

FIFTEENTH AMENDMENT

RIGHT OF CITIZENS TO VOTE

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RIGHT OF CITIZENS TO VOTE

FIFTEENTH AMENDMENT

SECTIONS 1 AND 2. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

ABOLITION OF SUFFRAGE QUALIFICATIONS ON BASIS OF RACE

Adoption and Judicial Enforcement

Adoption.—The final decision of Congress not to include anything relating to the right to vote in the Fourteenth Amendment, aside from the provisions of § 2,¹ left the issue of Negro suffrage solely with the states, and Northern states were generally as loath as Southern to grant the ballot to African-Americans, both the newly freed and those who had never been slaves.² But, in the second session of the 39th Congress, the right to vote was extended to African-Americans by statute in the District of Columbia and the territories, and the seceded states as a condition of readmission had to guarantee Negro suffrage.³ Following the election of President Grant, the “lame duck” third session of the Fortieth Congress sent the proposed Fifteenth Amendment to the states for ratification. The struggle was intense because Congress was divided into roughly three factions: those who opposed any federal constitutional guarantee of Negro suffrage, those who wanted to go beyond a limited guarantee and enact universal male suffrage, including abolition of all educational and property-holding tests, and those who wanted or who were

¹ See discussion under “Apportionment of Representation,” *supra*. Of course, the Equal Protection Clause has been extensively used by the Court to protect the right to vote. See “Fundamental Interests: The Political Process,” *supra*.

² W. GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 25–28 (1965).

³ *Id.* at 29–31; ch. 6, 14 Stat. 375 (1866) (District of Columbia); ch. 15, 14 Stat. 379 (1867) (territories); ch. 36, 14 Stat. 391 (1867) (admission of Nebraska to statehood upon condition of guaranteeing against racial qualifications in voting); ch. 153, 14 Stat. 428 (1867) (First Reconstruction Act).

willing to settle for an amendment merely proscribing racial qualifications in determining who could vote under any other standards the states wished to have.⁴ The latter group ultimately prevailed.

The Judicial View of the Amendment.—In its initial appraisals of this Amendment, the Supreme Court appeared disposed to emphasize only its purely negative aspects. “The Fifteenth Amendment,” it announced, did “not confer the right . . . [to vote] upon any one,” but merely “invested the citizens of the United States with a new constitutional right which is . . . exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.”⁵ But in subsequent cases, the Court, conceding “that this article” has originally been construed as giving “no affirmative right to the colored man to vote” and as having been “designed primarily to prevent discrimination against him,” professed to be able “to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words ‘white man’ as a qualification for voting, this provision did, in effect, confer on him the right to vote, because . . . it annulled the discriminating word white, and this left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which would give the right of voting exclusively to white people. . . .”⁶

Although “the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote,” the Amendment “is cast in fundamental terms, terms transcending the particular controversy,” and “grants protection to all persons, not just members of a particular race.”⁷ Moreover, the Court has construed “race” broadly to comprehend classifications based on ancestry as well as those based on race.⁸ “Ancestry can be a proxy for race,” the Court has explained, finding such a proxy in Hawaii’s limitation of the right to vote in a statewide election for an office responsible for ad-

⁴ Gillette, *supra*, at 46–78. The congressional debate is conveniently collected in 1 B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* 372 (1971).

⁵ *United States v. Reese*, 92 U.S. 214, 217–18 (1876); *United States v. Cruikshank*, 92 U.S. 542, 566 (1876).

⁶ *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884); *Guinn v. United States*, 238 U.S. 347, 363 (1915). A state constitutional provision limiting the right of suffrage to whites was automatically nullified by ratification of the Fifteenth Amendment. *Neal v. Delaware*, 103 U.S. 370 (1881).

⁷ *Rice v. Cayetano*, 528 U.S. 495 (2000).

