

THE ADMINISTRATION'S ANTI-LITERACY TEST BILL:
WHOLLY CONSTITUTIONAL BUT
WHOLLY INADEQUATE

*William W. Van Alstyne**

THE nature of American national government has undergone a profound metamorphosis, moving from the near oligarchy which characterized the system as established in 1789 to the imperfectly representative government which it is today. At the time the Constitution was ratified, all restrictions then imposed by the several states on the right to vote for state and federal electors were preserved.¹ These various limitations on the franchise restricted the active body politic to approximately four percent of the total population.² Disfranchisement applied then, as now, to those under twenty-one,³ to those lacking sufficient residence in a given community, to the insane, and to the criminally confined. It applied also to all females, to virtually all Negroes (including many who were not slaves),⁴ to most who were not endowed with a freehold estate, to many not owning substantial personal property, and to those of particular religious convictions.

Since 1789, the franchise has been greatly extended through a series of seven amendments to the Constitution.⁵ And within the past six years, Congress has twice enacted laws affecting the right to vote.⁶ These recent legislative enactments, however, were designed only for the more efficient protection of persons already qualified to vote according to state laws. They have cast no reflection on the older constitutional tradition that the states may generally limit the federal electorate by fixing voter qualifications according to the local prevailing majority's notion of limited representative government.⁷ And, for nearly one hundred years,

* Associate Professor of Law, Ohio State University.—Ed.

¹ U.S. CONST. art. I, § 2. See *THE FEDERALIST* No. 52, at 360 (Wright ed. 1961) (Madison); *id.* No. 60, at 402 (Hamilton).

² See BISHOP, *HISTORY OF ELECTIONS IN THE AMERICAN COLONIES* 66-69 (1893); MCGOVNEY, *THE AMERICAN SUFFRAGE MEDLEY* 11-26 (1949) [hereinafter cited as MCGOVNEY]; MILLER, *A NEW HISTORY OF THE UNITED STATES* 109-12 (1958); PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 4-6, 14 (1918); 1959 U.S. COMM'N ON CIVIL RIGHTS REP. 19-26.

³ The current exceptions being Georgia (eighteen), Kentucky (eighteen), and Alaska (nineteen).

⁴ MCGOVNEY 17.

⁵ U.S. CONST. amends. XIII, XIV, XV, XVII, XIX, XXIII, and XXIV (proposed).

⁶ Civil Rights Act of 1957, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C.); Civil Rights Act of 1960, 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C.).

⁷ See note 1 *supra*; *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959); *Breedlove v. Suttles*, 302 U.S. 277 (1937); *United States v. Gradwell*, 243 U.S. 476

there has been no congressional attempt to expand the franchise without recourse to amending the Constitution.⁸ Indeed, after several years of unsuccessful attempts to eliminate poll tax qualifications by legislation alone,⁹ recourse has been taken once again to the cumbersome process of constitutional amendment.¹⁰ As a consequence of this tradition and the language of the Constitution itself,¹¹ it is generally presumed that incursions by the national government into the area of the states' power to limit the right to vote can be made only by the mechanism of constitutional amendment.

In the last session of Congress, however, extraordinary committee deliberation and floor debate resurrected the controversy over whether Congress might further extend the franchise without constitutional amendment.¹² The argument arose in connection with Senate Bill 2750 which seemingly would forbid states from requiring literacy, education, intelligence, or understanding qualifications above that level represented by a sixth-grade education. In the short run, the controversy engendered by the bill appeared to be entirely out of proportion to the probable impact of the proposed law itself. Although twenty states currently require some

(1917); *Guinn & Beal v. United States*, 238 U.S. 347 (1915); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

⁸ Various Reconstruction statutes affecting Negro suffrage were enacted prior to the adoption of the fifteenth amendment, but only a few of these remain and none attempt to confer the right to vote on persons not otherwise qualified according to state laws or protected by constitutional amendment.

The use of the fourteenth amendment to enfranchise Negroes [as in *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932)] has represented an unhistorical application of that amendment. The neglected provision in § 2 of the fourteenth amendment, that representation should be reduced to the extent that the male population over twenty-one is disenfranchised, clearly implied at the time that states were otherwise free to forbid Negroes from voting. See MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 11-19 (1909); CONG. GLOBE, 39th Cong., 1st Sess. 3027-28, 3039 (1866).

⁹ See, e.g., S. 1734, 82d Cong., 1st Sess. (1951); H.R. 29, 80th Cong., 1st Sess. (1947); H.R. 7, 79th Cong., 1st Sess. (1945); H.R. 1024 and S. 1280, 77th Cong., 1st Sess. (1941).

¹⁰ The desultory character of the Southern filibuster against the amendment, and the fact that some of the states otherwise discriminating against Negroes do not have a poll tax (e.g., Florida, Georgia, Louisiana, and South Carolina), confirm suggestions that the poll tax amendment will be of little significance. See MCGOVNEY 143-57; 1959 U.S. COMM'N ON CIVIL RIGHTS REP. 118.

¹¹ Section 2 of article I of the Constitution provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." See also the seventeenth amendment, supplanting art. I, § 3, and compare art. II, § 1, regarding the selection of President and Vice-President.

