University of Michigan Journal of Law Reform

Volume 4

1970

Katzenbach V. Morgan and the 18 Year Old Vote

E. Rick Buell II
University of Michigan Law School

KATZENBACH V. MORGAN AND THE 18 YEAR OLD VOTE

I. INTRODUCTION

Recently the 91st Congress passed the Voting Rights Act Amendments of 1970.[1] The provisions of the statute include Title III which extended the right of suffrage to eighteen year old citizens in all federal, state, and local elections.[2] The basis for

[1] Pub. L. No. 91-285, tit. III (June 22, 1970) [hereinafter Voting Rights Act]

[2] Voting Rights Act, tit. III:

"Title III-REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"'Declaration and Findings

"Sec. 301 (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

" (1) denies and abrides the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair tratment of such citizens in view of the national defense responsibilities imposed upon such citizens;

" (2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the Fourteenth Amendment of the Constitution; and

" (3) does not bear a reasonable relationship to any compelling state interest.

" (b) In order to secure the Constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

" Prohibition

"Sec. 302 Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any state or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

" Enforcement

"Sec. 303 (a) (1) In the exercise of the powers of Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the Fourteenth Amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purpose of this title.

" (2) The district courts of the United States shall have jurisdictions instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

" (b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

" Definition

"Sec. 304 As used in this title the term 'State' includes the District of Columbia.

enacting Title III was the belief of Congress[3] that citizens between the ages of eighteen and twenty-one, by being denied the right to vote, were being denied equal protection of the laws as required by the Fourteenth Amendment to the United States Constitution.[4] The purpose of this note is to briefly trace the historical development of Congress' power to enforce the Equal Protection Clause and from this basis to examine the constitutionality of Title III.

II. HISTORY OF SECTION 5 OF THE FOURTEENTH AMENDMENT

An examination of the Fourteenth Amendment reveals that Congress has the power under Section 5 to enforce equal protection of the laws for all citizens by appropriate legislation.[5] During the early history of the Amendment, Congress' power under section 5 was severely restricted by the courts. A line of Supreme Court decisions made it clear that Congress could legislate under the Enforcement Clause only to correct recognized violations of the Equal Protection Clause.[6] Congress could not, on its own initiative, determine that a denial of equal protection had occurred. Thus, only the courts had the authority to interpret the substantive provisions of the Fourteenth Amendment, and the Congress could do no more than follow the court decisions.[7] This was the position of the Court until 1966.

In the 1960's the Court began to recognize the right of Con-

"Effective Date

"Sec. 305 The provisions of Title III shall take effect with respect to any primary or election held on or after January 1, 1971."

[3] Voting Rights Act, § 301 (a) (2).

[4] U.S. CONST. amend. XIV.

[5] U.S. CONST. amend. XIV, § 5.

[6] *See, for example,* United States v. Cruikshank, 92 U.S. 542, 545 (1875). The defendants were indicted under the criminal provisions of the federal civil rights legislation of 1870. The defendants were charged with conspiracy to hinder a group of Negro citizens from exercising their "lawful right and privilege to peacefully assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The indictment was invalid as not stating an offense under the statute.

In *United States v. Harris,* 106 U.S. 629 (1882), the defendants were indicted for having violated section 5519 of the Revised Statutes which made it unlawful for two or more persons to conspire for the purpose of depriving any person or class of persons "of the equal protection of the laws or of equal privileges and immunities under the laws . . . " 106 U.S. at 632. The Court held the statute unconstitutional on the basis that no state action violated equal protection and thus the Fourteenth Amendment "imposes no duty and confers no power upon Congress." 106 U.S. at 639.

See also Civil Rights Cases, 109 U.S. 3 (1883), where defendants were indicted for violating the Civil Rights Act passed March 1, 1875. The Court held that the specific provisions of the act which led to the indictment were unconstitutional because the Congress had no authority under the Fourteenth Amendment to control individual acts but was limited to creating legislation to protect against state action which violated the Fourteenth Amendment.

