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IN THE

Supreme Court of the United States

October Term, 1965

No. 48

ANNIE E. HARPER, ET AL.,
Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR APPELLEES

STATEMENT

This case was heard and decided below on a Motion to Dismiss (R. 17, 33), without any evidence as to the administrative procedures for assessment and payment of poll taxes in Virginia or their practical operation and effect (see pp. 5-6 of unprinted transcript of hearing on October 21, 1964).

The only question presented, accordingly, is whether the non-discriminatory requirement for a poll tax as prescribed by the Constitution and statutes of Virginia is unconstitutional on its face as applied to State elections.

Both the Government and the Appellants, however, deal at length in their briefs with assertions wholly unsupported

by proof with regard to the operation of the poll tax and election laws in Virginia (Gov. 6-13, 31-40; App. 18-27). In addition the Government invites the Court to notice various statistics unavailable at the time of the hearing below (Br. 47-49, App. B) and a deposition of Judge C. H. Morrissett, the Virginia State Tax Commissioner, taken after the hearing below (Br. 11, App. C).

Being unsure whether the Court will look only to the face of the statutes or notice these extrinsic matters, we have no choice except to invite the attention of the Court to the still more recent and comprehensive deposition of Judge Morrissett attached as Appendix A. This was taken in *United States of America* v. *Commonwealth of Virginia et als.*, E.D. Va., Civil Action 4423, on September 27, 1965, with the Government and the Commonwealth both represented.*

The salient point in this authoritative exposition of the poll tax in actual operation is the illusory nature of the complications stressed by the Government (Br. 9-13). It is by no means necessary for any prospective voter to make an advance determination of the date of any special election or of any local election or of any general election. All he need do is to pay the poll tax on or before the fourth day of December and, having been duly registered, he may vote in every regular election, whatever its nature, held six months or more thereafter.** The poll tax is assessed

*That is a proceeding by the Attorney General in accordance with the Voting Rights Act of 1965, 79 Stat. 437. It broadly attacks the poll tax and election laws of Virginia on various grounds, including those argued in this appeal. Evidence is still being taken.

** Municipal elections are normally held in June, primary elections for State and local constitutional officers and members of Congress in July and general elections for State and local constitutional officers and members of Congress, as well as presidential elections, in November. A voter who has paid his poll tax by the required date of December 4 would have paid it more than 6 months in advance of the earliest of these elections.

or assessable as of January 1 in each year (Va. Code §58-4) and is payable on or before the fourth day of each December (Va. Code §58-963). Having so paid it, any citizen may register to vote at any time up to 30 days before the election (Va. Code §§24-67, 24-74, 24-76). If by any chance he is not assessed, he will be on request (Va. Code §58-1163). Once on the tax roll, he will be billed annually from then on (App. A, p. 7).

The tax is not applied discriminatorily as against the Negro race or any other group. It is applied with all the energy and effort that it is practical to expect of local officials, utilizing tax lists of previous years, tangible personal property returns, automobile registrations and any other information available to the Commissioner of Revenue (App. A, p. 3).

In short, many more people pay the tax than vote and anyone who wishes to vote may pay the tax. By doing so he indicates his continued residence, his civic interest and his support of State revenue requirements (App. A, p. 7).

The poll tax in Virginia is, therefore, as mechanical as the calendar. All that anyone has to do is to pay the sum of $1.50 some time between January 1 and December 4 of each year and thereupon he is entitled to register and to vote in all regular elections.

SUMMARY OF ARGUMENT

1.

Suffrage is Not a First Amendment Right.

