



The Legislative History of the Fourteenth Amendment

Part 2: The Supreme Court Cases

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AN INTRODUCTION TO THIS COLLECTION

This is a collection of the key selections from the relatively small number of Supreme Court cases which have engaged in a historical inquiry into the adoption or ratification of the 14th Amendment. Given the breadth of the power that the Federal Courts currently have (either granted to them or arrogated by them, depending on your point of view) to review and to declare unconstitutional state laws, municipal ordinances, and the official actions of state agencies, it is remarkable that so few cases have bothered to examine the historical record to examine the arguments for or against a particular interpretation of the three key clauses of the first section of the Amendment.

The Court in *Brown v. Board of Education* at least explained why it did not include such an inquiry, although it had directed the parties to research and brief the issue:

"Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing

practices in racial segregation, and the views of proponents and opponents of the Amendment.

"This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."

The cases which have made this inquiry in a detailed fashion consist of the following:

- Two opinions by Justice Hugo Black, written 19 years apart, in *Adamson v. California* and *Duncan v. Louisiana*, in support of his lonely position that the intent of the framers of the Due Process clause was to incorporate all of the protections afforded against Federal governmental action in the Bill of Rights and make them effective against state action.
- Two opinions by the second Justice John Harlan, dissenting against the "one-man one-vote" decisions in *Reynolds v. Sims* and *Orgeon v. Mitchell*, and arguing that the Equal Protection clause was never intended to give the Federal judiciary the power to interfere with the internal political structure of the states.

The *City of Boerne* case engaged in some discussion of historical factors in connection with its ruling under Section 5, the Congressional enforcement clause.

We have included under "Brief Mentions" some much more limited language as found in a few other cases.

This is Part 2 of the project on the Legislative History of the Fourteenth Amendment. Part 1 is the collection of pertinent entries from the Congressional Globe, 39th Congress, 1st session, entitled "The Debates in Congress on the Fourteenth Amendment". It is available at [this site](#).

Part 3 is not publicly available, for copyright reasons. It collects several of the articles that have appeared in law reviews on this topic.

Visit my public wiki site for additional information and updates about the project.

A technical note about these pages

The text of these opinions was retrieved from Findlaw's excellent collection.¹ Please visit <http://www.findlaw.com/cascode/#federal> for the complete text of these and other opinions.

The pages are created so as to be easily read on a computer screen.

We have set up most pages so that each page from the original is found on one page in this file. This occasionally resulted in a very small amount of text on one page. The reason is that the original opinions were published with footnotes rather than endnotes. Thus, a page with several footnotes or with a lengthy footnote will have relatively little text. On occasion, we have combined several such short pages on one page of this file.

¹ The single exception is the *City of Boerne* case. FindLaw's version of that opinion does not include page numbers.

Adamson v. California

332 U.S. 46 (1947)

This case involved a claim that the Due Process clause of the 14th Amendment was violated when the prosecution in a state murder trial was allowed to comment on the defendant's failure to take the stand. Over the years, the Court had been grappling with the question of whether the substantive guarantees of the Bill of Rights were adopted as against the states by the Due Process clause, and if so, which ones. Justice Hugo Black, alone against his brethren, argued for a total incorporation theory, under which each of the first eight amendments, and nothing else, was enforceable against the states under the clause.

To his dissenting opinion, at p. 92, he attached an Appendix which set forth his summary of the debates and proceedings which led to the adoption of the 14th Amendment. It consists of Sections I through VIII, as follows:

- I - The origin of the Amendment in the Joint Committee
- II - Debates on the amendment, February 26, 1866
- III - Outside events which influenced the debates

IV - The Committee on Reconstruction

V - Introduction of the Amendment in the House

VI - The report of the Joint Committee

VII - Formal statements made after adoption in Congress

VIII - Discussion of the Supreme Court cases decided since the Amendment was adopted which reflected an incorporation theory

APPENDIX

I. The legislative origin of the first section of the Fourteenth Amendment seems to have been in the Joint Committee on Reconstruction. That Committee had been appointed by a concurrent resolution of the House and Senate with authority to report 'by bill or otherwise' whether the former Confederate States 'are entitled to be represented in either House of Congress.' Cong. Globe, 39th Cong., 1st Sess. (1865) 6, 30. The broad mission of that Committee was revealed by its very first action of sending a delegation to President Johnson requesting him to 'defer all further executive action in regard to reconstruction until this committee shall have taken action on that subject.' Journal of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866), reprinted as Sen.Doc. No. 711, 63d Cong., 3d Sess. (1915) 6. It immediately set about the business of drafting constitutional amendments which would outline the plan of reconstruction which it would recommend to Congress. Some of those proposed amendments related to suffrage and representation in the South. Journal, 7. On January 12, 1866, a subcommittee, consisting of Senators Fessenden (Chairman of the Reconstruction Com-

[332 U.S. 46 , 93] mittee) and Howard, and Congressmen Stevens, Bingham and Conkling, was appointed to consider those suffrage proposals. Journal, 9. There was at the same time referred to this Committee a 'proposed amendment to the Constitution' submitted by Mr. Bingham that:

'The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property.' Journal, 9.

Another proposed amendment that 'All laws, State or national, shall operate impartially and equally on all persons without regard to race or color,'¹ was also referred to the Committee. Journal, 9. On January 24, 1866, the subcommittee reported back a combination of these two proposals which was not accepted by the full Committee. Journal, 13, 14. Thereupon the proposals were referred to a 'select committee of three,' Bingham, Boutwell and Rogers. Journal, 14. On January 27, 1866, Mr. Bingham on behalf of the select committee, presented this recommended amendment to the full committee:

'Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges.' Journal, 14.

This was not accepted. But on February 3, 1866, Mr. Bingham submitted an amended version:

'The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (art. 4, sec. 2); and to all persons in the several States equal protection

[332 U.S. 46 , 94] in the rights of life, liberty, and property (5th amendment).'

This won committee approval, Journal, 17, and was presented by Mr. Bingham to the House on behalf of the Committee on February 13, 1866. Cong. Globe, supra, 813.

II. When, on February 26, the proposed amendment came up for debate, Mr. Bingham stated that 'by order * * * of the committee * * * I propose adoption of this amendment.' In support of it he said:

'* * * The amendment proposed stands in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers. Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States. The residue of the resolution, as the House will see by a reference to the Constitution, is the language of the second section of the fourth article, and of a portion of the fifth amendment adopted by the First Congress in 1789, and made part of the Constitution of the country. * * *

'Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution. Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility. * * *

'And, sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its con-

[332 U.S. 46, 95] tinued construction, legislative, executive, and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States. * * * Cong.Globe, supra, 1033, 1034.

Opposition speakers emphasized that the Amendment would destroy state's rights and empower Congress to legislate on matters of purely local concern. Cong.Globe, supra, 1054, 1057, 1063-1065, 1083, 1085-1087. See also id. at 1082. Some took the position that the Amendment was unnecessary because the Bill of Rights were already secured against state violation. Id. at 1059, 1066, 1088. Mr. Bingham joined issue on this contention:

'The gentleman seemed to think that all persons could have remedies for all violations of their rights of 'life, liberty, and property' in the Federal courts.

'I ventured to ask him yesterday when any action of that sort was ever maintained in any of the Federal courts of the United States to redress the great wrong which has ben practice d, and which is being practiced now in more States than one of the Union under the authority of State laws, denying to citizens therein equal protection or any protection in the rights of life, liberty, and property.

* * * A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.

'Mr. Speaker, on this subject I refer the House and the country to a decision of the Supreme Court, to be found in 7 Pet., at page 247, in the case of Barron v. The Mayor and City

[332 U.S. 46 , 96] Council of Baltimore, involving the question whether the provisions of the fifth article of the amendments to the Constitution are binding upon the State of Maryland and to be enforced in the Federal courts. The Chief Justice says:

"The people of the United States framed such a Government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this Government were to be exercised by itself; and the limitations of power, if expressed in general terms, are naturally, and we think necessarily, applicable to the Government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes.

"If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States.'

I read one further decision on this subject-the case of the Lessee of Livingston v. Moore and others, 7 Pet., 469, at page 551. The court, in delivering its opinion, says:

"As to the Amendments of the Constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the States; and this observation disposes of the next exception, which relies on the seventh article of those amendments.'

'The question is simply whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of oaths enjoined upon them by their Constitution? * * * Is the Bill of Rights to stand in

[332 U.S. 46 , 97] our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.

'Mr. Speaker, it appears to me that this very provision of the bill of rights brought in question this day, upon this trial before the House, more than any other provision of the Constitution, makes that unity of government which constitutes us one people, by which and through which American nationality came to be, and only by the enforcement of which can American nationality continue to be.

'What more could have been added to that instrument to secure the enforcement of these provisions of the bill of rights in every State, other than the additional grant of power which we ask this day? * * *

'As slaves were not protected by the Constitution, there might be some color of excuse for the slave States in their disregard for the requirement of the bill of rights as to slaves in refusing them protection in life or property. * * *

'But, sir, there never was even colorable excuse, much less apology, for any man North or South claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, and property. Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights. Gentlemen who oppose this amendment simply declare to these rebel States, 'Go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to the Constitution and Government of the United States.'" Id. at 1089-1091.

* * * Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reen-

[332 U.S. 46, 98] actment of those infernal statutes * * *? Let some man answer. Why, sir, the gentleman from New York (Mr. Hale) * * * yesterday gave up the argument on this point. He said that the citizens must rely upon the State for their protection. I admit that such is the rule under the Constitution as it now stands.' Id. at 1093.

As one important writer on the adoption of the Fourteenth Amendment has observed, 'Mr. Bingham's speech in defense and advocacy of his amendment comprehends practically everything that was said in the press or on the floor of the House in favor of the resolution. * * *' Kendrick, *Journal of the Joint Committee on Reconstruction* (1914) 217. A reading of the debates indicates that no member except Mr. Hale had contradicted Mr. Bingham's argument that without this Amendment the states had power to deprive persons of the rights guaranteed by the first eight amendments. Mr. Hale had conceded that he did not 'know of a case where it has ever been decided that the United States Constitution is sufficient for the protection of the liberties of the citizen.' *Cong.Globe*, supra, at 1064. But he was apparently unaware of the decision of this Court in *Barron v. Baltimore*, supra. For he thought that the protections of the Bill of Rights had already been 'thrown over us in some way, whether with or without the sanction of a judicial decision * * *' And in any event, he insisted, '* * * the American people have not yet found that their State governments are insufficient to protect the rights and liberties of the citizen.' He further objected, as had most of the other opponents to the proposal, that the Amendment authorized the Congress to 'arrogate' to itself vast powers over all kinds of affairs which should properly be left to the States. *Cong.Globe*, supra, 1064, 1065.

When Mr. Hotchkiss suggested that the amendment should be couched in terms of a prohibition against the States in addition to authorizing Congress to legislate

[332 U.S. 46, 99] against state deprivations of privileges and immunities, debate on the amendment was postponed until April 2, 1866. Cong.Globe, supra, 1095.

III. Important events which apparently affected the evolution of the Fourteenth Amendment transpired during the period during which discussion of it was postponed. The Freedman's Bureau Bill which made deprivation of certain civil rights of negroes an offense punishable by military tribunals had been passed. It applied, not to the entire country, but only to the South. On February 19, 1866, President Johnson had vetoed the bill principally on the ground that it was unconstitutional. Cong.Globe, supra, 915. Forthwith, a companion proposal known as the Civil Rights Bill empowering federal courts to punish those who deprived any person anywhere in the country of certain defined civil rights was pressed to passage. Senator Trumbull, Chairman of the Senate Judiciary Committee, who offered the bill in the Senate on behalf of that Committee, had stated that 'the late slaveholding States' had enacted laws '* * * depriving persons of African descent of privileges which are essential to freemen. * * * (S) tatutes of Mississippi * * * provide that if any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority. Other provisions of the statute prohibit any negro or mulatto from having fire-arms; and one provision of the statute declares that for 'exercising the functions of a minister of the Gospel free negroes * * * on onviction, may be punished by * * * lashes. * * *' Other provisions * * * prohibit a free negro * * * from keeping a house of entertainment, and subject him to trial before two justices of the peace and five slaveholders for

[332 U.S. 46 , 100] violating * * * this law. The statutes of South Carolina make it a highly penal offense for any person, white or colored, to teach slaves; and similar provisions are to be found running through all the statutes of the late slaveholding States. * * * The purpose of the bill * * * is to destroy all these discriminations. * * *' Cong.Globe, supra, 474.

In the House, after Mr. Bingham's original proposal for a constitutional amendment had been rejected, the suggestion was also advanced that the bill secured for all 'the right to speech, * * * transit , * * * domicil, * * * the right to sue, the writ of habeas corpus, and the right of petition.' Cong.Globe., supra, 1263. And an opponent of the measure, Mr. Raymond, conceded that it would guarantee to the negro 'the right of free passage * * *. He has a defined status * * * a right to defend himself * * * to bear arms * * * to testify in the Federal courts * * *.' Cong.Globe, supra, 1266, 1267. But opponents took the position that without a constitutional amendment such as that proposed by Mr. Bingham, the Civil Rights Bill would be unconstitutional. Cong.Globe, supra, 1154, 1155, 1263.

Mr. Bingham himself vigorously opposed and voted against the Bill. His objection was two fold: First, insofar as it extended the protections of the Bill of Rights as against state invasion, he believed the measure to be unconstitutional because of the Supreme Court's holding in *Barron v. Baltimore*, supra. While favoring the extension of the Bill of Rights guarantees as against state invasion, he thought this could be done only by passage of his amendment. His second objection to the Bill was that in his view it would go beyond his objective of making the states observe the Bill of Rights and would actually strip the states of power to govern, centralizing all power in the Federal Government. To this he was opposed. His views are in part reflected by his own remarks and the answers to him by Mr. Wilson. Mr. Bingham said, in part:

[332 U.S. 46 , 101] '* * * I do not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that Constitution. I know that the enforcement of the bill of rights is the want of the Republic. I know if it had been enforced in good faith in every State of the Union the calamities and conflicts and crimes and sacrifices of the past five years would have been impossible.

'But I feel that I am justified in saying, in view of the text of the Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the Bill of Rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserve powers of the States to be enforced by State tribunals. * * *

'* * * I am with him in an earnest desire to have the bill of rights in your Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country.

'* * * I submit that the term 'civil rights' includes every right that pertains to the citizen under the Constitution, laws, the Government of this country. * * *

'* * * The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future. * * *'

'If the bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the powers of the States and prohibit such gross njustice b y

[332 U.S. 46 , 102] States, it does limit the power of Congress to prohibit any such legislation by Congress.

'* * * (T)he care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. * * *' Cong. Globe, supra, 1291, 1292.

Mr. Wilson, House sponsor of the Civil Rights Bill, answered Mr. Bingham's objections to it with these remarks:

'The gentleman from Ohio tells the House that civil rights involve all the rights that citizens have under the Government; that in the terms are embraced those rights which belong to the citizen of the United States as such, and those which belong to a citizen of a State as such; and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. * * *

'* * * I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that 'no person shall be deprived of life, liberty, or property without due process of law.' I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to

[332 U.S. 46 , 103] which this bill relates, having nothing to do with subjects submitted to the control of the several States.' Cong. Globe, supra at 1294.

In vetoing the Civil Rights Bill, President Johnson said among other things that the bill was unconstitutional for many of the same reasons advanced by Mr. Bingham:

'Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. * * * As respects the Territories, they come within the power of Congress, for as to them, the lawmaking power is the federal power; but as to the States no similar provisions exist, vesting in Congress the power 'to make rules and regulations' for them.' Cong. Globe, supra, 1679, 1680.

The bill, however, was passed over President Johnson's veto and in spite of the constitutional objections of Bingham and others. Cong. Globe, supra, 1809, 1861.

IV. Thereafter the scene changed back to the Committee on Reconstruction. There Mr. Stevens had proposed an amendment, 1 of which provided 'No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.' Journal 28. Mr. Bingham proposed an additional section providing that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' Journal 30. After the Committee had twice declined to recommend Mr. Bingham's proposal, on April 28 it was accepted by the Committee, substantially in the form he had proposed it, as 1 of the recommended Amendment. Journal 44.

V. In introducing the proposed Amendment to the House on May 8, 1866, Mr. Stevens speaking for the Committee said:

'The first section (of the proposed amendment) prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the 'equal' protection of the laws.

'I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.' Cong. Globe, 2459.2

On May 23, 1866, Senator Howard introduced the proposed amendment to the Senate in the absence of Senator Fessenden who was sick. Senator Howard prefaced his remarks by stating:

'I * * * present to the Senate * * * the views and the motives (of the Reconstruction Committee). * * * One result of their investigation has been the joint resolution for the amendment of the Constitution of the United States now under consideration. * * *

'The first section of the amendment * * * submitted for the consideration of the two Houses, relates to the privileges and immunities of citizens of the several States,

[332 U.S. 46 , 105] and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States. * * *

'It will be observed that this is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. That is its first clause, and I regard it as very important. It also prohibits each one of the States from depriving any person of life, liberty, or property without due process of law, or denying to any person within the jurisdiction of the State the equal protection of its laws.

'It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. * * * I am not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guaranteed. * * * But we may gather some intimation of what probably will be the opinion of the judiciary by referring to * * * *Corfield v. Coryell* (Fed.Cas. No. 3230) 4 Washington Circuit Court Reports, page 380. (Here Senator Howard quoted at length from that opinion.)

'Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be-for they are not and cannot be fully defined in their entire extent and precise nature-to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner;

[332 U.S. 46 , 106] the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

'Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; ad it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution, or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or a prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

'Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions,

[332 U.S. 46 , 107] which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States any compel them at all times to respect these great fundamental guarantees.' Cong.Globe, supra, 2764.

Mr. Bingham had closed the debate in the House on the proposal prior to its consideration by the Senate. He said in part:

'* * * (M) any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.

'It was an approbrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment.' Cong. Globe, supra, 2542, 2543.

Both proponents and opponents of 1 of the amendment spoke of its relation to the Civil Rights Bill which had been previously passed over the President's veto. Some considered that the amendment settled any doubts there might be as to the constitutionality of the Civil Rights Bill. Cong. Globe, 2511, 2896. Others maintained that the Civil Rights Bill would be unconstitutional

[332 U.S. 46 , 108] unless and until the amendment was adopted. Cong. Globe, 2461, 2502, 2506, 2513, 2961, 2513. Some thought that amendment was nothing but the Civil Rights 'in another shape.' Cong. Globe, 2459, 2462, 2465, 2467, 2498, 2502. One attitude of the opponents was epitomized by a statement by Mr. Shanklin that the amendment strikes 'down the reserved rights of the States, * * * declared by the framers of the Constitution to belong to the States exclusively and necessary for the protection of the property and liberty of the people. The first section of this proposed amendment * * * is to strike down those State rights and invest all power in General Government.' Cong. Globe, supra, 2500. See also Cong. Globe, supra, 2530, 2538.

Except for the addition of the first sentence of 1 which defined citizenship, Cong. Globe, supra 2869, the amendment weathered the Senate debate without substantial change. It is significant that several references were made in the Senate debate to Mr. Bingham's great responsibility for 1 of the amendment as passed by the House. See e.g. Cong. Globe, supra, 2896.

VI. Also just prior to the final votes in both Houses passing the resolution of adoption, the Report of the Joint Committee on Reconstruction, H.R.Rep.No.30, 39th Cong., 1st Sess. (1866); Sen.Rep.No. 112, 39th Cong., 1st Sess. (1866), was submitted. Cong.Globe, supra, 3038, 3051. This report was apparently not distributed in time to influence the debates in Congress. But a student of the period reports that 150,000 copies of the Report and the testimony which it contained were printed in order that senators and representatives might distribute them among their constituents. Apparently the Report was widely reprinted in the press and used as a campaign document

[332 U.S. 46 , 109] in the election of 1866. Kendrick, Journal of the Joint Committee on Reconstruction (1914) 265. According to Kendrick the Report was 'eagerly * * * perused' for information concerning 'conditions in the South.' Kendrick, supra, 265.

The Report of the Committee had said with reference to the necessity of amending the Constitution:

'* * * (T)he so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic. * * *' Report, supra, XXI.

Among the examples recited by the testimony were discrimination against negro churches and preachers by local officials and criminal punishment of those who attended objectionable church services. Report, Part II, 52. Testimony also cited recently enacted Louisiana laws which made it 'a highly penal offense for anyone to do anything that might be construed into encouraging the blacks to leave the persons with whom they had made contracts for labor * * *.' Report, Part III, p. 25.3

Flack, supra at 142, who canvassed newspaper coverage and speeches concerning the popular discussion of the adoption of the Fourteenth Amendment, indicates that

[332 U.S. 46 , 110] Senator Howard's speech stating that one of the purposes of the first section was to give Congress power to enforce the Bill of Rights as well as extracts and digests of other speeches were published widely in the press. Flack summarizes his observation that

'The declarations and statements of newspapers, writers and speakers , * * * show very clearly, * * * the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not, whether the privileges guaranteed by those Amendments were to be considered as privileges secured by the Amendment, but it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it.' Flack, *supra*, 153, 154.

VII. Formal statements subsequent to adoption of the Amendment by the congressional leaders who participated in the drafting and enactment of it are significant. In 1871 a bill was before the House which contemplated enforcement of the Fourteenth Amendment. Mr. Garfield, who had participated in the debates on the Fourteenth Amendment in 1866 said:

'I come now to consider * * * for it is the basis of the pending bill, the fourteenth amendment. I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construc-

[332 U.S. 46 , 111] tion given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter.' Cong. Globe, 42d Cong., 1st Sess. (App. 1871) 150.

'The next clause of the section under debate declares: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law.'

'This is copied from the fifth article of amendments, with this difference: as it stood in the fifth article it operated only as a restraint upon Congress, while here it is a direct restraint upon the governments of the States. The addition is very valuable. It realizes the full force and effect of the clause in Magna Charta, from which it was borrowed; and there is now no power in either the State or the national Government to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty, and property, except by due process of law; that is, by an impartial trial according to the laws of the land. * * *'
Cong. Globe, supra, at 152, 153.

A few days earlier, in a debate on this same bill to enforce the Fourteenth Amendment, Mr. Bingham, still a member of Congress, had stated at length his understanding of the purpose of the Fourteenth Amendment as he had originally conceived it:

'Mr. Speaker, the Honorable Gentleman from Illinois (Mr. Farnsworth) did me unwittingly, great service, when he ventured to ask me why I changed the form of the first section of the fourteenth article of amendment from the form in which I reported it to the House in February, 1866, from the Committee on Reconstruction. I will answer the gentleman, sir, and answer him truthfully. I had the honor to frame the amendment as reported in February, 1866, and the first section, as it now

[332 U.S. 46 , 112] stands, letter for letter, and syllable for syllable, in the fourteenth article of the amendments to the Constitution of the United States, save the introductory clause defining citizens. The clause defining citizens never came from the joint Committee on Reconstruction, but the residue of the first section of the fourteenth amendment did come from the committee precisely as I wrote it and offered it in the Committee on Reconstruction, and precisely as it now stands in the Constitution. * * *

'That is the grant of power. It is full and complete. The gentleman says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is now, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.

'The gentleman ventured upon saying that this amendment does not embrace all of the amendment prepared and reported by me with the consent of the committee in February, 1866. The amendment reported in February, to which the gentleman refers, is as follows: 'The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.'

'That i the amendment, and the whole of it, as reported in February, 1866. That amendment never was rejected by the House or Senate. A motion was made to lay it on the table, which was a test vote on the merits of it, and the motion failed. * * * I consented to and voted for the motion to postpone it. * * *
Afterward in the joint

[332 U.S. 46 , 113] Committee on Reconstruction, I introduced this amendment, in the precise form, as I have stated, in which it was reported, and as it now stands in the Constitution of my country. * * *

I answer the gentleman, how I came to change the form of February to the words now in the first section of the fourteenth article of amendments, as they stand, and I trust will forever stand, in the Constitution of my country. I had read-and that is what induced me to attempt to impose by constitutional amendments new limitations upon the power of the States-the great decision of Marshall in Barron v. The Mayor and City Council of Baltimore, wherein the Chief Justice said, in obedience to his official oath and the Constitution as it then was: 'The amendments (to the Constitution) contained no expression indicating an intention to apply them to the State governments. This court cannot so apply them.'-7 Pet. page 250.

'In this case the city had taken private property for public use, without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States; and only for this reason, the first eight amendments were not limitations on the power of the States.

'And so afterward, in the case of the Lessee of Livingstone v. Moore * * * the court ruled, 'It is now settled that the amendments (to the Constitution) do not extend to the States.' They were but limitations upon Congress. Jefferson well said of the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights. Those amendments secured the citizens against any deprivation of any essential rights of person by any act of Congress, and among other things thereby they were secured

[332 U.S. 46 , 114] in their persons, houses, papers, and effects against unreasonable searches and seizures, in the inviolability of their homes in times of peace, by declaring that no soldier shall in time of peace be quartered in any house without the consent of the owner. They secured trial by jury; they secured the right to be informed of the nature and cause of accusation which might in any case be made against them; they secured compulsory process for witnesses and to be heard in defense by counsel. They secured, in short, all the rights dear to the American citizen. And yet it was decided, and rightfully, that these amendments defining and protecting the rights of men and citizens were only limitations on the power of Congress, not on the power of the States.

