

# LITERACY TESTS FOR VOTERS: A CASE STUDY IN FEDERALISM

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Among the major problems of our American constitutional system has been the maintenance of a proper balance of power between the states and the federal government. This problem, foreseen by our forefathers in 1787, has been experienced in somewhat similar form in several countries, and, in the United States, has been aggravated by developments during the past few years.

I have been especially disturbed by recent developments which threaten to erode the traditional state control of the electoral process. The Supreme Court's reapportionment decision in *Baker v. Carr*<sup>1</sup> is one step in this direction and has produced judicial intervention in an area where political solutions, in my view, would be more lasting and satisfactory.<sup>2</sup> This intervention may well present some of the administrative and other difficulties that have characterized federal court intervention in the educational process under the authority of *Brown v. Board of Education*.<sup>3</sup>

Recently the Senate had occasion to consider a proposed constitutional amendment that would prohibit state poll taxes.<sup>4</sup> Although I am not an advocate of the poll tax and my own state of North Carolina has had no such tax as a prerequisite for voting for many years, I did not consider that this amendment was conducive to the most suitable balance between state and federal authority.

In the five states where it currently exists,<sup>5</sup> the poll tax seems to express a philosophy that a voter will take much more interest in the exercise of his franchise if he has paid something, albeit a token amount, in order to vote. A somewhat similar rationale has been advanced for proposals designed to encourage a broad

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<sup>1</sup> 369 U.S. 186 (1962).

<sup>2</sup> In this connection I agree with the dissent of Justice Frankfurter in *Baker v. Carr*, 369 U.S. 186 (1962). He pointed out in his opinion:

"In sustaining appellants' claim, based on the Fourteenth Amendment, that the District Court may entertain this suit, this Court's uniform course of decision over the years is overruled or disregarded. Explicitly it begins with *Colegrove v. Green*, *supra*, decided in 1946, but its roots run deep in the Court's historic adjudicatory process." *Id.* at 277.

"Although the District Court had jurisdiction in the very restricted sense of power to determine whether it could adjudicate the claim, the case is of that class of political controversy which, by the nature of its subject, is unfit for federal judicial action." *Id.* at 330.

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> S.J. Res. 29. Passed the Senate March 27, 1962. Passed the House August 27, 1962. Now awaiting action by state legislatures.

<sup>5</sup> Alabama, Arkansas, Mississippi, Virginia, Texas.

popular base of campaign contributions in elections.<sup>6</sup> According to this view, a voter takes a much greater interest in a party or candidate to which he has made a contribution; and because of this greater interest, there will be greater public understanding of issues to be decided.

Although the poll tax may not produce in practice the advantages which its proponents claim, I feel that each state should be free to make the decision as to whether such a limitation on the franchise is desirable. Under my view of federalism, the states should retain considerable leeway to experiment with different institutions and with different solutions to problems. After balancing the national interest in an election free of poll tax limitations against the desirability of allowing each state to determine its own qualifications for voting, I was unable to support the proposed constitutional amendment. To me it did not seem best to restrict each state's choice in this matter by an amendment to the Federal Constitution.

If, however, the Constitution is to be amended, I prefer that these amendments be adopted openly in the manner authorized by that document itself, rather than result indirectly from judicial decision or from congressional enactment of legislation which tends to destroy the traditional state-federal balance. Into this latter category of legislation fell the proposals concerning literacy tests for voters. Three of these bills were the subject of an extensive study by the Senate Committee on Constitutional Rights.

S. 2750, sponsored by Senators Mansfield and Dirksen, requires registration in federal elections of applicants, including Spanish-speaking citizens from Puerto Rico, who have completed six years of schooling; S. 480, introduced by Senator Javits, sets a similar sixth grade standard as a test for literacy, which encompasses not only federal but state elections; S. 2979, sponsored by Senator Keating, also sets a sixth grade standard, but in addition, prohibits denial of registration to vote on any ground other than failure to meet the literacy test, inability to meet reasonable age and residence requirements, legal confinement at the time of the election or registration, or conviction of a felony. Neither S. 480 nor S. 2979 includes provisions pertaining to Puerto Ricans.

Inasmuch as the Senate floor debate on literacy tests centered about the provisions of S. 2750, as an Administration-backed measure, it is to this bill that the following comments are directed.