[7] *See* Comment, *Residence Requirements for Voting in Presidential Elections,* 37 U. CHI. L. REV. 359, 384 (1970). *See generally* Comment, *Equal Protection Clause—Congressional Power of Initial Determination,* 20 RUTGERS L. REV. 827 (1966).

gress initially to determine when to implement its constitutional powers.[8] In *Katzenbach v. McClung*,[9] the Court explicitly established that Congress has the power of initial determination under the Commerce Clause. Shortly thereafter the Court in *South Carolina v. Katzenbach*[10] interpreted Congress' power of initial determination to include the right of Congress to preclude racially discriminatory voting practices under the Fifteenth Amendment.

These cases provide the framework in which the Supreme Court decided *Katzenbach v. Morgan*.[11] In this decision, the Court upheld the constitutionality of section 4(e) of the Voting Rights Act of 1965[12] by finding that Congress under Section 5 of the Fourteenth Amendment had the ability to exercise its discretion in determining what legislation is needed to secure the guarantees of equal protection.[13]

Section 4(e) provided that no citizen who had completed six years of primary education in any Puerto Rican school in which English was not the language of instruction, could be denied his right to vote in any election because of his inability to read and speak the English language. In overruling objections to the constitutionality of the section, the Court wrote:

> Correctly viewed, section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.[14]

Furthermore when discussing the extent to which the judicial branch could review such a determination by Congress the Court stated:

> It is not for us to review the Congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[15]

Thereby the Court extended the power of initial determination in

---

[8] *See* Comment, *Equal Protection Clause, supra* note 7.

[9] 379 U.S. 294 (1964). The Court upheld the constitutionality of Title II of the Civil Rights Act of 1964. The Court held that the statute was valid under Congress's power under the Commerce Clause. The Court further decided that if Congress in light of the facts and testimony before them have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce it could not find the statute invalid.

[10] 383 U.S. 301 (1966). Here, the Court upheld the constitutionality of the sections of the 1965 Voting Rights Act which prohibited the use of literacy tests in determining voter qualification on the basis that under Section 2 of the Fifteenth Amendment Congress may use any rational means to eliminate racial discrimination as against the states.

[11] 384 U.S. 641 (1966).

[12] 42 U.S.C. §1973 (1969).

[13] U.S. CONST. amend XIV, § 5.

[14] 384 U.S. at 651.

[15] 384 U.S. at 653.

implementing the protection of the Fourteenth Amendment to Congress and, consequently, authorized Congress to interpret the substantive provisions of this Amendment. It is within the context of this historical background that the constitutionality of Title III must be examined.

III. CONSTITUTIONALITY OF TITLE III OF THE VOTING RIGHTS ACT AMENDMENT OF 1970

The United States Constitution delegates the power to establish voter qualifications to the states.[16] However, this power is restricted by applicable provisions of the Constitution.[17] Congress, under *Morgan,* has an affirmative power under the Enforcement Clause to enact appropriate legislation to promote the provisions of the Fourteenth Amendment, including the Equal Protection Clause.[18] Thus, the only determination for the Court is to answer "whether such legislation is, as required by Section 5, *appropriate legislation* to enforce the Equal Protection Clause."[19] (Emphasis supplied).

To determine whether a specific legislative enactment is appropriate legislation, the Court has traditionally turned to the standards pronounced in *McCulloch v. Maryland.*[20] Applied to the Fourteenth Amendment, these tests consist of examining whether the legislation may be regarded as an enactment to enforce the Equal Protection Clause, whether it is plainly adapted to that end, and whether it is consistent with the letter and spirit of the Constitution.[21]

---

[16] U.S. CONST. art. I, § 2. U.S. CONST. amend XIV. *See also* Katzenbach v. Morgan, 384 U.S. 641 (1966), where the Court stated: "Under the distribution of powers effected by the Constitution, the States establish qualification for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, . . . " at 647.

[17] "But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution." 384 U.S. at 647.

[18] As stated by the Court: "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U.S. at 651.

[19] 384 U.S. at 650.