'In reexamining that case of Barron, Mr. Speaker, after my struggle in the House in February 1866 to which the gentleman has alluded, I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: 'Had the framers of these amendments intended them to be limitations on the power of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.' Barron v. The Mayor, &c., 7 Pet. 250.

'Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said 'No state shall emit bills of credit, pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts;' imitating their example and imitating it to the letter, I prepared the provision of the first section of the Fourteenth Amendment as it stands in the Constitution, as follows: 'No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person, of life, liberty, or property without due process of law,

[332 U.S. 46 , 115] nor deny to any person within its jurisdiction the equal protection of the laws.'

I hope the gentleman now knows why I changed the form of the amendment of February, 1866.

'Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows: (Here Mr. Bingham recited verbatim the first eight articles.)

'These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, 'no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States,' are an express prohibition upon every State of the Union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make.

'Mr. Speaker, that decision in the fourth of Washington's Circuit Court Reports, to which my learned colleague * * * has referred is only a construction of the second section, fourth article of the original Constitution, to wit, 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' In that case the court only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own.

'In the case of the United States v. Primrose, Mr. Webster said that- 'For the purposes of trade, it is evidently not in the power of any State to impose any hindrance or embarrassment, etc., upon citizens of other States, or to place them, on coming there, upon a different

[332 U.S. 46 , 116] footing from her own citizens.' 6 Webster's Works, 112.

'The learned Justice Story declared that-'The intention of the clause ('The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States') was to confer on the citizens of each State a general citizenship, and communicated all the privileges and immunities which a citizen of the same State would be entitled to under the same circumstances.' Story on The Constitution, Vol. 2, page 605.

'Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provisions of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?

'Sir, before the ratification of the fourteenth amendment, the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was so done in half the States of the Union. Before that a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread. The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America, in the Supreme Court of the United States; but nevertheless affirmed in obedience to the requirements of the Constitution. * * *

'Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter

[332 U.S. 46 , 117] can imitate the bad example of Illinois, to which I have referred, nor can any State ever repeat the example of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lesson of the New Testament, to know that new evangel, 'The pure in heart shall see God.'

* * * You say it is centralized power to restrain by law unlawful combinations in States against the Constitution and citizens of the United States, to enforce the Constitution and the rights of United States citizen (sic.) by national law, and to disperse by force, if need be, combinations too powerful to be overcome by judicial process, engaged in trampling underfoot the life and liberty, or destroying the property of the citizen.

'The States never had the right, though they had the power, to inflict wrongs upon free citizens by denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States, did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials

[332 U.S. 46 , 118] of right as these in States and by States, or combinations of persons?

'Mr. Speaker, I respectfully submit to the House and country that, by virtue of these amendments, it is competent for Congress today to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that state without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of its property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances. For these are of the rights of citizens of the United States defined in the Constitution and guaranteed by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered. * * *' Cong.Globe, App. 1st Sess., 42d Cong., pp. 81, 83-85.

And the day after Mr. Garfield's address, Mr. Dawes, also a member of the 39th Congress, stated his understanding of the meaning of the Fourteenth Amendment:

'Sir, in the progress of constitutional liberty, when, in addition to those privileges and immunities (secured by the original Constitution), there were added from time to time, by amendments, others, and these were augmented, amplified, and secured and fortified in the buttresses of the Constitution itself, he hardly comprehended the full scope and measure of the phrase which appears in this bill. Let me read, one by one, these

[332 U.S. 46 , 119] amendments, and ask the House to tell me when and where and by what chosen phrase has man been able to bring before the Congress of the country a broader sweep of legislation than my friend has in the bill here. In addition to the original rights secured to him in the first article of amendments, he had secured the free exercise of his religious belief, and freedom of speech and the press. Then he had secured to him the right to keep and bear arms in his defense. Then, after that, his home was secured in time of peace from the presence of a soldier; and, still further, sir, his house, his papers, and his effects were protected against unreasonable seizure. * * *

'Then, again, as if that were not enough, by another amendment he was secured against trial for any alleged offense except it be on the presentation of a grand jury, and he was protected against ever giving testimony against himself. (Italics supplied.) Then, sir, he was guaranteed a speedy trial, and the right to confront every witness against him. Then in every controversy which should arise he had the right to have it decided by a jury of his peers. Then, sir, by another amendment, he was never to be required to give excessive bail, or be punished by cruel and unusual punishment. And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens who sprang into being, as it were, by the wave of a magic wand. Still further, every person born on the soil was made a citizen and clothed with them all.

'It is all these, Mr. Speaker, which are comprehended in the words 'American citizen,' and it is to protect and to secure him in these rights, privileges, and immunities this bill is before the House. And the question to be settled is, whether by the Constitution, in which these provisions are

[332 U.S. 46 , 120] inserted, there is also power to guard, protect, and enforce these rights of the citizens; whether they are more, indeed, than a mere declaration of rights, carrying with it no power of enforcement. * * *' Cong.Globe, 42d Cong., 1st Sess. Part I (1871) 475, 476.

VIII. Hereafter appear statements in opinions of this Court rendered after adoption of the Fourteenth Amendment and prior to the Twining case which indicate a belief that the Fourteenth Amendment, and particularly its privileges and immunities clause, was plain application of the Bill of Rights to the states. See [332 U.S. 75](#) , note 6, supra.

In the Slaughter-House Cases, 16 Wall. 36, 83, the dissenting opinion of Mr. Justice Field emphasized that the Fourteenth Amendment made a 'citizen of a State * * * a citizen of the United States residing in that State.' 16 Wall. at page 95. But he enunciated a relatively limited number of privileges and immunities which he considered protected by national power from state interference by the Fourteenth Amendment. Apparently dissatisfied with the limited interpretation of Mr. Justice Field, Mr. Justice Bradley, although agreeing with all that Mr. Justice Field had said, wrote an additional dissent. 16 Wall. at page 111. In it he said:

'But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of

[332 U.S. 46 , 121] attainder, ex post facto laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal Government; such as the right of habeas corpus, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of not being deprived of life, liberty, or property, without due process of law. These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.' 16 Wall. at pages 118, 119; see also 16 Wall. at pages 120-122.

Mr. Justice Swayne joined in this opinion but added his own not inconsistent views. 16 Wall. at page 124.

But in *Walker v. Sauvinet*, [92 U.S. 90, 92](#), when a majority of the Court held that 'A trial by jury in suits at common law pending in the State courts is not * * * a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge,' Mr. Justice Field and Mr. Justice Clifford dissented from 'the opinion and judgment of the Court.' 92 U.S. at page 93.

In *Spies v. Illinois*, [123 U.S. 131](#), counsel for the petitioners, Mr. J. Randolph Tucker, after enumerating the protections of the Bill of Rights, took this position:

* * * Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental

[332 U.S. 46 , 122] rights-common law rights-of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.

'* * * the rights declared in the first ten amendments are to be regarded as privileges and immunities of citizens of the United States, which, as I insist, are protected as such by the Fourteenth Amendment.' 123 U.S. at pages 151, 152.

The constitutional issues raised by this argument were not reached by the Court which disposed of the case on jurisdictional grounds.

However, Mr. Justice Field in his dissenting opinion in *O'Neil v. Vermont*, [144 U.S. 323, 337](#), 361, 698, 707, stated that 'after much reflection' he had become persuaded that the definition of privileges and immunities given by Mr. Tucker in *Spies v. Illinois*, supra, 'is correct.' And Mr. Justice Field went on to say that 'While, therefore, the ten amendments as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the federal government and not to the states, yet, so far as they declare or recognize the rights of persons they are rights belonging to them as citizens of the United States under the constitution; and the fourteenth amendment, as

[[332 U.S. 46](#) , [123](#)] to all such rights, places a limit upon state power by ordaining that no state shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both state and federal action. The state cannot apply to him, any more than the United States, the torture, the rack, or thumb-screw, or any cruel and unusual punishment, or any more than it can deny to him security in his house, papers, and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights, as those of citizens of the United States, find their recognition and guaranty against federal action in the constitution of the United States, and against state action in the fourteenth amendment. The inhibition by that amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the constitutions of the several states. * * *' [144 U.S.](#) at page 363, [12 S.Ct.](#) at page 708.

Mr. Justice Harlan , and apparently Mr. Justice Brewer, concurred in this phase of Mr. Justice Field's dissent. [144 U.S.](#) at pages 366, 370, 371, [12 S.Ct.](#) at pages 709, 711.

For further exposition of these views see also the vigorous dissenting opinions of Mr. Justice Harlan in [Hurtado v. California](#), [110 U.S. 516, 538](#) , 122, 292, and [Maxwell v. Dow](#), [176 U.S. 581, 605](#) , as well as his dissenting opinion in [Twining v. New Jersey](#), [211 U.S. 78, 114](#) , 26.

Duncan v. Louisiana

391 U.S. 145 (1968)

After the Adamson decision was issued, Charles Fairman had written a critical appraisal of Black's total incorporation theory. 2 Stan. L. Rev. 5 (1949)

In this case, the question was whether Due Process required that the defendant charged with burglary be afforded a jury trial. Justice Black concurred with the majority that it did, and he took the opportunity to respond to Fairman's criticism, 19 years later, beginning at p. 162. He noted in the early paragraphs:

The historical appendix to my Adamson dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (the Bill of Rights) applicable to the States.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth Amendment to defendants tried in state courts. With

[391 U.S. 145, 163] this holding I agree for reasons given by the Court. I also agree because of reasons given in my dissent in *Adamson v. California*, [332 U.S. 46, 68](#). In that dissent, at 90, I took the position, contrary to the holding in *Twining v. New Jersey*, [211 U.S. 78](#), that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States. This Court in *Palko v. Connecticut*, [302 U.S. 319, 323](#), decided in 1937, although saying "[t]here is no such general rule," went on to add that the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes the

"freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion . . . or the right of peaceable assembly . . . or the right of one accused of crime to the benefit of counsel In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Id.*, at 324-325.

And the *Palko* opinion went on to explain, [302 U.S., at 326](#), that certain Bill of Rights' provisions were made applicable to the States by bringing them "within the Fourteenth Amendment by a process of absorption." Thus *Twining v. New Jersey*, *supra*, refused to hold that any one of the Bill of Rights' provisions was made applicable to the States by the Fourteenth Amendment, but *Palko*, which must be read as overruling *Twining* on this point, concluded that the Bill of Rights Amendments that are "implicit in the concept of ordered liberty" are "absorbed" by the Fourteenth as protections against

[391 U.S. 145, 164] state invasion. In this situation I said in *Adamson v. California*, [332 U.S., at 89](#), that, while "I would . . . extend to all the people of the nation the complete protection of the Bill of Rights," that "[i]f the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process." See *Gideon v. Wainwright*, [372 U.S. 335](#). And I am very happy to support this selective process through which our Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government. Among these are the right to trial by jury decided today, the right against compelled self-incrimination, the right to counsel, the right to compulsory process for witnesses, the right to confront witnesses, the right to a speedy and public trial, and the right to be free from unreasonable searches and seizures.

All of these holdings making Bill of Rights' provisions applicable as such to the States mark, of course, a departure from the *Twining* doctrine holding that none of those provisions were enforceable as such against the States. The dissent in this case, however, makes a spirited and forceful defense of that now discredited doctrine. I do not believe that it is necessary for me to repeat the historical and logical reasons for my challenge to the *Twining* holding contained in my *Adamson* dissent and Appendix to it. What I wrote there in 1947 was the product of years of study and research. My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions,

[391 U.S. 145, 165] and proposed constitutional amendments. My Brother HARLAN'S objections to my Adamson dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan. L. Rev. 5 (1949). I have read and studied this article extensively, including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my Adamson dissent. Professor Fairman's "history" relies very heavily on what was not said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what was said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my Adamson dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (the Bill of Rights) applicable to the States.

In addition to the adoption of Professor Fairman's "history," the dissent states that "the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that `The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as

[391 U.S. 145, 166] well." Dissenting opinion, n. 9. In response to this I can say only that the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States. 1 What more precious "privilege" of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless. Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, certainly read the words this way. Although I have cited his speech at length in my Adamson dissent appendix, I believe it would be worthwhile to reproduce a part of it here.

"Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the Senator had just read from the old opinion of *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3,230) (E. D. Pa. 1825)]. To these privileges and immunities, whatever they may be - for they are not and cannot be fully defined in their entire extent and precise nature - to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining

[391 U.S. 145, 167] to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

"Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. . . .

". . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866).

From this I conclude, contrary to my Brother HARLAN, that if anything, it is "exceedingly peculiar" to read the Fourteenth Amendment differently from the way I do.

While I do not wish at this time to discuss at length my disagreement with Brother HARLAN'S forthright and frank restatement of the now discredited Twining doctrine, [2](#)

[391 U.S. 145, 168] I do want to point out what appears to me to be the basic difference between us. His view, as was indeed the view of Twining, is that "due process is an evolving concept" and therefore that it entails a "gradual process of judicial inclusion and exclusion" to ascertain those "immutable principles . . . of free government which no member of the Union may disregard." Thus the Due Process Clause is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an "immutable principl[e] of free government" or is "implicit in the concept of ordered liberty," or whether certain conduct "shocks the judge's conscience" or runs counter to some other similar, undefined and undefinable standard. Thus due process, according to my Brother HARLAN, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that "no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government." It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.

Another tenet of the Twining doctrine as restated by my Brother HARLAN is that "due process of law requires only fundamental fairness." But the "fundamental

[391 U.S. 145, 169] fairness" test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values. The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." [3](#) (Emphasis added.) As early as 1354 the words "due process of law" were used in an English statute interpreting Magna Carta, [4](#) and by the end of the 14th century "due process of law" and "law of the land" were interchangeable. Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws. There is not one word of legal history that justifies making the

[391 U.S. 145, 170] term "due process of law" mean a guarantee of a trial free from laws and conduct which the courts deem at the time to be "arbitrary," "unreasonable," "unfair," or "contrary to civilized standards." The due process of law standard for a trial is one in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.

Finally I want to add that I am not bothered by the argument that applying the Bill of Rights to the States, "according to the same standards that protect those personal rights against federal encroachment," [5](#) interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights. As Justice Goldberg said so wisely in his concurring opinion in *Pointer v. Texas*, [380 U.S. 400](#) :

"to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism." 380 U.S., at 414.

It seems to me totally inconsistent to advocate, on the one hand, the power of this Court to strike down any state law or practice which it finds "unreasonable" or "unfair" and, on the other hand, urge that the States be

[391 U.S. 145, 171] given maximum power to develop their own laws and procedures. Yet the due process approach of my Brothers HARLAN and FORTAS (see other concurring opinion, post, p. 211) does just that since in effect it restricts the States to practices which a majority of this Court is willing to approve on a case-by-case basis. No one is more concerned than I that the States be allowed to use the full scope of their powers as their citizens see fit. And that is why I have continually fought against the expansion of this Court's authority over the States through the use of a broad, general interpretation of due process that permits judges to strike down state laws they do not like.

In closing I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.

FOOTNOTES

[[Footnote 1](#)] My view has been and is that the Fourteenth Amendment, as a whole, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause.

[[Footnote 2](#)] For a more thorough exposition of my views against this approach to the Due Process Clause, see my concurring opinion in *Rochin v. California*, [342 U.S. 165, 174](#).

[[Footnote 3](#)] See *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 276.

[[Footnote 4](#)] 28 Edw. 3, c. 3 (1354).

[[Footnote 5](#)] See *Malloy v. Hogan*, [378 U.S. 1, 10](#); *Pointer v. Texas*, [380 U.S. 400, 406](#); *Miranda v. Arizona*, [384 U.S. 436, 464](#).

Reynolds v. Sims

377 U.S. 533 (1964)

From the Court's syllabus:

Charging that malapportionment of the Alabama Legislature deprived them and others similarly situated of rights under the Equal Protection Clause of the Fourteenth Amendment and the Alabama Constitution, voters in several Alabama counties brought suit against various officials having state election duties. Complaints sought a declaration that the existing state legislative apportionment provisions were unconstitutional; an injunction against future elections pending reapportionment in accordance with the State Constitution; or, absent such reapportionment, a mandatory injunction requiring holding the 1962 election for legislators at large over the entire State. The complaint alleged serious discrimination against voters in counties whose populations had grown proportionately far more than others since the 1900 census which, despite Alabama's constitutional requirements for legislative representation based on population and for decennial reapportionment, formed the basis for the existing legislative apportionment. . .

Held:

1. The right of suffrage is denied by debasement or dilution of a citizen's vote in a state or federal election. Pp. 554-555.
2. Under the Equal Protection Clause a claim of debasement of the right to vote through malapportionment

presents a justiciable controversy; and the Equal Protection Clause provides manageable standards for lower courts to determine the constitutionality of a state legislative apportionment scheme. *Baker v. Carr*, 369 U.S. 186, followed. Pp. 556-557.

3. The Equal Protection Clause requires substantially equal legislative representation for all citizens in a State regardless of where they reside. Pp. 561-568.

The majority opinion was written by Chief Justice Warren. Surprisingly, the published opinion does not make it clear which Justices joined in the majority opinion. It is known that Justices Clark and Stewart concurred, and Justice Harlan dissented. Harlan had dissented from several earlier "one man - one vote" rulings. See *Wesberry v. Sanders*, 376 U.S. 1 (1964), *Gray v. Sanders*, 372 U.S. 368 (1963), and *Baker v. Carr*, 369 U.S. 186 (1962).

The historical analysis is found in Harlan's opinion, beginning at p. 589, in support of his position that nothing in the 14th Amendment's language or history shows any intention that it be used to give the Federal government or the Federal judiciary the power to dictate to the states how their political institutions should be structured. It begins with an analysis of the language of the 14th Amendment in Part I-A, and then engages in a discussion of its proposal and ratification in Part I-B. There are two appendices attaching additional textual material.

[377 U.S. 533, 589]

MR. JUSTICE HARLAN, dissenting. *

In these cases the Court holds that seats in the legislatures of six States 1 are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate. 2 These decisions, with Wesberry v. Sanders, 376 U.S. 1, involving congressional districting by the States, and Gray v. Sanders, 372 U.S. 368, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. Once again, 3 I must register my protest.

[377 U.S. 533, 590]

PRELIMINARY STATEMENT.

Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people; other factors may be given play only to the extent that they do not significantly encroach on this basic "population" principle. Whatever may be thought of this holding as a piece of political ideology - and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate (see the dissenting opinion of Frankfurter, J., in *Baker v. Carr*, [369 U.S. 186, 266](#), 301-323) - I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.

The Court's constitutional discussion, found in its opinion in the Alabama cases (Nos. 23, 27, 41, ante, p. 533) and more particularly at pages 561-568 thereof, is remarkable (as, indeed, is that found in the separate opinions of my Brothers STEWART and CLARK, ante, pp. 588, 587) for its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand. Stripped of aphorisms, the Court's argument boils down to the assertion that appellees' right to vote has been invidiously "debased" or "diluted" by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that "equal" means "equal."

Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection Clause was never intended to inhibit the States in choosing

[377 U.S. 533, 591] any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted. It is confirmed by numerous state and congressional actions since the adoption of the Fourteenth Amendment, and by the common understanding of the Amendment as evidenced by subsequent constitutional amendments and decisions of this Court before *Baker v. Carr*, supra, made an abrupt break with the past in 1962.

The failure of the Court to consider any of these matters cannot be excused or explained by any concept of "developing" constitutionalism. It is meaningless to speak of constitutional "development" when both the language and history of the controlling provisions of the Constitution are wholly ignored. Since it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, 4), [4](#) the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.

So far as the Federal Constitution is concerned, the complaints in these cases should all have been dismissed below for failure to state a cause of action, because what

[377 U.S. 533, 592] has been alleged or proved shows no violation of any constitutional right.

Before proceeding to my argument it should be observed that nothing done in Baker v. Carr, supra, or in the two cases that followed in its wake, Gray v. Sanders and Wesberry v. Sanders, supra, from which the Court quotes at some length, forecloses the conclusion which I reach.

Baker decided only that claims such as those made here are within the competence of the federal courts to adjudicate. Although the Court stated as its conclusion that the allegations of a denial of equal protection presented "a justiciable constitutional cause of action," [369 U.S., at 237](#), it is evident from the Court's opinion that it was concerned all but exclusively with justiciability and gave no serious attention to the question whether the Equal Protection Clause touches state legislative apportionments. [5](#) Neither the opinion of the Court nor any of the concurring opinions considered the relevant text of the Fourteenth Amendment or any of the historical materials bearing on that question. None of the materials was briefed or otherwise brought to the Court's attention. [6](#)

[377 U.S. 533, 593]

In the Gray case the Court expressly laid aside the applicability to state legislative apportionments of the "one person, one vote" theory there found to require the striking down of the Georgia county unit system. See [372 U.S., at 376](#), and the concurring opinion of STEWART, J., joined by CLARK, J., *id.*, at 381-382.

In Wesberry, involving congressional districting, the decision rested on Art. I, 2, of the Constitution. The Court expressly did not reach the arguments put forward concerning the Equal Protection Clause. See [376 U.S., at 8](#), note 10.

Thus it seems abundantly clear that the Court is entirely free to deal with the cases presently before it in light of materials now called to its attention for the first time. To these I now turn.

I.

A. The Language of the Fourteenth Amendment.

The Court relies exclusively on that portion of 1 of the Fourteenth Amendment which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and disregards entirely the significance of 2, which reads:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or

[377 U.S. 533, 594] other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Emphasis added.)

The Amendment is a single text. It was introduced and discussed as such in the Reconstruction Committee, [7](#) which reported it to the Congress. It was discussed as a unit in Congress and proposed as a unit to the States, [8](#) which ratified it as a unit. A proposal to split up the Amendment and submit each section to the States as a separate amendment was rejected by the Senate. [9](#) Whatever one might take to be the application to these cases of the Equal Protection Clause if it stood alone, I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny "or in any way" abridge the right of their inhabitants to vote for "the members of the [State] Legislature," and its express provision of a remedy for such denial or abridgment. The comprehensive scope of the second section and its particular reference to the state legislatures preclude the suggestion that the first section was intended to have the result reached by the Court today. If indeed the words of the Fourteenth Amendment speak for themselves, as the majority's disregard of history seems to imply, they speak as clearly as may be against the construction which the majority puts on them. But we are not limited to the language of the Amendment itself.

[377 U.S. 533, 595]

B. Proposal and Ratification of the Amendment.

The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment.

(i) Proposal of the amendment in Congress. - A resolution proposing what became the Fourteenth Amendment was reported to both houses of Congress by the Reconstruction Committee of Fifteen on April 30, 1866, [10](#). The first two sections of the proposed amendment read:

"SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"SEC. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens

[377 U.S. 533, 596] shall bear to the whole number of male citizens not less than twenty-one years of age."
[11](#)

In the House, Thaddeus Stevens introduced debate on the resolution on May 8. In his opening remarks, Stevens explained why he supported the resolution although it fell "far short" of his wishes:

"I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this." [12](#)

In explanation of this belief, he asked the House to remember "that three months since, and more, the committee reported and the House adopted a proposed amendment fixing the basis of representation in such way as would surely have secured the enfranchisement of every citizen at no distant period," but that proposal had been rejected by the Senate. [13](#)

He then explained the impact of the first section of the proposed Amendment, particularly the Equal Protection Clause.

"This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the

[377 U.S. 533, 597] law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen." [14](#)

He turned next to the second section, which he said he considered "the most important in the article." [15](#) Its effect, he said, was to fix "the basis of representation in Congress." [16](#) In unmistakable terms, he recognized the power of a State to withhold the right to vote:

"If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive." [17](#)

[377 U.S. 533, 598]

Closing his discussion of the second section, he noted his dislike for the fact that it allowed "the States to discriminate [with respect to the right to vote] among the same class, and receive proportionate credit in representation." [18](#)

Toward the end of the debate three days later, Mr. Bingham, the author of the first section in the Reconstruction Committee and its leading proponent, [19](#) concluded his discussion of it with the following:

"Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States." [20](#) (Emphasis added.)

He immediately continued:

"The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a

[377 U.S. 533, 599] despotic government, and thereby deny suffrage to the people." [21](#) (Emphasis added.)

He stated at another point in his remarks:

"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." [22](#) (Emphasis added.)

In the three days of debate which separate the opening and closing remarks, both made by members of the Reconstruction Committee, every speaker on the resolution, with a single doubtful exception, [23](#) assumed without question that, as Mr. Bingham said, supra, "the second section excludes the conclusion that by the first section suffrage is subjected to congressional law." The assumption was neither inadvertent nor silent. Much of the debate concerned the change in the basis of representation effected by the second section, and the speakers stated repeatedly, in express terms or by unmistakable implication, that the States retained the power to regulate suffrage within their borders. Attached as Appendix A hereto are some of those statements. The resolution was adopted by the House without change on May 10. [24](#)

[377 U.S. 533, 600]

Debate in the Senate began on May 23, and followed the same pattern. Speaking for the Senate Chairman of the Reconstruction Committee, who was ill, Senator Howard, also a member of the Committee, explained the meaning of the Equal Protection Clause as follows:

"The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? . . .