¹² *Hearings on S. 480, S. 2750, and S. 2979 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. (1962) [hereinafter cited as *Hearings*]; 108 CONG. REC. 6607 *et seq.* (daily ed. April 25, 1962).

literacy qualification,¹³ all but a few states have indicated that a sixth-grade ceiling would not hamper or invalidate their modest requirements.¹⁴ Nevertheless, the establishment of the broader principle of congressional interference would seem to invite limitless future forays into a domain which many regard as involving a basic states' right. It was therefore not surprising that an imposing array of legal scholars was summoned by both sides to examine the constitutional implications of the bill. These discussions,¹⁵ together with earlier discussions occasioned by the anti-poll tax bills, are doubtless of great importance. They have sharpened national awareness of an unexplored congressional power. Acceptance of the proponents' arguments would open a broad avenue to hasten the trend toward more fully representative government in the United States.¹⁶

Nevertheless, most of these discussions were quite unnecessary in the particular context of S. 2750. Indeed, the constitutional burdens gratuitously assumed by many who supported the bill were themselves so great that they may have inadvertently estranged some members of Congress who might otherwise be expected to support this type of legislation.¹⁷

The purpose of this brief article is neither to recapitulate the broad constitutional issues on which others have ably written, nor to examine the arguments which can be made for enhanced congressional control of the franchise. It is much narrower, intending only to assess the scope of S. 2750 which was co-sponsored by the majority and minority leaders,¹⁸ supported by the Administration,¹⁹ and likely to be considered again; to demonstrate its un-

¹³ *Hearings* 144-45, 604 n.32; MCGOVNEY 59-60; Ervin, *Literacy Tests for Voters: A Case Study in Federalism*, 27 *LAW & CONTEMP. PROB.* 481, 483 (1962).

¹⁴ *Hearings* 263, 276, 665-72.

¹⁵ See notes 12 and 13 *supra*; Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 *MINN. L. REV.* 513 (1962); Maggs & Wallace, *Congress and Literacy Tests: A Comment on Constitutional Power and Legislative Abnegation*, 27 *LAW & CONTEMP. PROB.* 510 (1962); Werdegarr, *The Constitutionality of Federal Legislation To Abolish Literacy Tests: Civil Rights Commission's 1961 Report on Voting*, 30 *GEO. WASH. L. REV.* 723 (1962); Comment, 50 *CALIF. L. REV.* 265 (1962); Note, 46 *MINN. L. REV.* 1076 (1962). See also 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* 522-41 (1953).

¹⁶ This is especially true of Dean Griswold's likening of the fifteenth amendment to the highly elastic commerce clause (*Hearings* 138-53), Professors Maggs' and Wallace's suggestion of an implied powers argument (*supra* note 15, at 517-23), Mr. Bonfield's able enlargement on Professor Crosskey's "republican form of government" theme (*supra* note 15), and Professor Crosskey's own rendition of art. I, § 4 (*op. cit. supra* note 15).

¹⁷ See Maggs & Wallace, *supra* note 15, at 513-14. Representative Celler of New York, normally a stalwart on civil rights legislation, allegedly refused to support the House version of S. 2750 on grounds of its doubtful constitutionality. See *N.Y. Times*, March 13, 1962, p. 25, col. 1.

¹⁸ 108 *CONG. REC.* 6615 (daily ed. April 25, 1962).

¹⁹ *Hearings* 261; *N.Y. Times*, March 16, 1962, p. 19, col. 3.

remarkable constitutionality; and to comment briefly on the efficacy of the bill (assuming it may become law) to secure the franchise from racial discrimination.

I. WHAT S. 2750 PROVIDES

It has generally been assumed that S. 2750 would deprive states of the power to prescribe literacy, educational, intelligence, or understanding qualifications beyond a sixth-grade education. Senator Ervin, who presided at the hearings and who opened discussion of the bill, stated: "I feel that a particular State . . . might reasonably and not arbitrarily conclude that a stricter requirement than a sixth-grade education is desirable. This bill would take from that State the right to make such a determination."²⁰ The staff memorandum of the Civil Rights Commission appears to concur in this view,²¹ and others who contributed to the hearings manifested a similar impression.²² It may be seen, however, that these impressions are inaccurate, and that S. 2750 does not affect the power of any state to set voter qualifications as high as it wishes.

The pivotal provision of the bill is in section 2(b), which provides:

"No person . . . may subject any other person to the deprivation of the right to vote in any Federal election 'Deprivation of the right to vote' shall include but shall not be limited to (1) the application to any person of standards or procedures more stringent than are applied to others similarly situated²³ and (2) the denial to any person otherwise qualified

²⁰ *Hearings* 30.

²¹ *Hearings* 168: "[T]he bill does not go so far as to outlaw literacy tests; it merely declares that a sixth grade education in any public school, including those of Puerto Rico, is a sufficient demonstration of literacy."

²² See, e.g., remarks of Professor Robert Dixon, *Hearings* 599: "A special vice of these bills, and one not stressed nearly enough in most current comment on them, is that they would put all States under a 'sixth grade' ceiling of literacy . . ." (Emphasis added.)

²³ Down to this point, S. 2750 is essentially repetitive of REV. STAT. § 2004 (1875), 42 U.S.C. § 1971(a) (1958), and raises no new problems. It has been argued that Congress is without authority to legislate regarding presidential electors because their selection is committed to the state legislatures under art. II, § 1 [See *McPherson v. Blacker*, 146 U.S. 1 (1892); *Walker v. United States*, 93 F.2d 383 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938); *McGOVNEY* 34-35, 160-61.], although the Supreme Court has upheld federal laws designed to protect the integrity of the presidential selection process. *Burroughs v. United States*, 290 U.S. 534 (1934); *Ex parte Yarbrough*, 110 U.S. 651 (1884). Even assuming the inclusion of presidential electors to exceed congressional authority in the context of S. 2750, however, so long as registration to qualify to vote for such electors occurs at the same time as for Representatives and Senators, lack of "standing" will make it impossible for the statute to be invalidated on such grounds. *United States v. Raines*, 362 U.S. 17 (1960).

A related question might arise under proposed § 2(b) were private parties to intimidate

by law of the right to vote on account of his *performance in any examination*, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited school in any State" (Emphasis added.)