[20] 17 U.S. (4 Wheat) 316 (1819). The Court through Chief Justice Marshall initially established the classic formulation of the reach of Congress's powers under the Necessary and Proper Clause when it held:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

17 U.S. (4 Wheat) at 421.

[21] This was also the standard applied in *Morgan:*

> We therefore proceed to the consideration whether § 4(e) is 'appropriate legis-

In deciding whether section 4(e) of the Voting Rights Act of 1965 could be regarded as an enactment to promote equal protection, the Court in *Morgan* considered two factors. It noted that Congress "explicitly declared that it enacted section 4(e) 'to secure the rights under the Fourteenth Amendment of persons educated in American flag schools in which the predominant classroom language was other than English.' "[22] It also noted that

> more specifically, section 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing, and law enforcement.[23]

In enacting Title III Congress carefully reiterated the considerations accepted by the Court in *Morgan,* by explicitly declaring that it enacted Title III to secure rights protected under the Fourteenth Amendment:

> Congress finds and declares that the imposition and application of a requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or any election . . . has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the Fourteenth Amendment of the Constitution . . . .In order to secure the Constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age and over.[24]

Therefore, Title III expresses a congressional determination that the present voting laws express an invidious discrimination against a class of citizens. If such discrimination exists, then the second test of *McCulloch* is met—that the legislation is plainly adapted to end the discrimination—for those over eighteen are given the right to vote.

Finally, according to *McCulloch* as interpreted in *Morgan,* the enactment must not be prohibited by, but must be consistent with,

---

lation' to enforce the Equal Protection Clause, that is, under the *McCulloch* v. *Maryland* standard, whether § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with the 'letter and spirit of the Constitution.'

384 U.S. at 651.

[22] 384 U.S. at 652.

[23] 384 U.S. at 652.

[24] Pub. L. 91-285, tit. III, § 301(a)(2) (b) (June 22, 1970).

the letter and spirit of the Constitution. *Morgan,* in applying this test, demands that such legislation does not dilute guarantees of the Fourteenth Amendment[25] or violate other portions of the Constitution.[26] Title III, Congress argues, does not dilute the guarantees of the Fourteenth Amendment but, by extending the franchise to a class which has unjustifiably been denied the right to vote, promotes and enforces equal protection. Furthermore, it does not appear that such an extention of the sufferage is inconsistent with other portions of the Constitution. Although the Consitution provides in Article I, Section II and the Seventeenth Amendment that the states shall set voting requirements, the requirements may not deny the equal protection guarantees of the Fourteenth Amendment.[27] Having complied with the third and final standard of the *McCulloch* test, Title III appears to be an appropriate exercise of congressional power under the Enforcement Clause.

Yet, whether Title III is, in fact, an appropriate exercise of congressional power under the Enforcement Clause must in the final analysis depend upon the validity of the congressional determination that denial of the vote to eighteen year olds is a denial of equal protection. Even though Congress has met the tests of *McCulloch* by deciding and remedying what Congress feels is a denial of equal protection, the final determination of whether there is such a denial must rest with the Supreme Court.

Morgan determines that in reviewing a congressional finding of discrimination, the Court may not overturn the congressional determination if it is reasonable. The Court need only "perceive a rational basis upon which Congress might resolve the conflict as it

---

[25] 384 U.S. at 651 n. 10:

> Contrary to the suggestion of the dissent, *post,* p. 668, § 5 does not grant Congress power to exercise discretion in the other direction and to enact statutes so as in effect to dilute equal protection and due process decisions of this Court. We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

[26] 384 U.S. at 656.

[27] In Lassiter v. Northampton Election Bd., 360 U.S. 45, 51 (1958) the Court said:

> Article I, § 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 the '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 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.

did."[28] The Court should be able to perceive such a rational basis in the present situation.

Under the existing laws two classes of citizens are established, those over twenty-one who may vote and those under twenty-one who are not eligible to vote. Yet both of these classes form part of a larger class—the group of American citizens mature and responsible enough to exercise a vote—and Congress has determined that all within this larger class, those over eighteen, satisfy the criteria to enable one to vote. The reasoning of Congress is clear. Both these classes of citizens are subject to several of the same laws which substantially affect their personal and property rights. The selective service laws[29] and laws subjecting a citizen to federal criminal prosecution as an adult[30] include all citizens over eighteen, not only those over twenty-one. Since involuntary conscription is the result of the draft and incarceration is the result of prosecution, their application may result in serious restriction of personal liberties.

Nevertheless, only the class of those citizens over twenty-one has a right to participate in the decision-making process of federal policy, which in turn determines the size of the draft calls and decides which acts are to be considered criminal and the necessary punishment if they are committed. The result is that one class of citizens is subject to the jurisdiction of these laws without being able to express his vote upon the policy determining the extent to which these statutes are effectuated. This classification creates the invidious discrimination alleviated by Title III.