Free Speech within the meaning of the First Amendment is the privilege of saying what one thinks, short of imminent danger to the state. The other "freedoms" specifically enumerated in the First Amendment enjoy the same preferred status. Yet the Amendment has never been considered or suggested to be, as the Government now urges, "a comprehen-

sive charter of freedom of political expression," having as its keystone an unrestricted right to vote. Any such interpretation would repeal Article I, Section 2, of the Constitution and overturn decisions and practices that have been considered fundamental since the foundation of the Republic. It is, moreover, self-contradictory in that the keystone right admittedly may be made subject to numerous limitations, such as residence, literacy, *etc.*, while no one would assert that the subordinate right to speak one's mind may be limited to residents, persons who are literate, *etc.* The right to assemble and petition for grievances is not a ticket to the voting booth, but a substitute for it. And what was advanced as a shield against the Federal Government to induce ratification of the Constitution cannot be converted into a sword against the States.

2.

THE FOURTEENTH AMENDMENT DOES NOT LIMIT THE STATES' POWER TO PRESCRIBE VOTER QUALIFICATIONS.

The Fourteenth Amendment was deliberately written in terms that do not relate to any aspect of suffrage except to permit any provisions in that regard that the States had adopted or might later adopt and to impose a deterrent by reduction of congressional representation in proportion to any denial of suffrage to adult male citizens. This was explicitly declared in Congress and well understood by the ratifying States. It has been corroborated by a series of further amendments which have specifically changed the Constitution in every case of a change in suffrage qualifications, first race, then sex and last poll tax in Federal elections. In all other respects the soverign power of the States to determine suffrage qualifications, and especially in State elections, has been uniformly recognized by this Court.

Recent decisions have not undermined this doctrine but merely determined that once a voter is qualified, he is entitled to cast his ballot and have it fairly counted or that, all other residence qualifications being met, their normal consequence for voting cannot be denied in perpetuity on the mere ground of service in the armed forces of the United States.

3.

THE POLL TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

In contrast to such a permanent disqualification of a particular class, the poll tax establishes a procedure of qualification open to all the world to satisfy on reasonable effort. It was well known and widely required when the Fourteenth Amendment was adopted and since. In particular, the Virginia system affords a non-discriminatory, objective test of minimum intelligence for ordering one's own affairs and participating in those of state, requiring no more than a token payment of $1.50 by December 4 of each year, guaranteeing against the abuses of subjective judgment and operating in a manner "as mechanical as the calendar." Requirements of this nature have been sustained since the adoption of the Constitution. If a change be desired in State election procedure, it should be made by constitutional amendment as the Twenty-fourth Amendment did in the case of Federal election procedure rather than by proliferation of adjectives and analogies before this Court.

The underlying question is whether the Federalist system on which our Republic was founded shall be maintained and confirmed by requiring the amendment procedure to be followed or abolished by irrevocable sentence of this Court, ignoring the prescribed constitutional procedures as well as the risks of survival that the resulting concentration of power would entail.

4.

THE QUESTION OF PAUPERS IS NOT PRESENTED.

The term being now undefinable and there being no effort time out of mind to enforce it, the issue, as found below, is "entirely academic and without place here."

ARGUMENT

1.

SUFFRAGE IS NOT A FIRST AMENDMENT RIGHT.*

It is understandable that, in the words of the Government (Br. 19), "the right to vote in State elections is nowhere expressly conferred in the Constitution." The Constitution was ratified by the assent of sovereign States that were conferring, withholding and regulating the right to vote in State elections as they saw fit, and manifestly proposed to continue doing so. This was recognized in terms by Article I, Section 2, providing that members of the House of Representatives should be chosen "by the People of the several States," not in any case by *all* the people, but on the contrary

> ". . . the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

This in terms left unimpaired to the States their original sovereign power to determine the qualifications requisite

* The First Amendment argument now made by the Government and Appellants was not even alluded to in the proceeding below, nor was it mentioned in Appellants' Jurisdictional Statement on the basis of which probable jurisdiction was noted. Though clearly transcending Rule 40(1)(d) of the Rules of this Court, this argument is made the cornerstone of the case for the Government and the Appellants. So we have no choice except to answer it.