To determine whether this provision conflicts with article I, section 2, and the seventeenth amendment (which we will assume reserve the power to prescribe voting qualifications to the states), we might ask simply whether it forbids a state from requiring more, or less, than a sixth-grade education of one who applies to register. If it does, most assuredly the power of states to prescribe "qualifications" has been trammled in some measure, and we would be obliged to argue that article I, section 2, and the seventeenth amendment do not indirectly commit federal elector qualifications exclusively to the states, or at least that they are sufficiently qualified by other provisions²⁴ so as not to invalidate this bill. Clearly, however, S. 2750 does not forbid states from requiring less than a sixth-grade education. In fact, neither does it forbid them from requiring more. It leaves the degree of qualification entirely to the states' discretion and represents only an unremarkable exercise of congressional power pursuant to article I, section 4. The bases for these conclusions follow.

A. *The Language of the Bill*

The bill does not state, in these or equivalent terms, that a "deprivation of the right to vote" would occur if a state disqualified any person because he had no more than a sixth-grade education. Nor does it say that a deprivation occurs upon rejection of an applicant lacking literacy beyond what can be expected of one who has completed six grades at an accredited school. Rather, it

Negroes from registering in a single registration process for voting in elections for both federal and state officers, where their intent was only to deter the Negroes from registering to vote for state officers. Since the power of Congress to reach local elections proceeds largely from the fourteenth and fifteenth amendments, and since these restrict congressional authority to legislating in an appropriate manner only against "state action," private intimidation would seem to be beyond congressional reach. Nevertheless, S. 2750 defines a "federal election" as one held "solely or *in part*" for the purpose of electing federal officers, and thus appears to reach private intimidation of voters for local candidates whenever, as is universally the case, such candidates are to be elected in the same election in which federal officers are elected. Dicta from two federal cases suggest that where the defendants, though intending to affect only the local election, act in a manner which necessarily corrupts the federal election also, or in a manner manifesting reckless disregard that their acts may have this incidental effect, they can be reached under federal statutes. *In re Coy*, 127 U.S. 731 (1888); *United States v. Nathan*, 238 F.2d 401 (7th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

²⁴ See notes 12, 13, 15 and 16 *supra*.

provides only that, regardless of the degree of literacy required by state law, the applicant may not be rejected for failure to demonstrate that measure of literacy *if the means employed to measure his literacy involved his performance on some examination*. The bill is simply a restriction on the manner of determining literacy, and not a restriction on the degree of literacy which may be required. It therefore contemplates the following situations.

1. State X enacts a statute requiring that all persons wishing to register to vote must demonstrate the equivalence of a *high school education*. The statute also provides that the qualification can be met upon presentation of a high school diploma, a notarized certification by a high school principal that the applicant has completed high school, or certification by a branch of the United States military that the applicant successfully completed the G.E.D. program. Although the requisite degree of literacy is higher than a sixth-grade education, the means of demonstrating the qualification do not involve a performance test administered by a registrar or other election official. If applied in an equal fashion to white and colored applicants, this state law would not conflict with S. 2750.

2. State Y provides that applicants for registration must demonstrate an understanding of good citizenship. The statutes of State Y require that this understanding be demonstrated by responding correctly to questions pertaining to state government, the questions to be posed by each registrar and the answers to be judged by each registrar. A, an applicant, applies for registration and is asked to interpret a passage from State Y's constitution, in satisfaction of the test. Such a procedure involves A's performance on an examination for literacy "or otherwise" and would be invalid under S. 2750, if A could show that he had completed the sixth grade.²⁵

²⁵ If A has not completed the sixth grade, then he may still be required to take the examination. Curiously, this treatment makes it entirely possible for a state to require more by way of education, intelligence, and understanding for those lacking a sixth-grade education than for those possessing it, because the questions which may be asked of an applicant lacking sixth-grade credentials may themselves require far more education in order to produce a satisfactory answer than is commonly possessed by a sixth grader. Mississippi requires applicants to "demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government," give a "reasonable interpretation" of any section of the state constitution, and be of "good character." Miss. CONST. art. 12, § 241-A (Proposed by-laws 1960, ch. 550, ratified by electors Nov. 8, 1960, inserted by Proclamation of the Secretary of State, Nov. 23, 1960). See also Miss. House Bill 905, of the legislature's 1962 session, in 7 RACE REL. L. REP. 932 (1962). Louisiana has similar requirements [LA. CONST. art. VIII, § 1] and adds the requirement that the applicant compute his exact age in years, months, and days, a chore subject to disagreement among Louisiana registrars and one which a registrar herself was unable

B. *The Legislative History of the Bill*

Proponents of the bill, on the suggestion of the Department of Justice, inserted the following remarks in the *Congressional Record*:

[Senator Keating]: "I believe that many who have challenged the bill's constitutionality have not fully understood its limited provisions and limited impact The argument that the States have the power to establish qualifications for voting can be conceded without in any way impairing the constitutionality of the bill

"This bill does not overturn any existing literacy qualifications. *If the existing qualification is objective, such as the completion of the eighth grade or third grade*, it has no operation. Only if the existing qualification is *subjective*, does the bill provide a procedure to prevent discrimination against electors on the basis of their race."²⁶

[Senator Javits]: "The means chosen in this particular proposed statute would deny to the giver of a *performance test* for registering and for voting the right or the opportunity to utilize that performance test to deny the right to vote if the person taking the test holds a sixth grade certificate.