<sup>6</sup>In appointing a Commission on Campaign Costs to study the cost of campaigning in presidential elections, President Kennedy commented:

"For candidates to depend on large financial contributions of those with special interests is highly undesirable, especially in these days when the public interest requires basic decisions so essential to our national security and survival. . . . The financial base of our presidential campaigns must be broadened." *N.Y. Times*, Oct. 5, 1961, p. 28, col. 1.

Among many proposals considered by the Commission were: direct federal subsidies to campaigns; subsidies to communications media; tax incentives such as that proposed in S. 1555 by Senator Neuberger, to provide a tax credit of up to \$10 for campaign contributions; and community action to encourage small donations. See also 20 *CONG. Q. WEEKLY REPORT* 299 (1962).

The Legislative Recommendations of the Commission were transmitted to the Congress on May 29, 1962. One of their recommendations is embodied in S. 3484, introduced by Senator Cannon, which allows a deduction or credit against tax for contributions to national and state political committees.

Both the Democratic and Republican campaign platforms in the 1960 national elections had pledged an effort to push legislation concerning literacy tests which, in some form, exist in some twenty states.<sup>7</sup> The platform promises were apparently based on findings by the United States Commission on Civil Rights that, in some instances, persons otherwise qualified to vote had been denied that right because of unlawful and discriminatory application of literacy tests.<sup>8</sup> The principal objection to the bill is that it is an unconstitutional attempt by federal action to prescribe voter qualifications, and thereby to impose federal standards on the states.

Endorsing the constitutionality of this proposal, the Attorney General of the United States told the Senate Subcommittee:<sup>9</sup>

On their face and as a matter of history, the 14th and 15th amendments are an affirmative grant of power to Congress to enact legislation to guarantee the rights protected by these amendments, including, principally, the right to vote.

I have no doubt that this bill is valid under that grant of power.

In addition to the fourteenth and fifteenth amendments, the Attorney General found a source of power in the original Constitution. It was his opinion that,<sup>10</sup>

. . . since our proposal is limited to the protection of federal elections, it is supported also by article I, section 4 of the Constitution and the broad, inherent power of Congress to govern the federal elective process.

The obvious defects in this argument and the absence of congressional authority to enact such legislation become apparent upon careful examination of the history of these provisions and an analysis of decisions in which their meaning has been construed by the Supreme Court of the United States.

My opinion, as a long-time student of our Federal Constitution, is that the states alone possess the right to establish qualifications for voting. The very first article of the Constitution provides that, in choosing members of the House of Representatives, the electors shall have the same qualifications required for electors of the most numerous branch of the state legislature. The same proposition is enunciated by the seventeenth amendment with respect to elections of United States Senators. Under the only reasonable interpretation of article one, section two, and the seventeenth amendment, anyone qualified to vote for members of the most numerous branch of the state legislature also is entitled to vote for members of Congress and for senators. Conversely, those who do not have the right to vote for state legislators are ineligible to vote for members of the House and Senate.

<sup>7</sup> Alabama, Alaska, Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, South Carolina, Virginia, and Washington. In addition to these states, Oklahoma has a literacy law which has been declared unconstitutional, but which still remains on the books. In Nebraska the voter must sign his own name in the register. The constitutions of Colorado and North Dakota require that the legislatures of those states enact an educational qualification; however, the legislatures have not so acted.

<sup>8</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT, Pt. 2 (1959).

<sup>9</sup> *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on Literacy Tests and Voter Requirements in Federal and State Elections*, 87th Cong., 2d Sess. 264 (1962) [hereinafter cited as *Hearings*].

<sup>10</sup> *Id.* at 265.

According to James Madison's *Journal of the Constitutional Convention*, article one, section two, would appear to be the provision that met with the most complete approval of the delegates to the Constitutional Convention.<sup>11</sup> The overwhelming majority there felt that the right of the states to prescribe qualifications should remain unfettered, and they were loath to authorize the national legislature to decide who might vote. George Mason of Virginia said,<sup>12</sup> "A power to alter the qualifications would be a dangerous power in the hands of the [national] legislature"; and James Madison took the floor to state that,<sup>13</sup> "The right of suffrage is certainly one of the most fundamental articles of republican government, and ought not to be left to be regulated by the [national] legislature."