⁸ *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating Oklahoma exception to literacy requirement for any “lineal descendants” of persons entitled to vote in 1866).

ministering a trust for the benefit of persons who can trace their ancestry to Hawaiian inhabitants of 1778.⁹

Grandfather Clauses.—Until quite recently, the history of the Fifteenth Amendment has been largely a record of belated judicial condemnation of various state efforts to disenfranchise African-Americans either overtly through statutory enactment or covertly through inequitable administration of electoral laws and toleration of discriminatory membership practices of political parties. Of several devices that have been held unconstitutional, one of the first was the “grandfather clause.” Beginning in 1895, several states enacted temporary laws whereby persons who had been voters, or descendants of those who had been voters, on January 1, 1867, could be registered notwithstanding their inability to meet any literacy requirement. Unable because of the date to avail themselves of the exemption, African-Americans were disabled to vote on grounds of illiteracy or through discriminatory administration of literacy tests, while illiterate whites were permitted to register without taking any tests. With the achievement of the intended result, most states permitted their laws to lapse, but Oklahoma’s grandfather clause had been enacted as a permanent amendment to the state constitution. A unanimous Court condemned the device as recreating and perpetuating “the very conditions which the [Fifteenth] Amendment was intended to destroy.”¹⁰

The Court did not experience any difficulty in voiding a subsequent Oklahoma statute of 1916 that provided that all persons, except those who voted in 1914, who were qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916, with some exceptions for sick and absent persons who were given an additional brief period to register, should be perpetually disenfranchised. The Fifteenth Amendment, Justice Frankfurter declared for the Court, nullified “sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.”¹¹ The impermissible effect of the statute, the Court said, was automatically to continue as permanent voters, without their being obliged to register again, all white persons who were on registration lists in 1914 by virtue of the previously invalidated grandfather clause, whereas African-Americans, prevented from registering by that clause, had been afforded only a 20-day registration opportunity to avoid permanent disenfranchisement.

⁹ Rice v. Cayetano, 528 U.S. 495, 514 (2000).

¹⁰ Guinn v. United States, 238 U.S. 347 (1915).

¹¹ Lane v. Wilson, 307 U.S. 268, 275 (1939).

The White Primary.—The Court displayed indecision, however, when it was called upon to deal with the exclusion of African-Americans from participation in primary elections. Prior to its becoming convinced that primary contests were in fact elections to which federal constitutional guarantees applied,¹² the Court had relied upon the Equal Protection Clause to strike down the Texas White Primary Law¹³ as well as a later Texas statute that contributed to a similar exclusion by limiting voting in primary elections to members of state political parties as determined by the central committees of such parties.¹⁴ When exclusion of African-Americans was thereafter perpetuated by political parties not acting in obedience to any statutory command, this discrimination was for a time viewed as not constituting state action and therefore as not prohibited by either the Fourteenth or the Fifteenth Amendments.¹⁵ This holding was reversed nine years later when the Court declared that, where the selection of candidates for public office is entrusted by statute to political parties, a political party in making its selection at a primary election is a state agency, and consequently may not under the Fifteenth Amendment exclude African-Americans from such elections.¹⁶ An effort by South Carolina to escape the effects of this ruling by repealing all statutory provisions regulating primary elections and political organizations conducting them was nullified by a lower federal court with no doctrinal difficulty,¹⁷ but the Supreme Court, although nearly unanimous on the result, was unable to come to a majority agreement with regard to the exclusion of African-Americans by the Jaybird Association, a countywide organization that, independently of state laws and the use of state election machinery or funds, nearly monopolized access to Democratic nomination for local offices. The exclusionary policy was held unconstitutional but there was no opinion of the Court.¹⁸

Literacy Tests.—At an early date the Court held that literacy tests that are drafted so as to apply alike to all applicants for the voting franchise would be deemed to be fair on their face and in the absence of proof of discriminatory enforcement could not be said

¹² *United States v. Classic*, 313 U.S. 299 (1941); *Smith v. Allwright*, 321 U.S. 649 (1944).