"That does not mean it is a qualification for voting, Mr. President. This is the point which has been constantly, in my opinion, confused and obfuscated in this debate. This merely would mean that if the *performance test* is given and if such a sixth grade literacy certificate is produced, then the *performance test* stops at that point."²⁷

Similarly, the memorandum submitted by the Department of Justice makes the same point: "Under the bill the States would be prohibited from denying the right to vote for Federal officials on account of *performance on any educational-type examination*."²⁸

to perform. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., bk. 1, 56-57. Georgia's "literacy" requirement [GA. CONST. art. II, § 2-704] has been interpreted by statute to require that applicants define a "republican form of government" [GA. CODE ANN. § 34-119 (1962)], a task too weighty for the Supreme Court of the United States [See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874); *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).], and subject to a variety of interpretations by political philosophers. See ARISTOTLE, *CONSTITUTION OF ATHENS* 60-66 (Hafner ed. 1950); 1 CROSKEY, *POLITICS AND THE CONSTITUTION* 522-24 (1953); MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8-13, 19-22, 120, 126-28 (Nugent transl. 1949); MORLEY, *FREEDOM AND FEDERALISM* (1959); PLATO, *THE REPUBLIC* *passim* (3d ed. Jowett transl. 1888); *THE FEDERALIST* 49 (Editor's Introduction) (Wright ed. 1961); 1 *THE COMPLETE WORKS OF THOMAS PAINE* 369-70 (Foner ed. 1945); 2 *id.* at 372-80, 520.

²⁶ 108 CONG. REC. 7749 (daily ed. May 15, 1962). (Emphasis added.)

²⁷ *Id.* at 7744. (Emphasis added.)

²⁸ *Hearings* 303. (Emphasis added.)

It is this view of the bill which doubtless lays the foundation for the testimony of the Attorney General before the Subcommittee on Constitutional Rights:

"If they [the states] establish a specific and particular test for themselves of a second grade, fourth grade, or eighth grade, we do not change that one single bit. They have some specific test.

"It is when they get into an arbitrary area, Mr. Chairman, where we come in. So we are not setting qualifications.

"We are not establishing qualifications. All we are getting into is the question of testing of the qualifications . . . Now, they [the states] can establish any test of their own. If the State wants to establish a test, a specific and particular test, that an individual complete the eighth grade, for instance, they can set up that standard."²⁹

The full significance of directing the bill to a prohibition of performance tests, without restricting the degree of literacy a state may require to have demonstrated by other, objective, means, will immediately be appreciated from a brief review of the particular problem which occasioned the bill. This problem was not that states were tending to require unreasonably high standards of literacy for their prospective voters generally. Rather, it was that the *manner of testing* certain qualifications committed the fate of each applicant to the discretion of the registrar, by allowing the registrar to employ *subjective tests*. The practical difficulties of proving abuses under 42 U.S.C. section 1971³⁰ were felt to be an impediment to insuring that Negroes were treated no differently than whites. The point of the bill was to remove the opportunity for such abuses by forbidding registrars to use subjective tests for most voters—those possessing a sixth-grade education. The Civil Rights Commission has reported:

"There are reasonable grounds to believe that substantial numbers of Negro citizens are, or recently have been, denied the right to vote on grounds of race or color in about 100 counties in 8 Southern States: Alabama, Florida, Georgia,

²⁹ *Id.* at 271-72. See also *id.* at 463, 464 (testimony of Joseph Rauh): "I believe the Attorney General was correct in his reading of this and, certainly, that is the legislative history now, until changed, that a State can still say 'only college graduates.' They can still provide an educational test as long as it is an objective test which is not subject to the registrar's utilization on a performance basis and, therefore, on a possibly abused basis . . . They can say, as I have said before, that a college education is required, and that would not be barred by this bill."

³⁰ Civil Rights Act of 1957, § 131, 71 Stat. 637.

Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Some denials of the right to vote occur by reason of discriminatory application of laws setting qualifications for voters

"A common technique of discriminating against would-be voters on racial grounds involves the discriminatory application of legal qualifications for voters. Among the qualifications used in this fashion are requirements that the voter be able to read and write, that he be able to give a satisfactory interpretation of the Constitution, that he be able to calculate his age to the day, and that he be of 'good character.'"³¹

These findings confirm what the Commission had declared in its 1959 report,³² and a survey of cases filed under section 1971 will make even clearer that it is abuses of discretion by registrars, operating under state laws allowing them to test applicants by subjective standards, that is felt to be the problem.³³ In contrast, there is no evidence that states are felt to have set literacy qualifications too high, or that a qualification requiring more than a sixth-grade education would be a matter for congressional action, if the means for determining the qualification did not involve the discretion of registrars.

During the hearings, the question arose as to what difference S. 2750 would make, since a registrar could still refuse to register an applicant possessing a sixth-grade certificate or equivalent evidence of the state's literacy qualification, and since his refusal might result in lengthy litigation as it does under existing section 1971.³⁴ The answer was that the elimination of variable, subjective means of testing qualifications, and the consequent substitution of objective referents in measuring qualifications, tend to make it harder for registrars covertly to discriminate, easier for appli-

³¹ 1961 U.S. COMM'N ON CIVIL RIGHTS REP., bk. 1, 135-37.

³² 1959 U.S. COMM'N ON CIVIL RIGHTS REP. 133. Other sources, including the Assistant Attorney General responsible for enforcement of § 1971, have confirmed these findings. See Marshall, *Federal Protection of Negro Voting Rights*, 27 LAW & CONTEMP. PROB. 455, 461 (1962). See also KEY, SOUTHERN POLITICS IN STATE AND NATION 576 (1955); *Hearings* 610; Heyman, *Federal Remedies for Voteless Negroes*, 48 CALIF. L. REV. 190, 194 (1960); Comment, *Judicial Protection of Minority Voting Rights: The Case for Constitutional Reform*, 22 OHIO ST. L.J. 390, 391-93 (1961).

³³ See, e.g., *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1962); *United States v. Association of Citizens Councils, Inc.*, 196 F. Supp. 908 (W.D. La. 1961); *United States v. Raines*, 189 F. Supp. 121 (M.D. Ga. 1960); *United States v. McElveen*, 180 F. Supp. 10 (E.D. La.), *aff'd sub nom. United States v. Thomas*, 362 U.S. 58 (1960). Other cases of the same character are pending. *United States v. Penton* (M.D. Ala., No. 1741-N); *United States v. Lucky* (W.D. La., No. 8366); *United States v. Fox* (E.D. La., No. 11625); *United States v. Wilder* (W.D. La., No. 8695).