"But, sir, 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]." [25](#). (Emphasis added.)

Discussing the second section, he expressed his regret that it did "not recognize the authority of the United States over the question of suffrage in the several States

[377 U.S. 533, 601] at all" [26](#) He justified the limited purpose of the Amendment in this regard as follows:

"But, sir, it is not the question here what will we do; it is not the question what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage; it is not entirely the question what measure we can pass through the two Houses; but the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions?

.

"The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race. . . .

"The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." [27](#) (Emphasis added.)

There was not in the Senate, as there had been in the House, a closing speech in explanation of the Amendment. But because the Senate considered, and finally adopted, several changes in the first and second sections, even more attention was given to the problem of voting rights there than had been given in the House. In the

[377 U.S. 533, 602] Senate, it was fully understood by everyone that neither the first nor the second section interfered with the right of the States to regulate the elective franchise. Attached as Appendix B hereto are representative statements from the debates to that effect. After having changed the proposed amendment to the form in which it was adopted, the Senate passed the resolution on June 8, 1866. [28](#) As changed, it passed in the House on June 13. [29](#)

(ii) Ratification by the "loyal" States. - Reports of the debates in the state legislatures on the ratification of the Fourteenth Amendment are not generally available. [30](#) There is, however, compelling indirect evidence. Of the 23 loyal States which ratified the Amendment before 1870, five had constitutional provisions for apportionment of at least one house of their respective legislatures which wholly disregarded the spread of population. [31](#)

[377 U.S. 533, 603] Ten more had constitutional provisions which gave primary emphasis to population, but which applied also other principles, such as partial ratios and recognition of political subdivisions, which were intended to favor sparsely settled areas. [32](#) Can it be seriously contended that the legislatures of these States, almost two-thirds of those concerned, would have ratified an amendment which might render their own States' constitutions unconstitutional?

Nor were these state constitutional provisions merely theoretical. In New Jersey, for example, Cape May County, with a population of 8,349, and Ocean County, with a population of 13,628, each elected one State Senator, as did Essex and Hudson Counties, with populations of 143,839 and 129,067, respectively. [33](#) In the House, each county was entitled to one representative, which left 39 seats to be apportioned according to population. [34](#) Since there were 12 counties besides the two already mentioned which had populations over 30,000, [35](#) it is evident that there were serious disproportions in the House also. In

[377 U.S. 533, 604] New York, each of the 60 counties except Hamilton County was entitled to one of the 128 seats in the Assembly. [36](#) This left 69 seats to be distributed among counties the populations of which ranged from 15,420 to 942,292. [37](#) With seven more counties having populations over 100,000 and 13 others having populations over 50,000, [38](#) the disproportion in the Assembly was necessarily large. In Vermont, after each county had been allocated one Senator, there were 16 seats remaining to be distributed among the larger counties. [39](#) The smallest county had a population of 4,082; the largest had a population of 40,651 and there were 10 other counties with populations over 20,000. [40](#)

(iii) Ratification by the "reconstructed" States. - Each of the 10 "reconstructed" States was required to ratify the Fourteenth Amendment before it was readmitted to the Union. [41](#) The Constitution of each was scrutinized in Congress. [42](#) Debates over readmission

[377 U.S. 533, 605] were extensive. [43](#)In at least one instance, the problem of state legislative apportionment was expressly called to the attention of Congress. Objecting to the inclusion of Florida in the Act of June 25, 1868, Mr. Farnsworth stated on the floor of the House:

"I might refer to the apportionment of representatives. By this constitution representatives in the Legislature of Florida are apportioned in such a manner as to give to the sparsely-populated portions of the State the control of the Legislature. The sparsely-populated parts of the State are those where there are very few negroes, the parts inhabited by the white rebels, the men who, coming in from Georgia, Alabama, and other States, control the fortunes of their several counties. By this constitution every county in that State is entitled to a representative. There are in that State counties that have not thirty registered voters; yet, under this constitution, every one of those counties is entitled

[377 U.S. 533, 606] to a representative in the Legislature; while the populous counties are entitled to only one representative each, with an additional representative for every thousand inhabitants." [44](#)

The response of Mr. Butler is particularly illuminating:

"All these arguments, all these statements, all the provisions of this constitution have been submitted to the Judiciary Committee of the Senate, and they have found the constitution republican and proper. This constitution has been submitted to the Senate, and they have found it republican and proper. It has been submitted to your own Committee on Reconstruction, and they have found it republican and proper, and have reported it to this House." [45](#)

The Constitutions of six of the 10 States contained provisions departing substantially from the method of apportionment now held to be required by the Amendment. [46](#) And, as in the North, the departures were as real in fact as in theory. In North Carolina, 90 of the 120 representatives were apportioned among the counties without regard to population, leaving 30 seats to be distributed by numbers. [47](#) Since there were seven counties with populations under 5,000 and 26 counties with populations over 15,000, the disproportions must have been widespread and substantial. [48](#) In South Carolina, Charleston, with a population of 88,863, elected two Senators; each of the other counties, with populations ranging from 10,269 to

[377 U.S. 533, 607] 42,486, elected one Senator. [49](#) In Florida, each of the 39 counties was entitled to elect one Representative; no county was entitled to more than four. [50](#) These principles applied to Dade County, with a population of 85, and to Alachua County and Leon County, with populations of 17,328 and 15,236, respectively. [51](#)

It is incredible that Congress would have exacted ratification of the Fourteenth Amendment as the price of readmission, would have studied the State Constitutions for compliance with the Amendment, and would then have disregarded violations of it.

The facts recited above show beyond any possible doubt:

- (1) that Congress, with full awareness of and attention to the possibility that the States would not afford full equality in voting rights to all their citizens, nevertheless deliberately chose not to interfere with the States' plenary power in this regard when it proposed the Fourteenth Amendment;
- (2) that Congress did not include in the Fourteenth Amendment restrictions on the States' power to control voting rights because it believed that if such restrictions were included, the Amendment would not be adopted; and
- (3) that at least a substantial majority, if not all, of the States which ratified the Fourteenth Amendment did not consider that in so doing, they were accepting limitations on their freedom, never before questioned, to regulate voting rights as they chose.

Even if one were to accept the majority's belief that it is proper entirely to disregard the unmistakable implications

[377 U.S. 533, 608] of the second section of the Amendment in construing the first section, one is confounded by its disregard of all this history. There is here none of the difficulty which may attend the application of basic principles to situations not contemplated or understood when the principles were framed. The problems which concern the Court now were problems when the Amendment was adopted. By the deliberate choice of those responsible for the Amendment, it left those problems untouched.

C. After 1868.

The years following 1868, far from indicating a developing awareness of the applicability of the Fourteenth Amendment to problems of apportionment, demonstrate precisely the reverse: that the States retained and exercised the power independently to apportion their legislatures. In its Constitutions of 1875 and 1901, Alabama carried forward earlier provisions guaranteeing each county at least one representative and fixing an upper limit to the number of seats in the House. [52](#) Florida's Constitution of 1885 continued the guarantee of one representative for each county and reduced the maximum number of representatives per county from four to three. [53](#) Georgia, in 1877, continued to favor the smaller counties. [54](#) Louisiana, in 1879, guaranteed each parish at least one representative in the House. [55](#) In 1890, Mississippi guaranteed each county one representative, established a maximum number of representatives, and provided that specified groups of counties should each have approximately one-third of the seats in the House, whatever

[377 U.S. 533, 609] the spread of population. [56](#) Missouri's Constitution of 1875 gave each county one representative and otherwise favored less populous areas. [57](#) Montana's original Constitution of 1889 apportioned the State Senate by counties. [58](#) In 1877, New Hampshire amended its Constitution's provisions for apportionment, but continued to favor sparsely settled areas in the House and to apportion seats in the Senate according to direct taxes paid; [59](#) the same was true of New Hampshire's Constitution of 1902. [60](#)

In 1894, New York adopted a Constitution the peculiar apportionment provisions of which were obviously intended to prevent representation according to population: no county was allowed to have more than one-third of all the Senators, no two counties which were adjoining or "separated only by public waters" could have more than one-half of all the Senators, and whenever any county became entitled to more than three Senators, the total number of Senators was increased, thus preserving to the small counties their original number of seats. [61](#) In addition, each county except Hamilton was guaranteed a seat in the Assembly. [62](#) The North Carolina Constitution of 1876 gave each county at least one representative and fixed a maximum number of representatives for the whole House. [63](#) Oklahoma's Constitution at the time of its admission to the Union (1907) favored small counties by the use of partial ratios and a maximum number of seats in the House; in addition, no county was permitted to "take part" in the election of more than seven

[377 U.S. 533, 610] representatives. [64](#) Pennsylvania, in 1873, continued to guarantee each county one representative in the House. [65](#) The same was true of South Carolina's Constitution of 1895, which provided also that each county should elect one and only one Senator. [66](#) Utah's original Constitution of 1895 assured each county of one representative in the House. [67](#) Wyoming, when it entered the Union in 1889, guaranteed each county at least one Senator and one representative. [68](#)

D. Today.

Since the Court now invalidates the legislative apportionments in six States, and has so far upheld the apportionment in none, it is scarcely necessary to comment on the situation in the States today, which is, of course, as fully contrary to the Court's decision as is the record of every prior period in this Nation's history. As of 1961, the Constitutions of all but 11 States, roughly 20% of the total, recognized bases of apportionment other than geographic spread of population, and to some extent favored sparsely populated areas by a variety of devices, ranging from straight area representation or guaranteed minimum area representation to complicated schemes of the kind exemplified by the provisions of New York's Constitution of 1894, still in effect until struck down by the Court today in No. 20, post, p. 633. [69](#) Since

[377 U.S. 533, 611] Tennessee, which was the subject of *Baker v. Carr*, and Virginia, scrutinized and disapproved today in No. 69, post, p. 678, are among the 11 States whose own Constitutions are sound from the standpoint of the Federal Constitution as construed today, it is evident that the actual practice of the States is even more uniformly than their theory opposed to the Court's view of what is constitutionally permissible.

E. Other Factors.

In this summary of what the majority ignores, note should be taken of the Fifteenth and Nineteenth Amendments. The former prohibited the States from denying or abridging the right to vote "on account of race, color, or previous condition of servitude." The latter, certified as part of the Constitution in 1920, added sex to the prohibited classifications. In *Minor v. Happersett*, 21 Wall. 162, this Court considered the claim that the right of women to vote was protected by the Privileges and Immunities Clause of the Fourteenth Amendment. The Court's discussion there of the significance of the Fifteenth Amendment is fully applicable here with respect to the Nineteenth Amendment as well.

"And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: '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.' The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must

[377 U.S. 533, 612] include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?" Id., at 175.

In the present case, we can go still further. If constitutional amendment was the only means by which all men and, later, women, could be guaranteed the right to vote at all, even for federal officers, how can it be that the far less obvious right to a particular kind of apportionment of state legislatures - a right to which is opposed a far more plausible conflicting interest of the State than the interest which opposes the general right to vote - can be conferred by judicial construction of the Fourteenth Amendment? [70](#) Yet, unless one takes the highly implausible view that the Fourteenth Amendment controls methods of apportionment but leaves the right to vote itself unprotected, the conclusion is inescapable that the Court has, for purposes of these cases, relegated the Fifteenth and Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned.

Mention should be made finally of the decisions of this Court which are disregarded or, more accurately, silently overruled today. *Minor v. Happersett*, supra, in which the Court held that the Fourteenth Amendment did not

[[377 U.S. 533, 613](#)] confer the right to vote on anyone, has already been noted. Other cases are more directly in point. In *Colegrove v. Barrett*, [330 U.S. 804](#), this Court dismissed "for want of a substantial federal question" an appeal from the dismissal of a complaint alleging that the Illinois legislative apportionment resulted in "gross inequality in voting power" and "gross and arbitrary and atrocious discrimination in voting" which denied the plaintiffs equal protection of the laws. [71](#) In *Remmey v. Smith*, 102 F. Supp. 708 (D.C. E. D. Pa.), a three-judge District Court dismissed a complaint alleging that the apportionment of the Pennsylvania Legislature deprived the plaintiffs of "constitutional rights guaranteed to them by the Fourteenth Amendment." *Id.*, at 709. The District Court stated that it was aware that the plaintiffs' allegations were "notoriously true" and that "the practical disenfranchisement of qualified electors in certain of the election districts in Philadelphia County is a matter of common knowledge." *Id.*, at 710. This Court dismissed the appeal "for the want of a substantial federal question." [342 U.S. 916](#).

In *Kidd v. McCanless*, 200 Tenn. 273, 292 S. W. 2d 40, the supreme Court of Tennessee dismissed an action for a declaratory judgment that the Tennessee Apportionment Act of 1901 was unconstitutional. The complaint alleged that "a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives." *Id.*, at 276, 292 S. W. 2d, at 42. Without dissent, this Court granted the motion to dismiss the appeal. [352 U.S. 920](#). In *Radford v. Gary*, 145 F. Supp. 541 (D.C. W. D. Okla.), a three-judge District Court was

[377 U.S. 533, 614] convened to consider "the complaint of the plaintiff to the effect that the existing apportionment statutes of the State of Oklahoma violate the plain mandate of the Oklahoma Constitution and operate to deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States." *Id.*, at 542. The plaintiff alleged that he was a resident and voter in the most populous county of the State, which had about 15% of the total population of the State but only about 2% of the seats in the State Senate and less than 4% of the seats in the House. The complaint recited the unwillingness or inability of the branches of the state government to provide relief and alleged that there was no state remedy available. The District Court granted a motion to dismiss. This Court affirmed without dissent. [352 U.S. 991](#).

Each of these recent cases is distinguished on some ground or other in *Baker v. Carr*. See [369 U.S., at 235](#)-236. Their summary dispositions prevent consideration whether these after-the-fact distinctions are real or imaginary. The fact remains, however, that between 1947 and 1957, four cases raising issues precisely the same as those decided today were presented to the Court. Three were dismissed because the issues presented were thought insubstantial and in the fourth the lower court's dismissal was affirmed. [72](#)

I have tried to make the catalogue complete, yet to keep it within the manageable limits of a judicial opinion. In my judgment, today's decisions are refuted by

[377 U.S. 533, 615] the language of the Amendment which they construe and by the inference fairly to be drawn from subsequently enacted Amendments. They are unequivocally refuted by history and by consistent theory and practice from the time of the adoption of the Fourteenth Amendment until today.

II.

The Court's elaboration of its new "constitutional" doctrine indicates how far - and how unwisely - it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States.

In the Alabama cases (Nos. 23, 27, 41), the District Court held invalid not only existing provisions of the State Constitution - which this Court lightly dismisses with a wave of the Supremacy Clause and the remark

[377 U.S. 533, 616] that "it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions," ante, p. 584 - but also a proposed amendment to the Alabama Constitution which had never been submitted to the voters of Alabama for ratification, and "standby" legislation which was not to become effective unless the amendment was rejected (or declared unconstitutional) and in no event before 1966. *Sims v. Frink*, 208 F. Supp. 431. See ante, pp. 543-551. Both of these measures had been adopted only nine days before, [73](#) at an Extraordinary Session of the Alabama Legislature, convened pursuant to what was very nearly a directive of the District Court, see *Sims v. Frink*, 205 F. Supp. 245, 248. The District Court formulated its own plan for the apportionment of the Alabama Legislature, by picking and choosing among the provisions of the legislative measures. 208 F. Supp., at 441-442. See ante, p. 552. Beyond that, the court warned the legislature that there would be still further judicial reapportionment unless the legislature, like it or not, undertook the task for itself. 208 F. Supp., at 442. This Court now states that the District Court acted in "a most proper and commendable manner," ante, p. 586, and approves the District Court's avowed intention of taking "some further action" unless the State Legislature acts by 1966, ante, p. 587.

In the Maryland case (No. 29, post, p. 656), the State Legislature was called into Special Session and enacted a temporary reapportionment of the House of Delegates, under pressure from the state courts. [74](#) Thereafter, the

[377 U.S. 533, 617] Maryland Court of Appeals held that the Maryland Senate was constitutionally apportioned. *Maryland Committee for Fair Representation v. Tawes*, 229 Md. 406, 184 A. 2d 715. This Court now holds that neither branch of the State Legislature meets constitutional requirements. *Post*, p. 674. The Court presumes that since "the Maryland constitutional provisions relating to legislative apportionment [are] hereby held unconstitutional, the Maryland Legislature . . . has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions" which satisfy the Federal Constitution, *id.*, at 675. On this premise, the Court concludes that the Maryland courts need not "feel obliged to take further affirmative action" now, but that "under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan." *Id.*, at 676.

In the Virginia case (No. 69, *post*, p. 678), the State Legislature in 1962 complied with the state constitutional requirement of regular reapportionment. [75](#) Two days later, a complaint was filed in the District Court. [76](#) Eight months later, the legislative reapportionment was

[377 U.S. 533, 618] declared unconstitutional. *Mann v. Davis*, 213 F. Supp. 577. The District Court gave the State Legislature two months within which to reapportion itself in special session, under penalty of being reapportioned by the court. [77](#) Only a stay granted by a member of this Court slowed the process; [78](#) it is plain that no stay will be forthcoming in the future. The Virginia Legislature is to be given "an adequate opportunity to enact a valid plan"; but if it fails "to act promptly in remedying the constitutional defects in the State's legislative apportionment plan," the District Court is to "take further action." Post, p. 693.

In Delaware (No. 307, post, p. 695), the District Court entered an order on July 25, 1962, which stayed proceedings until August 7, 1962, "in the hope and expectation" that the General Assembly would take "some appropriate action" in the intervening 13 days. *Sincock v. Terry*, 207 F. Supp. 205, 207. By way of prodding, presumably, the court noted that if no legislative action were taken and the court sustained the plaintiffs' claim, "the present General Assembly and any subsequent General Assembly, the members of which were elected pursuant to Section 2 of Article 2 [the challenged provisions of the Delaware Constitution], might be held not to be a de jure legislature and its legislative acts might be held invalid and unconstitutional." *Id.*, at 205-206. Five days later, on July 30, 1962, the General Assembly approved a proposed amendment to the State Constitution. On August 7, 1962, the District Court entered an order denying the

[377 U.S. 533, 619] defendants' motion to dismiss. The court said that it did not wish to substitute its judgment "for the collective wisdom of the General Assembly of Delaware," but that "in the light of all the circumstances," it had to proceed promptly. 210 F. Supp. 395, 396. On October 16, 1962, the court declined to enjoin the conduct of elections in November. 210 F. Supp. 396. The court went on to express its regret that the General Assembly had not adopted the court's suggestion, see 207 F. Supp., at 206-207, that the Delaware Constitution be amended to make apportionment a statutory rather than a constitutional matter, so as to facilitate further changes in apportionment which might be required. 210 F. Supp., at 401. In January 1963, the General Assembly again approved the proposed amendment of the apportionment provisions of the Delaware Constitution, which thereby became effective on January 17, 1963. [79](#) Three months later, on April 17, 1963, the District Court reached "the reluctant conclusion" that Art. II, 2, of the Delaware Constitution was unconstitutional, with or without the 1963 amendment. *Sincock v. Duffy*, 215 F. Supp. 169, 189. Observing that "the State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time," *id.*, at 191, the court gave the General Assembly until October 1, 1963, to adopt acceptable provisions for apportionment. On May 20, 1963, the District Court enjoined the defendants from conducting any elections, including the general election scheduled for November 1964, pursuant to the old or the new constitutional provisions. [80](#) This Court now approves all these

[377 U.S. 533, 620] proceedings, noting particularly that in allowing the 1962 elections to go forward, "the District Court acted in a wise and temperate manner." Post, p. 710. [81](#)

Records such as these in the cases decided today are sure to be duplicated in most of the other States if they have not been already. They present a jarring picture of courts threatening to take action in an area which they have no business entering, inevitably on the basis of political judgments which they are incompetent to make. They show legislatures of the States meeting in haste and deliberating and deciding in haste to avoid the threat of judicial interference. So far as I can tell, the Court's only response to this unseemly state of affairs is ponderous insistence that "a denial of constitutionally protected rights demands judicial protection," ante, p. 566. By thus refusing to recognize the bearing which a potential for

[377 U.S. 533, 621] conflict of this kind may have on the question whether the claimed rights are in fact constitutionally entitled to judicial protection, the Court assumes, rather than supports, its conclusion.

It should by now be obvious that these cases do not mark the end of reapportionment problems in the courts. Predictions once made that the courts would never have to face the problem of actually working out an apportionment have proved false. This Court, however, continues to avoid the consequences of its decisions, simply assuring us that the lower courts "can and . . . will work out more concrete and specific standards," ante, p. 578. Deeming it "expedient" not to spell out "precise constitutional tests," the Court contents itself with stating "only a few rather general considerations." Ibid.

Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever. Quite obviously, there are limitless possibilities for districting consistent with such a principle. Nor can these problems be avoided by judicial reliance on legislative judgments so far as possible. Reshaping or combining one or two districts, or modifying just a few district lines, is no less a matter of choosing among many possible

[377 U.S. 533, 622] solutions, with varying political consequences, than reapportionment broadside. [82](#)

The Court ignores all this, saying only that "what is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case," ante, p. 578. It is well to remember that the product of today's decisions will not be readjustment of a few districts in a few States which most glaringly depart from the principle of equally populated districts. It will be a redetermination, extensive in many cases, of legislative districts in all but a few States.

Although the Court - necessarily, as I believe - provides only generalities in elaboration of its main thesis, its opinion nevertheless fully demonstrates how far removed these problems are from fields of judicial competence. Recognizing that "indiscriminate districting" is an invitation to "partisan gerrymandering," ante, pp. 578-579, the Court nevertheless excludes virtually every basis for the formation of electoral districts other than "indiscriminate districting." In one or another of today's opinions, the Court declares it unconstitutional for a State to give effective consideration to any of the following in establishing legislative districts:

- (1) history; [83](#)
- (2) "economic or other sorts of group interests"; [84](#)
- (3) area; [85](#)
- (4) geographical considerations; [86](#)
- (5) a desire "to insure effective representation for sparsely settled areas"; [87](#)

[377 U.S. 533, 623]

- (6) "availability of access of citizens to their representatives"; [88](#)
- (7) theories of bicameralism (except those approved by the Court); [89](#)
- (8) occupation; [90](#)
- (9) "an attempt to balance urban and rural power." [91](#)
- (10) the preference of a majority of voters in the State. [92](#)

So far as presently appears, the only factor which a State may consider, apart from numbers, is political subdivisions. But even "a clearly rational state policy" recognizing this factor is unconstitutional if "population is submerged as the controlling consideration . . ." [93](#)

I know of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes all or any of these exclusions. Certain it is that the Court's opinion does not establish them. So far as the Court says anything at all on this score, it says only that "legislators represent people, not trees or acres," ante, p. 562; that "citizens, not history or economic interests, cast votes," ante, p. 580; that "people, not land or trees or pastures, vote," *ibid.* [94](#) All this may be conceded. But it is surely equally obvious, and, in the context of elections, more meaningful to note that people are not ciphers and that legislators can represent their electors only by speaking

[377 U.S. 533, 624] for their interests - economic, social, political - many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation.

CONCLUSION.

With these cases the Court approaches the end of the third round set in motion by the complaint filed in *Baker v. Carr*. What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible. As I have said before, *Wesberry v. Sanders*, supra, at 48, I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result.

These decisions also cut deeply into the fabric of our federalism. What must follow from them may eventually appear to be the product of state legislatures. Nevertheless, no thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable.

Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is

[377 U.S. 533, 625] not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

I dissent in each of these cases, believing that in none of them have the plaintiffs stated a cause of action. To the extent that *Baker v. Carr*, expressly or by implication, went beyond a discussion of jurisdictional doctrines independent of the substantive issues involved here, it should be limited to what it in fact was: an experiment in venturesome constitutionalism. I would reverse the judgments of the District Courts in Nos. 23, 27, and 41 (Alabama), No. 69 (Virginia), and No. 307 (Delaware), and remand with directions to dismiss the complaints. I would affirm the judgments of the District Courts in No. 20 (New York), and No. 508 (Colorado), and of the Court of Appeals of Maryland in No. 29.

FOOTNOTES

[Footnote *] [This opinion applies also to No. 20, WMCA, Inc., et al. v. Lomenzo, Secretary of State of New York, et al., post, p. 633; No. 29, Maryland Committee for Fair Representation et al. v. Tawes, Governor, et al., post, p. 656; No. 69, Davis, Secretary, State Board of Elections, et al. v. Mann et al., post, p. 678; No. 307, Roman, Clerk, et al. v. Sincock et al., post, p. 695; and No. 508, Lucas et al. v. Forty-Fourth General Assembly of Colorado et al., post, p. 713.]