for electors in all State and local elections so long as a republican form of government is maintained in accordance with Article IV, Section 4. Absent any amendment, it further guaranteed that these qualifications should equally control in electing members of the House.*

There was such widespread opposition to the proposed new Constitution that its ratification was a close piece of business, particularly in the key States of Massachusetts, Virginia and New York, without whose assent the instrument would have proved ineffectual. Even then ratifications were obtained only by the general assurance that the limitation of the new Federal government to the powers expressly delegated to it and the retention of all other powers by the assenting States would be expressly emphasized by immediate adoption of the first ten Amendments. The Tenth Amendment (which hardly merits its present repute of "the forgotten amendment") fulfills this assurance by the express provision that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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* There can be no question as to the intent of the original Framers; Article I, Section 2 represents a compromise reached by the members of the Constitutional Convention of 1787. While they realized that the matter of qualifications of electors of the Congress was too important to be omitted entirely from the Constitution, they also were aware that to create uniform standards for a national electorate, or to give Congress the power to create such standards, would arouse powerful opposition in the States. See Elliott, "Debates on the Adoption of the Federal Constitution" Vol. 5, pp. 385-88 (1866). Consequently they adopted Article I, Section 2 as a compromise intended to promote stability and uniformity as fully as possible consistently with adopting the qualifications fixed by the several States for voting for their own popular assemblies as the qualifications for voting for members of the House of Representatives. See The Federalist, No. 52, 342 (Modern Library ed.).

The First Amendment provides in well considered language that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

While it is normal to read simple words simply and as meaning what they say, this is not the approach of the Government (Br. 19-21, 38-39) or the Appellants (Br. 14-17). For the first time in the 176 years that have elapsed since the First Amendment was adopted, its words are now embellished and elaborated into "a comprehensive charter of freedom of political expression." The scope and content of this vague charter are nowhere described for the edification of the Court or the citizenry. Nowhere is there an explanation why the simple language of the First Amendment should be abandoned in favor of "broad, abstract and ambiguous concepts" newly discovered by opponents of the poll tax.* At this moment we are told only that the supreme freedom protected by this new First Amendment is that of voting.

Voting is, in short, guaranteed to all the people by the First Amendment. That is the cornerstone of the Government's case and of Appellants'.

We think this untenable, for these reasons:

1. If it be granted that the right of suffrage is the supreme expression of political freedom, it would certainly have

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* It has recently been pointed out with great force and clarity that the introduction of such concepts can be quite dangerous. What is today urged by the Government as a vast expansion of Federal power over the States may tomorrow be interpreted as a restrictive ban on all governmental power, *Griswold* v. *Connecticut,* 381 U.S. 479, 509-10 (1965) (Black, J., dissenting).

been mentioned, and mentioned first of all, if the First Amendment had been designed to operate as a comprehensive charter of political freedom.

2. The only "freedoms" unconditionally protected by the First Amendment were freedom of religion and "freedom of speech, or of the press," none of which is exclusively or even distinctively political in character, and plainly they do not include or contemplate the right to vote. The only other right safeguarded in the First Amendment is the right of assembly and petition for redress of grievances, historic practices of consultation and remonstrance which have never been deemed to include the right to vote and might indeed have been wholly unnecessary if a general right to vote had existed.

3. To argue that the First Amendment could have been written better, or should have been written better, or indeed that it is "not meaningful" (Gov. Br. 20) unless supplemented, cannot change what the First Amendment says, but is only an appeal for a further amendment in the manner appointed by law.

4. The First Amendment, being designed solely and expressly as a limitation on Congress alone, in order to induce ratification by the States, could not conceivably have been taken to overturn or limit the fundamental premise of Article I, Section 2, that each State should determine for itself the qualifications requisite for electors.