¹³ *Nixon v. Herndon*, 273 U.S. 536 (1927).

¹⁴ *Nixon v. Condon*, 286 U.S. 73 (1932).

¹⁵ *Grovey v. Townsend*, 295 U.S. 45 (1935).

¹⁶ *Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁷ *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); *see also Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949).

¹⁸ *Terry v. Adams*, 345 U.S. 461 (1953). For analysis of the opinions, *see* "State Action," *supra*.

to deny equal protection .Voter qualifications¹⁹ But an Alabama constitutional amendment, the legislative history of which disclosed that both its object and its intended administration were to disenfranchise African-Americans, was held to violate the Fifteenth Amendment.²⁰

Racial Gerrymandering.—The Court’s series of decisions interpreting the Equal Protection Clause as requiring the apportionment and districting of state legislatures solely on the basis of population²¹ had its beginning in *Gomillion v. Lightfoot*,²² in which the Court found a violation of the Fifteenth Amendment in the redrawing of a municipal boundary line into a 28-sided figure that excluded from the city all but four or five of 400 African-Americans but no whites, and that thereby continued white domination of municipal elections. Subsequent decisions, particularly concerning the validity of multi-member districting and alleged dilution of minority voting power, were decided under the Equal Protection Clause,²³ and, in *City of Mobile v. Bolden*,²⁴ in the course of a considerably divided decision with respect to the requirement of discriminatory motivation in Fifteenth Amendment cases,²⁵ a plurality of the Court sought to restrict the Fifteenth Amendment to cases in which there is official denial or abridgment of the right to register and vote, and to exclude indirect dilution claims.²⁶ Congressional amendment of

¹⁹ *Williams v. Mississippi*, 170 U.S. 213 (1898); *Cf. Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

²⁰ *Davis v. Schnell*, 81 F. Supp. 872 (M.D. Ala. 1949), *aff’d*, 336 U.S. 933 (1949).

²¹ See “Apportionment and Districting,” *supra*.

²² 364 U.S. 339 (1960). See also *Wright v. Rockefeller*, 376 U.S. 52 (1964).

²³ *E.g.*, *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973).

²⁴ 446 U.S. 55 (1980).

²⁵ On the issue of motivation versus impact under the equal protection clause, see discussion of “Testing Facially Neutral Classifications Which Impact on Minorities” in the Fourteenth Amendment, *supra*. On the plurality’s view, see 446 U.S. at 61–65. Justice White appears clearly to agree that purposeful discrimination is a necessary component of equal protection clause violation, and may have agreed as well that the same requirement applies under the Fifteenth Amendment. *Id.* at 94–103. Only Justice Marshall unambiguously adhered to the view that discriminatory effect is sufficient. *Id.* at 125. See also *Beer v. United States*, 425 U.S. 130, 146–49 & nn.3–5 (1976) (dissenting).

²⁶ 446 U.S. at 65. At least three Justices disagreed with this view and would apply the Fifteenth Amendment to vote dilution claims. *Id.* at 84 n.3 (Justice Stevens concurring), 102 (Justice White dissenting), 125–35 (Justice Marshall dissenting). The issue was reserved in *Rogers v. Lodge*, 458 U.S. 613, 619 n.6 (1982).

§ 2 of the Voting Rights Act may obviate the further development of constitutional jurisprudence in this area, however.²⁷

Congressional Enforcement

Although the Fifteenth Amendment is “self-executing,”²⁸ the Court early emphasized that the right granted to be free from racial discrimination “should be kept free and pure by congressional enactment whenever that is necessary.”²⁹ Following ratification of the Fifteenth Amendment in 1870, Congress passed the Enforcement Act of 1870,³⁰ which had started out as a bill to prohibit state officers from restricting suffrage on racial grounds and providing criminal penalties and ended up as a comprehensive measure aimed as well at private action designed to interfere with the rights guaranteed under the Fourteenth and Fifteenth Amendments. Insofar as this legislation reached private action, it was largely nullified by the Supreme Court and the provisions aimed at official action proved ineffectual and much of it was later repealed.³¹ More recent legislation has been much more far-reaching in this respect and has been sustained.