[[Footnote 1](#)] Alabama, Colorado, Delaware, Maryland, New York, Virginia.

[[Footnote 2](#)] In the Virginia case, Davis v. Mann, post, p. 678, the defendants introduced an exhibit prepared by the staff of the Bureau of Public Administration of the University of Virginia in which the Virginia Legislature, now held to be unconstitutionally apportioned, was ranked eighth among the 50 States in "representativeness," with population taken as the basis of representation. The Court notes that before the end of 1962, litigation attacking the apportionment of state legislatures had been instituted in at least 34 States. Ante, p. 556, note 30. See infra, pp. 610-611.

[[Footnote 3](#)] See Baker v. Carr, [369 U.S. 186, 330](#), and the dissenting opinion of Frankfurter, J., in which I joined, id., at 266; Gray v. Sanders, [372 U.S. 368, 382](#); Wesberry v. Sanders, [376 U.S. 1, 20](#).

[[Footnote 4](#)] That clause, which manifestly has no bearing on the claims made in these cases, see V Elliot's Debates on the Adoption of the Federal Constitution (1845), 332-333, could not in any event be the foundation for judicial relief. Luther v. Borden, 7 How. 1, 42-44; Ohio ex rel. Bryant v. Akron Metropolitan Park District, [281 U.S. 74, 79](#) -80; Highland Farms Dairy, Inc., v. Agnew, [300 U.S. 608, 612](#). In Baker v. Carr, supra, at 227, the Court stated that reliance on the Republican Form of Government Clause "would be futile."

[[Footnote 5](#)] It is fair to say that, beyond discussion of a large number of cases having no relevance to this question, the Court's views on this subject were fully stated in the compass of a single sentence: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." [369 U.S., at 226](#) .

Except perhaps for the "crazy quilt" doctrine of my Brother CLARK, [369 U.S., at 251](#) , nothing is added to this by any of the concurring opinions, *id.*, at 241, 265.

[[Footnote 6](#)] The cryptic remands in *Scholle v. Hare*, [369 U.S. 429](#) , and *WMCA, Inc., v. Simon*, [370 U.S. 190](#) , on the authority of *Baker*, had nothing to say on the question now before the Court.

[[Footnote 7](#)] See the Journal of the Committee, reprinted in Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914), 83-117.

[[Footnote 8](#)] See the debates in Congress, *Cong. Globe*, 39th Cong., 1st Sess., 2459-3149, *Passim* (1866) (hereafter *Globe*).

[[Footnote 9](#)] *Globe* 3040.

[[Footnote 10](#)] *Globe* 2265, 2286.

[[Footnote 11](#)] As reported in the House. *Globe* 2286. For prior versions of the Amendment in the Reconstruction Committee, see Kendrick, *op. cit.*, *supra*, note 7, 83-117. The work of the Reconstruction Committee is discussed in Kendrick, *supra*, and Flack, *The Adoption of the Fourteenth Amendment* (1908), 55-139, *passim*.

[[Footnote 12](#)] Globe 2459.

[[Footnote 13](#)] Ibid. Stevens was referring to a proposed amendment to the Constitution which provided that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation." Globe 535. It passed the House, *id.*, at 538, but did not muster the necessary two-thirds vote in the Senate, *id.*, at 1289.

[[Footnote 14](#)] Globe 2459.

[[Footnote 15](#)] Ibid.

[[Footnote 16](#)] Ibid.

[[Footnote 17](#)] Ibid.

[[Footnote 18](#)] Globe 2460.

[[Footnote 19](#)] Kendrick, *op. cit.*, *supra*, note 7, 87, 106; Flack, *op. cit.*, *supra*, note 11, 60-68, 71.

[[Footnote 20](#)] Globe 2542.

[[Footnote 21](#)] Ibid. It is evident from the context of the reference to a republican government that Bingham did not regard limitations on the right to vote or the denial of the vote to specified categories of individuals as violating the guarantee of a republican form of government.

[[Footnote 22](#)] Ibid.

[[Footnote 23](#)] Representative Rogers, who voted against the resolution, Globe 2545, suggested that the right to vote might be covered by the Privileges and Immunities Clause. Globe 2538. But immediately thereafter he

discussed the possibility that the Southern States might "refuse to allow the negroes to vote." Ibid.

[[Footnote 24](#)] Globe 2545.

[[Footnote 25](#)] Globe 2766.

[[Footnote 26](#)] Ibid.

[[Footnote 27](#)] Ibid.

[[Footnote 28](#)] Globe 3042.

[[Footnote 29](#)] Globe 3149.

[[Footnote 30](#)] Such evidence as there is, mostly committee reports and messages to the legislatures from Governors of the States, is to the same effect as the evidence from the debates in the Congress. See Ark. House J. 288 (1866-1867); Fla. Sen. J. 8-10 (1866); Ind. House J. 47-48, 50-51 (1867); Mass. Legis. Doc., House Doc. No. 149, 4-14, 16-17, 23, 24, 25-26 (1867); Mo. Sen. J. 14 (1867); N. J. Sen. J. 7 (Extra Sess. 1866); N.C. Sen. J. 96-97, 98-99 (1866-1867); Tenn. House J. 12-15 (1865-1866); Tenn. Sen. J. 8 (Extra Sess. 1866); Va. House J. & Doc., Doc. No. 1, 35 (1866-1867); Wis. Sen. J. 33, 101-103 (1867). Contra: S. C. House J. 34 (1866); Tex. Sen. J. 422 (1866 App.).

For an account of the proceedings in the state legislatures and citations to the proceedings, see Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5, 81-126 (1949).

[[Footnote 31](#)] Conn. Const., 1818, Art. Third, 3 (towns); N. H. Const., 1792, Part Second, XXVI (direct taxes paid); N. J. Const., 1844, Art. IV, II, cl. 1 (counties); R. I. Const., 1842, Art. VI, 1 (towns and cities); Vt. Const., 1793, c. II, 7 (towns).

In none of these States was the other House apportioned strictly according to population. Conn. Const., 1818, Amend. II; N. H. Const., 1792, Part Second, IX-XI; N. J. Const., 1844, Art. IV,

[377 U.S. 533, 603] III, cl. 1; R. I. Const., 1842, Art. V, 1; Vt. Const., 1793, Amend. 23.

[[Footnote 32](#)] Iowa Const., 1857, Art. III, 35; Kan. Const., 1859, Art. 2, 2, Art. 10, 1; Me. Const., 1819, Art. IV-Part First, 3; Mich. Const., 1850, Art. IV, 3; Mo. Const., 1865, Art. IV, 2; N. Y. Const., 1846, Art. III, 5; Ohio Const., 1851, art. XI, 2-5; Pa. Const., 1838, Art. I, 4, 6, 7, as amended; Tenn. Const., 1834, Art. II, 5; W. Va. Const., 1861-1863, Art. IV, 9.

[[Footnote 33](#)] Ninth Census of the United States, Statistics of Population (1872) (hereafter Census), 49. The population figures, here and hereafter, are for the year 1870, which presumably best reflect the figures for the years 1866-1870. Only the figures for 1860 were available at that time, of course, and they would have been used by anyone interested in population statistics. See, e. g., Globe 3028 (remarks of Senator Johnson).

The method of apportionment is contained in N. J. Const., 1844, Art. IV, II, cl. 1.

[[Footnote 34](#)] N. J. Const., 1844, Art. IV. III, cl. 1. Census 49.

[[Footnote 35](#)] Ibid.

[[Footnote 36](#)] N. Y. Const., 1846, Art. III, 2, 5. Census 50-51.

[[Footnote 37](#)] Ibid.

[[Footnote 38](#)] Ibid.

[[Footnote 39](#)] There were 14 counties, Census 67, each of which was entitled to at least one out of a total of 30 seats. Vt. Const., 1793, Amend. 23.

[[Footnote 40](#)] Census 67.

[[Footnote 41](#)] Act of Mar. 2, 1867, 5, 14 Stat. 429. See also Act of June 25, 1868, 15 Stat. 73, declaring that the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, would be admitted to representation in Congress when their legislatures had ratified the Fourteenth Amendment. Other conditions were also imposed, including a requirement that Georgia nullify certain provisions of its Constitution. *Ibid.* Arkansas, which had already ratified the Fourteenth Amendment, was readmitted by Act of June 22, 1868, 15 Stat. 72. Virginia was readmitted by Act of Jan. 26, 1870, 16 Stat. 62; Mississippi by Act of Feb. 23, 1870, 16 Stat. 67; and Texas by Act of Mar. 30, 1870, 16 Stat. 80. Georgia was not finally readmitted until later, by Act of July 15, 1870, 16 Stat. 363.

[[Footnote 42](#)] Discussing the bill which eventuated in the Act of June 25, 1868, see note 41, *supra*, Thaddeus Stevens said:

"Now, sir, what is the particular question we are considering? Five or six States have had submitted to them the question of forming

[[377 U.S. 533, 605](#)] constitutions for their own government. They have voluntarily formed such constitutions, under the direction of the Government of the United States. . . . They have sent us their constitutions. Those constitutions have been printed and laid before us. We have looked at them; we have pronounced them republican in form; and all we propose to require is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the Union." Cong. Globe, 40th Cong., 2d Sess., 2465 (1868). See also the remarks of Mr. Butler, *infra*, p. 606.

The close attention given the various Constitutions is attested by the Act of June 25, 1868, which conditioned Georgia's readmission on the deletion of "the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision" 15 Stat. 73. The sections involved are printed in Sen. Ex. Doc. No. 57, 40th Cong., 2d Sess., 14-15.

Compare *United States v. Florida*, [363 U.S. 121, 124](#) -127.

[[Footnote 43](#)] See, e. g., Cong. Globe, 40th Cong., 2d Sess., 2412-2413, 2858-2860, 2861-2871, 2895-2900, 2901-2904, 2927-2935, 2963-2970, 2998-3022, 3023-3029 (1868).

[[Footnote 44](#)] Cong. Globe, 40th Cong., 2d Sess., 3090-3091 (1868).

[[Footnote 45](#)] *Id.*, at 3092.

[[Footnote 46](#)] Ala. Const., 1867, Art. VIII, 1; Fla. Const., 1868, Art. XIV; Ga. Const., 1868, Art. III, 3, 1; La. Const., 1868, Tit. II, Art. 20; N.C. Const., 1868, Art. II, 6; S. C. Const., 1868, Art. II, 6, 8.

[[Footnote 47](#)] N.C. Const., 1868, Art. II, 6. There were 90 counties. Census 52-53.

[[Footnote 48](#)] *Ibid.*

- [[Footnote 49](#)] S. C. Const., 1868, Art. II, 8; Census 60.
- [[Footnote 50](#)] Fla. Const., 1868, Art. XIV.
- [[Footnote 51](#)] Census 18-19.
- [[Footnote 52](#)] Ala. Const., 1875, Art. IX, 2, 3; Ala. Const., 1901, Art. IX, 198, 199.
- [[Footnote 53](#)] Fla. Const., 1885, Art. VII, 3.
- [[Footnote 54](#)] Ga. Const., 1877, Art. III, III.
- [[Footnote 55](#)] La. Const., 1879, Art. 16.
- [[Footnote 56](#)] Miss. Const., 1890, Art. 13, 256.
- [[Footnote 57](#)] Mo. Const., 1875, Art. IV, 2.
- [[Footnote 58](#)] Mont. Const., 1889, Art. V, 4, Art. VI, 4.
- [[Footnote 59](#)] N. H. Const., 1792, Part Second, IX-XI, XXVI, as amended.
- [[Footnote 60](#)] N. H. Const., 1902, Part Second, Arts. 9, 10, 25.
- [[Footnote 61](#)] N. Y. Const., 1894, Art. III, 4.
- [[Footnote 62](#)] N. Y. Const., 1894, Art. III, 5.
- [[Footnote 63](#)] N.C. Const., 1876, Art. II, 5.
- [[Footnote 64](#)] Okla. Const., 1907, Art. V, 10.

[[Footnote 65](#)] Pa. Const., 1873, Art. II, 17.

[[Footnote 66](#)] S. C. Const., 1895, Art. III, 4, 6.

[[Footnote 67](#)] Utah Const., 1895, Art. IX, 4.

[[Footnote 68](#)] Wyo. Const., 1889, Art. III, 3.

[[Footnote 69](#)] A tabular presentation of constitutional provisions for apportionment as of Nov. 1, 1961, appears in *The Book of the States 1962-1963*, 58-62. Using this table, but disregarding some deviations from a pure population base, the Advisory Commission on Intergovernmental Relations states that there are 15 States in which the legislatures are apportioned solely according to population. *Apportionment of State Legislatures* (1962), 12.

[[Footnote 70](#)] Compare the Court's statement in *Guinn v. United States*, [238 U.S. 347, 362](#) :

". . . Beyond doubt the [Fifteenth] Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

[[Footnote 71](#)] The quoted phrases are taken from the Jurisdictional Statement, pp. 13, 19.

[[Footnote 72](#)] In two early cases dealing with party primaries in Texas, the Court indicated that the Equal

Protection Clause did afford some protection of the right to vote. Nixon v. Herndon, [273 U.S. 536](#); Nixon v. Condon, [286 U.S. 73](#). Before and after these cases, two cases dealing with the qualifications for electors in Oklahoma had gone off on the Fifteenth Amendment, Guinn v. United States,

[[377 U.S. 533, 615](#)] [238 U.S. 347](#); Lane v. Wilson, [307 U.S. 268](#). The rationale of the Texas cases is almost certainly to be explained by the Court's reluctance to decide that party primaries were a part of the electoral process for purposes of the Fifteenth Amendment. See Newberry v. United States, [256 U.S. 232](#). Once that question was laid to rest in United States v. Classic, [313 U.S. 299](#), the Court decided subsequent cases involving Texas party primaries on the basis of the Fifteenth Amendment. Smith v. Allwright, [321 U.S. 649](#); Terry v. Adams, [345 U.S. 461](#).

The recent decision in Gomillion v. Lightfoot, [364 U.S. 339](#), that a constitutional claim was stated by allegations that municipal lines had been redrawn with the intention of depriving Negroes of the right to vote in municipal elections was based on the Fifteenth Amendment. Only one Justice, in a concurring opinion, relied on the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 349.

[[Footnote 73](#)] The measures were adopted on July 12, 1962. The District Court handed down its opinion on July 21, 1962.

[[Footnote 74](#)] In reversing an initial order of the Circuit Court for Anne Arundel County dismissing the plaintiffs' complaint, the Maryland Court of Appeals directed the lower court to hear evidence on and determine the plaintiffs' constitutional claims, and, if it found provisions

[377 U.S. 533, 617] of the Maryland Constitution to be invalid, to "declare that the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its membership for purposes of the November, 1962, election." *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 438-439, 180 A. 2d 656, 670. On remand, the opinion of the Circuit Court included such a declaration. The opinion was filed on May 24, 1962. The Maryland Legislature, in Special Session, adopted the "emergency" measures now declared unconstitutional seven days later, on May 31, 1962.

[[Footnote 75](#)] The Virginia Constitution, Art. IV, 43, requires that a reapportionment be made every 10 years.

[[Footnote 76](#)] The 1962 reapportionment acts were approved on Apr. 7, 1962. The complaint was filed on Apr. 9, 1962.

[[Footnote 77](#)] The District Court handed down its opinion on Nov. 28, 1962, and gave the Virginia General Assembly until Jan. 31, 1963, "to enact appropriate reapportionment laws." 213 F. Supp., at 585-586. The court stated that failing such action or an appeal to this Court, the plaintiffs might apply to it "for such further orders as may be required." *Id.*, at 586.

[[Footnote 78](#)] On Dec. 15, 1962, THE CHIEF JUSTICE granted a stay pending final disposition of the case in this Court.

[[Footnote 79](#)] The Delaware Constitution, Art. XVI, 1, requires that amendments be approved by the necessary two-thirds vote in two successive General Assemblies.

[[Footnote 80](#)] The District Court thus nailed the lid on the "box of time" in which everyone seemed to it "to be trapped." The lid was temporarily opened a crack on June 27, 1963, when MR. JUSTICE BRENNAN

[[377 U.S. 533, 620](#)] granted a stay of the injunction until disposition of the case by this Court. Since the Court states that "the delay inherent in following the state constitutional prescription for approval of constitutional amendments by two successive General Assemblies cannot be allowed to result in an impermissible deprivation of appellees' right to an adequate voice in the election of legislators to represent them," post. p. 711, the lid has presumably been slammed shut again.

[[Footnote 81](#)] In New York and Colorado, this pattern of conduct has thus far been avoided. In the New York case (No. 20, post, p. 633), the District Court twice dismissed the complaint, once without reaching the merits, *WMCA, Inc., v. Simon*, 202 F. Supp. 741, and once, after this Court's remand following *Baker v. Carr*, supra, [370 U.S. 190](#), on the merits, 208 F. Supp. 368. In the Colorado case (No. 508, post, p. 713), the District Court first declined to interfere with a forthcoming election at which reapportionment measures were to be submitted to the voters, *Lisco v. McNichols*, 208 F. Supp. 471, and, after the election, upheld the apportionment provisions which had been adopted, 219 F. Supp. 922.

In view of the action which this Court now takes in both of these cases, there is little doubt that the legislatures of these two States will now be subjected to the same kind of pressures from the federal judiciary as have the other States.

[[Footnote 82](#)] It is not mere fancy to suppose that in order to avoid problems of this sort, the Court may one day be tempted to hold that all state legislators must be elected in statewide elections.

[[Footnote 83](#)] Ante, p. 579.

[[Footnote 84](#)] Ante, pp. 579-580.

[[Footnote 85](#)] Ante, p. 580.

[[Footnote 86](#)] Ibid.

[[Footnote 87](#)] Ibid.

[[Footnote 88](#)] Ibid.

[[Footnote 89](#)] Ante, pp. 576-577.

[[Footnote 90](#)] Davis v. Mann, post, p. 691.

[[Footnote 91](#)] Id., at 692.

[[Footnote 92](#)] Lucas v. Forty-Fourth General Assembly, post, p. 736.

[[Footnote 93](#)] Ante, p. 581.

[[Footnote 94](#)] The Court does note that, in view of modern developments in transportation and communication, it finds "unconvincing" arguments based on a desire to insure representation of sparsely settled areas or to avoid districts so large that voters' access to their representatives is impaired. Ante, p. 580.

APPENDIX A TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

Statements made in the House of Representatives during the debate on the resolution proposing the Fourteenth Amendment. [*a](#)

[[Footnote *a](#)] All page references are to Cong. Globe, 39th Cong., 1st Sess. (1866).

[377 U.S. 533, 626]

"As the nearest approach to justice which we are likely to be able to make, I approve of the second section that bases representation upon voters." 2463 (Mr. Garfield).

"Would it not be a most unprecedented thing that when this [former slave] population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here; that when they will not count them in apportioning their own legislative districts, we are to count them as five fifths (no longer as three fifths, for that is out of the question) as soon as you make a new apportionment?" 2464-2465 (Mr. Thayer).

"The second section of the amendment is ostensibly intended to remedy a supposed inequality in the basis of representation. The real object is to reduce the number of southern representatives in Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage." 2467 (Mr. Boyer).

"Shall the pardoned rebels of the South include in the basis of representation four million people to whom they deny political rights, and to no one of whom is allowed a vote in the selection of a Representative?" 2468 (Mr. Kelley).

"I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country." 2469 (Mr. Kelley).

"But I will ask, why should not the representation of the States be limited as the States themselves limit suffrage? . . . If the negroes of the South are

[377 U.S. 533, 627] not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union?" 2498 (Mr. Broomall).

"It is now proposed to base representation upon suffrage, upon the number of voters, instead of upon the aggregate population in every State of the Union." 2502 (Mr. Raymond).

"We admit equality of representation based upon the exercise of the elective franchise by the people. The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country - and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people - I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation." 2508 (Mr. Boutwell).

"Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation for male citizens not less than twenty-one years of age, whether white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age." 2510 (Mr. Miller).

[377 U.S. 533, 628]

"Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, ultimately recognized and admitted." 2511 (Mr. Eliot).

"I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have no doubt that the Government of the United States has authority to do this under the Constitution; but I do not think they have the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion. The situation

[377 U.S. 533, 629] of opinion in these States compels us to look to other means to protect the Government against the enemy." 2532 (Mr. Banks).

"If you deny to any portion of the loyal citizens of your State the right to vote for Representatives you shall not assume to represent them, and, as you have done for so long a time, misrepresent and oppress them. This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best." 2539-2540 (Mr. Farnsworth).

APPENDIX B TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

Statements made in the Senate during the debate on the resolution proposing the Fourteenth Amendment. [*b](#)

"The second section of the constitutional amendment proposed by the committee can be justified upon no other theory than that the negroes ought to vote; and negro suffrage must be vindicated before the people in sustaining that section, for it does not exclude the non-voting population of the North, because it is admitted that there is no wrong in excluding from suffrage aliens, females, and minors. But we say, if the negro is excluded from suffrage he shall also be excluded from the basis of representation. Why this inequality? Why this injustice? For injustice it would be unless there be some good reason for this discrimination against the South in excluding her non-voting population from the basis

[[Footnote *b](#)] All page references are to Cong. Globe, 39th Cong., 1st Sess. (1866).

[377 U.S. 533, 630] of representation. The only defense that we can make to this apparent injustice is that the South commits an outrage upon human rights when she denies the ballot to the blacks, and we will not allow her to take advantage of her own wrong, or profit by this outrage. Does any one suppose it possible to avoid this plain issue before the people? For if they will sustain you in reducing the representation of the South because she does not allow the negro to vote, they will do so because they think it is wrong to disfranchise him." 2800 (Senator Stewart).

"It [the second section of the proposed amendment] relieves him [the Negro] from misrepresentation in Congress by denying him any representation whatever." 2801 (Senator Stewart).

"But I will again venture the opinion that it [the second section] means as if it read thus: no State shall be allowed a representation on a colored population unless the right of voting is given to the negroes - presenting to the States the alternative of loss of representation or the enfranchisement of the negroes, and their political equality." 2939 (Senator Hendricks).

"I should be much better satisfied if the right of suffrage had been given at once to the more intelligent of them [the Negroes] and such as had served in our Army. But it is believed by wiser ones than myself that this amendment will very soon produce some grant of suffrage to them, and that the craving for political power will ere long give them universal suffrage. . . . Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in

[377 U.S. 533, 631] the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further." 2963-2964 (Senator Poland).

"What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania, and you say to her that she must either allow her negroes to vote or have one member of Congress less." 2987 (Senator Cowan).

"Now, sir, in all the States - certainly in mine, and no doubt in all - there are local as contradistinguished from State elections. There are city elections, county elections, and district or borough elections; and those city and county and district elections are held under some law of the State in which the city or county or district or borough may be; and in those elections, according to the laws of the States, certain qualifications are prescribed, residence within the limits of the locality and a property qualification in some. Now, is it proposed to say that if every man in a State is not at liberty to vote at a city or a county or a borough election that is to affect the basis of representation?" 2991 (Senator Johnson).

"Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States . . . not only the right, but the exclusive right, to regulate the franchise. . . . It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Government

[377 U.S. 533, 632] of the United States will be impotent to redress." 3027 (Senator Johnson).

"The amendment fixes representation upon numbers, precisely as the Constitution now does, but when a State denies or abridges the elective franchise to any of its male inhabitants who are citizens of the United States and not less than twenty-one years of age, except for participation in rebellion or other crime, then such State will lose its representation in Congress in the proportion which the male citizen so excluded bears to the whole number of male citizens not less than twenty-one years of age in the State." 3033 (Senator Henderson).

Oregon v. Mitchell

400 U.S. 112 (1970)

From the Court's syllabus:

These original actions involve the constitutionality of three provisions of the Voting Rights Act Amendments of 1970 which (1) lower the minimum age of voters in both state and federal elections from 21 to 18, (2) bar the use of literacy tests (and similar voting eligibility requirements) for a five-year period in state and federal elections in any area where such tests are not already proscribed by the Voting Rights Act of 1965, and (3) forbid States from disqualifying voters in presidential and vice-presidential elections for failure to meet state residency requirements and provide uniform national rules for absentee voting in such elections.

Held: (1) The 18-year-old minimum-age requirement of the Voting Rights Act Amendments is valid for national elections. (2) That requirement is not valid for state and local elections. (3) The literacy test provision is valid. (4) The residency and absentee balloting provisions are valid.

The Court was split 4-4 on most issues, and Justice Black provided the swing vote in each ruling. The ruling against literacy tests was unanimous.

Once again, Justice Harlan, concurring and dissenting, engaged in a detailed examination of the history of the 14th Amendment in Part I. In Part II, he expressed his frustration in this comment:

I must confess to complete astonishment at the position of some of my Brethren that the history of the Fourteenth Amendment has become irrelevant. . . In the six years since I first set out much of this history [in Reynolds], I have seen no justification for such a result which appears to me at all adequate. With matters in this posture, I need do no more by way of justifying my reliance on these materials than sketch the familiar outlines of our constitutional system.