#### ARTICLE I, SECTION 4

Article one, section four, of the Constitution, gives Congress the ultimate power to regulate the "times, place, and manner of holding" elections for senators and representatives. Under the rule of *ejusdem generis*, it seems clear that the words "manner of holding" refer only to the procedures and methods for holding elections, rather than to the qualifications of those persons who are to participate as voters in the electoral process. As Hamilton said in *The Federalist*:<sup>14</sup> "The qualifications of the persons who may choose or be chosen as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the [national] legislature."

The debates held on article one, section four, do not suggest that the "manner of holding" elections was in any way related to voter qualifications.<sup>15</sup> Mr. Rufus King, who, along with Hamilton, was a member of the style-drafting committee, stated that,<sup>16</sup> ". . . [T]he power of control given by this section extends to the *manner* of election, not the *qualifications* of the electors." The debates in the various State Conventions, concerning ratification of the Constitution, reflect a similar interpretation.<sup>17</sup> Upon ratifying the document, the states of Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia, all passed resolutions expressing their sense that Congress should neither make nor alter state regulations respecting the times, places, and manner of holding elections except where the states did not so act.<sup>18</sup>

If article one, section four, authorized the Congress to determine who was qualified to vote for senators and representatives, it would also seem arguable, under article one, section two, that Congress would then have the authority to

<sup>11</sup> 2 JAMES MADISON, (ED.), *JOURNAL OF THE CONSTITUTIONAL CONVENTION*, 462 *et seq.* (1898).

<sup>12</sup> *Id.* at 468.

<sup>13</sup> *Id.* at 470.

<sup>14</sup> *THE FEDERALIST* No. 60, at 379 (Lodge ed. 1888) (Hamilton).

<sup>15</sup> 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 137, 139, 152, 153, 164 (1927).

<sup>16</sup> 2 JONATHAN ELLIOT (ED.), *THE DEBATES IN THE SEVERAL STATE CONVENTIONS* 51 (1836); see also *id.* at 49-51, 183 (1836).

<sup>17</sup> See, for example, the debates in the Virginia Convention, as reported in 3 *id.* at 8, 60, 185, 202, 203.

<sup>18</sup> 47 CONG. REC. 1892, 1893 (1911).

determine the qualifications of electors of the state legislature. After all, article one, section two, and the seventeenth amendment reveal unmistakably that the qualifications for electors in the senatorial and congressional elections shall be the same as those for the election of state legislators, and it seems highly unlikely that, either when the Constitution was originally adopted, or at the time the seventeenth amendment was adopted, there was any intent to give the federal government any power over state elections. In fact, when the seventeenth amendment regarding election of senators was ratified in 1913, it in effect recognized and sanctioned anew the principles of article one, section two. The words in article one, section four, of the Constitution, taken in conjunction with section two of the same article, lead inevitably to the conclusion recited by Mr. Justice Field in *Ex parte Clarke*.<sup>19</sup>

Regulations as to the manner of holding elections cannot extend beyond the designation of the mode in which the will of the voters will be expressed and ascertained. The power does not authorize Congress to determine who shall participate in the election, or what shall be the qualification of the voters. These are matters not pertaining to or involved in the manner of holding the election, and their regulation rests exclusively with the states. The only restriction upon them with respect to these matters is found in the provision that the electors of representatives in Congress shall have the qualifications required for electors of the most numerous branch of the state legislature, and the provision relating to the suffrage of the colored race. And whatever regulations Congress may prescribe as to the manner of holding the election for representatives must be so framed as to leave the election of state officers free, otherwise they cannot be maintained.

The proponents of the Mansfield-Dirksen bill feel that it does not set qualifications for voters and therefore is not in violation of article one, section two; rather it is valid under the language of article one, section four because it only prescribes some guide-lines or standards, by which literacy might be measured. Attorney General Robert F. Kennedy testified before the Subcommittee on Constitutional Rights:<sup>20</sup>

As I have said, it is concerned solely with the appropriate, fair, and nondiscriminatory manner of measuring the qualifications of federal voters under state law."

He further stated:<sup>21</sup>

I would say that if we came in here and offered legislation that set the qualifications of the voters, that it would be unconstitutional; not unconstitutional only under article I, section 4, but under the fourteenth and fifteenth amendments. I would agree with you entirely then, but we are not doing that. . . . All we are doing is suggesting legislation which deals with the testing of these qualifications.