The States, in opposing the validity of the act, assert that it would be an unwarranted extension of *Morgan* for the Court to accept the congressional determination of the existence of an invidious discrimination on a "rational basis" test, yet never decide the true question of whether an invidious discrimination in fact exists. Otherwise, the congressional opinion must always be upheld. The argument of the State, is that, in this case, Congress has not shown that denying eighteen year olds the right to vote denies them equal protection of the laws.

Assuming that classification by age is a rational method of determining who is able to vote, the only relevant question is whether there is an invidious discrimination by the States in choosing twenty-one instead of eighteen. The States cite several reasons why this age distinction is not an invidious dis-

[28] 384 U.S. at 654.
[29] 50 U.S.C. app. § 453 (1968).
[30] 18 U.S.C. ch. 403 (1969).

crimination.[31] Initially they point to the period of time and the number of court decisions that have consistently approved voting at age twenty-one.[32] In addition, it is difficult to believe that the age designated for coming of majority, adopted by all states at the founding of our country and currently in effect in 46 of the states, has been an almost 200 year discrimination against those younger than twenty-one.

The States also attack the congressional rationale in determining that a minimum voting age of twenty-one denies equal protection to those between eighteen and twenty-one.[33] Title III of the Act states that the twenty-one age requirement is "particularly unfair treatment . . . in view of national defense responsibilities."[34] Although it is true that both selective service responsibilities and prosecution for criminal activity are tied to the age of eighteen,[35] other federal burdens are imposed at different ages. For example, the federal income tax will fall upon sixteen and eighteen year olds alike.

In addition, more than national interests are affected by the citizens' voting, and any attempt to establish an invidious discrimination based on the minimum age of twenty-one must take state interests into consideration. Although for purposes of federal prosecution, one is a juvenile if under eighteen years of age, the juvenile courts in Michigan, for example, have jurisdiction of children under seventeen, and in cases involving felonies one as young as fifteen years may be tried as an adult.[36] Thus, if the question before the Congress was whether the twenty-one year old vote created an invidious discrimination and, if so, how to alleviate it, then perhaps Congress should have decided either fifteen, sixteen or seventeen was the proper age because persons in these age groups both pay taxes, and in some states, can be prosecuted as adults.[37]

---

[31] *See* Plaintiff's brief for the State of Oregon, Oregon v. Mitchell, No. 43 Original, (Oct Term 1970).

[32] *See, for example,* Riley v. Holmer, 100 Fla. 938, 131 So. 330 (1930), where the Court relied on the state constitutional voting requirement of twenty-one years, against an eighteen year old plaintiff's claim that, as a married man, he was entitled to vote. *See also* Dorsey v. Brigham, 177 Ill. 250, 52 N.E. 303 (1898), upholding state constitutional voting requirement of twenty-one years as applied to women voters; Edwin v. Benton, 120 Ky. 536, 87 S.W. 291 (1905), and Widick v. Rolsom, 303 Ky. 373, 197 S.W.2d 261 (1946), both upholding the state constitutional voting requirement of twenty-one years.

[33] *See* note 31 *supra.*

[34] *See* note 2 *supra.*

[35] *See* notes 29 and 30 *supra.*

[36] MICH. COMP LAWS § 764.27 (1968). The statute provides in part: "That in any case where a child *over the age of 15 years* is charged with a felony the judge of probate . . . may . . . waive jurisdiction; whereupon it shall be lawful to try such child in the court having general criminal jurisdiction of such offenses." [Emphasis added].

[37] For an example of states providing for a lower age requirement for criminal

This analogy serves the States in two ways. First, they maintain that, regardless of the congressional determination, the differences in ages required for voting do not deny equal protection because there is no invidious classification. No one is denied the right to vote, as in previous voting rights cases;[38] rather, that right is simply delayed in accordance with reasonable state decisions about the maturity of people at different ages. Even though burdens are imposed upon citizens at various ages under twenty-one—at fifteen as well as eighteen—the simple fact of age differences cannot be an adequate basis for a congressional finding of invidious discrimination. Article I, Section 2 and the Seventeenth Amendment establish that the states shall determine voting requirements. The Fourteenth Amendment does not give Congress the right to second-guess the states upon their determinations; it only gives Congress the right to affirmatively act to eliminate denials of equal protection, and no such denial can be shown.