³⁴ *Hearings* 125 (question by Creech, committee counsel).

cants to know when they are being treated differently, and easier for the Government to prove its case.³⁵

This being the answer, it should be obvious that these aims are accomplished equally well by restricting the states from employing subjective examinations and all other discretionary criteria. These aims do not, on the other hand, require the substitution of a single, nationwide standard such as a sixth-grade certificate; they are met if the several states are confined to objective means of measuring qualifications, regardless of the level of qualification otherwise required. And this, as the language and background of S. 2750 indicate, is solely what the bill does.³⁶ To insist that it does more is needlessly to ignore its language, to overreach the problem, and to assume burdens of constitutional persuasion that are not easily carried.

II. CONSTITUTIONALITY OF S. 2750

Wrongly brushed aside as "the flimsiest of foundations,"³⁷ and metaphorically maligned as "a very slender reed to stand on,"³⁸ article I, section 4 is, nevertheless, all that is necessary to sustain this bill:

"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."

If S. 2750 is a regulation concerning the "manner of holding [federal] Elections," it is within the congressional prerogative. Part of the problem is disposed of quickly. S. 2750 is limited to *federal* elections by its own terms, and does not affect the manner of holding elections for state officers, except to the extent that the

³⁵ *Id.* at 125, 264, 465-66. See also 1961 U.S. COMM'N ON CIVIL RIGHTS REP., bk. 1, 137, and materials cited at note 32 *supra*.

³⁶ In only one minor respect does the language of S. 2750 go beyond the problem which occasioned it. Since the bill forbids the use of *all* performance examinations, it appears to exclude the use of standardized objective tests, scored by machine, with a stated percentage of correct responses required for qualification. The use of such tests carries a minimal risk of registrar manipulation, especially if test results are processed by an independent contractor having no knowledge of the race or color of the applicants whose tests are being scored. They would be no more offensive than the use of other objective means of testing applicants allowed by the bill, *e.g.*, presentation of a sixth-grade certificate. Arguably, by hedging on the language of S. 2750 and by relying on the bill's legislative background, such tests might still be allowable (see note 29 *supra*), and the law could be interpreted as outlawing discretionary tests only.

³⁷ Maggs & Wallace, *supra* note 15, at 519.

³⁸ *Hearings* 133 (remarks of Dean Griswold).

state itself decides to combine local registration and elections with the federal process.³⁹ Since S. 2750 does not presume to regulate local elections per se, unlike other bills which failed to reach the Senate floor,⁴⁰ there is consequently no need to borrow from other sections of the Constitution which may allow such local regulation.

The second issue is whether a federal law affecting the *registration process* prerequisite to voting for federal officers comes within the power to regulate the "manner of *holding elections*." Is the registration process so remote from, or anterior to, the holding of an election so as not to be, constitutionally, a part of the overall election? An abundance of judicial dicta and holdings in analogous situations make clear that the federal power to regulate elections extends equally to the registration process.⁴¹ Any matter affecting the character or choice of the federal electorate is so integrally related to the election ultimately held as to come within the "holding" of the election under article I, section 4. The section is thus fairly interpreted for purposes here as though it provided: "Congress may at any time by law make or alter regulations affecting the manner of registration."

Finally, the issue which remains is whether the outlawing of

³⁹ See discussion in note 23 *supra*.

⁴⁰ See, e.g., S. 480, reproduced in *Hearings* 7, and see recommendations of the Commission in 1961 U.S. COMM'N ON CIVIL RIGHTS REP., bk. 1, 139-42.

⁴¹ *Smiley v. Holm*, 285 U.S. 355, 366 (1932): "It cannot be doubted that these comprehensive words [those of art. I, § 4] embrace authority to provide for a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, . . . to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . . The phrase 'such regulations' plainly refers to regulation of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections." (Emphasis added.)

Ex parte Siebold, 100 U.S. 371 (1879), sustained a Reconstruction statute providing for the attendance of federal supervisors at *registration places*, on the basis of art. I, § 4. For other cases indicating that "elections" in § 4 include any step in the selection of winning congressional candidates, see *United States v. Classic*, 313 U.S. 299 (1941); *Ex parte Yarbrough*, 110 U.S. 651 (1884). See also *Burroughs v. United States*, 290 U.S. 534 (1934); *Dummit v. O'Connell*, 298 Ky. 44, 181 S.W.2d 691 (1944). By way of analogy, other sections of the Constitution employing the word "vote" or "chosen," without express mention of "registration," have been held to sustain federal laws applied to the registration process. *United States v. Association of Citizens Councils, Inc.*, 196 F. Supp. 908 (W.D. La. 1961); *United States v. Raines*, 189 F. Supp. 121 (M.D. Ga. 1960); *United States v. McElveen*, 180 F. Supp. 10 (E.D. La.), *aff'd sub nom. United States v. Thomas*, 362 U.S. 58 (1960). Indeed, the several "elections" sections of the Constitution provide ample bases for congressional protection of electoral integrity anterior to registration [*United States v. Beaty*, 288 F.2d 653 (6th Cir. 1961)], and extending even to a private, pre-primary [*Terry v. Adams*, 345 U.S. 461 (1953)]. Any construction of § 4 making it inapplicable to the registration process would make it possible for the states to prevent congressional elections by requiring registration and then refusing to provide how, when, or where, registration should take place—a possibility § 4 was intended to foreclose. See 5 ELLIOT'S DEBATES 326, 401-02, 535 (2d ed. 1941); 2 *id.* at 23, 326; THE FEDERALIST No. 59, at 394-95 (Wright ed. 1961) (Hamilton).

performance examinations goes to the "manner" of qualifying to vote, as distinct from the "qualifications" themselves, which are still assumed to be reserved to the states under article I, section 2. If the bill means what has previously been suggested, it doubtless goes to "manner" alone.