According to the late Henry Cabot Lodge, Sr., former majority leader of the United States Senate, the words relating to "times, places and manner," in article one, section four, were put in the Constitution only because ". . . toward the close of the Revolution the states failed to send delegates, in many cases, to the Continental Congress, and during the Confederation they absolutely brought the Government

<sup>19</sup> 100 U.S. 399, 418 (1879).

<sup>20</sup> *Hearings* 265. (Emphasis added.)

<sup>21</sup> *Id.* at 271.

to a standstill by their failure to provide representation at the seat of government, and this was put in to prevent the new Government from being paralyzed in that way."<sup>22</sup> James Madison offered essentially the same explanation to the Virginia Ratifying Convention.<sup>23</sup> Thus, the section was intended to serve only the most narrow and limited purposes, and clearly had nothing to do with voter qualifications. Article one, section four, granted no power to the federal government which would sustain an attempt by the Congress to establish qualifications for electors in federal elections.

Of course, this section has been interpreted as giving Congress the power to protect the electoral process itself, and to assure that elections are conducted free from fraud, corrupt practices, violence, intimidation, and illegal political activities. In *Ex parte Yarbrough*, the Supreme Court referred to the positive duty of the government<sup>24</sup> to see that,

. . . its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

The language is clearly limited to apply to "those who have the right to take part in that choice" and to no others.

The Supreme Court, in *In re Coy*, stated:<sup>25</sup>

The power under the Constitution of the United States, of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned.

However, here there is no intimation that power exists in the federal government to determine who is eligible to vote.

Mr. Justice Miller, in *Ex parte Yarbrough*,<sup>26</sup> said:

The states in prescribing the qualifications of voters for the most numerous branch of their own legislatures do not do this with reference to the election for members of Congress. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualifications thus furnished as the qualifications of its own electors for members.

These cases leave no doubt that the Constitution's grant of power to Congress to alter certain state regulations should not provide congressional authority to enfranchise persons not otherwise qualified. Where the right to vote exists, the full protection of article one, section four, surrounds the applicant; but until that time the power of Congress is non-existent. The power to alter and amend, granted by this section, may be power to correct; but it is not a power to create.

<sup>22</sup> *Hearings* 17.

<sup>23</sup> 3 ELLIOT, *op. cit. supra* note 16, at 367.

<sup>25</sup> 127 U.S. 731, 752 (1888).

<sup>24</sup> 110 U.S. 651, 662 (1884).

<sup>26</sup> 110 U.S. 651, 663 (1884).

## ARTICLE II, SECTION I, PARAGRAPH 2

While the method of choosing senators and representatives may be subject to certain regulations by the Congress under authority granted by article one, section four, it is quite clear that Congress may not even prescribe the mode by which electors for President and Vice President are chosen. This is most clearly a matter for the states alone to determine, and each may adopt a different mode, provided the method is fair and nondiscriminatory.

Article two, section one, clause two states that, "Each state shall appoint in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress."

The twelfth amendment prescribes the method by which the votes of the presidential electors shall be taken and counted, and the administration of the duties of those who compose the electoral college is regulated in a fixed and certain manner. However, the qualifications of those persons who are electors are not subject to congressional regulation, but are left entirely to the state legislatures. Therefore, as might be expected, we find that various states choose electors by various methods, all of which are perfectly legitimate and approved by the Constitution and not within the power of Congress to alter.<sup>27</sup>

## THE FOURTEENTH AMENDMENT

Supporters of the Administration bill apparently fail to realize that the equal protection clause only forbids unreasonable classification. Classification of prospective voters on grounds of literacy is certainly not unreasonable. Putting it differently, there is a universal policy of encouraging literacy—a policy reflected in the compulsory education laws existing in many states. It could hardly be argued that a state acts unreasonably in distinguishing between the literate and illiterate in determining who may vote. As recently as 1959, Mr. Justice Douglas, speaking for a unanimous Court, wrote that ". . . in our society . . . a state might conclude that only those who are literate should exercise the franchise."<sup>28</sup>

If the test of literacy is arbitrarily or unreasonably applied, federal sanctions can be invoked against the persons responsible; but the test itself is valid if on its face it applies without distinction to race or color or sex. When the right to vote is denied or in any way abridged, existing civil and criminal statutes afford adequate remedies, and are sufficient to secure to every qualified voter of any race anywhere in the United States the right to vote.<sup>29</sup>

<sup>27</sup> *McPherson v. Blacker*, 146 U.S. 1 (1892).