5. This contemporaneous construction, to which special weight is ordinarily accorded, was continuously accepted and again corroborated in 1913 by the Seventeenth Amendment adopting, in the case of the Senate, the identical words that:

> "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

6. The restrictions imposed on Congress by the First Amendment cannot be transposed into a limitation on the States by resort to the vague contours of the Fourteenth Amendment unless its words and history reveal such a design, which in fact, as we show below (p. 13), they wholly fail to do but rather demonstrate the contrary.

In short, the First Amendment does not deal in any way with suffrage and has no application to the States in that regard. Were these premises untrue, it would have been wholly unnecessary to adopt the Fifteenth Amendment, the Nineteenth Amendment and the Twenty-fourth Amendment, all of which specifically outlaw particular regulations by the States of the privilege of suffrage. If another amendment is desired, the procedure is well known. It does not consist of urging adjectives and analogies on this Court.

There are, of course, no authorities to support the Government's position on this central point. The cases cited by it or the Appellants merely hold that there can be no prohibition of communications under the Free Speech Clause* and that the right of assembly may not be ob-

*_Edwards_ v. _South Carolina,_ 372 U. S. 229 (1963), held that the States cannot make a criminal offense of the mere peaceable expression of ideas, no matter how obnoxious and inflammatory they may be to bystanders. _Lamont_ v. _Postmaster General,_ 381 U. S. 301 (1965), held that Congress could not condition the right to receive what was deemed "communist political propaganda" upon a written request of the addressee that it be delivered. _Thomas_ v. _Collins,_ 323 U. S. 516 (1945), held unconstitutional the application of a statute licensing solicitation by labor organizers to a speaker advocating unionism. _Martin_ v. _City of Struthers,_ 319 U. S. 141 (1943), held unconstitutional an ordinance unconditionally prohibiting door-to-door distribution of pamphlets. _Eastern Railroad Presidents Conference_ v. _Noerr,_ 365 U. S. 127 (1961), is not even a First Amendment case; it holds only that concerted attempts to effect the enactment of legislation are not within Section 1 of the Sherman Act, 15 U.S.C. § 1.

structed by forbidding steps essential for its exercise,* unless, of course, there is some clear and present danger or other overriding governmental interest**. Other cases are referred to only for isolated phrases out of context, like *Griswold* v. *Connecticut,* 381 U.S. 479, 485 (1965) for the axiom that the States may not "sweep unnecessarily broadly" (Gov. Br. 22). The holding there could not be more remote from any question of suffrage; and indeed it was only that a law forbidding contraceptive information to married persons is unconstitutional†.

So far from being supported by authority, this novel suggestion of the Government and Appellants is in conflict with accepted milestones of Constitutional history. If suffrage is a part of free speech, the same rules must govern both. We know from previous decisions of the Court that the States may require residence as a condition of suffrage, *Carrington* v. *Rash,* 380 U.S. 89, 91 (1965); *Lassiter* v. *Northampton Election Bd.,* 360 U.S. 45, 51 (1959); *cf. Pope* v. *Williams,*

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* *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1964) and *NAACP* v. *Button,* 371 U. S. 415 (1963), held that a State may not abridge the right of free association for a lawful purpose under the guise of regulating the practice of law. *NAACP* v. *Alabama,* 357 U. S. 449 (1958), held that the same right could not be abridged by the States by requiring the production of documents pursuant to court order.

** *Schenck* v. *United States,* 249 U.S. 47, 52 (1919); *Cantwell* v. *Connecticut,* 310 U. S. 296, 306-07 (1940); *Martin* v. *City of Struthers,* 319 U. S. 141, 143 (1943).

† Whatever the merits of the statute there involved, it appears that they lie in an area where opinions may differ, so that the inflexibility of a Constitutional pronouncement may in time prove disadvantageous. Thus the National Catholic Welfare Conference said to the Senate Government Operations Committee on August 24, 1965, that a law *providing* contraceptive information would be unconstitutional, both as an invasion of protected privacy and as a discrimination against the Negro race. (New York Times, August 25, 1965, pp. 1, 19; Documentary Service issued by the Press Department, National Catholic Welfare Conference, August 24, 1965.)