A conservative distinction between the two is that "manner" goes only to the "how" of determining voters, rather than to the "who" they shall be, or to "what" it is they must possess by way of qualification.⁴² A "qualification" may fairly be described as an attribute one must possess, while the various means by which one may demonstrate that he has such an attribute concern the manner in which he establishes it. Thus, the attributes of a prospective voter, whether they encompass length of residence, absence of a criminal record, good moral character, or degree of literacy, may properly be styled as voter "qualifications." The myriad ways in which these attributes may be demonstrated go to the manner of proving them.

It should now be recalled that S. 2750 does not require registration applicants to possess a sixth-grade education, nor does it forbid states from requiring more than a sixth-grade education. It leaves the states free to require any degree of education, intelligence, or good citizenship they desire, and it restricts the manner in which the state may require proof only by condemning the use of performance examinations. It is to be recalled, too, that it forbids the use of this particular means of testing qualifications as an entirely reasonable precaution against demonstrated abuses which, as ample research discloses, inhere in the registration process of states which employ performance examinations.⁴³ In this connection, it is abundantly clear that article I, section 4, was designed at least to permit Congress to protect the integrity of its own selection process, so long as it did not set aside or alter the qualifications of the electors.⁴⁴ In the discharge of this power, S. 2750 is much

⁴² 108 CONG. REC. 6678 (daily ed. April 26, 1962) (remarks of Senator Johnston of South Carolina); 4 ELLIOT'S DEBATES 71 (2d ed. 1941); THE FEDERALIST No. 59, at 395 (Wright ed. 1961) (Hamilton). See also 108 CONG. REC. 6664 (daily ed. April 26, 1962). Compare the relatively extravagant claim for congressional power under this section made by Professor Crosskey [1 POLITICS AND THE CONSTITUTION 524-36 (1953)], with 2 ELLIOT'S DEBATES 50-51, 438-39 (2d ed. 1941); 5 *id.* 377-86; MCGOVNEY 160-62; PADOVER, TO SECURE THESE BLESSINGS 239-43 (1962); THE FEDERALIST No. 52, at 360 (Wright ed. 1961) (Hamilton); *id.* No. 60, at 402 (Hamilton). Additionally, congressional debate on the fifteenth amendment suggests that voters' qualifications were regarded as beyond congressional alteration. See CONG. GLOBE, 40th Cong., 3d Sess. 1301-05 (1869).

⁴³ See text at notes 31-33 *supra*.

⁴⁴ See *Burroughs v. United States*, 290 U.S. 534 (1934); *In re Coy*, 127 U.S. 731 (1888); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1879). See also

like the Reconstruction statute empowering the appointment of federal registration supervisors to inspect registration procedures and to challenge certain registration practices, a statute upheld in *Ex parte Siebold*.⁴⁵

"The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. . . ." ⁴⁶

"The counsel for the petitioners concede that Congress may, if it sees fit, assume the entire control and regulation of the election of representatives . . . and every other matter relating to the subject." ⁴⁷

The bill is also no different in principle from section 1974,⁴⁸ which requires registrars to maintain records for a period of twenty-two months to enable federal agents to inspect these records as a check against discriminatory practices; both bills somewhat limit registrars from giving certain tests or disposing of certain records, but neither obviously affects voter qualifications as such. S. 2750 is also in line with the Corrupt Practices Act,⁴⁹ upheld in *Burroughs v. United States* on grounds far broader than are needed here.⁵⁰ S. 2750 comes equally within the rationale of *Ex parte Yarbrough*.⁵¹

2 ELLIOT'S DEBATES 22-23, 326, 535 (2d ed. 1941); 4 *id.* 401-02; THE FEDERALIST No. 59, at 394-95 (Wright ed. 1961) (Hamilton); McGOVNEY 162.

⁴⁵ 100 U.S. 371 (1879).

⁴⁶ *Id.* at 388.

⁴⁷ *Id.* at 396.

⁴⁸ Civil Rights Act of 1960, §§ 301-06, 74 Stat. 88.

⁴⁹ Federal Corrupt Practices Act, 43 Stat. 1070 (1925), 2 U.S.C. §§ 241-56 (1958).

⁵⁰ 290 U.S. 534, 547-48 (1934): "The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." For a rationale supporting the belief that the Supreme Court will sustain congressional exercises of constitutional authority beyond an interpretation which the judiciary might otherwise give to the self-executing effect of such authority, see Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954). That S. 2750 would be treated sympathetically by the Court, see letter by Professor Sutherland, *Hearings* 627-31.

⁵¹ 110 U.S. 651 (1884). "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption . . ." *Id.* at 657-58.

"[T]he importance to the general government of having the actual election—the

There is, to be sure, a theoretical penumbral conflict between sections 2 and 4 of article I, and to that extent S. 2750 necessarily represents a slight hedging. The conflict amounts to this: since Congress is empowered to restrict the means of measuring whether an applicant possesses a certain qualification, it is theoretically possible that such a power might be employed so extensively as effectively to eliminate the requirement for the qualification itself. Note what becomes of a state's power to require literacy, for instance, should Congress provide that the manner of establishing proof of literacy may not include any of the following: a subjective test; an objective test; a diploma or certificate; a statement by a teacher, principal, or other educator; a statement by an employer, neighbor, or any other person; or any other means. In flexing its power to regulate the "manner" of proving qualifications so as to foreclose the states from all feasible means of requiring a qualification to be proved, Congress could effectively disable the states from requiring the qualification itself.

