status." But, in *South Carolina v. Katzenbach*,[1051] while holding that the state lacked standing under *Massachusetts v. Mellon* to attack the constitutionality of the Voting Rights Act of 1965[1052] under the Fifth Amendment's Due Process Clause and under the Bill of Attainder Clause of Article I,[1053] the Court decided on the merits the state's claim that Congress had exceeded its powers under the Fifteenth Amendment.[1054] Was the Court here *sub silentio* permitting it to assert its interest in the execution of its own laws, rather than those enacted by Congress, or its interest in having Congress enact only constitutional laws for application to its citizens, an assertion that is contrary to a number of supposedly venerated cases?[1055] Either possibility would be significant in a number of respects.[1056]

Controversies Between Citizens of Different States

The records of the Federal Convention are silent on why the Framers included controversies between citizens of different states among the judicial power of the United States,[1057] but Congress has

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[1051] 383 U.S. 301 (1966). The state sued the Attorney General of the United States as a citizen of New Jersey, thus creating the requisite jurisdiction, and avoiding the problem that the States may not sue the United States without its consent. Minnesota v. Hitchcock, 185 U.S. 373 (1902); Oregon v. Hitchcock, 202 U.S. 60 (1906); Kansas v. United States, 204 U.S. 331 (1907). The expedient is, of course, the same device as is used to avoid the Eleventh Amendment prohibition against suing a state by suing its officers. *Ex parte* Young, 209 U.S. 123 (1908).

[1052] 79 Stat. 437 (1965), 42 U.S.C. §§ 1973 *et seq*.

[1053] The Court first held that neither of these provisions were restraints on what the Federal Government might do with regard to a state. It then added: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parents patriae of every American citizen." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[1054] The Court did not indicate on what basis South Carolina could raise the issue. At the beginning of its opinion, the Court noted that "[o]riginal jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the Constitution. *See* Georgia v. Pennsylvania R. Co., 324 U.S. 439." 383 U.S. at 307. But surely this did not refer to that case's *parens patriae* holding.

[1055] *See* Massachusetts v. Mellon, 262 U.S. 447 (1923); Florida v. Mellon, 273 U.S. 12 (1927); Jones ex rel. Louisiana v. Bowles, 322 U.S. 707 (1944). *See especially* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867). In Oregon v. Mitchell, 400 U.S. 112 (1970), four original actions were consolidated and decided. Two were actions by the United States against States, but the other two were suits by States against the Attorney General, as a citizen of New York, seeking to have the Voting Rights Act Amendments of 1970 voided as unconstitutional. South Carolina v. Katzenbach was uniformly relied on by all parties as decisive of the jurisdictional question, and in announcing the judgment of the Court Justice Black simply noted that no one raised jurisdictional or justiciability questions. Id. at 117 n.1. *See also* id. at 152 n.1 (Justice Harlan concurring in part and dissenting in part); South Carolina v. Baker, 485 U.S. 505 (1988); South Carolina v. Regan, 465 U.S. 367 (1984).

[1056] Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 80–93.

[1057] Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).