<sup>28</sup> *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 52 (1959).

<sup>29</sup> 1. Under § 242 of title 18 of the United States Code, a state election official commits a crime punishable by a fine of as much as \$1,000 and imprisonment for as much as one year if he willfully deprives any qualified person of his right to vote in an election for Senators or Representatives in Congress for any reason whatever, or if he willfully deprives any qualified person of his right to vote in a state election on account of his race or color. 18 U.S.C. § 242 (1958); *United States v. Classic*, 313 U.S. 299 (1941); *Guinn v. United States*, 238 U.S. 347 (1915).

2. Under § 241 of title 18 of the United States Code, state election officials commit a crime punishable

If Congress legislates on literacy tests under the purported authority of section five of the fourteenth amendment, it would violate the Supreme Court's mandate that,<sup>30</sup>

. . . the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing. . . .

S. 2750 is clearly general legislation. Corrective legislation prohibiting discriminatory application of any state law is already in existence.

Thaddeus Stevens, as chairman of the Joint Committee on Reconstruction, spoke to the House of Representatives on January 31, 1866, during the first session of the Thirty-ninth Congress.<sup>31</sup> He expressed quite clearly and irrefutably that the Joint Committee on Reconstruction, which reported the proposal which later became

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by a fine of as much as \$5,000 and by imprisonment for as much as ten years if they conspire to deprive any qualified person of his right to vote in an election for Senators or Representatives in Congress for any reason whatever, or if they conspire to deprive any qualified citizen of his right to vote in a state election on account of his race or color. 18 U.S.C. § 242 (1958); *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Mosley*, 238 U.S. 383 (1915); *Guinn v. United States*, 238 U.S. 347 (1915).

3. Under § 1983 of title 42 of the United States Code, any qualified person may maintain a civil action for damages against any state election official who deprives him of his right to vote in an election for Senators or Representatives in Congress for any reason whatever, or who deprives him of his right to vote in a state election on account of his race or color. *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915).

4. Under § 1983 of title 42 of the United States Code, any qualified person may maintain a suit in equity to obtain preventive relief by injunction against any state election official who threatens to deprive him of his right to vote in an election for Senators or Representatives in Congress for any reason whatever, or who threatens to deprive him of his right to vote in a state election on account of his race or color. *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949).

5. Under the Civil Rights Act of 1957, the Attorney General may maintain a civil action of an equitable nature at public expense in the name of the United States against any state election official to obtain preventive relief by injunction or other order in behalf of any qualified person if the election official is about to deprive such person of his right to vote in a federal election for any reason whatever, or if the election official is about to deprive such person of his right to vote in a state election on account of his race or color. 42 U.S.C. § 1971 (1958); *United States v. Raines*, 362 U.S. 17 (1960).

6. Under the Civil Rights Act of 1960, in case the court finds in a civil action of an equitable nature brought under the Civil Rights Act of 1957 that any qualified person has been deprived of his right to vote in any state election on account of his race or color, and that such deprivation was pursuant to a pattern or practice, the court must receive applications from any other persons of the same race or color within the affected area whom state election officials have refused to register, and must order such election officials to register them to vote in both federal and state elections if it appears to the court from testimony taken by the court, or voting referees appointed by the court, that they have the qualifications for voting established by state law. The court may appoint an unlimited number of voting referees, who are empowered to take the testimony of applicants in *ex parte* proceedings from which the state election officials concerned are barred and report such evidence together with their findings thereon to the court. Under the Act, the court accepts the testimony given by the applicants before the voting referees as to their ages, residences, and prior efforts to register or otherwise qualify to vote as *prima facie* evidence; it considers no testimony whatever as to the literacy and understanding of other subjects by the applicants save that offered by them before the voting referees, and it automatically orders the registration of all applicants found qualified by the voting referees, except in those cases in which the state election officials file verified public records or affidavits of witnesses having personal knowledge of the facts indicating that the findings of the voting referees are not true. 42 U.S.C. § 1971 (1960).

<sup>30</sup> Civil Rights Cases, 109 U.S. 3, 11 (1883).

<sup>31</sup> CONG. GLOBE, 39th Cong., 1st Sess. 535 (1866).

section two of the fourteenth amendment, had no desire whatever to interfere with the basic right of the states to prescribe the qualifications of their voters.