Nevertheless, the penumbral overlap of qualifications and manner of proving them will scarcely upset the constitutionality of S. 2750; by itself, the bill leaves the power to require literacy qualifications relatively untrammelled, reserving to the states a number of feasible means of testing the requisite degree of literacy.⁵² Moreover, the problem caused by the overlap of sections 2 and 4, as here construed, does not argue against the construction urged. That the power to regulate the "manner" might be abused, so as to upset state control over voting, was contemplated at the time section 2 was ratified; the prospect was not regarded as serious enough to warrant excision or amendment of either section.⁵³

voting for those members—free from force and fraud is not diminished by the circumstances that the qualification of the voter is determined by the law of the State where he votes. It equally affects the government, it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by the law of the United States, or by their united result." *Id.* at 663. See also *In re Quarles*, 158 U.S. 532 (1895); *Logan v. United States*, 144 U.S. 263 (1892).

⁵² *E.g.*, by means of an oath, presentation of a diploma or of a certificate signed by a school principal, an affidavit from a teacher that the applicant has successfully completed such-and-such course in civics, or even the use of a standardized, objective, machine-scored test, as suggested in note 36 *supra*.

⁵³ See, *e.g.*, 2 ELLIOT'S DEBATES 23, 27, 30, 438-39, 535 (2d ed. 1941); 5 *id.* at 401-02. A better answer, perhaps, is that such an "abuse" would be subject to judicial review and risk invalidation by the Supreme Court, although this safeguard may not have been recognized when the Constitution was adopted, since the doctrine of judicial supremacy crystallized somewhat later. Still another way of rebutting the argument is to reverse the dilemma: if Congress lacks authority to regulate the manner of testing qualifications so as to insure the integrity of the election, then the unbridled power of the states to

The current difficulty is not the result of a strained construction of the two sections, but of a conflict fully anticipated and not especially feared. As Congress focuses its attention more and more on the "manner" of holding federal elections, we may expect the courts to resolve any conflict with section 2 state powers in the same common-sense fashion as they have resolved similar conflicts elsewhere in the law.

III. THE SIGNIFICANCE OF S. 2750

While S. 2750 is doubtless constitutional, it is really a most unpromising half-step toward broadening the franchise and protecting it from racial discrimination. Indeed, in one respect the law would inadvertently legalize some registration practices which are today unlawful. Under 42 U.S.C. section 1971, a state registrar may not now require subjective tests of some applicants and not of others; where it can be shown that the registrar administers the subjective test more often to Negroes than he does to whites, injunctive relief can be obtained.⁵⁴ Under S. 2750, however, the registrar might lawfully require subjective tests of some applicants, that is, those lacking a sixth-grade education, even though not using them in connection with all other applicants. If relatively more Negroes than whites do not have a sixth-grade education, the statute contemplates that proportionately more Negroes than whites may lawfully be subjected to discretionary tests—a departure from what is currently permitted.

The fact of the matter is that in the worst-offending states fifty percent of all Negroes over twenty-five years of age lack a sixth-grade education.⁵⁵ In contrast, the median educational attainment for white persons twenty-five years or older, in these same states, is above the tenth-grade level.⁵⁶ This disparity in median educational achievement between whites and Negroes necessarily means

prescribe qualifications could be used to corrupt the national government—a prospect Hamilton employed to demonstrate the necessity for art. I, § 4. *THE FEDERALIST* No. 59, at 394 (Wright ed. 1961) (Hamilton).

⁵⁴ The result follows from subsections (a) and (c) of § 1971. See, *e.g.*, cases cited in note 33 *supra*.

⁵⁵ U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960, GENERAL, SOCIAL AND ECONOMIC CHARACTERISTICS, U.S. SUMMARY 1-260, Final Report PC(1)-1C (1962). The "worst offending states" include Alabama, Georgia, Louisiana, Mississippi, and South Carolina. They are so designated because they are among the eight states in which the Civil Rights Commission determined that substantially all significant instances of voter discrimination occur. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., bk. 1., 5, 22.

⁵⁶ See U.S. BUREAU OF THE CENSUS, *op. cit. supra* note 55.

that S. 2750 would permit the subjective testing of relatively more Negroes than whites.

The sixth-grade cut-off feature of the bill is therefore most regrettable, especially in view of the very problem which occasioned the bill's proposal. It will be recalled that this problem resulted from the wholesale application of subjective tests to Negro applicants generally, and not merely from their application to Negroes having a sixth-grade education. Indeed, there is no evidence that Negroes having a sixth-grade education were treated any worse than other Negroes. In response to the problem, Congress should, as it may pursuant to article I, section 4, eliminate the use of all such tests entirely, and require that states assess voter qualifications by other means less subject to abuse. In permitting subjective tests to be used for all persons lacking a sixth-grade education, the bill would inadvertently result in the following consequences: (a) fifty percent of the Negroes of voting age in states most likely to discriminate against them will still be subject to discretionary tests; (b) a higher proportion of Negroes than of whites may lawfully be required to take such tests; (c) white-dominated legislatures will have an additional incentive to make subjective literacy tests more rigorous, knowing that relatively few white persons will be required to take these tests; (d) persons lacking a sixth-grade education may need to possess a higher degree of "literacy" in order to register than would persons having, but having only, a sixth-grade education.⁵⁷

In view of these anomalies, one might wonder why the sixth-grade limitation was put into the bill. The reason is not difficult to state, but it is impossible to defend. The sixth-grade cut-off was ostensibly established on the premise that it accurately reflects an educational standard above which virtually all persons are literate but below which a significantly increasing number are not. In one sense, this theory is defensible. Over ninety-eight percent of all persons who have completed the sixth grade are "literate," *as that term is defined by the United States Census Bureau*.⁵⁸ But use of

⁵⁷ The explanation for this bizarre result, that Negroes lacking a sixth-grade education will have to demonstrate a greater degree of "literacy" to register than will those possessing a sixth-grade education, is elaborated in note 25 *supra*.