State Action.—Like § 1 of the Fourteenth, § 1 of the Fifteenth Amendment prohibits official denial of the rights therein guaranteed, giving rise to the “state action” doctrine.³² Nevertheless, the Supreme Court in two early cases seemed to be of the opinion that Congress could protect the rights against private deprivation, on

²⁷ See Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131, amending 42 U.S.C. § 1973. The Supreme Court interpreted the 1982 amendments to section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986), determining that Congress had effectively overruled the *City of Mobile* intent standard in returning to a “totality of the circumstances” results test.

²⁸ *Guinn v. United States*, 238 U.S. 347, 362–63 (1915).

²⁹ *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884).

³⁰ 16 Stat. 140. Debate on the Act is collected in 1 B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* 454 (1971). See also *The Enforcement Act of 1871*, ch. 99, 16 Stat. 433.

³¹ Ch. 25, 28 Stat 36 (1894); ch. 321, 35 Stat. 1153 (1909). See R. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* 35–55 (1947), for a brief history of the enactment and repeal of the statutes. The surviving statutes of this period are 18 U.S.C. §§ 241–42, and 42 U.S.C. §§ 1971(a), 1983, and 1985(3).

³² See “State Action,” under the Fourteenth Amendment, *supra*. “The State . . . must mean not private citizens but those clothed with the authority and influence which official position affords. The application of the prohibition of the Fifteenth Amendment to ‘any State’ is translated by legal jargon to read ‘State action.’ This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored.” *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Justice Frankfurter concurring).

the theory that Congress impliedly had power to protect the enjoyment of every right conferred by the Constitution against deprivation from any source.³³ In *James v. Bowman*,³⁴ however, the Court held that legislation based on the Fifteenth Amendment that attempted to prohibit private as well as official interference with the right to vote on racial grounds was unconstitutional. That interpretation was not questioned until 1941.³⁵ But the Court's interpretation of the "state action" requirement in cases brought under § 1 of the Fifteenth Amendment narrowed the requirement there and opened the possibility, when these decisions are considered with cases decided under the Fourteenth Amendment, that Congress is not limited to legislation directed to official discrimination.³⁶

Thus, in *Smith v. Allwright*,³⁷ the exclusion of African-Americans from political parties without the compulsion or sanction of state law was nonetheless held to violate the Fifteenth Amendment because political parties were so regulated otherwise as to be in effect agents of the state and thus subject to the Fifteenth Amendment; additionally, in one passage the Court suggested that the failure of the state to prevent the racial exclusion might be the act implicating the Amendment.³⁸ Then, in *Terry v. Adams*,³⁹ the political organization was not regulated by the state at all and selected its candidates for the Democratic primary election by its own processes; all eligible white voters in the jurisdiction were members of the organization but African-Americans were excluded. Nevertheless, the Court held that this exclusion violated the Fifteenth Amend-

³³ The idea was fully spelled out in Justice Bradley's opinion on circuit in *United States v. Cruikshank*, 25 Fed. Cas. 707, 712, 713 (No. 14,897) (C.C.D. La. 1874). The Supreme Court's decision in *United States v. Cruikshank*, 92 U.S. 542, 555–56 (1876), and *United States v. Reese*, 92 U.S. 214, 217–18 (1876), may be read to support the contention. *Ex parte Yarbrough*, 110 U.S. 651 (1884), involved a federal election and the assertion of congressional power to reach private interference with the right to vote in federal elections, but the Court went further to broadly state the power of Congress to protect the citizen in the exercise of rights conferred by the Constitution, among which was the right to be free from discrimination in voting protected by the Fifteenth Amendment. *Id.* at 665–66.