193 U.S. 621 (1904); that they may require literacy, *Lassiter* v. *Northampton Election Bd., supra; Guinn* v. *United States,* 238 U.S. 347 (1915); that they may deny suffrage to ex-convicts, *Davis* v. *Beason,* 133 U.S. 333, 346-47 (1890); that they may require age, *Lassiter* v. *Northampton Election Bd., supra,* at 51; and that they may require advance registration, *Mason* v. *Missouri,* 179 U.S. 328 (1900); *Pope* v. *Williams, supra.* But it would hardly be contended that the States may prohibit anyone from speaking his mind in the public parks or circulating his political views through the distribution of pamphlets unless he were a resident of the particular State, or demonstrated some particular level of literacy or had never been a convict, or was adult in point of age or had registered in advance. Indeed, the contrary is established as to: nonresidents, *cf. NAACP* v. *Alabama,* 377 U.S. 288 (1964); ex-convicts, *cf. Cooper* v. *Pate,* 378 U.S. 546 (1964); *cf. Lambert* v. *California,* 355 U.S. 225 (1957); minors, *cf. Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963); those not registered, *cf. Thomas* v. *Collins,* 323 U.S. 516 (1945). In short, the Court and the country have uniformly considered suffrage as outside the scope of the First Amendment and subject to wholly different considerations, as should rightly be done. Reversal of this premise would reverse decisions and practices that have been deemed fundamental.

The Government concedes the vitality of Article I, Section 2, when it puts its stamp of approval on State voting regulations that disfranchise minors, convicts, non-residents and those who fail to register in advance (Br. 16, 28-29). Yet if the Government's reasoning is followed to its logical conclusion, even these favored regulations must be swept away and Article I, Section 2, rendered a nullity by the new First Amendment "charter of political freedom."

Long ago, the Court observed that it is perfectly well

settled that the First Amendment does not "lay down any novel principles of government." *Robertson* v. *Baldwin,* 165 U. S. 275, 281 (1897). No more novel principle, nor any more destructive of the whole Federalist concept on which our government is based, could be found than the suggestion that the procedure of Constitutional amendment, so carefully followed in every previous instance of change in voter qualifications, may here be shortcut through the simple expedient of insinuating the suffrage right by metaphor into the First Amendment and then reversing it from a shield against the Federal Government to a sword against the States, thus at one stroke annihilating explicit provisions of the Constitution and a century and a half of accumulated experience.

2.

THE FOURTEENTH AMENDMENT DOES NOT LIMIT THE STATES' POWER TO PRESCRIBE VOTER QUALIFICATIONS.

(*a*) *Introduction*

While the Court has decided numerous recent cases in the general area of suffrage and elections, these dealt for the most part with the effect to be given to ballots cast by voters who were admittedly qualified (e.g., the reapportionment cases). In no case where suffrage qualifications as such came up for consideration was the legislative history of the Fourteenth Amendment emphasized in brief and argument.

In these circumstances, we submit that the legislative history merits painstaking consideration in a challenge to the validity of a tax in common usage at the time of enactment and since.

(*b*) *The Text*

The text of the Fourteenth Amendment, while notably vague in certain aspects, is conspicuously clear in that here

relevant. Section 1 contains three clauses, each expressed in very general terms, the Privileges and Immunities Clause, the Due Process Clause and the Equal Protection Clause:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There is no reference here to suffrage and the omission was deliberate, as our subsequent discussion of the legislative history will demonstrate (p. 15). Rather, Section 2 expressly permits any State to deny or abridge the right to vote for any reason it may choose subject only to a deterrent provision that in such event the population base used in determining Congressional representation of the particular State "shall be reduced in the proportion in which the number of such male citizens [so discriminated against] shall bear to the whole number of male citizens twenty-one years of age in such State." It is elemental to read the whole of a document and give effect to each part. This done, the Fourteenth Amendment leaves no question on this point. Whatever privileges, liberties and protections it may have contemplated, it was designed to exclude suffrage in all its aspects.