And his opening to Part I is of interest to those of the originalist persuasion:

"It is fitting to begin with a quotation from one of the leading members 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.' Cong. Globe, 39th Cong., 1st Sess., 677 (1866) (Sen. Sumner)."

MR. 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*, [369 U.S. 186](#) (1962), I would find it difficult not to sustain all three aspects of the Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314, 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.

The four cases require determination of the validity of the Voting Rights Act Amendments in three respects. In Nos. 43, Orig., and 44, Orig., Oregon and Texas have sought to enjoin the enforcement of 302 of the Act as applied to lower the voting age in those States from 21 to 18. [1](#)

[400 U.S. 112, 153]

In Nos. 46, Orig., and 47, Orig., the United States seeks a declaration of the validity of the Act and an injunction requiring Arizona and Idaho to conform their laws to it. The Act would lower the voting age in each State from 21 to 18. It would suspend until August 6, 1975, the Arizona literacy test, which requires that applicants for registration be able to read the United States Constitution in English and write their names. It would require Idaho to make several changes in its laws governing residency, registration, and absentee voting in presidential elections. Among the more substantial changes, Idaho's present 60-day state residency requirement will in effect be lowered to 30-days; its 30-day county residency requirement for intrastate migrants will be abolished; Idaho will have to permit voting by citizens of other States formerly domiciled in Idaho who emigrated too recently to register in their new homes; and it must permit absentee registration and voting by persons who have lived in Idaho for less than six months. The relevant provisions of the Act and of the constitutions and laws of the four States are set out in an Appendix to this opinion.

Each of the States contests the power of Congress to enact the provisions of the Act involved in its suit. [2](#) The Government places primary reliance on the power of Congress under 5 of the Fourteenth Amendment to enforce the provisions of that Amendment by appropriate

[400 U.S. 112, 154] legislation. For reasons to follow, 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.

I

It is fitting to begin with a quotation from one of the leading members 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." Cong. Globe, 39th Cong., 1st Sess., 677 (1866) (Sen. Sumner).

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. This, for me, necessary undertaking has unavoidably led to an opinion of more than ordinary length. Except for those who are willing to close their eyes to constitutional history in making constitutional interpretations or who read such history with a preconceived determination to attain a particular constitutional

[400 U.S. 112, 155] goal, 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.

A. Historical Setting [3](#)

The point of departure for considering the purpose and effect of the Fourteenth Amendment with respect to the suffrage should be, I think, the pre-existing provisions of the Constitution. Article I, 2, provided that in determining the number of Representatives to which a State was entitled, only three-fifths of the slave population should be counted. [4](#) The section also provided that the qualifications of voters for such Representatives should be the same as those established by the States for electors of the most numerous branch of their respective legislatures. Article I, 4, provided that, subject to congressional veto, the States might prescribe the times, places, and manner of holding elections for Representatives. Article II, 1, provided that the States might direct the manner of choosing electors for President and Vice President, except that Congress might fix a uniform time for the choice. [5](#) Nothing in the original

[400 U.S. 112, 156] Constitution controlled the way States might allocate their political power except for the guarantee of a Republican Form of Government, which appears in Art. IV, 4. [6](#) No relevant changes in the constitutional structure were made until after the Civil War.

At the close of that war, there were some four million freed slaves in the South, none of whom were permitted to vote. The white population of the Confederacy had been overwhelmingly sympathetic with the rebellion. Since there was only a comparative handful of persons in these States who were neither former slaves nor Confederate sympathizers, the place where the political power should be lodged was a most vexing question. In a series of proclamations in the summer of 1865, President Andrew Johnson had laid the groundwork for the States to be controlled by the white populations which had held power before the war, eliminating only the leading rebels and those unwilling to sign a loyalty oath. [7](#) The Radicals, on the other hand, were ardently in favor of Negro suffrage as essential to prevent resurgent rebellion, requisite to protect the freedmen, and necessary to ensure continued Radical control of the government. This ardor cooled as it ran into northern racial prejudice. At that time, only six States - Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York - permitted Negroes to vote, and New York imposed special property and residency requirements on Negro voters. [8](#) In referenda late that year, enfranchising proposals

[400 U.S. 112, 157] were roundly beaten in Connecticut, Wisconsin, Minnesota, the Territory of Colorado, and the District of Columbia. Gillette, *supra*, n. 3, at 25-26. Such popular rebuffs led the Radicals to pull in their horns and hope for a protracted process of reconstruction during which the North could be educated to the advisability of Negro suffrage, at least for the South. In the meantime, of course, it would be essential to bar southern representation in Congress lest a combination of southerners and Democrats obtain control of the government and frustrate Radical goals.

The problem of congressional representation was acute. With the freeing of the slaves, the Three-Fifths Compromise ceased to have any effect. While predictions of the precise effect of the change varied with the person doing the calculating, the consensus was that the South would be entitled to at least 15 new members of Congress, and, of course, a like number of new presidential electors. The Radicals had other rallying cries which they kept before the public in the summer of 1865, but one author gives this description of the mood as Congress convened: [9](#)

"Of all the movements influencing the Fourteenth Amendment which developed prior to the first session of the Thirty-ninth Congress, that for Negro suffrage was the most outstanding. The volume of private and public comment indicates that it was viewed as an issue of prime importance. The cry for a changed basis of representation was, in reality, subsidiary to this, and was meant by Radicals to secure in another way what Negro suffrage might accomplish for them: removal of the danger of Democratic dominance as a consequence of Southern restoration. The danger of possible repudiation of the national obligations, and assumption of the rebel

[400 U.S. 112, 158] debt, was invariably presented to show the need for Negro suffrage or a new basis of representation. Sentiment for disqualification of ex-Confederates, though a natural growth, well suited such purposes. The movement to guarantee civil rights, sponsored originally by the more conservative Republicans, received emphasis from Radicals only when state elections indicated that suffrage would not serve as a party platform."

When Congress met, the Radicals, led by Thaddeus Stevens, were successful in obtaining agreement for a Joint Committee on Reconstruction, composed of 15 members, to "inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress" Cong. Globe, 39th Cong., 1st Sess., 30, 46 (1865) (hereafter Globe).

All papers relating to representation of the Southern States were to be referred to the Committee of Fifteen without debate. The result, which many had not foreseen, was to assert congressional control over Reconstruction and at the same time to put the congressional power in the hands of a largely Radical secret committee.

The Joint Committee began work with the beginning of 1866, and in due course reported a joint resolution, H. R. 51, to amend the Constitution. The proposal would have based representation and direct taxes on population, with a proviso that

"whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation." Globe 351.

The result, if the Southern States did not provide for Negro suffrage, would be a decrease in southern representation

[400 U.S. 112, 159] in Congress and the electoral college by some 24 seats from their pre-war position instead of an increase of 15. The House, although somewhat balky, approved the measure after lengthy debate. Globe 538. The Senate proved more intractable. An odd combination of Democrats, moderate Republicans, and extreme Radicals combined to defeat the measure, with the Radicals basing their opposition largely on the fear that the proviso would be read to authorize racial voter qualifications and thus prevent Congress from enfranchising the freedmen under powers assertedly granted by other clauses of the Constitution. See, e. g., Globe 673-687 (Sen. Sumner).

At about this same time the Civil Rights Bill and the Second Freedmen's Bureau Bill were being debated. Both bills provided a list of rights secured, not including voting. [10](#) Senator Trumbull, who reported the Civil Rights Bill on behalf of the Senate Judiciary Committee, stated: "I do not want to bring up the question of negro suffrage in the bill." Globe 606. His House counterpart exhibited the same reluctance. Globe 1162 (Cong. Wilson of Iowa). Despite considerable uncertainty as to the constitutionality of the measures, both ultimately passed. In the midst of the Senate debates on the basis of representation, President Johnson vetoed the Freedmen's Bureau Bill, primarily on constitutional grounds. This veto, which was narrowly sustained, was followed shortly by the President's bitter attack on Radical Reconstruction in his Washington's Birthday speech. These two actions, which were followed a month later by the veto of the Civil Rights Bill, removed any lingering hopes among the Radicals that Johnson would support them in a thoroughgoing plan of reconstruction. By the same token they increased the Radicals' need for an

[400 U.S. 112, 160] articulated plan of their own to be put before the country in the upcoming elections as an alternative to the course the President was taking.

The second major product of the Reconstruction Committee, before the resolution which became the Fourteenth Amendment, was a proposal to add an equal rights provision to the Constitution. This measure, H. R. 63, which foreshadowed 1 of the Fourteenth Amendment, read as follows:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." Globe 1034.

It was reported by Congressman Bingham of Ohio, who later opposed the Civil Rights Bill because he believed it unconstitutional. Globe 1292-1293. The amendment immediately ran into serious opposition in the House and the subject was dropped. [11](#)

Such was the background of the Fourteenth Amendment. Congress, at loggerheads with the President over Reconstruction, had not come up with a plan of its own after six months of deliberations; both friends and foes prodded it to develop an alternative. The Reconstruction Committee had been unable to produce anything which could even get through Congress, much less obtain the adherence of three-fourths of the States. The Radicals, committed to Negro suffrage, were confronted with widespread public opposition to that goal and the necessity for a reconstruction plan that could do service as a party platform in the elections that fall. The language

[400 U.S. 112, 161] of the Fourteenth Amendment must be read with awareness that it was designed in response to this situation.

B. The Language of the Amendment and Reconstruction Measures

Sections 1 and 2 of the Fourteenth Amendment as originally reported read as follows: [12](#)

"SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"SEC. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever,

[400 U.S. 112, 162] in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age." Globe 2286.

In the historical context, no one could have understood this language as anything other than an abandonment of the principle of Negro suffrage, for which the Radicals had been so eager. By the same token, the language could hardly have been understood as affecting the provisions of the Constitution placing voting qualifications in the hands of the States. Section 1 must have been seen as little more than a constitutionalization of the 1866 Civil Rights Act, concededly one of the primary goals of that portion of the Amendment. [13](#)

While these conclusions may, I think, be confidently asserted, it is not so easy to explain just how contemporary observers would have construed the three clauses of 1 to reach this result. [14](#) No doubt in the case of

[400 U.S. 112, 163] many congressmen it simply never occurred to them that the States' longstanding plenary control over voter qualifications would be affected without explicit language to that effect. And since no speaker during the debates on the Fourteenth Amendment pursued the contention that 1 would be construed to include the franchise, those who took the opposite view rarely explained how they arrived at their conclusions.

In attempting to unravel what was seldom articulated, the appropriate starting point is the fact that the framers of the Amendment expected the most significant portion of 1 to be the clause prohibiting state laws "which shall abridge the privileges or immunities of citizens of the United States." These privileges were no doubt understood to include the ones set out in the first section of the Civil Rights Act. To be prohibited by law from enjoying these rights would hardly be consistent with full membership in a civil society.

The same is not necessarily true with respect to prohibitions on participation in the political process. Many members of 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. [15](#) Others no doubt relied on

[400 U.S. 112, 164] the experience under the similar language of Art. IV, 2, which had never been held to guarantee the right to vote. The remarks of Senator Howard of Michigan, who as spokesman for the Joint Committee explained in greater detail than most why the Amendment did not reach the suffrage, contain something of each view. See *Globe* 2766, quoted *infra*, at 187; nn. 56 and 57, *infra*; cf. *Blake v. McClung*, [172 U.S. 239, 256](#) (1898) (*dictum*).

Since the Privileges and Immunities Clause was expected to be the primary source of substantive protection, the Equal Protection and Due Process Clauses were relegated to a secondary role, as the debates and other contemporary materials make clear. [16](#) Those clauses, which appear on their face to correspond with the latter portion of 1 of the Civil Rights Act, see n. 13, *supra*, and to be primarily concerned with person and property, would not have been expected to enfranchise the freedmen if the Privileges and Immunities Clause did not.

Other members of Congress no doubt saw 2 of the proposed Amendment as the Committee's resolution of the related problems of suffrage and representation. Since that section did not provide for enfranchisement, but simply reduced representation for disfranchisement, any doubts about the effect of the broad language of 1 were removed. Congressman Bingham, who was primarily responsible for the language of 1,

[400 U.S. 112, 165] stated this view. Globe 2542, quoted *infra*, at 185. Finally, characterization of the Amendment by such figures as Stevens and Bingham in the House and Howard in the Senate, not contested by the Democrats except in passing remarks, was no doubt simply accepted by many members of Congress; they, repeating it, gave further force to the interpretation, with the result that, as will appear below, not 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. [17](#) Further evidence of this original understanding can be found in later events.

The 39th Congress, which proposed the Fourteenth Amendment, also enacted the first Reconstruction Act, c. 153, 14 Stat. 428 (1867). This Act required, as a condition precedent to readmission of the Southern States, that they adopt constitutions providing that the elective franchise should be enjoyed by all male citizens over the age of 21 who had been residents for more than one year and were not disfranchised for treason or common-law felony; even so, no State would be readmitted until a legislature elected under the new Constitution had ratified the proposed Fourteenth Amendment and that Amendment had become part of the Constitution.

The next development came when the ratification drive in the North stalled. After a year had passed during which only one Northern State had ratified the proposed Fourteenth Amendment, Arkansas was readmitted to the Union by the Act of June 22, 1868, 15

[400 U.S. 112, 166] Stat. 72. This readmission was based on the "fundamental condition" that the state constitution should not be amended to restrict the franchise, except with reference to residency requirements. Three days later the Act of June 25, 1868, 15 Stat. 73, held out a promise of similar treatment to North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida if they would ratify the Fourteenth Amendment. By happy coincidence, the assent of those six States was just sufficient to complete the ratification process. It can hardly be suggested, therefore, that the "fundamental condition" was exacted from them as a measure of caution lest the Fourteenth Amendment fail of ratification.

The 40th Congress, not content with enfranchisement in the South, proposed the Fifteenth Amendment to extend the suffrage to northern Negroes. See Gillette, *supra*, n. 3, at 46. This fact alone is evidence that they did not understand the Fourteenth Amendment to have accomplished such a result. Less well known is the fact that the 40th Congress considered and very nearly adopted a proposed amendment which would have expressly prohibited not only discriminatory voter qualifications but discriminatory qualifications for office as well. Each House passed such a measure by the required two-thirds margin. Cong. Globe, 40th Cong., 3d Sess., 1318, 1428 (1869). A conference committee, composed of Senators Stewart and Conkling and Representatives Boutwell, Bingham, and Logan, struck out the officeholding provision, *id.*, at 1563, 1593, and with Inauguration Day only a week away, both Houses accepted the conference report. *Id.*, at 1564, 1641. See generally Gillette 58-77. While the reasons for these actions are unclear, it is unlikely that they were provoked by the idea that the Fourteenth Amendment covered the field; such a rationale seemingly would have made the enfranchising provision itself unnecessary.

[400 U.S. 112, 167]

The 41st Congress readmitted the remaining three States of the Confederacy. The admitting act in each case recited good-faith ratification of the Fourteenth and Fifteenth Amendments, and imposed the fundamental conditions that the States should not restrict the elective franchise [18](#) and "[t]hat it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State." Act of Jan. 26, 1870, c. 10, 16 Stat. 62, 63 (Virginia); Act of Feb. 23, 1870, c. 19, 16 Stat. 67, 68 (Mississippi); Act of Mar. 30, 1870, c. 39, 16 Stat. 80, 81 (Texas).

These materials demonstrate not only that 1 of the Fourteenth Amendment is susceptible of an interpretation that it does not reach suffrage qualifications, but that this is the interpretation given by the immediately succeeding Congresses. Such an interpretation is the most reasonable reading of the section in view of the background against which it was proposed and adopted, particularly the doubts about the constitutionality of the Civil Rights Act, the prejudice in the North against any recognition of the principle of Negro suffrage, and the basic constitutional structure of leaving suffrage qualifications with the States. [19](#) If any further clarification were

[400 U.S. 112, 168] needed, one would have thought it provided by the second section of the same Amendment, which specifically contemplated that the right to vote would be denied or abridged by the States on racial or other grounds. As a unanimous Court once asked, "Why this, if it was not in the power of the [state] legislature to deny the right of suffrage to some male inhabitants?" *Minor v. Happersett*, 21 Wall. 162, 174 (1875).

The Government suggests that the list of protected qualifications in 2 is "no more than descriptive of voting laws as they then stood." Brief for the United States, Nos. 46, Orig., and 47, Orig., 75. This is wholly inaccurate. Aside from racial restrictions, all States had residency requirements and many had literacy, property, or taxation qualifications. On the other hand, several of the Western States permitted aliens to vote if they had satisfied certain residency requirements and had declared

[400 U.S. 112, 169] their intention to become citizens. [20](#) It hardly seems necessary to observe that the politicians who framed the Fourteenth Amendment were familiar with the makeup of the electorate. In any event, the congressional debates contain such proof in ample measure. [21](#)

Assuming, then, that 2 represents a deliberate selection of the voting qualifications to be penalized, what is the point of it? The Government notes that "it was intended - although it has never been used - to provide a remedy against exclusion of the newly freed slaves from the vote." Brief for the Defendant, Nos. 43, Orig., and 44, Orig., 20. Undoubtedly this was the primary purpose. But the framers of the Amendment, with their attention thus focused on racial voting qualifications, could hardly have been unaware of 1. If they understood that section to forbid such qualifications, the simple means of penalizing this conduct would have been to impose a reduction of representation for voting discrimination in violation of 1. Their adoption instead of the awkward phrasing of 2 is therefore significant.

To be sure, one might argue that 2 is simply a rhetorical flourish, and that the qualifications listed there are merely the ones which the framers deemed to be consistent with the alleged prohibition of 1. This argument is not only unreasonable on its face and untenable in light of the historical record; it is fatal to the validity of the reduction of the voting age in 302 of the Act before us.

The only sensible explanation of 2, therefore, is that the racial voter qualifications it was designed to penalize

[400 U.S. 112, 170] 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. As my Brother BLACK states: "[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." Ante, at 127. The detailed historical materials make this unmistakably clear.

C. The Joint Committee

The first place to look for the understanding of the framers of the Fourteenth Amendment is the Journal of the Joint Committee on Reconstruction. [22](#) The exact sequence of the actions of this Committee presumably had little or no effect on the members of Congress who were not on the Committee, for the Committee attempted to keep its deliberations secret, [23](#) and the Journal itself was lost for nearly 20 years. [24](#) Nevertheless the Journal, although only a record of proposals and votes, illustrates the thoughts of those leading figures of Congress who were members and participated in the drafting of the Amendment.

Two features emerge from such a review with startling clarity. First, the Committee regularly rejected explicitly

[400 U.S. 112, 171] enfranchising proposals in favor of plans which would postpone enfranchisement, leave it to congressional discretion, or abandon it altogether. Second, the abandonment of Negro suffrage as a goal exactly corresponded with the adoption of provisions to reduce representation for discriminatory restrictions on the ballot.

This correspondence was present from the start. Five plans were proposed to deal with representation. One would have prohibited racial qualifications for voters and based representation on the whole number of citizens in the State; the other four proposals contained no enfranchising provision but in various ways would have reduced representation for States where the vote was racially restricted. Kendrick 41-44. A subcommittee reduced the five proposals to two, one prohibiting discrimination and the other reducing representation where it was present. On Stevens' motion the latter alternative was accepted by a vote of 11 to 3, Kendrick 51; with minor changes it was subsequently reported as H. R. 51.

The subcommittee also proposed that whichever provision on the basis of representation was adopted, the Congress should be empowered to legislate to secure all citizens "the same political rights and privileges" and also "equal protection in the enjoyment of life, liberty and property." Kendrick 51. After the Committee reported H. R. 51, it turned to consideration of this proposal. At a meeting attended by only 10 members, a motion to strike out the clause authorizing Congress to legislate for equal political rights and privileges lost by a vote of six to four. Kendrick 57. At a subsequent meeting, however, Bingham had the subcommittee proposal replaced with another which did not mention political rights and privileges, but was otherwise quite similar. Kendrick 61; see the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE

[400 U.S. 112, 172] MARSHALL, post, at 258-259, for the text of the two provisions. The Committee reported the substitute as H. R. 63. In the House so much concern was expressed over the centralization of power the amendment would work - a few said it would even authorize Congress to regulate the suffrage - that the matter was dropped. Post, at 260.

The Fourteenth Amendment had as its most direct antecedent a proposal drafted by Robert Dale Owen, who was not a member of Congress, and presented to the Joint Committee by Stevens. [25](#) Originally the plan provided for mandatory enfranchisement in 1876 and for reduction of representation until that date. Kendrick 82-84. However, Stevens was pressured by various congressional delegations who wanted nothing to do with Negro suffrage, even at a remove of 10 years. [26](#) He therefore successfully moved to strike out the enfranchising provision and correspondingly to abolish the 10-year limitation on reduction of representation for racial discrimination. The motion carried by a vote of 12 to 2. Kendrick 101.

Bingham was then successful in replacing 1 of Owen's proposal, which read:

"No discrimination shall be made by any State, or by the United States, as to the civil rights of persons, because of race, color, or previous condition of servitude"

with the following now-familiar language:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

[400 U.S. 112, 173] any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Kendrick 106.

The summary style of the Journal leaves unclear the reasons for the change. However, Bingham himself had rather consistently voted against proposals for direct and immediate enfranchisement, [27](#) and on the face of things it seems unlikely that the other members of the Joint Committee understood his provision to be an enfranchising proposal. [28](#) That they did not so understand is

[400 U.S. 112, 174] demonstrated by the speeches in the debates on the floor. [29](#)

Before I examine those debates, a word of explanation is in order. For obvious reasons, the discussions of voter qualifications in the 39th Congress and among the public were cast primarily in terms of racial disqualifications. This does not detract from their utility as guides to interpretation. When an individual speaker said that the Amendment would not result in the enfranchisement of Negroes, he must have taken one of two views: either the Amendment did not reach voter qualifications at all; or it set standards limiting state restrictions on the ballot, but those standards did not prohibit racial discrimination. I have already set out some of the reasons which lead me to conclude that the former interpretation is correct, and that it is the understanding

[400 U.S. 112, 175] shared by the framers of the Amendment, as well as by almost all of the opponents. The mere statement of the latter position appears to me to be a complete refutation of it. Even on its wholly unsupportable assumptions (1) that certain framers of the Amendment contemplated that the privileges and immunities of citizens included the vote, (2) that they intended to permit state laws to abridge the privileges and immunities of citizens whenever it was rational to do so, and (3) that they agreed on the rationality of prohibiting the freed slaves from voting, this remarkable theory still fails to explain why they understood the Amendment to permit racial voting qualifications in the free States of the North.

D. In Congress

On May 8, 1866, Thaddeus Stevens led off debate on H. R. 127, the Joint Resolution proposing the Fourteenth Amendment. After explaining the delay of the Joint Committee in coming up with a plan of reconstruction, he apologized for his proposal in advance:

"This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this." Globe 2459.

In the climate of the times, Stevens could hardly have been understood as referring to anything other than the failure of the measure to make some provision for the enfranchisement of the freedmen. However, lest any mistake be made, he recounted the history of the Committee's prior effort in the field of representation and suffrage,

[400 U.S. 112, 176] H. R. 51, which "would surely have secured the enfranchisement of every citizen at no distant period." That measure was dead, "slaughtered by a puerile and pedantic criticism," and "unless this (less efficient, I admit) shall pass, its death has postponed the protection of the colored race perhaps for ages." Ibid.

With this explanation made, Stevens turned to a section-by-section study of the proposed resolution. The results to be achieved by 1, as he saw it, would be equal punishment for crime, equal entitlement to the benefits of "[w]hatever law protects the white man," equal means of redress, and equal competence to testify. Ibid. If he thought the section provided equal access to the polls, despite his immediately preceding apology for the fact that it did not, his failure to mention that application is remarkable. [30](#)

Turning then to 2, Stevens again discussed racial qualification for voting. He explained the section as follows:

"If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive." Ibid.

Stevens recognized that it might take several years for the coercive effect of the Amendment to result in Negro suffrage, but since this would give time for education and enlightenment of the freedmen, "That short delay would

[400 U.S. 112, 176] H. R. 51, which "would surely have secured the enfranchisement of every citizen at no distant period." That measure was dead, "slaughtered by a puerile and pedantic criticism," and "unless this (less efficient, I admit) shall pass, its death has postponed the protection of the colored race perhaps for ages." Ibid.

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Stevens recognized that it might take several years for the coercive effect of the Amendment to result in Negro suffrage, but since this would give time for education and enlightenment of the freedmen, "That short delay would

[400 U.S. 112, 177] not be injurious." Ibid. He did not indicate that he believed it would be unconstitutional. He admitted that 2 was not so good as the proposal which had been defeated in the Senate, for that, by reducing representation by all the members of a race if any one was discriminated against, would have hastened full enfranchisement. Section 2 allowed proportional credit. "But it is a short step forward. The large stride which we in vain proposed is dead" Globe 2460.