³⁴ 190 U.S. 127 (1903), holding unconstitutional Rev. Stat. § 5507, which was § 5 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140.

³⁵ *E.g.*, *United States v. Classic*, 313 U.S. 299, 315 (1941); *United States v. Williams*, 341 U.S. 70, 77 (1951).

³⁶ See "Congressional Definition of Fourteenth Amendment Rights," *supra*.

³⁷ 321 U.S. 649 (1944).

³⁸ "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restrictions by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." 321 U.S. at 664.

³⁹ 345 U.S. 461 (1953).

ment, although a majority of the Justices did not agree on a rationale for the holding. Four of them thought the case simply indistinguishable from *Smith v. Allwright*, and they therefore did not deal with the central issue.⁴⁰ Justice Frankfurter thought the participation of local elected officials in the processes of the organization was sufficient to implicate state action.⁴¹ Three Justices thought that when a purportedly private organization is permitted by the state to assume the functions normally performed by an agency of the state, then that association is subject to federal constitutional restrictions,⁴² but this opinion also, in citing selected passages of *Yarborough* and *Reese* and Justice Bradley's circuit opinion in *Cruikshank*, appeared to be suggesting that the state action requirement is not indispensable.⁴³ The 1957 Civil Rights Act⁴⁴ included a provision prohibiting private action with intent to intimidate or coerce persons in respect of voting in federal elections and authorized the Attorney General to seek injunctive relief against such private actions regardless of the character of the election. The 1965 Voting Rights Act⁴⁵ went further and prohibited and penalized private actions to intimidate voters in federal, state, or local elections. The Supreme Court has yet to consider the constitutionality of these sections.

Federal Remedial Legislation.—The history of federal remedial legislation is of modern vintage.⁴⁶ The 1957 Civil Rights Act⁴⁷ authorized the Attorney General of the United States to seek injunctive relief to prevent interference with the voting rights of citizens.

⁴⁰ 345 U.S. at 477 (Justices Clark, Reed, and Jackson, and Chief Justice Vinson).

⁴¹ 345 U.S. at 470.

⁴² 345 U.S. at 462, 468–69, 470 (Justices Black, Douglas, and Burton).

⁴³ 345 U.S. at 466–68. Justice Minton understood Justice Black's opinion to do away with the state action requirement. *Id.* at 485 (dissenting).

⁴⁴ 71 Stat. 637, 42 U.S.C. §§ 1971(b), 1971(c). In a suit to enjoin state officials from violating 42 U.S.C. § 1971(a), derived from Rev. Stat. 2004, applying to all elections, the defendants challenged the constitutionality of the law because it applied to private action as well as state. The Court held that inasmuch as the statute could constitutionally be applied to the defendants it would not hear their contention that as applied to others it would be void. *United States v. Raines*, 362 U.S. 17 (1960), disapproving the approach of *United States v. Reese*, 92 U.S. 214 (1876).

⁴⁵ Pub. L. 89–110, §§ 11–12, 79 Stat. 443, 42 U.S.C. §§ 1973i, 1973j.

⁴⁶ The 1871 Act, ch. 99, 16 Stat. 433, provided for a detailed federal supervision of the electoral process, from registration to the certification of returns. It was repealed in 1894. ch. 25, 28 Stat. 36. In *Giles v. Harris*, 189 U.S. 475 (1903), the Court, in an opinion by Justice Holmes, refused to order the registration of 6,000 African-Americans who alleged that they were being wrongly denied the franchise, the Court observing that no judicial order would do them any good in the absence of judicial supervision of the actual voting, which it was not prepared to do, and suggesting that the petitioners apply to Congress or the President for relief.

⁴⁷ Pub. L. 85–315, 71 Stat. 634. *See United States v. Raines*, 362 U.S. 17 (1960); *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir.), *aff'd*, 371 U.S. 37 (1962).