Attention should be given to the words of Chief Justice Waite in *Minor v. Happersett*:<sup>32</sup>

The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guarantee for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the states, but it operates for this purpose, if at all, through the states and the state laws, and not directly upon the citizen.

It does not appear necessary to dwell longer on the fourteenth amendment. If that amendment had been intended to deal with suffrage, the fifteenth amendment would have been mere surplusage. Since the fifteenth amendment deals with, and is specifically limited to, the right to vote, it seems clear that we must center our attention on this amendment.

#### THE FIFTEENTH AMENDMENT

As I understand it, the most popular argument for the constitutionality of S. 2750 is as follows:

The second section of the fifteenth amendment gives Congress the power to enforce by appropriate legislation the terms of the first section of that amendment, which declares that no person shall be denied the right to vote because of his race or color. The Civil Rights Commission, established to investigate and report to Congress and to the President on matters pertaining to civil rights, has found that literacy tests have been and are being arbitrarily and unreasonably used to deny Negroes the right to vote because of their race and color, in violation of the fifteenth amendment. Congress, in the preamble to S. 2750, adopts the findings of the Commission, and finds further that

. . . education in the United States is such that persons who have completed six primary grades in a public school or accredited private school cannot reasonably be denied the franchise on grounds of illiteracy or lack of sufficient intelligence to exercise the prerogatives of citizenship.

The bill declares that Congress has the duty to provide against such abuses effected through use of literacy tests and other performance examinations. The legislation only limits and does not abolish the literacy test; nor does it set the qualifications for voters. The proposal is, therefore, within the scope of the fifteenth amendment.

This, of course, was not the only argument used by the proponents. However, because of the frequency of its recurrence and the complexity of the reasoning involved, I feel it should be explicitly dealt with. The following discussion of the fifteenth amendment—the congressional intent behind it, the language employed,

<sup>32</sup> 88 U.S. 162, 171 (1874).

and the Supreme Court cases interpreting it—refutes this thesis of those seeking passage of S. 2750.

Congress has authority, under the fifteenth amendment, to enact appropriate legislation to insure that no person is deprived of the right to vote because of race, color, or previous condition of servitude. This amendment does not grant a right to vote where it did not formerly exist; it only prohibits the states from denying suffrage on the ground of race or color. The essentially negative mandate of the fifteenth amendment in effect declares that if a person can qualify under state laws to vote for members of the most numerous branch of his state legislature, the state may not deny him that right because of his race, color, or previous condition of servitude.

The Supreme Court of the United States has defined the negative mandate of the amendment in numerous decisions. For instance, in *Reese v. United States*,<sup>33</sup> two inspectors of a municipal election in Kentucky were prosecuted under the Civil Rights Act of May 31, 1870, for refusing to receive and count the vote of a Negro. Sections of the act imposed penalties upon officials who prevented performance of an act necessary for qualification as a voter, and penalized any person who by force or intimidation sought to hinder a citizen from voting or qualifying to vote. The Supreme Court held that these provisions could not be sustained under the fifteenth amendment because they were not limited to deprivation of the right to vote "on account of race, color, or previous condition of servitude." Chief Justice Waite in the majority opinion said:<sup>34</sup>

The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States, over another on account of race, color, or previous condition of servitude. . . . The power of Congress to legislate at all upon the subject of voting at state elections rests upon this amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such elections is because of his race, color, or previous condition of servitude.

Thus, the privilege to vote is not given by the Federal Constitution, or any of its amendments; it is not a privilege springing from citizenship of the United States, but rather is within the jurisdiction of the state itself, and is to be exercised as the state may direct, upon such terms as it may deem proper, provided no discrimination is made between individuals in violation of the Federal Constitution. This constitutional principle was reiterated by the Supreme Court in its decision in *Pope v. Williams*:<sup>35</sup>

The Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the Federal Constitution, already stated; although it may be observed that the right to vote for a member of Congress is not derived exclusively from state law. See Federal Constitution, article I, section 2. . . . But the elector must be one entitled to vote under the state statute. . . . The question whether the conditions

<sup>33</sup> 92 U.S. 214 (1876).

<sup>34</sup> *Id.* at 217.

<sup>35</sup> 193 U.S. 621, 633 (1904).

prescribed by the state might be regarded by others as reasonable or unreasonable is not a federal one.