Yet the Government (Br. 15-23) and Appellants (Br. 17-26), while standing with their right foot on the First Amendment, place their left on the Fourteenth. As we have seen, the words give no support, indeed disclaim it. But in view of the heavy weight nevertheless put on the Fourteenth Amendment, we turn now to history. Our purpose here is to show that this is not an evolving situation, where the Court must adjust a general principle to progressive changes of

industrial technique, as the Commerce Clause grew from post roads to television channels, but rather to show that suffrage requirements were explicitly disavowed by the Framers as being beyond the purpose or reach of the Fourteenth Amendment and excluded for deliberate reason. The facts being so, it is not possible to reverse this meaning except by amending the Constitution.

(*c*) *Proceedings in Congress*

The text of the Amendment was drafted by the Joint Committee of Fifteen on Reconstruction. When it was introduced by Representative Thaddeus Stevens on the floor of the House, some of the Representatives expressed disappointment that the Amendment did not in terms confer suffrage upon the Negro, but the reason for its failing in this respect was explained by Stevens in his introductory speech:

> "I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this." Congressional Globe, 39th Cong., 1st Sess. (1866) (hereinafter cited as Globe) 2459.

But it was hoped that the second section would tend to bring about universal male suffrage. As Stevens immediately continued, *id.:*

> "If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in

> a hopeless minority in the national Government, both legislative and executive."

Three days later Representative Bingham, "the Madison of the first section of the Fourteenth Amendment," *Adamson* v. *California,* 332 U.S. 46, 74 (1947) (Black, J., dissenting), closed the House debate by summarizing the provisions of the Amendment:

> "The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> "Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. *The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.*

> *"The second section excludes the conclusion that by the first section suffrage is subjected to congressional law;* save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people." (Globe 2542, emphasis added.)

He summarized the point in these words:

> "To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that *the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States."* (*Id., loc. cit.,* emphasis added.)

These remarks cannot be taken as the individual views of a few prominent supporters of the Amendment. Debate in the House proceeded with every member except one assuming that under the Amendment the States retained their original constitutional prerogatives over suffrage. The assumption was neither inadvertent nor silent. The remarks of those who spoke on the Amendment show expressly or by unmistakable implication that they shared Bingham's view that although it altered the basis of congressional representation, it left suffrage "exclusively under the control of the States." Excerpts from those remarks may be found in *Reynolds* v. *Sims,* 377 U.S. 533, 625-29 (1964) (Harlan, J., dissenting).

When the Amendment came to the Senate floor for debate, it was introduced by Senator Howard, speaking on

behalf of Senator Fessenden, the Senate Chairman of the Reconstruction Committee. Howard, also a member of the Committee, said:

> "The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?
>
> *"But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting.* The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [sic]." (Globe 2766, emphasis added.)

Addressing himself to the second section of the Amendment, he continued:

> "It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race. I wish to meet this question fairly and frankly; I have nothing to conceal upon it; and I am perfectly free to say that if I could have my own way, if my preferences could be carried out, I certainly should secure suffrage to the colored race to some extent at least; for I am opposed to the exclusion and proscription of an entire race. If I could not obtain universal suffrage in the popular sense of that expression, I should be in favor of restricted, qualified suffrage for the colored race. But, sir, it is not the question here what will we do; it is not the question what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage; it is not entirely the question what measure we can pass through the two Houses; but the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions?
>
> * * *
>
> "The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race.
>
> * * *

> *The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.*" (*Id., loc. cit.,* emphasis added.)

At another later point during the debate, Senator Howard declared:

> "We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it by any clause of the Constitution of the United States." (Globe 3039.)