⁵⁸ Recent census surveys have assumed that 100% of the population having a sixth-grade education are literate, because earlier surveys, in which census-takers inquired specifically of literacy, disclosed that virtually all having a sixth-grade education passed the test. The assumption appears to be warranted, inasmuch as all persons not having completed the sixth grade continue to be polled as to literacy by the Census Bureau, and the 1950 census indicates that, of those having completed five grades of schooling, only 1.3% of white persons over fourteen and 1.9% of non-white persons over fourteen

the Census Bureau's definition of "literacy," in the context of S. 2750, is wholly illogical. Literacy, as defined for census purposes, embraces only the ability to *read and write a simple message*.⁵⁹ Literacy as used in S. 2750 is concerned not only with those who may be asked by registrars to read and write a simple message, but with those who may be asked to interpret complicated sections of state constitutions, to determine their age exactly in terms of years, months, and days, or to demonstrate good citizenship.⁶⁰ S. 2750 outlaws subjective tests for "literacy or otherwise" for persons having a sixth-grade education; it does not outlaw only those subjective tests which confine themselves to determining whether an applicant can read and write a simple message. There is, of course, no data to support a claim that even fifty percent of the population possessing a sixth-grade education could pass the type of tests employed by the worst-offending states.⁶¹ It is therefore arbitrary to exempt those with a sixth-grade, or greater, education from tests they are hardly more likely to pass than are those with lesser educational accomplishments.⁶²

What has been said, however, by no means supports an argument that some higher cut-off should have been used. It becomes necessary to employ a cut-off *only* if Congress desires actually to restrict the power of states to set literacy qualifications,

are illiterate. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SER. P-20, No. 45, POPULATION CHARACTERISTICS, Table 19, at 23 (1953).

⁵⁹ *Id.* at 9-10: "In 1952, as in past censuses and surveys, persons who could not both read and write a simple message either in English or any other language were classified as illiterate. Thus, illiterates include persons who are able to read but not write. Persons who formerly knew how to read but who were unable to do so at the time of the survey because of mental or physical impairment, such as blindness, are classified as literate." The same minimum definition is used by the United Nations. See UNITED NATIONS, POPULATION COMMISSION, REPORT OF THE THIRD SESSION 25 (Lake Success 1948); UNESCO, WORLD ILLITERACY AT MID-CENTURY: A STATISTICAL STUDY 19 (Monographs on Fundamental Education—XI, 1957); UNESCO, EXPERT COMMITTEE ON STANDARDIZATION OF EDUCATIONAL STATISTICS, REPORT 3 (Paris 1952).

⁶⁰ See note 25 *supra*.

⁶¹ That is, the fact that virtually all persons completing the sixth grade can read and write a simple message (the Census Bureau's standard of "literacy") is no guarantee at all that the same persons could give a reasonable interpretation of any section of the Mississippi constitution, compute their age in years, months, and days, or satisfactorily define a "republican form of government," all of which are required by various performance tests among several Southern states. See note 25 *supra*.

⁶² Indeed, a Negro lacking a sixth-grade education, and asked by a registrar to define a republican form of government in order to qualify to vote, might argue that, in the face of S. 2750, such a demand tends to deny him the equal protection of the laws under the fourteenth amendment. His argument would rest on the supportable claim that persons no more likely than he, with respect to their ability to respond to such a demand, are exempted under S. 2750; consequently, the application of subjective tests of this kind only to persons lacking a sixth-grade education rests on a classification which is arbitrary.

a task not attempted in S. 2750, not required by the problem it seeks to solve, and one which would in fact raise serious constitutional issues. Should Congress forbid states from requiring more by way of literacy than the ability to read and write a simple message, it would be making a judgment of policy that any qualification more stringent than that proposed has no rational connection with an individual's ability to cast an informed vote and, on this basis, more stringent qualifications must not be allowed. But, as has been indicated, S. 2750 does not forbid states from requiring educational attributes far beyond the ability to read and write a simple message. Rather, it leaves each state free to decide for itself the level of requisite intelligence, and it provides only that, whatever the level of qualification required may be, the states may not employ subjective tests in determining whether a given applicant possesses the qualification. Since states are not restricted from requiring an eighth-grade education, or even a college education, legislation which simply eliminates the use of subjective tests has no occasion to consider what degree of literacy voters ought to have were a single, nationwide standard being enacted. Thus, the sixth-grade cut-off feature of the bill serves no legitimate purpose and it otherwise would tend to aggravate the vices which have resulted from state requirements measured by subjective tests.⁶³

Short of an amendment to the Constitution, or additional federal legislation unlikely to find favor with Congress as it is presently constituted, these other varieties of discrimination can be met only through piecemeal litigation under existing laws.⁶⁴ S. 2750 is thus no more than a short thread in the ravelled history of the franchise. It would effect no great change in electoral power anywhere in America, and, without some alteration, its enactment would be of doubtful value. The temporary failure of a bill of such modest proportions reflects ruefully on our egalitarian commitments. As we were among the last civilized nations to abandon slavery, so it seems we are to be among the last to remove its final vestiges as well.

⁶³ A classic report canvassing the varieties of discriminatory devices available to registrars is contained in TAPER, *GOMILLION VERSUS LIGHTFOOT* (1962). See also *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1962); *United States v. McElveen*, 180 F. Supp. 10 (E.D. La.), *aff'd sub nom. United States v. Thomas*, 362 U.S. 58 (1960).

⁶⁴ The current program of the Civil Rights Division of the Justice Department is described in Marshall, *supra* note 32, and reviewed favorably in Bickel, *Civil Rights*, *The New Republic*, Dec. 15, 1962, p. 11. At the same time, President Kennedy has made the Justice Department's task more difficult by making some hostile appointments to the Southern federal bench. See Bickel, *supra* at 16. The responsibility is not entirely shifted by considerations of senatorial courtesy alone. See CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 73-75, 361-67 (4th ed. 1957).