The 1960 Civil Rights Act⁴⁸ expanded on this authorization by permitting the Attorney General to seek a court finding of “pattern or practice” of discrimination in any particular jurisdiction and authorizing upon the entering of such a finding the registration of all qualified persons in the jurisdiction of the race discriminated against by court-appointed referees. This authorization moved the vindication of voting rights beyond a case-by-case process. Further amendments were added in 1964.⁴⁹ Finally, in the Voting Rights Act of 1965,⁵⁰ Congress went substantially beyond what it had done before. It provided that if the Attorney General determined that any state or political subdivision maintained on November 1, 1964, any “test or device”⁵¹ and that less than 50 per cent of the voting age population in that jurisdiction was registered on November 1, 1964, or voted in the 1964 presidential election, such tests or devices were to be suspended for five years and no person should be denied the right to vote on the basis of such a test or device. A state could reinstitute such a test or device within the prescribed period only by establishing in a three-judge court in the District of Columbia that the test or device did not have a discriminatory intent or effect and the covered jurisdiction could only change its election laws in that period by obtaining the approval of the Attorney General or a three-judge court in the District of Columbia. The Act also provided for the appointment of federal examiners who could register persons meeting nondiscriminatory state qualifications who then must be permitted to vote.

⁴⁸ Pub. L. 86–449, 74 Stat. 86.

⁴⁹ Pub. L. 88–352, 78 Stat. 241.

⁵⁰ Pub. L. 89–110, 79 Stat. 437, 42 U.S.C. §§ 1973 *et seq.*

⁵¹ The phrase “test or device” was defined as any requirement for (1) demonstrating the ability to read, write, understand, or interpret any matter, (2) demonstrating any educational achievement or knowledge, (3) demonstrating good moral character, (4) proving qualifications by vouching of registered voters. Aimed primarily at literacy tests, *South Carolina v. Katzenbach*, 383 U.S. 301, 333–34 (1966), the Act was considerably broadened through the Court’s interpretation of § 5, 42 U.S.C. § 1973c, which require the approval either of the Attorney General or a three-judge court in the District of Columbia before a state could put into effect any new voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting, to include such changes as apportionment and districting, adoption of at-large instead of district elections, candidate qualification regulations, provisions for assistance of illiterate voters, movement of polling places, adoption of appointive instead of elective positions, annexations, and public employer restrictions upon employees running for elective office. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Perkins v. Matthews*, 400 U.S. 379 (1971); *Georgia v. United States*, 411 U.S. 526 (1973); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32 (1978). *See also* *United States v. Board of Comm’rs of Sheffield*, 435 U.S. 110 (1978) (pre-coverage provisions apply to all entities having power over any aspect of voting, not just “political subdivisions” as defined in Act).

The Supreme Court upheld and expansively applied these laws. In *United States v. Mississippi*,⁵² it held that the Attorney General was properly authorized to sue for preventive relief to protect the right of citizens to vote, that the state could be sued, and that various election officers were defendants and the suit could not be defeated by the resignation of various officers. In *Louisiana v. United States*,⁵³ the Court upheld a lower federal court's judgment voiding an "interpretation test" that required an applicant to interpret a section of the state or federal constitution to the satisfaction of the voting registrar. The test was unconstitutional because it vested vast discretion in the registrars to determine qualifications, it imposed no definite and objective standards for administration of the tests, and it had been administered so as to disqualify African-Americans and qualify whites. The Court also affirmed the lower court's decree invalidating imposition of a new objective test for new voters unless the state required all present voters to reregister so that all voters were tested by the same standards.