Second, the States can use the fifteen year old analogy to argue that Congress has not complied with the second requirement of *McCulloch:* that the legislation is plainly adapted to alleviate the discrimination.[39] If Congress is correct that the twenty-one year old vote denies equal protection to those under twenty-one, then Congress fails to alleviate that discrimination when it creates another invidious classification between those eighteen and those younger. Although the State arguments possess significant validity, they fail to offset the unique presumption the Court in *Morgan* places upon the congressional, not the states', belief about the existence of an invidious discrimination. As the Court stated in *Morgan,* "the states have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth

---

prosecutions as an adult, *see* CAL. WELF. INST'NS CODE § 707 (West 1966), which allows the court discretion to direct that a minor of sixteen years and above be prosecuted under the applicable criminal statute or ordinance as an adult rather than be dealt with under the auspices of the juvenile Court. *See also* ILL. CODE ANN. ch. 37 § 702-2, confining the jurisdiction of the juvenile court to males under the age of seventeen , and to females under the age of eighteen, who have violated a state or federal law, or municipal ordinance; TEX. CODE CRIM. PRO. art. 2338 § 6 (b) (1966) providing that the juvenile court may waive jurisdiction and transfer to an appropriate district court or criminal district court for criminal proceedings any child of age fifteen or over charged with commission of a felony.

[38] *See, for example,* Harper v. Virginia Board of Education 383 U.S. 663, 666 (1966), where the Court held that a "State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard;" and Carrington v. Rash 380 U.S. 89 (1965), where the Court declared as being a denial of equal protection a provision of the Texas Constitution which prohibited any member of the armed forces of the United States who moves to Texas during his military career from voting in any election in Texas so long as he remained a member of the armed forces.

[39] *See* note 20 *supra* and accompanying text.

Amendment."[40] This determination is given to the Congress under Section 5. In the words of the Court,

> [i]t is not for us to review the congressional resolution of these factors. It is enough that we are able to perceive a basis upon which the Congress might resolve the conflict as it did.[41]

If Congress truly has the authority to balance the factors and the courts will not carefully scrutinize the accuracy of Congress' decision, then the congressional suggestions of discrimination will override the arguments of the States.

The States also argue that *Morgan* can be distinguished from the present facts, by limiting its holding to the now traditional Fourteenth Amendment litigation which invalidates state restrictions on ethnic minorities' rights.[42] *Morgan* decided that Congress could determine that citizens educated in Puerto Rican schools could not be denied their right to vote because of an inability to read English. Section 4(e) of the Voting Rights Act, thus, superceded New York State Laws to the contrary.[43] Inherent in this case, however, was a racial discrimination. Acknowledging this, the Court stated:

> The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community.[44]

Puerto Ricans were denied the right to vote because they were a Spanish-speaking people educated in Spanish-taught schools. Therefore, had a private citizen instituted suit against New York on the basis of discrimination in its voting laws, there is a significant likelihood that the Puerto Rican's plea for equal protection on voting would have been sustained on the basis of racial discrimination. The same is clearly not true of the twenty-one year old vote. Had an eighteen year old citizen challenged the constitutionality of his state's twenty-one year old voting law, most likely he would not have succeeded. Unlike the particular area of racial discrimination, legislation that discriminates on bases other

[40] 384 U.S. at 647.

[41] 384 U.S. at 653.

[42] *See, for example,* Brown v. Board of Education of Topeka 347 U.S. 483 (1954), where separate but equal schools for purposes of segregating black and white children were found to be a denial of equal protection; Burton v. Wilmington Parking Authority 365 U.S. 715 (1961), where a restaurant owner whose restaurant located within an off-street municipally controlled auto parking structure was found to have violated the Equal Protection Clause when it refused to serve food or drink solely to those of the Negro race; Evans v. Newton 382 U.S. 296 (1966), where it was held to be a denial of equal protection to refuse to let Blacks use a private park because of their race.

[43] N.Y. CONST. art. II, § 1; N.Y. ELECTION LAW § § 150, 168 (1964).