In addition to violating the negative mandate of the fifteenth amendment, S. 2750 attempts to nullify the literacy laws of twenty-one states and deprive the other twenty-nine of their power to set literacy tests for voters.

The Supreme Court has twice dealt with the constitutionality of state literacy test requirements as a condition to the exercise of the voting privilege. In both instances, it has decided that, in the absence of unreasonable and discriminatory application as condemned by the fifteenth amendment, the literacy test is a valid exercise of the state's power, and the citizen is not deprived of any right under the United States Constitution.

In *Guinn v. United States*, the Supreme Court held that an amendment to the Oklahoma Constitution which contained a "grandfather clause" was contrary to the fifteenth amendment. The Court stated, however,<sup>36</sup>

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. . . . [I]t is true also that the amendment does not change, modify or deprive the states of their full power as to suffrage except of course as to the subject with which the amendment deals and to the extent that obedience to its command is necessary. Thus, the authority over suffrage which the states possess and the limitation which the amendment imposes are coordinate and one may not destroy the other without bringing about the destruction of both. . . .

*No time need be spent on the question of the validity of the literary test considered alone since, as we have seen, its establishment was but the exercise by the state of a lawful power vested in it not subject to our supervision. . . .*

This language of 1915 has not been overruled; in fact, it was reaffirmed just three years ago in the case of *Lassiter v. Northampton County Board of Elections*.<sup>37</sup> There, Mr. Justice Douglas, speaking for a unanimous Court, held that, in the absence of a showing that the North Carolina literacy test had been capriciously applied, the plaintiff had not been denied her rights under the United States Constitution. The following excerpt from the Court's ruling amply defines the power of the states to require literacy of its voters:<sup>38</sup>

We come then to the question whether a state may, consistently with the fourteenth and seventeenth amendments, apply a literacy test to all voters irrespective of race or color. The Court in *Guinn v. United States* disposed of the question in a few words. "No time need be spent on the question of the validity of the literacy test considered alone, since,

<sup>36</sup> 238 U.S. 347, 362, 366 (1915). (Emphasis added.)

<sup>37</sup> 360 U.S. 45 (1959).

<sup>38</sup> *Id.* at 50.

as we have seen, its establishment was but the exercise by the state of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted." [238 U.S. at 366]

The states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. *Pope v. Williams*, 193 U.S. 621, 633, *Mason v. Missouri*, 179 U.S. 328, 335, absent, of course, the discrimination which the Constitution condemns. Article I, section 2 of the Constitution in its provision for the election of members of the House of Representatives and the seventeenth amendment in its provision for the election of senators provide that officials will be chosen "by the People." Each provision goes on to state that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U.S. 651; *Smith v. Allwright*, 321 U.S. 649) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.

It cannot be deemed unreasonable to place ever greater emphasis on intellectual ability to perform the duties of citizenship. This is not to say that we should turn government over to "philosopher-kings," as advocated by Plato in his *Republic*. However, in our society, which presents a voter with difficult and complicated issues to determine in federal, state, or local elections, the damage done by ignorant exercise of the franchise is almost immeasurable. This has been found equally true in performance of jury duty. New York was one of the states that pioneered in the use of a "blue ribbon jury"—a device intended to increase the likelihood of intelligent determinations of guilt and innocence in complicated and serious cases. The Supreme Court of the United States upheld the constitutionality of the "blue ribbon jury," and ruled that a state was free to consider intellectual qualifications for jury service.<sup>39</sup> While the performance of jury duty is of special importance in our society, the exercise of the franchise is not so far down the scale of civic duties in importance that a state could not reasonably consider the citizen's intellectual ability to vote.

When the fifteenth amendment was being considered by Congress, the Senate amended the House version of the bill to provide that in addition to the prohibition against denial of the voting privilege on grounds now encompassed by that amendment, no state should deny the franchise on the ground that the applicant lacked educational attainment. The Senate amendment was then sent back to the House, which struck it out by a vote of 133 to 37. It does not seem reasonable to conclude that Congress can now, under the guise of enforcing the fifteenth amendment as it stands, pass legislation to overrule this very conscious deletion made in 1870, and thereby amend the Constitution.

George W. McCrary, who was Chairman of the Committee on Elections at the time the fifteenth amendment was proposed, wrote in 1875:<sup>40</sup>

<sup>39</sup> *Fay v. New York*, 332 U.S. 261 (1947).