I have dealt at length with Stevens' remarks because of his prominent position in the House and in the Joint Committee. The remaining remarks, except for Bingham's summation, can be treated in more summary fashion. Of the supporters of the Amendment, Garfield of Ohio, [31](#) Kelley of Pennsylvania, [32](#) Boutwell of Massachusetts (a member of the Joint Committee), [33](#)

[400 U.S. 112, 178] Eliot of Massachusetts, [34](#) Beaman of Michigan, [35](#) and Farnsworth of Illinois, [36](#) expressed their regret that the Amendment did not prohibit restrictions on the franchise. As the quotations set out in the margin indicate, the absence of such a prohibition was generally attributed to prejudice in the Congress, in the States, or both, to such an extent that an enfranchising amendment could not pass. This corresponds with the first part of Stevens' introductory speech.

[400 U.S. 112, 179]

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. In this group were Thayer of Pennsylvania, [37](#) Broomall of Pennsylvania, [38](#) Raymond of New York, [39](#) McKee of Kentucky, [40](#) Miller of Pennsylvania, [41](#)

[400 U.S. 112, 180] Banks of Massachusetts, [42](#) and Eckley of Ohio. [43](#)

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. Those in the latter group who gave speeches on the proposed Amendment included

[400 U.S. 112, 181] Spalding of Ohio, [44](#) Longyear of Michigan, [45](#) and Shellabarger of Ohio. [46](#) The remaining Republican members of the Joint Committee - Washburne of Illinois, Morrill of Vermont, Conkling of New York, and Blow of Missouri - did not participate in the debates over the Amendment.

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. Finck of Ohio and Shanklin of Kentucky did not even

[400 U.S. 112, 182] mention Negro suffrage in their attacks on the Amendment, although Finck discussed the reasons why the Southern States could not be expected to ratify it, Globe 2460-2462, and Shanklin characterized the Amendment as "tyrannical and oppressive." Globe 2501. Eldridge of Wisconsin [47](#) and Randall of Pennsylvania [48](#) affirmatively indicated their understanding that with the Amendment the Radicals had at least temporarily abandoned their crusade for Negro suffrage, as did Finck when the measure returned from the Senate with amendments. [49](#)

The other two Democrats to participate in the three days of debate on H. R. 127, Boyer of Pennsylvania and Rogers of New Jersey, have been a source of great comfort to those who set out to prove that the history of the Fourteenth Amendment is inconclusive on this issue. Each, in the course of a lengthy speech, included a sentence which, taken out of context, can be read to indicate a fear that 1 might prohibit racial restrictions on the ballot. Boyer said, "The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly,

[400 U.S. 112, 183] the political equality of the negro race." Globe 2467. Rogers, commenting on the uncertain scope of the Privileges and Immunities Clause, observed: "The right to vote is a privilege." Globe 2538.

While these two statements are perhaps innocuous enough to be left alone, it is noteworthy that each speaker had earlier in the session delivered a tirade against the principle of Negro suffrage; [50](#) if either seriously believed that the Fourteenth Amendment might enfranchise the freedmen, he was unusually calm about the fact. That they did not seriously interpret the Amendment in this way is indicated as well by other portions of their speeches. [51](#)

[400 U.S. 112, 184]

Two other opponents of the Fourteenth Amendment, Phelps of Maryland and Niblack of Indiana, made statements which have been adduced to show that there was no consensus on the applicability of the Fourteenth Amendment to suffrage laws. Phelps voiced his sentiments on May 5, three days before the beginning of debate. [52](#) In the course of a speech urging a soft policy on reconstruction, he expressed the fear that the Amendment would authorize Congress to define the privileges of citizens to include the suffrage - or indeed that it might have that effect proprio vigore. Globe 2398. Phelps did not repeat this sentiment after he was contradicted by speaker after speaker during the debates proper; indeed, he did not take part in the debates at all, but simply voted against the Amendment, along with most of his Democratic colleagues. Globe 2545. [53](#)

As for Niblack, on the first day of debate he made the following remarks:

"I give notice that I will offer the following amendment if I shall have the opportunity:

[400 U.S. 112, 185]

"Add to the fifth section as follows:

"Provided, That nothing contained in this article shall be so construed as to authorize Congress to regulate or control the elective franchise within any State, or to abridge or restrict the power of any State to regulate or control the same within its own jurisdiction, except as in the third section hereof prescribed." Globe 2465.

Like Phelps, Niblack found it unnecessary to participate in the debates. He was not heard from again until the vote on the call for the previous question. As Garfield ascertained at the time, the only opportunity to amend H. R. 127 would arise if the demand was voted down. Niblack voted to sustain it. Globe 2545.

Debate in the House was substantially concluded by Bingham, the man primarily responsible for the language of 1. Without equivocation, he stated:

"The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.

"The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people." Globe 2542.

Stevens then arose briefly in rebuttal. He attacked Bingham for saying in another portion of his speech that the disqualification provisions of 3 were unenforceable. He did not contradict - or even refer to - Bingham's

[400 U.S. 112, 186] interpretation of 1 and 2. Globe 2544. The vote was taken and the resolution passed immediately thereafter. Globe 2545.

To say that Stevens did not contradict Bingham is to minimize the force of the record. Not once, during the three days of debate, did any supporter of the Amendment criticize or correct any of the Republicans or Democrats who observed that the Amendment left the ballot "exclusively under the control of the States." Globe 2542 (Bingham). This fact is tacitly admitted even by those who find the debates "inconclusive." The only contrary authority they can find in the debates is the pale remarks of the four Democrats already discussed.

54

In the Senate, which did not have a gag rule, matters proceeded at a more leisurely pace. The introductory speech would normally have been given by Senator Fessenden of Maine, the Chairman of the Joint Committee on behalf of the Senate, but he was still weak with illness and unable to deliver a lengthy speech. The duty of presenting the views of the Joint Committee therefore devolved on Senator Howard of Michigan. 55

[400 U.S. 112, 187]

Howard 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]. Globe 2766.

"The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." Ibid. Howard stated that while he personally would have preferred to see the freedmen enfranchised, the Committee was confronted with the necessity of proposing an amendment which could be ratified.

"The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race." Ibid.

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. [56](#)

[400 U.S. 112, 188] For some, however, time has muddied the clarity with which he spoke. [57](#)

The Senate, like the House, made frequent reference to the fact that the proposed amendment would not result in the enfranchisement of the freedmen. The supporters

[400 U.S. 112, 189] who expressed their regret at the fact were Wade of Ohio, [58](#) Poland of Vermont, [59](#) Stewart of Nevada, [60](#) Howe of Wisconsin, [61](#) Henderson of Missouri, [62](#)

[400 U.S. 112, 190] and Yates of Illinois. [63](#) The remarks of Senator Sherman of Ohio, whose support for the amendment was lukewarm, see Globe 2986, seem to have been based on the common interpretation. [64](#)

Doolittle of Wisconsin, whose support for the President resulted in his virtually being read out of the Republican Party, proposed to base representation on adult male voters. Globe 2942. In a discussion with Senator Grimes of Iowa, a member of the Joint Committee, about the desirability of this change, Doolittle defended himself by pointing out that: "Your amendment proposes to

[400 U.S. 112, 191] allow the States to say who shall vote." Globe 2943. Grimes did not respond. Among the Democrats, no different view was expressed. Those whose remarks are informative are Hendricks of Indiana, [65](#) Cowan of Pennsylvania, [66](#) Davis of Kentucky, [67](#) and Johnson of Maryland. [68](#)

Senator Howard, who had opened debate, made the last remarks in favor of the Amendment. He said:

"We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate

[400 U.S. 112, 192] it by any clause of the Constitution of the United States." Globe 3039.

Shortly thereafter the Amendment was approved. Globe 3041-3042.

In the House, there was a brief discussion of the Senate amendments and the measure generally, chiefly by the Democrats. Stevens then concluded the debate as he had begun it, expressing his regret that the Amendment would not enfranchise the freedmen. [69](#) The House accepted the Senate changes and sent the measure to the States. Globe 3149.

E. Collateral Evidence of Congressional Intent

It has been suggested that despite this evidence of congressional understanding, which seems to me overwhelming, the history is nonetheless inconclusive. Primary reliance is placed on debates over H. R. 51, the Joint Committee's first effort in the field of the basis of representation. In these debates, some of the more extreme Radicals, typified by Senator Sumner of Massachusetts, suggested that Congress had power to interfere with state voter qualifications at least to the extent of enfranchising the freedmen. This power was said to exist in a variety of constitutional provisions, including Art. I, 2, Art. I, 4, the war power, the power over territories, the guarantee of a republican form of government, and 2 of the Thirteenth Amendment. Those who held this view expressed concern lest the Committee's proposal be read to authorize the States to discriminate on racial grounds and stated that they could not vote for the measure if such was the correct construction. They were sometimes comforted by supporters

[400 U.S. 112, 193] of the committee proposal, who assured them that there would be no such effect. From these statements, and the fact that some of those who took the extreme view ultimately did vote for the proposed Fourteenth Amendment, it is sought to construct a counter-argument: if H. R. 51, properly interpreted, would not have precluded congressional exercise of power otherwise existing under the constitutional provisions referred to, then 2 of the Fourteenth Amendment, properly interpreted, does not preclude the exercise of congressional power under 1 and 5 of that Amendment.

This argument, however, is even logically fallacious, and quite understandably none of the opinions filed today place much reliance on it. I do not maintain that the framers of the Fourteenth Amendment took away with one hand what they had given with the other, but simply that the Amendment must be construed as a whole, and that for the reasons already given, *supra*, at 167-170, the inclusion of 2 demonstrates that the framers never intended to confer the power which my Brethren seek to find in 1 and 5. Bingham, for one, distinguished between these two positions. When it was suggested in the debates over H. R. 51 that the proviso would remove pre-existing congressional power over voting qualifications, Bingham made the response quoted by my colleagues. *Globe* 431-432; see *post*, at 276-277. When it was observed during the debates over the proposed Fourteenth Amendment that 2 demonstrated that the Amendment did not reach state control over voting qualifications, Bingham was the one making the observation. *Globe* 2542, quoted *supra*, at 185. As Bingham seems to have recognized, the sort of argument he made in connection with H. R. 51 is beside the point with respect to the Fourteenth Amendment.

In any event, even disregarding its analytical difficulties, the argument is based on blatant factual shortcomings. All but one of the speakers on whose statements

[400 U.S. 112, 194] primary reliance is placed stated, either during the debates on the Fourteenth Amendment or subsequently, that the Amendment did not enfranchise the freedmen. [70](#)

Finally, some of those determined to sustain the legislation now before us rely on speeches made between two and three years after Congress had sent the proposed Amendment to the States. Boutwell and Stevens in the House, and Sumner in the Senate, argued that the Fifteenth

[400 U.S. 112, 195] Amendment or enfranchising legislation was unnecessary because the Fourteenth Amendment prohibited racial discrimination in voter qualifications. Each had earlier expressed the opposite position. [71](#) Their subsequent attempts to achieve by assertion what they had not had the votes to achieve by constitutional processes can hardly be entitled to weight.

F. Ratification

State materials relating to the ratification process are not very revealing. For the most part only gubernatorial messages and committee reports have survived. [72](#) So far as my examination of these materials reveals, while the opponents of the Amendment were divided

[400 U.S. 112, 196] and sometimes equivocal on whether it might be construed to require enfranchisement, [73](#) the supporters of the Amendment in the States approached the congressional proponents in the unanimity of their interpretation. I have discovered only one brief passage in support of the Amendment which appears to be based on the assumption that it would result in enfranchisement. [74](#) These remarks, in the message of the Governor of Illinois, had to compete in the minds of the legislators with the viewpoint of the Chicago Tribune. This Radical journal repeatedly criticized the Amendment's lack of an enfranchising provision, and at one time it even expressed the hope that the South would refuse to ratify the Amendment so that the North would turn to enfranchisement of the freedmen as the only means of reconstruction. June 25, 1866, quoted in James 177. In all the other States I have examined, where the materials are sufficiently full for the understanding of a supporter of the Amendment to appear, his understanding

[400 U.S. 112, 197] has been that enfranchisement would not result. [75](#)

The scanty official materials can be supplemented by other sources. There was a congressional election in the fall of the year the Fourteenth Amendment went to the States. The Radicals ran on the Amendment as their reconstruction program, attempting to force voters to choose between their plan and that of President Johnson. From the campaign speeches and from newspaper reactions, we can get some further idea of the understanding of the States.

The tone of the campaign was set by the formal report of the Joint Committee, which Fessenden openly stated he had composed as a partisan document. James 147. Indeed, it was not even submitted to Congress until the day the Senate approved the measure, and then only in manuscript form. Globe 3038. On the delicate issue of Negro suffrage, the report read as follows: [76](#)

"Doubts were entertained whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or could act directly on the subject. It was doubtful, in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. As the best if not the only method of surmounting the difficulty, and as eminently just and proper in itself, your committee came to the conclusion that political power should be possessed in all the States exactly in proportion as the right of suffrage should be granted, without distinction of color or race.

[400 U.S. 112, 198] This it was thought would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise. Such a provision would be in its nature gentle and persuasive, and would lead, it was hoped, at no distant day, to an equal participation of all, without distinction, in all the rights and privileges of citizenship, thus affording a full and adequate protection to all classes of citizens, since all would have, through the ballot-box, the power of self-protection.

"Holding these views, your committee prepared an amendment to the Constitution to carry out this idea, and submitted the same to Congress. Unfortunately, as we think, it did not receive the necessary constitutional support in the Senate, and therefore could not be proposed for adoption by the States. The principle involved in that amendment is, however, believed to be sound, and your committee have again proposed it in another form, hoping that it may receive the approbation of Congress."

Newspapers expressed the same view of the reach of the Amendment. Even while deliberations were underway, predictions that Congress would come up with a plan involving enfranchisement of the freedmen had gradually ceased. James 91. When the Amendment was released to the press, Andrew Johnson was reported as seeing in it a "practical abandonment of the negro suffrage issue." Cincinnati Daily Commercial, April 30, 1866, quoted in James 117. The New York Herald had reported editorially that the Amendment reflected an abandonment of the Radical push for Negro suffrage and acceptance of Johnson's position that control over suffrage rested exclusively with the States. May 1, 1866, reported in James 119. The Nation, a Radical organ,

[400 U.S. 112, 199] attributed the absence of any provision on Negro suffrage to "sheer want of confidence in the public." 2 Nation 545 (May 1, 1866), quoted in James 120. The Chicago Tribune, another Radical organ, complained that 1 was objectionable as "surplusage," May 5, 1866, quoted in James 123, and later in the same month criticized the measure for "postponing, and not settling" the matter of equal political rights for Negroes. May 31, 1866, quoted in James 146. As deliberations continued, the reporting went on in the same vein. The New York Times reported that with elections approaching, "No one now talks or dreams of forcing Negro suffrage upon the Southern States." June 6, 1866. The Cincinnati Daily Commercial and the Boston Daily Journal for June 7, 1866, commented on the Radicals' abandonment of Negro suffrage. James 145.

Much the same picture emerges from the campaign speeches. Although an occasional Democrat expressed the fear that the Amendment would or might result in political equality, [77](#) the supporters of the Amendment denied such effects without exception that I have discovered. Among the leading congressional figures who stated in campaign speeches that the Amendment did not prohibit racial voting qualifications were Senators Howe, Lane, Sherman, Sumner, and Trumbull, and Congressmen Bingham, Delano, Schenck, and Stevens. See James 159-168, 173, 178; Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 70-78 (1949).

As was pointed out above, all but a handful of Northern States prohibited blacks from voting at all,

[400 U.S. 112, 200] and opposition to a change was intense. Between 1865 and 1869 referenda on the issue rejected impartial Negro suffrage in Colorado Territory, Connecticut, Wisconsin, Minnesota (twice), the District of Columbia, Nebraska Territory, Kansas, Ohio, Michigan, Missouri, and New York. Only Iowa and Minnesota accepted it, and that on the day Grant was elected to the Presidency. [78](#) It is inconceivable that those States, in that climate, could have ratified the Amendment with the expectation that it would require them to permit their black citizens to vote.

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. If the consequences for our federal system were not so serious, the contention that the history is "inconclusive" would be undeserving of attention. And, with all respect, the transparent failure of attempts to cast doubt on the original understanding is simply further evidence of the force of the historical record.

II

The history of the Fourteenth Amendment with respect to suffrage qualifications is remarkably free of the problems which bedevil most attempts to find a reliable guide to present decision in the pages of the past. Instead, there is virtually unanimous agreement, clearly and repeatedly expressed, that 1 of the Amendment did not reach discriminatory voter qualifications. In this rather remarkable situation, the issue of the bearing of the historical understanding on constitutional interpretation squarely arises.

[400 U.S. 112, 201]

I must confess to complete astonishment at the position of some of my Brethren that the history of the Fourteenth Amendment has become irrelevant. Ante, at 139-140. In the six years since I first set out much of this history, [79](#) I have seen no justification for such a result which appears to me at all adequate. With matters in this posture, I need do no more by way of justifying my reliance on these materials than sketch the familiar outlines of our constitutional system.

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 [80](#) 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. [81](#) 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

[400 U.S. 112, 202] 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. [82](#) 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

[400 U.S. 112, 203] unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers. [83](#) 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. [84](#)

[400 U.S. 112, 204]

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, [85](#) 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." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). [86](#) It inheres in the structure of the

[400 U.S. 112, 205] constitutional system itself. Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure. Nor is that structure adequately protected by a requirement that the judiciary be able to perceive a basis for the congressional interpretation, the only restriction laid down in *Katzenbach v. Morgan*, [384 U.S. 641](#) (1966).

It is suggested that the proper basis for the doctrine enunciated in *Morgan* lies in the relative factfinding competence of Court, Congress, and state legislatures. *Post*, at 246-249. In this view, as I understand it, since Congress is at least as well qualified as a state legislature to determine factual issues, and far better qualified than this Court, where a dispute is basically factual in nature the congressional finding of fact should control, subject only to review by this Court for reasonableness.

In the first place, this argument has little or no force as applied to the issue whether the Fourteenth Amendment covers voter qualifications. Indeed, I do not understand the adherents of *Morgan* to maintain the contrary.

[400 U.S. 112, 206] But even on the assumption that the Fourteenth Amendment does place a limit on the sorts of voter qualifications which a State may adopt, I still do not see any real force in the reasoning.

When my Brothers refer to "complex factual questions," post, at 248, they call to mind disputes about primary, objective facts dealing with such issues as the number of persons between the ages of 18 and 21, the extent of their education, and so forth. The briefs of the four States in these cases take no issue with respect to any of the facts of this nature presented to Congress and relied on by my Brothers DOUGLAS, ante, at 141-143, and BRENNAN, WHITE, and MARSHALL, post, at 243-246, 279-280. Except for one or two matters of dubious relevance, these facts are not subject to rational dispute. The disagreement in these cases revolves around the evaluation of this largely uncontested factual material. [87](#) On the assumption that maturity and experience are relevant to intelligent and responsible exercise of the elective franchise, are the immaturity and inexperience of the average 18-, 19-, or 20-year-old sufficiently serious to justify denying such a person a direct voice in decisions affecting his or her life? Whether or not this judgment is characterized as "factual," it calls for striking a balance between incommensurate interests. Where the balance is to be struck depends ultimately on the values and the perspective of the decisionmaker. It is a matter as to which men of good will can and do reasonably differ.

I fully agree that judgments of the sort involved here are beyond the institutional competence and constitutional

[[400 U.S. 112, 207](#)] authority of the judiciary. See, e. g., *Baker v. Carr*, [369 U.S. 186, 266](#) -330 (1962) (Frankfurter, J., dissenting); *Kramer v. Union School District*, [395 U.S. 621, 634](#) -641 (1969) (STEWART, J., dissenting). They are pre-eminently matters for legislative discretion, with judicial review, if it exists at all, narrowly limited. But the same reasons which in my view would require the judiciary to sustain a reasonable state resolution of the issue also require Congress to abstain from entering the picture.

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. This order of things is more efficient and more congenial to our system and, in my judgment, much more likely to achieve satisfactory results than one in which the Court has a free hand to replace state legislative judgments with its own. See *Ferguson v. Skrupa*, [372 U.S. 726](#) (1963).

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

[400 U.S. 112, 208] 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. Whether one agrees with this judgment or not, it is the one expressed by the Framers in leaving voter qualifications to the States. The Supremacy Clause does not, as my colleagues seem to argue, represent a judgment that federal decisions are superior to those of the States whenever the two may differ.

To be sure, my colleagues do not expressly say that Congress or this Court is empowered by the Constitution to substitute its own judgment for those of the States. However, before sustaining a state judgment they require a "clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." [88](#) Post, at 238; see post, at 247 n. 30. I should think that if the state interest were truly "compelling" and "substantial," and a clear showing could be made that the voter qualification was "necessary" to its preservation, no reasonable person would think the qualification undesirable. Equivalently, if my colleagues or a majority of Congress deem a given voting qualification undesirable as a matter of policy, they must consider that the state interests involved are not "compelling" or "substantial" or that they can be adequately protected in other ways. It follows that my colleagues must be prepared to hold invalid as a matter

[400 U.S. 112, 209] of federal constitutional law all state voting qualifications which they deem unwise, as well as all such qualifications which Congress reasonably deems unwise. For this reason, I find their argument subject to the same objection as if it explicitly acknowledged such a conclusion.

It seems to me that the notion of deference to congressional interpretation of the Constitution, which the Court promulgated in *Morgan*, is directly related to this higher standard of constitutionality which the Court intimated in *Harper v. Virginia Board of Elections*, [383 U.S. 663](#) (1966), and brought to fruition in *Kramer*. 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.

III

Since I cannot agree that the Fourteenth Amendment empowered Congress, or the federal judiciary, to control voter qualifications. I turn to other asserted sources of congressional power. My Brother BLACK would find that such power exists with respect to federal elections by

[400 U.S. 112, 210] virtue of Art. I, 4, and seemingly other considerations that he finds implicit in federal authority.

The constitutional provisions controlling the regulation of congressional elections are the following:

Art. I, 2: "the Electors [for Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Art. I, 4: "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."

Amdt. XVII: "The electors [for Senators] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

It is difficult to see how words 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. The reason for the scheme is not hard to find. In the Constitutional Convention, Madison expressed the view that: "The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." 2 M. Farrand, Records of the Federal Convention of 1787, pp. 249-250 (1911). He explained further in The Federalist No. 52, p. 326 (C. Rossiter ed. 1961):

"To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the

[400 U.S. 112, 211] States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution."

See also Federalist No. 60, p. 371 (C. Rossiter ed. 1961) (Hamilton), quoted in the opinion of MR. JUSTICE STEWART, post, at 290, which is to the same effect.

As to presidential elections, the Constitution provides:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors"
Art. II, 1, cl. 2.

"The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Art. II, 1, cl. 4.

Even the power to control the "Manner" of holding elections, given with respect to congressional elections by Art. I, 4, is absent with respect to the selection of presidential electors. [89](#) And, of course, the fact that it was deemed necessary to provide separately for congressional

[400 U.S. 112, 212] power to regulate the time of choosing presidential electors and the President himself demonstrates that the power over "Times, Places and Manner" given by Art. I, 4, does not refer to presidential elections, but only to the elections for Congressmen. Any shadow of a justification for congressional power with respect to congressional elections therefore disappears utterly in presidential elections.

IV

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.

The history of the Fourteenth Amendment may well foreclose the possibility that 5 empowers Congress to enfranchise a class of citizens so that they may protect themselves against discrimination forbidden by the first section, but it is unnecessary for me to explore that question. For I think it fair to say that the 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

[400 U.S. 112, 213] 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. [90](#)

I therefore conclude, for these and other reasons given in this opinion, that in 302 of the Voting Rights Act Amendments of 1970 Congress exceeded its delegated powers.

B. Residency

For reasons already stated, neither the power to regulate voting qualifications in presidential elections, asserted by my Brother BLACK, nor the power to declare the meaning of 1 of the Fourteenth Amendment, relied on by my Brother DOUGLAS, can support 202 of the Act. It would also be frivolous to contend that requiring States to allow new arrivals to vote in presidential elections is an appropriate means of preventing local discrimination against them in other respects, or of forestalling violations of the Fifteenth Amendment. The remaining grounds relied on are the Privileges and Immunities Clause of Art. IV, 2, [91](#) and the right to travel across state lines.

While the right of qualified electors to cast their ballots and to have their votes counted was held to be a privilege of citizenship in *Ex parte Yarbrough*, [110 U.S. 651](#) (1884), and *United States v. Classic*, [313 U.S. 299](#) (1941), these decisions were careful to observe that it

[400 U.S. 112, 214] remained with the States to determine the class of qualified voters. It was federal law, acting on this state-defined class, which turned the right to vote into a privilege of national citizenship. 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. *Minor v. Happersett*, 21 Wall. 162, 170-175 (1875); *Pope v. Williams*, [193 U.S. 621, 632](#) (1904); *Breedlove v. Suttles*, [302 U.S. 277, 283](#) (1937); cf. *Snowden v. Hughes*, [321 U.S. 1, 6](#)-7 (1944). 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. [92](#) The Privileges and Immunities Clause of Art. IV of the Constitution is a direct descendent of Art. IV of the Articles of Confederation:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States"

It is inconceivable that these words when used in the Articles could have been understood to abolish state durational residency requirements. [93](#) There is not a

[400 U.S. 112, 215] vestige of evidence that any further extent was envisioned for them when they were carried over into the Constitution. And, as I have shown, when they were substantially repeated in 1 of the Fourteenth Amendment it was affirmatively understood that they did not include the right to vote. The Privileges and Immunities Clause is therefore unavailing to sustain any portion of 202.