But, it was in upholding the constitutionality of the 1965 Act that the Court sketched in the outlines of a broad power in Congress to enforce the Fifteenth Amendment.⁵⁴ Although § 1 authorized the courts to strike down state statutes and procedures that denied the vote on the basis of race, the Court held, § 2 authorized Congress to go beyond proscribing certain discriminatory statutes and practices to "enforcing" the guarantee by any rational means at its disposal. The standard was the same as that used under the "necessary and proper" clause supporting other congressional legislation. Congress was therefore justified in deciding that certain areas of the nation were the primary locations of voting discrimination and in directing its remedial legislation to those areas. Congress chose a rational formula based on the existence of voting tests that could be used to discriminate and based on low registration or voting rates demonstrating the likelihood that the tests had been so used; it could properly suspend for a period all literacy tests in the affected areas upon findings that they had been administered discriminatorily and that illiterate whites had been registered while both literate and illiterate African-Americans had not been; it could require the states to seek federal permission to reinstitute old tests or to institute new ones; and it could provide for federal examiners to register qualified voters. The nearly unanimous decision affords

⁵² 380 U.S. 128 (1965).

⁵³ 380 U.S. 145 (1965). *See also* *United States v. Thomas*, 362 U.S. 58 (1960); *United States v. Alabama*, 362 U.S. 602 (1960); *Alabama v. United States*, 371 U.S. 37 (1962).

⁵⁴ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Congress a vast amount of discretion to enact measures designed to enforce the Amendment through broad affirmative prescriptions rather than through proscriptions of specific practices.⁵⁵ Subsequent decisions confirm the reach of this power. In one case, the Court held that evidence of discrimination in the educational opportunities available to black children in the county as compared to that available to white children during the period in which most of the adults who were now potential voters were in school precluded a North Carolina county from reinstating a literacy test because of the past educational discrimination.⁵⁶ And, in 1970, when Congress⁵⁷ suspended for a five-year period literacy tests throughout the nation, the Court unanimously sustained the action as a valid measure to enforce the Fifteenth Amendment.⁵⁸

Moreover, in *City of Rome v. United States*,⁵⁹ the Court read even more broadly the scope of Congress's remedial powers under § 2 of the Fifteenth Amendment, paralleling the similar reasoning under § 5 of the Fourteenth. The jurisdiction sought to escape from coverage of the Voting Rights Act by showing that it had not utilized any discriminatory practices within the prescribed period. The lower court had found that the City had engaged in practices without any discriminatory motive, but that its practices had had a discriminatory impact. The City thus argued that, because the Fifteenth Amendment reached only purposeful discrimination, the Act's proscription of effect as well as purpose went beyond Congress's power. The Court held, however, that even if discriminatory intent was a prerequisite to finding a violation of § 1 of the Fifteenth Amendment by the courts,⁶⁰ Congress had the authority to go beyond that and proscribe electoral devices that had the effect of discriminating. The section, like § 5 of the Fourteenth Amendment, was in effect a "necessary and proper clause" enabling Congress to enact enforcement legislation that was rationally related to the end sought and that was not prohibited by it but was consistent with the letter and spirit of the Constitution, even though the actual practice outlawed or restricted would not be judicially found to violate the Fifteenth Amendment. In so acting, Congress could prohibit state action that perpetuated the effect of past discrimination, or that,

⁵⁵ Justice Black dissented from that portion of the decision that upheld the requirement that before a state could change its voting laws it must seek approval of the Attorney General or a federal court. 383 U.S. at 355.

⁵⁶ *Gaston County v. United States*, 395 U.S. 285 (1969).

⁵⁷ 84 Stat. 315, 42 U.S.C. § 1973aa.

⁵⁸ *Oregon v. Mitchell*, 400 U.S. 112, 131–34, 144–47, 216–17, 231–36, 282–84 (1970).

⁵⁹ 446 U.S. 156 (1980).

