, with that "lack of legal precision" typical of the period, stated that the right of suffrage was not one of the privileges and immunities protected by the Constitution, immediately after he had read into the record an excerpt from the case of *Corfield v. Coryell* (C.C. E. D. Pa. 1823), . . . an excerpt which listed the elective franchise as among the privileges and immunities. Bingham was equally ambiguous, for he too thought that the elective franchise was a constitutionally protected privilege and immunity. . . . Indeed, at one point in the debates, Bingham made what is for us a completely incongruous statement:

> To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.

. . . Bingham seemed to say in one breath, first, that the franchise was a constitutionally protected privilege in support of which Congress under § 5 of the Fourteenth Amendment could legislate and then, in the next breath, that the franchise was exclusively under the control of the States.

. . . In the minds of members of the 39th Congress, the leading case to construe that clause was *Corfield v. Corell,* which had listed among a citizen's privileges and immunities "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised." . . . Here again is the same apparent ambiguity that later occurred in Bingham's thought—that the franchise is a federally protected right, but only to the extent it is regulated and established by state law. The ambiguity was, however, only apparent, and not real, for the Privileges and Immunities Clause of the original Constitution served a peculiar function; it did not create absolute rights, but only placed a noncitizen of a State "upon a perfect equality with its own citizens" as to those fundamental rights already created by state law. . . . Thus, what Bingham may have meant in indicating that the franchise was included within the scope of the Privileges and Immunities Clause of the Fourteenth Amendment while remaining entirely under the control of the States was that, although the States would be free in general to confer the franchise upon whomever they chose, Congress would have power to bar them from racial or other arbitrary discriminations in making their choices. . . .

Others had a similar understanding. Thus, for Charles Sumner,

> Equality of *political rights* . . . [did] not involve necessarily what is sometimes called the 'regulation' of the suffrage by the National Government, although this would be best . . . , [but] simply require[d] the abolition of any discrimination among citizens, inconsistent with Equal Rights.

. . .

Of course, few of the above statements taken from congressional debates, campaign speeches, and the press were made with such clarity and precision that we can know with certainty that its framers intended the Fourteenth Amendment to function as we think they did. But clarity and precision are not to be expected in an age when men are confronting new problems for which old concepts do not provide ready solutions. As we have seen, the 1860's were such an age, and the men who formulated the Fourteenth Amendment were facing an especially perplexing problem—that of creating federal mechanisms to insure the fairness of state action without, in the process, destroying the reserved powers

of the States. It would, indeed, be surprising if the men who first faced this difficult problem were possessed of such foresight that they could debate its solution with complete clarity and consistency and with uniformity of views. There is, in short, every reason to believe that different men reconciled in different and often imprecise ways the Fourteenth Amendment's broad guarantee of equal rights and the statements of some of its framers that it did not give Congress power to legislate upon the suffrage.

. . . [A]t least three identifiable groups may have existed within the Republican majorities that enacted and ratified the Amendment—those who thought that Congress would have power to insure to Negroes the same right to suffrage as the States gave to whites, those who thought that Congress would not have such power, since Negroes and whites constituted distinct and dissimilar classes for voting purposes, and those who thought Congress would possess no power at all over the suffrage. Perhaps all three such groups did not exist in 1866 in Congress and in the Nation at large, but surely the evidence is not clear "beyond any reasonable doubt" that the only existent group was the last one, consisting of men who, despite the broad language of § 1 and the hints by speakers of its applicability to the suffrage, simply assumed without developing any analytical framework in support of their assumption that the section would not be so applied.

The evidence, in sum, plausibly suggests that the men who framed the Fourteenth Amendment possessed differing views as to the limits of its applicability but that they papered over their differences because those differences were not always fully apparent and because they could not foresee with precision how their amendment would operate in the future. . . .

. . .

Not surprisingly, the product of such political needs was an Amendment which contemporaries saw was vague and imprecise. . . .

Thus, the historical evidence does not point to a single, clear-cut conclusion that contemporaries viewed the first section of the Fourteenth Amendment as an explicit abandonment of the radical goal of equal suffrage for Negroes. Rather, the evidence suggests an alternative hypothesis: that the Amendment was framed by men who possessed differing views on the great question of the suffrage and who, partly in order to formulate some program of government and partly out of political expediency, papered over their differences with the broad, elastic language of § 1 and left to future interpreters of their Amendment the task of resolving in accordance with future vision and future needs the issues that they left unresolved. Such a hypothesis strikes us as far more consistent with the turbulent character of the times than one resting upon a belief that the broad language of the Equal Protection Clause contained a hidden limitation upon its operation that would prevent it from applying to state action regulating rights that could be characterized as "political."

. . .

The historical record left by the framers of the Fourteenth Amendment, because it is a product of differing and conflicting political pressures and conceptions of federalism, is thus too vague and imprecise to provide us with sure guidance in deciding the pending cases. We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record and cease to interpret the Amendment as this Court has always interpreted it.

There remains only the question whether Congress could rationally have concluded that denial of the franchise to citizens between the ages of 18 and 21 was unnecessary to promote any legitimate interests of the States in assuring intelligent and responsible voting. . . .