The right to travel across state lines, see *United States v. Guest*, [383 U.S. 745, 757](#) -758 (1966), and *Shapiro v. Thompson*, [394 U.S. 618, 630](#) (1969), is likewise insufficient to require Idaho to conform its laws to the requirements of 202. MR. JUSTICE STEWART justifies 202 solely on the power under 5 of the Fourteenth Amendment to enforce the Privileges and Immunities Clause of 1 which he deems the basis for the right to travel. Post, at 285-287. 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.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL do not anchor the right of interstate travel to any specific constitutional provision. Post, at 237-238. Past decisions to which they refer have relied on the two Privileges and Immunities Clauses, just discussed, the Due Process Clause of the Fifth Amendment, and the Commerce Clause. See *Shapiro v. Thompson*, [394 U.S., at 630](#) n. 8; *id.*, at 663-671 (dissenting opinion). The Fifth Amendment is wholly inapplicable to state laws; and surely the Commerce Clause cannot be seriously relied on to sustain the Act here challenged. With no specific clause of the Constitution

[400 U.S. 112, 216] empowering Congress to enact 202, I fail to see how that nebulous judicial construct, the right to travel, can do so.

C. Literacy

The remaining provision of the Voting Rights Act Amendments involved in these cases is the five-year suspension of Arizona's requirement that registrants be able to read the Constitution in English and to write their names. Although the issue is not free from difficulty, I am of the opinion that this provision can be sustained as a valid means of enforcing the Fifteenth Amendment.

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. [94](#) This danger of violation of 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under 2.

Whether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make. [95](#) The fact that the suspension is only for five years will require Congress to re-evaluate at the close of that period. While a less sweeping approach

[400 U.S. 112, 217] in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable. [96](#) I therefore agree that 201 of the Act is a valid exercise of congressional power to the extent it is involved in this case. I express no view about its validity as applied to suspend tests such as educational qualifications, which do not lend themselves so readily to discriminatory application or effect.

For the reasons expressed in this opinion, I would grant the relief requested in Nos. 43, Orig., and 44, Orig. I would dismiss the complaint in No. 47, Orig., for failure to state a claim on which relief can be granted. In No. 46, Orig., I would grant declaratory relief with respect to the validity of 201 of the Voting Rights Act Amendments as applied to Arizona's current literacy test; I would deny relief in all other respects, with leave to reapply to the United States District Court for the District of Arizona for injunctive relief in the event it proves necessary, which I am confident it will not.

V

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

[400 U.S. 112, 218] state electoral processes, I would, particularly perforce of the decisions cited in n. 84, supra, 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.

In taking this position, I feel fortified by the evident malaise among the members of the Court with those decisions. Despite them, a majority of the Court holds that this congressional attempt to lower the voting age by simple legislation is unconstitutional, insofar as it relates to state elections. Despite them, four members of the Court take the same view of this legislation with respect to federal elections as well; and the fifth member of the Court who considers the legislation constitutionally infirm as regards state elections relies not at all on any of those decisions in reaching the opposite conclusion in federal elections. And of the eight members of the Court who vote to uphold the residential provision of the statute,

[400 U.S. 112, 219] only four appear to rely upon any of those decisions in reaching that result.

In these circumstances I am satisfied that I am free to decide these cases unshackled by a line of decisions which I have felt from the start entailed a basic departure from sound constitutional principle.

APPENDIX TO OPINION OF HARLAN, J. [removed]

FOOTNOTES

[[Footnote 1](#)] The Attorney General of the United States, a citizen of New York, is named as defendant. The jurisdictional basis alleged is Art. III, 2, which gives this Court original jurisdiction over controversies [\[400 U.S. 112, 153\]](#) between a State and a citizen of another State. We held a similar suit justiciable and otherwise within our original jurisdiction in *South Carolina v. Katzenbach*, [383 U.S. 301, 307](#) (1966). The parties have not asked us to re-examine the validity of that ruling, and since the Court has not undertaken to do so, I am content to sustain jurisdiction on the authority of that decision.

[[Footnote 2](#)] In response to inquiries from the Attorney General, Arizona, Oregon, and Texas indicated willingness to abide by 202 of the Act, governing residency, registration, and absentee voting in presidential elections and to conform conflicting state laws.

[[Footnote 3](#)] The account in the text is largely drawn from J. James, *The Framing of the Fourteenth Amendment* (1956) (hereafter James), and to some extent from W. Gillette, *The Right To Vote: Politics and the Passage of the Fifteenth Amendment* (1969) (hereafter Gillette), and B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914) (hereafter Kendrick), as well.

[[Footnote 4](#)] "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the

whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

[[Footnote 5](#)] See *infra*, at 209-212, for the text of these provisions, and for discussion of the contention that they empower Congress to set qualifications of voters in federal elections.

[[Footnote 6](#)] "The United States shall guarantee to every State in this Union a Republican Form of Government."

[[Footnote 7](#)] E. g., Proclamation of May 29, 1865, 13 Stat. 760 (North Carolina).

[[Footnote 8](#)] The texts of the state constitutions are most readily available in F. Thorpe, *The Federal and State Constitutions* (1909). The qualifications imposed by the various States three years later, when the Fifteenth Amendment was proposed, are presented in tabular form in Hearings on the Voting Rights Bill, S. 1564, before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 128-129 (1965).

[[Footnote 9](#)] James 33.

[[Footnote 10](#)] See *Globe* 209 (Freedmen's Bureau Bill); *Globe* 211 (Civil Rights Bill).

[[Footnote 11](#)] While formally further consideration was postponed until a date in April, six weeks off, *Globe* 1095, it was generally understood that "April means indefinitely." 2 *Nation* 289 (Mar. 1. 1866), quoted in James 87.

[[Footnote 12](#)] The only change made in 1 was the addition of the Citizenship Clause by the Senate. *Globe* 3041. The primary change made in 2 was to condition reduction of representation on denial or abridgment of the right to vote in certain named elections, rather than to speak generally of denial or abridgment of "the

elective franchise." Ibid. That section now reads: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

[[Footnote 13](#)] Section 1 of that Act provided in part that "all persons . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Act of Apr. 9, 1866, 1, 14 Stat. 27.

[[Footnote 14](#)] In this connection, Professor Fairman's admonition of 20 years ago is even more forceful than it was when he wrote: "We know so much more about the constitutional law of the Fourteenth Amendment than the men who adopted it that we should

[400 U.S. 112, 163] remind ourselves not to be surprised to find them vague where we want them to prove sharp. Eighty years of adjudication has taught us distinctions and subtleties where the men of 1866 did not even perceive the need for analysis." Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 9 (1949).

[[Footnote 15](#)] See, e. g., Globe 599 (Sen. Trumbull); Globe 1117 (Cong. Wilson of Iowa, quoting Kent's Commentaries and Bouvier's Law Dictionary); Globe 1152 (Cong. Thayer). There were some, however, who considered the distinction either nonexistent or too uncertain to be

[400 U.S. 112, 164] a basis for legislation. E. g., Globe 477 (Sen. Saulsbury); Globe 1157 (Cong. Thornton); Globe 1292-1293 (Cong. Bingham). It hardly seems necessary to point out that the jurisprudential concept of "political" as opposed to "civil" or "natural" rights bears no relation to that class of nonjusticiable issues perhaps inappropriately known as "political questions." See the opinion of MR. JUSTICE DOUGLAS, ante, at 137-140.

[[Footnote 16](#)] See generally Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949), especially at 8-9.

[[Footnote 17](#)] The remarks of these three Democrats, Niblack, Boyer, and Rogers, are discussed infra, at 182-185. Also discussed there are the remarks of a fourth Democratic Representative, Phelps, which were delivered before the start of debate on the proposed Fourteenth Amendment.

[[Footnote 18](#)] While this provision might seem useless in light of the Fifteenth Amendment, it was doubtless intended to prohibit the imposition of property or literacy qualifications which, even though fairly applied, would have the effect of disfranchising most of the Negroes. The Radicals had sought to prohibit such qualifications in the Fifteenth Amendment, but were unsuccessful. See Gillette 53, 56-62, 69-72, 76.

[[Footnote 19](#)] While the history indicates that the supporters of the Fourteenth Amendment would have been surprised at the suggestion that the Amendment brought qualifications for state office under federal supervision, officeholding was not the focus of attention during the consideration of the Amendment. Moreover, state

[400 U.S. 112, 168] power to set voter qualifications, unlike state power to set qualifications for office, is explicitly recognized not only in the original Constitution but in 2 of the Fourteenth Amendment itself. Whether these distinctions are sufficient to justify testing state qualifications for office by the Fourteenth Amendment is a matter not presented by these cases. Where the state action has a racial basis, see *Anderson v. Martin*, [375 U.S. 399](#) (1964), I am not prepared to assume that the Fifteenth Amendment provides no protection. Despite the statement in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, post, at 252, I would find it surprising if a State could undercut the right to vote by taking steps to ensure that all candidates are unpalatable to voters of a certain race. Although an explicit provision on officeholding was deleted from the proposed Fifteenth Amendment at the eleventh hour, the idea that the right to vote without more implies the right to be voted for was specifically referred to by supporters of the Fifteenth Amendment in both Houses of Congress. See *Cong. Globe*, 40th Cong., 3d Sess., 1425-1426 (1869) (*Cong. Boutwell*); *id.*, at 1426 (*Cong. Butler*); *id.*, at 1629 (*Sen. Sawyer*).

[[Footnote 20](#)] Hearings, *supra*, n. 8, at 128-129.

[[Footnote 21](#)] See, e. g., *Globe* 141-142 (*Cong. Blaine*); *Globe* 2766-2767 (*Sen. Howard*); *Globe* 2769-2770 (*Sens. Wade and Wilson*); *Globe* 3033 (*Sen. Henderson*).

[[Footnote 22](#)] The *Journal* is reprinted in *Kendrick*, *supra*, n. 3, at 37-129.

[[Footnote 23](#)] The attempts were not altogether successful. See *James* 108-109.

[[Footnote 24](#)] See generally *Kendrick* 18-22. For reasons to be developed below, *infra*, at 197, the report of the Joint Committee, H. R. Rep. No. 30, 39th Cong., 1st Sess. (1866), is less useful as an indication of the understanding of the Committee and the Congress than as an indication of the understanding of the ratifying

States.

[[Footnote 25](#)] Owen's account of the Fourteenth Amendment is given in Political Results from the Varioloid, 35 Atlantic Monthly 660 (June 1875).

[[Footnote 26](#)] See James 109-112; Gillette 24; Owen, *supra*, n. 25, at 666.

[[Footnote 27](#)] See the votes on Steven's motion to select the alternative which reduced representation rather than that which prohibited racial restrictions on the ballot, Kendrick 52; Boutwell's motion to condition readmission of Tennessee on that State's agreement not to discriminate in its voter qualifications, Kendrick 70; Stevens' motion to strike out the provision of the Owen plan enfranchising Negroes after 1876, Kendrick 101; and the motion to condition readmission of Tennessee and Arkansas on their having provided impartial male suffrage, as well as on conforming their laws and constitutions to the requirements of the proposed amendment (which included Bingham's provision when this motion was made), Kendrick 109. Bingham was not, however, wholly opposed to Negro suffrage. As chairman of the subcommittee, he reported the equal-rights provision which would have empowered Congress to provide for equal political rights and privileges, Kendrick 56, although he was the one who subsequently had that replaced with the first equal-rights provision reported to Congress. Kendrick 61. As already noted, the substitute contained substantially identical language, but omitted reference to political rights and privileges. Bingham also voted for Owen's plan, which would have enfranchised Negroes in 1876, when it was first presented. Kendrick 85. In February 1867 he moved to condition readmission of the Southern States on impartial male suffrage as well as on the States' ratifying the Fourteenth Amendment and conforming their laws thereto. Kendrick 123.

[[Footnote 28](#)] While any guess as to the motives of Bingham and the other members of the committee is sheer speculation, it is not necessarily true that they believed they were replacing specific language with

[400 U.S. 112, 174] general. The author of the original plan, for one, seems to have taken the opposite view. He gave the following characterization of 1 some years later: "A declaration who is a citizen: unnecessary, if we had given suffrage to the negro; since there could be no possible doubt that an elector, native-born, is a citizen of the United States. Also a specification of the particular civil rights to be assured: out of place, I think, in a constitutional amendment, though necessary and proper in a civil rights bill." Owen, *supra*, n. 25, at 666 (emphasis added).

[[Footnote 29](#)] The proceedings of the Joint Committee are examined in greater detail in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL. Post, at 257-263. I agree with their apparent conclusion that the Journal sheds little light on the contemporary construction of the Fourteenth Amendment. One is left to do what he can with the two facts noted at the outset of this section: that of the plans considered by the Joint Committee, all provided either for reduction of representation or for enfranchisement while none provided for both at the same time; and that the Committee consistently rejected provisions to enfranchise the freedmen, with the conceivable exception of a plan which was defeated in the House largely because of the scope of the powers it transferred from the States to the Federal Government.

[[Footnote 30](#)] Unless, of course, one adopts a "conspiracy theory" of the history of the Fourteenth Amendment. Thus far no one has (quite) done so in this context.

[[Footnote 31](#)] "I regret more than I shall be able to tell this House that we have not found the situation [sic] of affairs in this country such, and the public virtue such that we might come out on the plain, unanswerable proposition that every adult intelligent citizen of the United States, unconvicted of crime, shall enjoy the right of suffrage." Globe 2462.

[[Footnote 32](#)] "I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country." Globe 2469. "So far as I am individually concerned, I object to the amendment as a whole, because it does not go far enough and propose to at once enfranchise every loyal man in the country." Ibid.

[[Footnote 33](#)] "The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country - and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people - I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation." Globe 2508.

[[Footnote 34](#)] "The second section, Mr. Speaker, is, in my judgment, as nearly correct as it can be without being fully, in full measure, right. But one thing is right, and that is secured by the amendment. Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, ultimately recognized and admitted." Globe 2511.

[[Footnote 35](#)] "I did hope to see the rights of the freedom completely established I did hope . . . that we should have the manhood and magnanimity to declare that men who have wielded the sword in defense of their country are fit to be intrusted with the ballot. But I am convinced that my expectations, hitherto fondly cherished, are doomed to some disappointment." Globe 2537.

[[Footnote 36](#)] "This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best." Globe 2540.

[[Footnote 37](#)] [If the freed slaves had been added] to the thinking, voting men of the southern States, it would be just and proper that that addition should be represented in this body. But we all know that such is not the case. In those States themselves the late slaves do not enter into the basis of local representation. . . . "Would it not be a most unprecedented thing that when this population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here" Globe 2464.

[[Footnote 38](#)] "The second proposition is, in short, to limit the representation of the several States as those States themselves shall limit suffrage. . . . " . . . And why not? If the negroes of the South are not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union? If they are not to be counted as against the southern people themselves, why should they be counted as against us?" Globe 2498.

[[Footnote 39](#)] H. R. 51 "deprived [the southern States] of all inducement for [the] gradual admission [of the freemen] to the right of suffrage, inasmuch as it exacted universal suffrage as the only condition upon which they should be counted in the basis of representation at all. . . . I voted against a proposition which seemed to

me so unjust and so injurious, not only to the whites of the southern States, but to the colored race itself. Well, sir, that amendment was rejected in the Senate, and the proposition, as embodied in the committee's report, comes before us in a very different form. It is now proposed to base representation upon suffrage, upon the number of voters, instead of upon the aggregate population in every State of the Union. And as I believe that to be essentially just, and likely to remedy the unequal representation of which complaint is so justly made, I shall give it my vote." Globe 2502. Later, in discussion of 3, which at that time would have

[400 U.S. 112, 180] disfranchised certain rebels in federal elections, Raymond remarked that the effect would be to allow "one fifth, one eighth, or one tenth, as the case may be, of the people of these southern States to elect members from those States, to hold seats upon this floor." Ibid. It is obvious that the possibility of Negroes' voting in these elections did not cross his mind.

[[Footnote 40](#)] "But this House is not prepared to enfranchise all men; the nation, perhaps, is not prepared for it to-day; the colored race are not prepared for it, probably, and I am sure the rebels are unfit for it; and as Congress has not the moral courage to vote for it, then put in this provision which cuts off the traitor from all political power in the nation, and then we have secured to the loyal men that control which they so richly deserve." Globe 2505.

[[Footnote 41](#)] "This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age." Globe 2510.

[[Footnote 42](#)] "I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have no doubt that the Government of the United States has authority to do this under the Constitution; but I do not think they have

the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion." Globe 2532.

[[Footnote 43](#)] "If South Carolina persists in withholding the ballot from the colored man, then let her take the alternative we offer, of confining her to the white basis of representation" Globe 2535.

[[Footnote 44](#)] Spalding's speeches are given at Globe 2509-2510. His only remarks addressed to 1 and 2 read: "As to the first measure proposed, a person may read it five hundred years hence without gathering from it any idea that this rebellion ever existed. The same may be said of the second proposition, for it only proposes that, the bondsmen being made free, the apportionment of Representatives in Congress shall be based upon the whole number of persons who exercise the elective franchise, instead of the population." Globe 2509. A month later, in the debate over the Amendment when it had returned from the Senate, Spalding expressed his views more clearly: "I say, as an individual, that I would more cheerfully give my vote if that provision allowed all men of proper age whom we have made free to join in the exercise of the right of suffrage in this country. But if I cannot obtain all that I wish, I will go heartily to secure all we can obtain." Globe 3146.

[[Footnote 45](#)] Longyear's speech is published at Globe 2536-2537. He did not in terms address himself to any section except the third. However, it is not difficult to read his statement that the proposals of the Joint Committee disappointed "the expectations of the people" and his personal hopes as having reference to the absence of any provision on suffrage.

[[Footnote 46](#)] Shellabarger spoke only briefly, and this in connection with the disfranchising section. In the course of his remarks he expressed the view that congressional power to regulate voter qualifications in federal

elections was granted by Art. I, 4. Globe 2512.

[[Footnote 47](#)] "Why is it that the gentleman from Pennsylvania [Mr. STEVENS] gives up universal suffrage? Why is it that he and other gentlemen give up universal confiscation? Why is it that other gentlemen give up universal butchery of that people? It is a compromise of what they call principle for the purpose of saving their party in the next fall election." Globe 2506.

[[Footnote 48](#)] "Gentlemen here admit that they desire [federal control over suffrage], but that the weak kneed of their party are not equal to the issue. Your purpose is the same, and but for that timidity you would now ingraft negro suffrage upon our Constitution and force it on the entire people of this Union." Globe 2530.

[[Footnote 49](#)] "While this [second] section admits the right of the States thus to exclude negroes from voting, it says to them, if you do so exclude them they shall also be excluded from all representation; and you shall suffer the penalty by loss of representation." Globe 3145.

[[Footnote 50](#)] Boyer's speech was made in opposition to a proposal to enfranchise Negroes in the District of Columbia. He then thought Negro suffrage a "monstrous proposition," Globe 176, which was incompatible with "the broad general principle that this is, and of right ought to be, a white man's Government." Globe 175. One of Rogers' harangues on the subject came in connection with the same bill. There he spoke of "the monstrous doctrine of political equality of the negro race with the white at the ballot-box," Globe 198, and launched into an attack remarkable for its vitriol.

[[Footnote 51](#)] Boyer viewed 3, which at that time would have prohibited voluntary participants in the rebellion from voting in federal elections, as "the most objectionable of all the parts," Globe 2467, as it would disfranchise nine-tenths of the voting population of the South for more than four years. The second section he

found objectionable as designed "to reduce the number of southern representatives in Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage." Globe 2467. These remarks indicate no awareness that the first section would increase the number of voters in the Southern States and also render any "inducement" to Negro suffrage unnecessary. Rogers later in his speech asserted: "The committee dare not submit the broad proposition to the people of the United States of negro suffrage. They dare not to-day pass the negro suffrage bill which passed this House in the Senate of the United States because, as I have heard one honorable and leading man on the Republican side of the House say, it would

[400 U.S. 112, 184] sink into oblivion the party that would advocate before the American people the equal right of the negro with the white man to suffrage." Globe 2538. When H. R. 127 was returned by the Senate with amendments, Rogers addressed the House and stated that when the records of the Joint Committee were made public, it would be revealed that the Committee at first agreed to recommend universal Negro suffrage, but reconsidered because of the force of public opinion. Globe App. 230. Rogers was himself a member of the Joint Committee, and he presumably was referring to the acceptance and then rejection of Owen's plan for enfranchisement in 1876.

[[Footnote 52](#)] The Amendment, however, had been released to the press on April 28. James 115.

[[Footnote 53](#)] It is not amiss to point out that whatever force Phelps' and Rogers' interpretations may have in the face of the contrary authority, even they foresaw no danger from the Equal Protection Clause as a source of federal power over the suffrage.

[[Footnote 54](#)] Like my colleagues, post, at 264, I find it difficult to understand what Bingham meant when he said 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." Globe 2542. However, I do not find this mysterious sentence to

mean that the exercise of the elective franchise is exclusively under the control of the States and Congress, nor do I find it to dilute the force of his explicit statements quoted above that 1 did not reach the right to vote. The general statements by Bingham and Stevens to the effect that the Amendment was designed to achieve equality before the law, or would be effectuated by legislation in part, likewise do not weaken the force of the statements specifically addressed to the suffrage question quoted above.

[[Footnote 55](#)] Fessenden, however, was present in the Senate and participated in the discussion. See Globe 2763, 2769, 2770. He was therefore in a position to correct any gross misinterpretation of his views or of those of the Committee.

[[Footnote 56](#)] My colleagues, post, at 264, point to Howard's reference to *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3230) (CCED Pa. 1825), in order to "gather some intimation of what probably will be the opinion of the judiciary" on the scope of the Privileges and Immunities Clause of 1. Globe 2765. As the text indicates, Howard rejected Justice Washington's lengthy dictum insofar as it said that the protected privileges and immunities included "the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised." No other Senator quoted or referred to this portion of Washington's opinion during the debates over the proposed Fourteenth Amendment. *Corfield*, which held that New Jersey could constitutionally restrict access to her oyster beds to her own residents, was the leading authority on privileges and immunities in the mind of the 39th Congress, but it was not the only one. *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797) (Samuel Chase, J.), and *Abbot v. Bayley*, 6 Pick. 89 (Mass. 1827) (Parker, C. J.), were also cited. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 12-15 (1949). Both specifically stated that the privileges and immunities protected by Art. IV, 2, did not include the right of suffrage or the right to hold office.

[[Footnote 57](#)] Howard was a very clear-spoken man. When it was suggested, during the debates over the Fifteenth Amendment, that the freedmen were entitled to the ballot by virtue of the Privileges and Immunities Clause of the Fourteenth Amendment, he recalled his role in the framing of that Amendment and said: "I feel constrained to say here now that this is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth article. I think such a construction cannot be maintained." Cong. Globe, 40th Cong., 3d Sess., 1003 (1869). He then referred to the debates, 2 of the Fourteenth Amendment, and the fact that "[n]obody ever supposed that the right of voting or of holding office was guaranteed by that second section of the fourth article of the old Constitution" to bolster his construction of 1 of the Fourteenth Amendment. Ibid.

[[Footnote 58](#)] "I think our friends, the colored people of the South, should not be excluded from the right of voting, and they shall not be if my vote and the votes of a sufficient number who agree with me in Congress shall be able to carry it. I do not agree in this particular with the Senator from Michigan [Mr. Howard]. He yields to the provision in the committee's resolution on the subject reluctantly, because he does not believe three fourths of the States can be got to ratify that proposition which is right and just in itself. My own opinion is that if you go down to the very foundation of justice, so far from weakening yourself with the people, you will strengthen yourself immensely by it; but I know that it is not the opinion of many here, and I suppose we must accommodate ourselves to the will of majorities, and if we cannot do all we would, do all we can. I propose for myself to contend for all I can get in the right direction, and finally to go with those who will give us anything that is beneficial." Globe 2769.

[[Footnote 59](#)] "I should be much better satisfied if the right of suffrage had been given at once to the more intelligent of ["the colored people of the South"] and such as had served in our Army. . . . Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be

glad to go further." Globe 2963-2964.

[[Footnote 60](#)] "It declares that all men are entitled to life, liberty, and property, and imposes upon the Government the duty of discharging these solemn obligations, but fails to adopt the easy and direct means for the attainment of the results proposed. It refuses the aid of four million people in maintaining the Government of the people. . . . [But] it furnishes a conclusive argument in favor of universal amnesty and impartial suffrage. . . . The utter impossibility of a final solution of the difficulties by the means proposed will cause the North to clamor for suffrage." Globe 2964.