<sup>40</sup> GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 7 (1875).

Subject to the limitation contained in the fifteenth amendment to the Constitution of the United States, the power to fix the qualifications of voters is vested in the states. Each state fixes for itself these qualifications, and the United States adopts the state law upon the subject, as the rule in federal elections, as will be seen by reference to section 2, article I, of the Constitution. . . .

A former Speaker of the House and member of the Senate, James G. Blaine, recalled in his memoirs,<sup>41</sup>

The fifteenth amendment, now proposed, did not attempt to declare affirmatively that the negro should be endowed with the elective franchise, but it did what was tantamount, in forbidding to the United States, or to any state, the power to deny or abridge the right to vote on account of race, color, or previous condition of servitude. States that should adopt an educational test or a property qualification might still exclude a vast majority of negroes from the polls, but they would at the same time, exclude all white men who could not comply with the tests that excluded the negro. In short, suffrage by the fifteenth amendment was made impartial, but not necessarily universal, to male citizens above the age of twenty-one years.

#### CONCLUSION

Proponents of S. 2750 neglect to recognize the existence of conditions precedent to the exercise of the power of Congress to protect the right to vote. After the state determines who its voters are to be, after it sets uniform standards to apply to all prospective voters, then Congress constitutionally may legislate to insure that persons who meet those standards are able to cast their ballot. It is clear that under the Constitution as it exists today, and under the decisions of the United States Supreme Court, when Congress considers a bill to establish uniform voter qualifications, it considers an amendment to the Constitution.

The "right" referred to in the fourteenth amendment was created not by that amendment but by the laws of the various states. However, if a state refuses to allow a person the right to vote because of his race or color, the fifteenth amendment protects him. Otherwise, until a prospective voter can bring himself within that class of people which the state has established as eligible to vote, Congress' power under these amendments to secure his vote is non-existent. It follows that a state may, without violating the Constitution, reasonably require its voters to be literate.

Since the fourteenth and fifteenth amendments forbid certain specific actions, legislation to enforce their provisions must be specifically directed to state action which violates those amendments. I submit that since it does not meet these criteria, S. 2750 is unconstitutional. Its provisions are not tailored to correct state discrimination on the grounds of race or color. It is, furthermore, an attempt to legislate affirmatively upon voter qualifications, a subject which is constitutionally within the power of the states.

It ought to be clear that the entire scheme known to us as "federalism" finds its best expression in the theory that the states, composing the Union and acting in concert where the circumstances demand that kind of action, have nonetheless re-

<sup>41</sup> 2 JAMES G. BLAINE, *TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD* 417-18 (1886).

tained the powers commensurate with their status as sovereign governments, and that the Founding Fathers envisioned the states as sovereign governments, possessing that authority which distinguishes the sovereign from the subject. One of the attributes of such a sovereignty is the power to prescribe how citizens shall exercise their granted prerogative of suffrage. This attribute was clearly recognized and provided for by the framers of the Constitution. It was their explicit intention to permit the states to adopt such fair and reasonable qualifications as they chose for the purpose of determining who should and who should not vote.

In the case of electors for President and Vice President, the Constitution permits the states to make their determination in such manner as they shall prescribe by legislative enactment. In the case of electors for Senators and Representatives, the Constitution prescribes a different rule, but the salient factor in the entire consideration is that in *both* cases, the *qualifications* of the persons who shall be electors, subject to the requirements of fairness and uniformity of application, are left to the states alone, and the Congress has no power, express or implied, to alter by legislation a state law which is consistent with the Constitution.

I wish to make it crystal clear that I deplore the act of any election official in any southern state who wrongfully denies to any person of any race his right to register and vote. I do this for two reasons: first, he does a gross wrong to the individual concerned; and second, he adds immeasurably to the task of those of us who reverence the Constitution.

When men succumb to the temptation to do evil, they often lay to their souls the flattering unction that the evil they do will result in good. It is thus with the advocates of S. 2750; and the magic name of "Civil Rights bill" cannot cure the evil inherent in the measure. The Constitution is too precious a document to be lightly tampered with, for the evil we do, even in the name of a just cause, will surely come back to haunt us some day through the precedents we set.

The highest goal any judge or elected representative can have is to preserve the Constitution for the benefit of all Americans of all generations and all races.