⁶⁰ *Cf. City of Mobile v. Bolden*, 446 U.S. 55 (1980).

because of the existence of past purposeful discrimination, raised a risk of purposeful discrimination that might not lend itself to judicial invalidation. “It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are ‘appropriate,’ as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia* Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.”⁶¹

City of Rome is highly significant for the validity of congressional additions to the Voting Rights Act. In 1975 and 1982, Congress extended and revised the Act to increase its effectiveness,⁶² and the 1982 Amendments were addressed to revitalizing § 2 of the Act, which, unlike § 4 and § 5, which remain limited to a number of jurisdictions, applies nationwide.⁶³ As enacted in 1965, § 2 largely tracked the language of the Fifteenth Amendment itself. In *City of Mobile*

⁶¹ *City of Rome v. United States*, 446 U.S. 156, 177 (1980). Justices Powell, Rehnquist, and Stewart dissented. *Id.* at 193, 206. In *Lopez v. Monterey County*, 525 U.S. 266 (1999), the Court reiterated its prior holdings that Congress may exercise its enforcement power based on discriminatory effects, and without any finding of discriminatory intent.

⁶² The 1975 amendments, Pub. L. 94–73, 89 Stat. 400, extended the Act for seven years, expanded it to include those areas having minorities distinguished by their language, *i.e.*, “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage,” § 207, 42 U.S.C. § 1973 1(c)(3), in which certain statistical tests are met and requiring election materials be provided in the language(s) of the group(s), and enlarged to require bilingual elections if more than five percent of the voting age citizens of a political subdivision are members of a single language minority group whose illiteracy rate is higher than the national rate. The 1982 amendments, Pub. L. 97–205, 96 Stat. 131, in addition to the § 2 revision, alter after August 5, 1984, the provisions by which a covered jurisdiction may take itself from under the Act by proving to the special court in the District of Columbia that it has complied with the Act for the previous ten years and that it has taken positive steps both to encourage minority political participation and to remove structural barriers to minority electoral influence. Moreover, the amendments change the result in *Beer v. United States*, 425 U.S. 130 (1976), in which the Court had held that a covered jurisdiction was precluded from altering a voting practice only if the change would lead to a retrogression in the position of racial minorities; even if the change was only a little ameliorative of existing discrimination, the jurisdiction could implement it. The 1982 amendments provide that the change may not be approved if it would “perpetuate voting discrimination,” in effect applying the new § 2 results test to preclearance procedures. S. REP. No. 417, 97th Congress, 2d Sess. 12 (1982); H.R. REP. No. 227, 97th Congress, 1st Sess. 28 (1981).

⁶³ Private parties may bring suit to challenge electoral practices under § 2. It provided, before the 1982 amendments, that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”

v. Bolden,⁶⁴ a majority of the Court agreed that the Fifteenth Amendment and § 2 of the Act were coextensive, but the Justices did not agree on the meaning to be ascribed to the statute. A plurality believed that, because the constitutional provision reached only purposeful discrimination, § 2 was similarly limited. A major purpose of Congress in 1982 had been to set aside this possible interpretation and to provide that any electoral practice “which results in a denial or abridgement” of the right to vote on account of race or color will violate the Act.⁶⁵ The subsequent Court adoption, or re-adoption, of the standards by which it can be determined when a practice denies or abridges the right to vote, though couched in terms of proving intent or motivation, may well bring the constitutional and statutory standards into such close agreement that the constitutional question will not arise.⁶⁶

⁶⁴ 446 U.S. 55 (1980). *See id.* at 60–61 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger), and *id.* at 105 n.2 (Justice Marshall dissenting).

⁶⁵ In § 3 of the 1982 amendments, § 2 of the Act was amended by the insertion of the quoted phrase and the addition of a section setting out a nonexclusive list of factors making up a totality of circumstances test by which a violation of § 2 would be determined. 96 Stat. 134, amending 42 U.S. § 1973. Without any discussion of the Fifteenth Amendment, the Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), interpreted and applied the “totality of the circumstances” test in the context of multimember districting.

⁶⁶ *See Rogers v. Lodge*, 458 U.S. 613 (1982).