[[Footnote 61](#)] "I am sorry to have to put that clause [2] into our Constitution, as I am sorry for the necessity which calls upon us to put the preceding clause into the Constitution. I wish there was no community and no State in the United States that was not

[400 U.S. 112, 190] prepared to say with my friend from Nevada [Mr. Stewart] that all men may be represented in the Congress of the United States and shall be represented and shall choose their own representatives. That is the better doctrine; that is the true doctrine. I would much prefer, myself, to unite with the people of the United States in saying that hereafter no man shall be excluded from the right to vote, than to unite with them in saying that hereafter some men may be excluded from the right of representation." Globe App. 219.

[[Footnote 62](#)] Henderson, who had offered a direct enfranchising provision as an alternative to the Committee's first effort in the field of representation, see Globe App. 115, stated that he now recognized that "the country is not yet prepared" to share political power with Negroes, and he supported the Committee plan. Globe 3035.

[[Footnote 63](#)] "[A]lthough we do not obtain suffrage now, it is not far off, because the grasping desire of the

South for office, that old desire to rule and reign over this Government and control its destinies, will at a very early day hasten the enfranchisement of the loyal blacks." Globe 3038.

[[Footnote 64](#)] "There is no reason why the white citizens of South Carolina should vote the political power of a class of people whom they say are entirely unfit to vote for themselves. If there is any portion of the people of this country who are unfit to vote for themselves, their neighbors ought not to vote for them." Globe 2986.

There was no indication that Sherman considered South Carolina's disqualification on racial grounds any more improper than Massachusetts' limitations of the franchise to men, which he mentioned in the next breath.

[[Footnote 65](#)] "If you think the negro ought to have the right of voting; if you are in favor of it, and intend it shall be given, why do you not in plain words confer it upon them? It is much fairer than to seek it by indirection, and the people will distinctly understand you when you propose such a change of the Constitution." Globe 2939.

[[Footnote 66](#)] "What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania, and you say to her that she must either allow her negroes to vote or have one member of Congress less." Globe 2987.

[[Footnote 67](#)] "[The second section's] true meaning was intended to be difficult to be reached, but when understood it is a measure which shrinks from the responsibility of openly forcing negro suffrage upon the late slave States, but attempts by a great penalty to coerce them to accept it." Globe App. 240.

[[Footnote 68](#)] "It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the

Government of the United States will be impotent to redress." Globe 3027. Johnson was the only Democratic Senator on the Joint Committee.

[[Footnote 69](#)] "With [the rebel States'] enlarged basis of representation, and exclusion of the loyal men of color from the ballot-box, I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition-precedent." Globe 3148.

[[Footnote 70](#)] Kelly: see Globe 2469, quoted at n. 32, supra. Farnsworth: see Globe 2540, quoted at n. 36, supra. Eliot: see Globe 2511, quoted at n. 34, supra. Higby: see Globe 3978 (debate over readmission of Tennessee despite all-white electorate). Bingham: see Globe 2542, quoted supra, at 185; see also Globe 3979 (debate over readmission of Tennessee). Stevens: see Globe 2459-2460, quoted supra, at 175-177; Globe 3148, quoted at n. 69, supra. Raymond: see Globe 2502, quoted at n. 39 supra. Ashley: see Globe 2882. Summer: see n. 71, infra. Fessenden: see H. R. Rep. No. 30, 39th Cong., 1st Sess., XIII-XIV (1866), quoted infra, at 197-198. Yates: see Globe 3038, quoted at n. 63, supra. Stewart: see Globe 2964, quoted at n. 60, supra. Wade: see Globe 2769, quoted at n. 58, supra. The exception is Senator Wilson of Massachusetts, who did not address himself to this issue. However, he participated in the debates, see Globe 2770, 2986-2987, and was therefore in a position to express disagreement with the interpretation uniformly offered in the Senate. Secondary reliance is placed on Shellabarger, Cook, Boutwell, Julian, and Lawrence of Ohio. These Representatives, with the exception of Boutwell, see n. 33, supra, did not participate significantly in the debates over the Fourteenth Amendment. The substance of their earlier remarks is that Congress had some power, usually by way of the Guarantee Clause, see n. 6, supra, to oversee state voter qualifications. Shellabarger also relied on Art. I, 4, see n. 46, supra; infra, at 210; Julian relied on the Thirteenth Amendment; and Boutwell looked to the Declaration of Independence. The relevance of these views to the scope of 1 of the Fourteenth Amendment is not apparent.

[[Footnote 71](#)] Stevens: see Globe 2459-2460, quoted *supra*, at 175-177; Globe 3148, quoted at n. 69, *supra*; James 163 (campaign speech in fall of 1866). Boutwell: see Globe 2508, quoted at n. 33, *supra*; Globe 3976 (debate over readmission of Tennessee). Sumner did not actually participate in the debates on H. R. 127. However, after the caucus of Republican Senators had agreed on the form of the Amendment, Sumner gave notice that he intended to move to amend the bill accompanying the proposed Amendment. This bill, S. 292, provided that any Confederate State might be readmitted to representation in Congress once the proposed Amendment had become part of the Constitution and the particular State should have ratified it and modified its constitution and laws in conformity therewith. The bill is reprinted in H. R. Rep. No. 30, 39th Cong., 1st Sess., V-VI, and in Kendrick 117-119. Sumner's amendment would have provided that a State might be readmitted when it should have ratified the Fourteenth Amendment and modified its constitution and laws in conformity therewith "and shall have further provided that there shall be no denial of the elective franchise to citizens of the United States because of race or color, and that all persons shall be equal before the law." Globe 2869 (emphasis added). Sumner also referred to Negro suffrage as unfinished business in speeches that fall. James 173, 178.

[[Footnote 72](#)] For citations to the state materials, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 84-132 (1949).

[[Footnote 73](#)] Fear that the Amendment would reach voting was expressed in Brevier Legis. Rep. [Indiana] 45-46, 80, 88-89 (1867); Tenn. H. R. J. 38 (Extra Sess. 1866); Fla. S. J. 102 (1866); N.C. S. J. 96-97 (1866-1867); S. C. H. R. J. 34 (1866); and Tex. S. J. 422-423 (1866). The last four States rejected the proposed Amendment. Opponents of the Amendment stated or assumed that it would not reach voting qualifications in Ark. H. R. J. 288-289 (1866); Fla. S. J. 8-9 (1866); Report of the Joint Committee on Federal Relations, Md. H. R. Doc. MM, p. 15 (Mar. 18, 1867); Mass. H. R. Doc. No. 149, pp. 7-9, 16-17 (1867); and Wis. S. J. 102-103

(1867). Fla. H. R. J. 76-78 (1866); Ind. H. R. J. 102-103 (1867); and N. H. S. J. 71-72 (1866) are equivocal.

[[Footnote 74](#)] "Are not all persons born or naturalized in the United States and subject to its jurisdiction, rightfully citizens of the United States and of each State, and justly entitled to all the political and civil rights citizenship confers? and should any State possess the power to divest them of these great rights except for treason or other infamous crime?" Ill. H. R. J. 40 (1867).

[[Footnote 75](#)] Ind. H. R. J. 47-48 (1867); Kan. S. J. 45 (1867); Maine S. J. 23 (1867); Mass. H. R. Doc. No. 149, pp. 25-26 (1867); Nev. S. J. App. 9 (1867); Vt. S. J. 28 (1866); W. Va. S. J. 19 (1867); Wis. Assembly J. 33 (1867).

[[Footnote 76](#)] H. R. Rep. No. 30, 39th Cong., 1st Sess., XIII-XIV (1866).

[[Footnote 77](#)] I have found references to only two such speeches, one by Senator Hendricks and the other by one George M. Morgan, a candidate for Congress in Ohio. Cincinnati Daily Commercial, Aug. 9, 1866, p. 1, col. 4, quoted in Fairman, *supra*, n. 14, at 72; Cincinnati Daily Commercial, Aug. 23, 1866, p. 2, col. 3, quoted in Fairman, *supra*, at 75.

[[Footnote 78](#)] See Gillette, *supra*, n. 3, at 25-27.

[[Footnote 79](#)] Reynolds v. Sims, [377 U.S. 533, 589](#) (1964) (dissenting opinion).

[[Footnote 80](#)] Art. IV, 4. See n. 6, *supra*, for the text.

[[Footnote 81](#)] The contention that Congress has power to override state judgments as to qualifications for voting in federal elections is discussed *infra*, at 209-212.

[[Footnote 82](#)] Amdt. XV: "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." Amdt. XIX: "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 sex. "Congress shall have power to enforce this article by appropriate legislation." Amdt. XXIV: "Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. "Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

[[Footnote 83](#)] See, e. g., *Harper v. Virginia Board of Elections*, [383 U.S. 663, 670](#) (1966): "Our conclusion, like that in *Reynolds v. Sims*, [[377 U.S. 533](#) (1964),] is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires."

[[Footnote 84](#)] Most of the cases in which this Court has used the Equal Protection Clause to strike down state voter qualifications have been decided since 1965. Eight such cases have been decided by opinion. *Carrington v. Rash*, [380 U.S. 89](#) (1965); *Louisiana v. United States*, [380 U.S. 145](#) (1965); *Harper v. Virginia Board of Elections*, [383 U.S. 663](#) (1966); *Katzenbach v. Morgan*, [384 U.S. 641](#) (1966); *Kramer v. Union School District*, [395 U.S. 621](#) (1969); *Cipriano v. City of Houma*, [395 U.S. 701](#) (1969); *Evans v. Cornman*, [398 U.S. 419](#) (1970); *Phoenix v. Kolodziejki*, [399 U.S. 204](#) (1970). Other cases have been summarily disposed of. In none of these cases did the Court advert to the argument based on the historical understanding. Before 1965, although this Court had occasionally entertained on the merits challenges to state voter qualifications under the Equal Protection Clause, only two cases had sustained the challenges. *Nixon v. Herndon*, [273 U.S. 536](#) (1927), held that a Texas statute limiting participation in the Democratic Party primary to whites violated the Fourteenth Amendment. *Nixon v. Condon*, [286 U.S. 73](#) (1932), held that Texas did not avoid the reach of the *Herndon*

[400 U.S. 112, 204] decision by transferring to the party's executive committee the power to set qualifications for participation in the primary. In neither of the Nixon cases was the history of the Fourteenth Amendment suggested to the Court. Both cases were argued on the assumption that racial prohibitions on voting in state general elections would violate the Fourteenth as well as the Fifteenth Amendment. This potential line of decisions proved abortive when *United States v. Classic*, [313 U.S. 299](#) (1941), laid the groundwork for holding that participation in party primaries was included within the "right . . . to vote" protected by the Fifteenth Amendment. See *Reynolds v. Sims*, [377 U.S. 533, 614](#) n. 72 (1964) (dissenting opinion). The Nixon opinions were not relied on by the Court in the subsequent white-primary cases, *Smith v. Allwright*, [321 U.S. 649](#) (1944), and *Terry v. Adams*, [345 U.S. 461](#) (1953), and they were not even referred to in the recent cases on voter qualifications cited above.

[[Footnote 85](#)] In this particular instance [the other two branches of the Government have in fact expressed conflicting views as to the validity of Title III of the Act, the voting-age provision. See H. R. Doc. No. 91-326 (1970).

[[Footnote 86](#)] In fact, however, I do not understand how the doctrine of deference to rational constitutional interpretation by Congress, espoused by the majority in *Katzenbach v. Morgan*, [384 U.S. 641](#) (1966), is consistent with this statement of Chief Justice Marshall or

[400 U.S. 112, 205] with our reaffirmation of it in *Cooper v. Aaron*, [358 U.S. 1, 18](#) (1958): "[Marbury] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

[[Footnote 87](#)] Contrast Metropolitan Cas. Ins. Co. v. Brownell, [294 U.S. 580](#) (1935), relied on by my colleagues. In that case the crucial factual issue, on which the record was silent, was whether casualty insurance companies not incorporated in Indiana "generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." [294 U.S., at 585](#).

[[Footnote 88](#)] It might well be asked why this standard is not equally applicable to the congressional expansion of the franchise before us. Lowering of voter qualifications dilutes the voting power of those who could meet the higher standard, and it has been held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, [377 U.S. 533, 555](#) (1964) (footnote omitted). Interference with state control over qualifications for voting in presidential elections in order to encourage interstate migration appears particularly vulnerable to analysis in terms of compelling federal interests.

[[Footnote 89](#)] Although MR. JUSTICE BLACK rests his decision in part on the assumption that the selection of presidential electors is a "federal" election, the Court held in *In re Green*, [134 U.S. 377, 379](#) (1890), and repeated in *Ray v. Blair*, [343 U.S. 214, 224](#)-225 (1952), that presidential electors act by authority of the States and are not federal officials.

[[Footnote 90](#)] At the time these suits were filed only two of the 50 States, Georgia and Kentucky, allowed 18-year-olds to vote, and only two other States, Hawaii and Alaska, set the voting age below 21. In subsequent referenda, voters in 10 States declined to lower the voting age; five States lowered the voting age to 19 or 20; and Alaska lowered the age from 19 to 18. See the *Washington Post*, Nov. 5, 1970, p. A13, col. 5.

[[Footnote 91](#)] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[[Footnote 92](#)] At the time the Constitution was adopted, additional restrictions based on payment of taxes and ownership of property, as well as creed and sex, were imposed, making the proposition even clearer.

[[Footnote 93](#)] See Art. II: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

[[Footnote 94](#)] The legislative history of the Voting Rights Act Amendments contain sufficient evidence to this effect, if any be needed.

[[Footnote 95](#)] Cf. 4 of the Voting Rights Act of 1965, 79 Stat. 438, which suspended literacy tests only in areas falling within a coverage formula and allowed reinstatement of the tests upon judicial determination that during the preceding five years no tests had been used with discriminatory purpose or effect. 42 U.S.C. 1973b (a) (1964 ed., Supp. V), amended by Pub. L. No. 91-285 3, 84 Stat. 315.

[[Footnote 96](#)] I assume that reasonableness is the applicable standard, notwithstanding the fact that the instant legislation is challenged on the ground that it improperly dilutes the votes of literate Arizona citizens. But see *Kramer v. Union School District*, [395 U.S. 621](#) (1969); n. 88, supra.

City of Boerne v. Flores

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After the Supreme Court decided *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), Congress passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.* Included in the statute are the following:

(a) Findings

The Congress finds that—

- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
- (2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

The statute's substantive requirement is:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Thus, the express purpose was to restore a judicial test that the Court had previously used but then had declined to apply in *Smith*. This was the first time that Congress had sought to impose a rule of decision on the courts, and the Supreme Court was not hesitant to assert its prerogative in this area.

Holding: The RFRA is unconstitutional [as to the states]. Congress has authority under section 5 of the 14th Amendment to enforce the limitations of section 1, but does not have the power to define the substance of those limitations in the exercise of its enforcement power.

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. The Joint Committee on Reconstruction of the 39th Congress began drafting what would become the Fourteenth Amendment in January 1866. The objections to the Committee's first draft of the Amendment, and the rejection of the draft, have a direct bearing on the central issue of defining Congress' enforcement power. In February, Republican Representative John Bingham of Ohio reported the following draft Amendment to the House of Representatives on behalf of the Joint Committee:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." Cong. Globe, 39th Cong., 1st Sess., 1034 (1866).

The proposal encountered immediate opposition, which continued through three days of debate. Members of Congress from across the political spectrum criticized the Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. E. g., *id.*, at 1063-1065 (statement of Rep. Hale); *id.*, at 1082

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(statement of Sen. Stewart); *id.*, at 1095 (statement of Rep. Hotchkiss); *id.*, at App. 133-135 (statement of Rep. Rogers). Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution. Typifying these views, Republican Representative Robert Hale of New York labeled the Amendment "an utter departure from every principle ever dreamed of by the men who framed our Constitution," *id.*, at 1063, and warned that under it "all State legislation, in its codes of civil and criminal jurisprudence and procedure ... may be overridden, may be repealed or abolished, and the law of Congress established instead." *Ibid.* Senator William Stewart of Nevada likewise stated the Amendment would permit "Congress to legislate fully upon all subjects affecting life, liberty, and property," such that "there would not be much left for the State Legislatures," and would thereby "work an entire change in our form of government." *Id.*, at 1082; accord, *id.*, at 1087 (statement of Rep. Davis); *id.*, at App. 133 (statement of Rep. Rogers). Some radicals, like their brethren "unwilling that Congress shall have any such power ... to establish uniform laws throughout the United States upon ... the protection of life, liberty, and property," *id.*, at 1095 (statement of Rep. Hotchkiss), also objected that giving Congress primary responsibility for enforcing legal equality would place power in the hands of changing congressional majorities, *ibid.* See generally Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 57 (1955); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 *Stan. L. Rev.* 3, 21 (1954).

As a result of these objections having been expressed from so many different quarters, the House voted to table the proposal until April. See, e. g., B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* 215, 217 (1914); Cong. Globe, 42d Cong., 1st Sess., App. 115 (1871) (statement

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of Rep. Farnsworth). The congressional action was seen as marking the defeat of the proposal. See *The Nation*, Mar. 8, 1866, p. 291 ("The postponement of the amendment ... is conclusive against the passage of [it]"); *New York Times*, Mar. 1, 1866, p. 4 ("It is doubtful if this ever comes before the House again ... "); see also *Cong. Globe*, 42d Cong., 1st Sess., at App. 115 (statement of Rep. Farnsworth) (The Amendment was "given its quietus by a postponement for two months, where it slept the sleep that knows no waking"). The measure was defeated "chiefly because many members of the legal profession s[aw] in [it] ... a dangerous centralization of power," *The Nation*, *supra*, at 291, and "many leading Republicans of thee] House [of Representatives] would not consent to so radical a change in the Constitution," *Cong. Globe*, 42d Cong., 1st Sess., at App. 151 (statement of Rep. Garfield). The Amendment in its early form was not again considered. Instead, the Joint Committee began drafting a new article of Amendment, which it reported to Congress on April 30, 1866.

Section 1 of the new draft Amendment imposed selfexecuting limits on the States. Section 5 prescribed that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See *Cong. Globe*, 39th Cong., 1st Sess., at 2286. Under the revised Amendment, Congress' power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective. Representative Bingham said the new draft would give Congress "the power ... to protect by national law the privileges and immunities of all the citizens of the Republic ... whenever the same shall be abridged or denied by the unconstitutional acts of any State." *Id.*, at 2542. Representative Stevens described the new draft Amendment as "allow[ing] Congress to correct the unjust legislation of the States." *Id.*, at 2459. See also *id.*, at 2768 (statement of Sen. Howard) (§ 5 "enables Congress, in case the States shall enact

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laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment"). See generally H. Brannon, *The Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States* 387 (1901) (Congress' "powers are only prohibitive, corrective, vetoing, aimed only at undue process of law"); *id.*, at 420, 452-455 (same); T. Cooley, *Constitutional Limitations* 294, n. 1 (2d ed. 1871) ("This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall 'abridge the privileges or immunities of citizens of the United States' "). The revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property. See, e. g., *Cong. Globe*, 42d Cong., 1st Sess., at App. 151 (statement of Rep. Garfield) ("The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State[s]"). After revisions not relevant here, the new measure passed both Houses and was ratified in July 1868 as the Fourteenth Amendment.

The significance of the defeat of the Bingham proposal was apparent even then. During the debates over the Ku Klux Klan Act only a few years after the Amendment's ratification, Representative James Garfield argued there were limits on Congress' enforcement power, saying "unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to [§ 5] ... the force and effect of the rejected [Bingham] clause." *Ibid.*; see also *id.*, at App. 115-116 (statement of Rep. Farnsworth). Scholars of successive generations have agreed with this assessment. See H. Flack, *The Adoption of the Fourteenth Amendment* 64 (1908); Bickel, *The Voting Rights Cases*, 1966.

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of pow-

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ers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. The Bingham draft, some thought, departed from that tradition by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation. Under it, "Congress, and not the courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States." Flack, *supra*, at 64. While this separation-of-powers aspect did not occasion the widespread resistance which was caused by the proposal's threat to the federal balance, it nonetheless attracted the attention of various Members. See Cong. Globe, 39th Cong., 1st Sess., at 1064 (statement of Rep. Hale) (noting that Bill of Rights, unlike the Bingham proposal, "provide[s] safeguards to be enforced by the courts, and not to be exercised by the Legislature"); *id.*, at App. 133 (statement of Rep. Rogers) (prior to Bingham proposal it "was left entirely for the courts ... to enforce the privileges and immunities of the citizens"). As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. Cf. *South Carolina v. Katzenbach*, 383 U. S., at 325 (discussing Fifteenth Amendment). The power to interpret the Constitution in a case or controversy remains in the Judiciary.

Brief mentions

In a few cases, the Court made some reference to the legislative history behind the 14th Amendment, but did not go into much detail.

The cases included here are:

- Katzenbach v. Morgan, 384 U.S. 641 (1966)
- Furman v. Georgia, 408 U.S. 238 (1972)
- Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

In the Brown case, the Court had directed the parties to brief the issue of whether the history of the Equal Protection clause permitted the operation of segregated schools, and ordered that the cases be reargued to address that question. A very extensive set of briefs with historical analyses was submitted. Nonetheless, the Court gave short shrift to these issues. These historical analyses were later used in a law review article addressing the issue, written by a clerk to one of the Justices. See Bickel, *The Original Understanding And The Segregation Decision*, Harvard Law Review, November 1955.

Katzenbach v. Morgan

384 U.S. 641 (1966)

Issue: Constitutionality of the Federal statute prohibiting literacy tests for voting

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter v. Northampton Election Bd.*, [360 U.S. 45](#), sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. Compare also *Guinn v. United States*, [238 U.S. 347, 366](#); *Camacho v. Doe*, 31 Misc. 2d 692, 221 N. Y. S. 2d 262 (1958), *aff'd* 7 N. Y. 2d 762, 163 N. E. 2d 140 (1959); *Camacho v. Rogers*, 199 F. Supp. 155 (D.C. S. D. N. Y. 1961). *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such [\[384 U.S. 641, 650\]](#) legislation is, as required by 5, appropriate legislation to enforce the Equal Protection Clause.

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. [9](#)The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v.*

Maryland, 4 Wheat. 316, 421:

"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."

Ex parte Virginia, [100 U.S., at 345](#) -346, decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under 5 had this same broad scope:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." [\[384 U.S. 641, 651\]](#)

Strauder v. West Virginia, [100 U.S. 303, 311](#) ; Virginia v. Rives, [100 U.S. 313, 318](#) . Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in South Carolina v. Katzenbach, [383 U.S. 301, 326](#) , that "[t]he basic test to be applied in a case involving 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." That test was identified as the one formulated in McCulloch v. Maryland. See also James Everard's Breweries v. Day, [265 U.S. 545, 558](#) -559 (Eighteenth Amendment). Thus the McCulloch v. Maryland standard is the measure of what constitutes "appropriate legislation" under 5 of the Fourteenth Amendment. 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.

We therefore proceed to the consideration whether 4 (e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch v. Maryland* standard, whether 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution." [10](#) [\[384 U.S. 641, 652\]](#)

FOOTNOTES

[[Footnote 9](#)] In fact, earlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment. See tenBroek, *The Antislavery Origins of the Fourteenth Amendment 187-190* (1951). The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. See, e. g., *Cong. Globe*, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals).

[[Footnote 10](#)] Contrary to the suggestion of the dissent, post, p. 668, 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 [\[384 U.S. 641, 652\]](#) 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.

Furman v. Georgia

408 U.S. 238 (1972)

Issues: Whether the death penalty violates the 8th Amendment's ban on cruel and unusual punishments, and whether that is carried through by the 14th

MR. JUSTICE DOUGLAS, concurring.

. . . Congressman Bingham, in proposing the Fourteenth Amendment, maintained that "the privileges or immunities of citizens of the United States" as protected by the Fourteenth Amendment included protection against "cruel and unusual punishments:"

"[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none." Cong. Globe, 39th Cong., 1st Sess., 2542.

Whether the privileges and immunities route is followed, or the due process route, the result is the same.

Brown v. Board of Education of Topeka

347 U.S. 483 (1954)

Issue: Whether the Equal Protection clause was violated by segregated schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.^[in2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.^[in3]**[p489]**

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools

is the status of public education at that time.^[n4] In the South, the movement toward free common schools, supported [p490] by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

Foonote 4:

For a general study of the development of public education prior to the Amendment, see Butts and Cremin, *A History of Education in American Culture* (1953), Pts. I, II; Cubberley, *Public Education in the United States* (1934 ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269-275; Cubberley, *supra*, at 288-339, 408-431; Knight, *Public Education in the South* (1922), cc. VIII, IX. See also H. Ex.Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408-423. In the country as a whole,

but particularly in the South, the War virtually stopped all progress in public education. *Id.* at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, *A History of Freedom of Teaching in American Schools* (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563-565.