Congress was aware, of course, of the facts and state practices already discussed. . . . Congress was aware that 18-year-olds today make up a not insubstantial proportion of the adult workforce; and it was entitled to draw upon its experience in supervising the federal establishment to determine the competence and responsibility with which 18-year-olds perform their assigned tasks. As Congress recognized, its judgment that 18-year-olds are capable of voting is consistent with its practice of entrusting them with the heavy responsibilities of military service. Finally, Congress was presented with evidence that the age of social and biological maturity in modern society has been consistently decreasing. . . .

In sum, Congress had ample evidence upon which it could have based the conclusion that exclusion of citizens 18 to 21 years of age from the franchise is wholly unnecessary to promote any legitimate interest the States may have in assuring intelligent and responsible voting. . . . If discrimination is unnecessary to promote any legitimate state interest, it is plainly unconstitutional under the Equal Protection Clause, and Congress has ample power to forbid it under § 5 of the Fourteenth Amendment. We would uphold § 302 of the 1970 Amendments as a legitimate exercise of congressional power.

JUSTICE STEWART, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

. . .

I concur in Part II of JUSTICE BLACK's opinion, which holds that the literacy test ban of § 201 of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment. . . . Congress has ample authority under § 2 of the Fifteenth Amendment to determine that literacy requirements work unfairly against Negroes in practice because they handicap those Negroes who have been deprived of the educational opportunities available to white citizens. . . .

Congress has now undertaken to extend the ban on literacy tests to the whole Nation. I see no constitutional impediment to its doing so. Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country. . . . A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one, and reflects a national commitment to its solution.

Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. . . .

Congress, in my view, has the power under the Constitution to eradicate political and civil disabilities that arise by operation of state law following a change in residence from one State to another. Freedom to travel from State to State—freedom to enter and abide in any State in the Union—is a privilege of United States citizenship. . . .

In the light of these considerations, . . . Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State. The objective of § 202 is clearly a legitimate one. Federal action is required if the privilege to change residence is not to be undercut by parochial local sanctions. . . .

. . .

The Constitution withholds from Congress any general authority to change by legislation the qualifications for voters in federal elections. The meaning of the applicable constitutional provisions is perfectly plain. Article I, § 2, and the Seventeenth Amendment prescribe the qualifications for voters in elections to choose Senators and Representatives: they "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Constitution thus adopts as the federal standard the standard which each State has chosen for itself. . . . Accordingly, a state law that purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Art. I, § 2, and the Seventeenth Amendment. By the same token, it cannot be gainsaid that federal legislation that had no objective other than to alter the qualifications to vote in congressional elections would be invalid for the same reasons. What the Constitution has fixed may not be changed except by constitutional amendment.

Contrary to the submission of my Brother BLACK, Art. I, § 4, does not create in the Federal Legislature the power to alter the constitutionally established qualifications to vote in congressional elections. . . . The "manner" of holding elections can hardly be read to mean the qualifications for voters, when it is remembered that § 2 of the same Art. I explicitly speaks of the "qualifications" for voters in elections to choose Representatives. . . .

. . . The issue, then, is whether, despite the intentional withholding from the Federal Government of a general authority to establish qualifications to vote in either congressional or presidential elections, there exists congressional power to do so when Congress acts with the objective of protecting a citizen's privilege to move his residence from one State to another. Although the matter is not entirely free from doubt, I am persuaded that the constitutional provisions discussed above are not sufficient to prevent Congress from protecting a person who exercises his constitutional right to enter and abide in any State in the Union from losing his opportunity to vote, when Congress may protect the right of interstate travel from other less fundamental disabilities. . . . The power that Congress has exercised in enacting § 202 is not a general power to prescribe qualifications for voters in either federal or state elections. It is confined to federal action against a particular problem clearly within the purview of congressional authority. Finally, the power to facilitate the citizen's exercise of his constitutional privilege to change residence is one that cannot be left for exercise by the individual States without seriously diminishing the level of protection available. As I have sought to show above, federal action is required if this privilege is to be effectively maintained. We should strive to avoid an interpretation of the Constitution that would withhold from Congress the power to legislate for the protection of those constitutional rights that the States are unable effectively to secure. For all these reasons, I conclude that it was within the power of Congress to enact § 202. . . .

. . .

[R]ecent decisions have established that state action regulating suffrage is not immune from the impact of the Equal Protection Clause. But we have been careful in those decisions to note the undoubted power of a State to establish a qualification for voting based on age. . . . Indeed, none of the opinions filed today suggests that the States have anything but a constitutionally unimpeachable interest in establishing some age qualification as such. Yet to test the power to establish an age qualification by the "compelling interest" standard is really to deny a State any choice at all, because no State could demonstrate a "compelling interest" in drawing the line with respect to age at one point, rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of the States have done.

The state laws that [provisions in the Voting Rights Act] invalidates do not invidiously discriminate against any discrete and insular minority. Unlike the statute considered in Morgan, § 302 is valid only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are "compelling." . . .