[44] 384 U.S. at 652.

than race will be struck down only if there is no rational basis for the discrimination.[45]

Although the States may point out that recent cases finding discrimination under the Fourteenth Amendment have concerned civil rights of ethnic minorities, there is no indication that the Court sought to limit its opinion in *Morgan* to similar situations. There is no language in *Morgan* to the effect that the Court meant the standards pronounced in the case were to apply only in cases involving the equal protection of ethnic minorities and that a different set of standards would be created to deal with the use of Section 5 powers in cases not involving ethnic minorities. The Court merely states:

> Correctly viewed section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.[46]

It added that Section 5 cannot be read to limit Congress' power to enact only legislation precluding state laws that the courts are prepared to declare prohibited by the Fourteenth Amendment.[47] In these statements the Court speaks of an expanded congressional power under the Enforcement Clause.

[45] *See, for example,* Dandridge v. Williams, 397 U.S. 471 (1970), where the Supreme Court held Maryland's creation of a maximum family grant in the distribution of welfare under AFDC to be a reasonable, not invidious, discrimination. Although the Maryland statute, passed in accord with the AFDC program, defined need in terms of $40 per person per month, the statute also limited the grant to any one family to $240 per month. The Court said that clearly this was a discrimination, however, it would be upheld because Maryland had suggested a rational basis for the discrimination. *See also* McInnis v. Ogilvie, 394 U.S. 322 (1969)(per curiam), where the Court affirmed a three judge district court decision that a public school financing system based on local school district property tax levies did not violate the Equal Protection Clause of the Fourteenth Amendment. Although the result of this system was that districts with greater property values provide more funds per pupil than poorer districts, the legislature could have rationally decided to base its financing on local property taxes, so such legislation could not be said to be an invidious discrimination. *See* McInnis v. Shapiro, 293 F.Supp. 327, 332 (N.D. Ill. 1968). In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court held that a state statute outlawing the business of debt-adjusting except as an incident to the practicing law did not violate the Equal Protection Clause of the Fourteenth Amendment. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." 372 U.S. at 733. The business of debt-adjusting could rationally be limited to lawyers since clients might need advice as to legality of claims and remedies under state law, which a non-lawyer could not provide him. 372 U.S. at 732-733. *See also* McGowan v. Maryland, 366 U.S. 420 (1961), where the Supreme Court upheld a state law prohibiting retail merchants to sell certain items on Sundays. The Court ruled that statutory exemptions for Sunday sale of certain merchandise did not constitute an arbitrary or invidious discrimination in violation of the Fourteenth Amendment: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 426. The Court found that the state "legislature could reasonably have found" that the Sunday sale of certain commodities was necessary for the health or welfare of the populace, and therefore should be exempted from the general ban against Sunday sales.

[46] 384 U.S. at 651.

[47] 384 U.S. at 648.

Finally it has been asserted[48] that Section 2 of the Fourteenth Amendment sets a presumptive benchmark for entry into the franchise by requiring the states to extend the right of suffrage to all otherwise qualified male citizens over twenty-one years of age, or to have their representation reduced accordingly.[49] The opponents of the Act argue that "[i]t surpasses belief that the Constitution authorizes Congress to define the Fourteenth Amendment's Equal Protection Clause so as to outlaw what the Amendment's next [second] section approves."[50] A careful reading of this section, however, indicates that it is aimed at preventing restriction of the franchise by the states to otherwise qualified voters over the age of twenty-one. It is not intended that this portion of the Fourteenth Amendment prevent further enlargement of the Franchise, and, consequently, it should not limit Congress in discharging its responsibilities under Section 5.

IV. CONCLUSION

Justice Douglas wrote in *Harper v. Virginia Board of Education* that the "notions of what constitute equal treatment for purposes of the Equal Protection Clause do change."[51] The problem then becomes determining which branch of the federal government can react most rapidly and efficiently to these changed conditions and continue to guarantee equal treatment for all citizens. *Katzenbach v. Morgan* resolves this problem by extending the doctrine of initial congressional determination to give great presumptive weight to congressional interpretation of the substantive provisions of the Fourteenth Amendment. If the Court continues to follow this doctrine, Title III should be a constitutional exercise of congressional power under the Enforcement Clause.

—E. Rick Buell II

---

[48] N.Y. Times, April 5, 1970, § 4, at 13, col. 3.

[49] Section 2 of the Fourteenth Amendment reads in part:

> [W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

[50] N.Y. Times, April 5, 1970, § 4, at 13, col. 1.

[51] 383 U.S. at 669.