Again, debate in the Senate proceeded, as it had in the House, with every member understanding that the Amendment was not to affect the States' power to prescribe qualifications for exercise of the right to vote. Excerpts to this effect may be found in *Reynolds* v. *Sims,* 377 U.S. 533, 629-32 (1964) (Harlan, J., dissenting). Moreover, that understanding was shared by opponents of the measure. Senator Reverdy Johnson of Maryland (which rejected the Amendment when it was presented for ratification) opposed the Amendment but nevertheless agreed with its sponsors as to its effect upon the States' power to regulate suffrage:

> "Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States—and that was one of the grounds upon which the honorable member from Massachusetts [MR. SUMNER] voted and spoke against that proposition—not only the right, but the exclusive right, to regulate the franchise." (Globe 3027.)

The second section of the Amendment, he continued, gives plain notice to the States:

> " 'If you exclude any class from the right to vote, we, admitting your power to make the exclusion, say it shall have no other effect whatever than to deduct the number excluded from the whole number which is to constitute the basis of representation. If, therefore, you exclude from the benefit of the franchise any who are citizens of the United States, and twenty-one years or more of age, and inhabitants of the State, who belong to any particular race, or who are of any color contradistinguished from the white man, we admit that you have a right to exclude them, and all we propose to do is to say that to the extent of that exclusion your basis of representation shall be diminished.' " (Globe 3028.)

The Fourteenth Amendment was not enacted in a vacuum. The Senate was fully aware that many States denied suffrage to illiterates, nonresidents, non-taxpayers, paupers and the like. But denials of suffrage to such persons were to be covered by the second section of the Amendment; no one suggested that the first section would render such laws invalid. The following colloquy between Senators Clark and Howard is illustrative:

> "MR. CLARK. If the Senator will pardon me for a moment, I wish to inquire whether the committee's attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State.
>
> "MR. HOWARD. Certainly it does, no matter what may be the occasion of the restriction. It follows out the logical theory upon which the Government was founded, that numbers shall be the basis of representa-

> tion in Congress, the only true, practical, and safe republican principle. If, then, Massachusetts should so far forget herself as to exclude from the right of suffrage all persons who do not believe with my honorable friend who sits near me [MR. SUMNER] on the subject of negro suffrage, she would lose her representation in proportion to that exclusion. If she should exclude all persons of what is known as the orthodox faith she loses representation in proportion to that exclusion. No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion. The principle applies to every one of the States in precisely the same manner." (Globe 2767.)

All these were public statements made in the nation's capital where all attention was focused, printed and distributed throughout the country and supplying the basis for action by the States. They show without question that Section 1 was not intended to limit in any manner or degree the power of the States to determine elector qualifications or disqualifications. The only limitation was that of Section 2, which does not prohibit the States from denying the franchise to persons who fail to pay taxes, or any others, but indeed contemplates that they may and provides a specific penalty in that event.

(*d*) *Ratification by the States*

The proceedings in the legislatures of the several States are not reported as thoroughly as those in Congress. But the available material is supplied in Appendix B. To the extent that gubernatorial messages or committee reports discuss the Amendment, they recognize, with only one exception (by an opponent of ratification), that it "leaves with

the States, as heretofore, the regulation of the elective franchise." Tenn. House J., App. 4 (1866). Section 2 was emphasized particularly since "it ratifies and confirms, for all future time, the power of the States to regulate this question of suffrage." Pa. Legis. Rec., App. XVI (1867). But its penalty provision was criticised both in Massachusetts and in New Hampshire because, as the latter said, it penalized the States

> "... for regulating, in their own way, the right of suffrage—clearly, a State right; a right vital to the theory of our government, and most carefully guarded by the framers of the Constitution." N.H. House J. 177 (1866).

and thus because it might have a tendency

> "... to remove those time-honored restrictions upon the right of voting which the experience of the past has proved to be necessary and just ..." (*Id., loc. cit.*).

This sufficiently epitomizes what was said by the States in ratifying the Fourteenth Amendment. It will be helpful to the Court to look also at what was being done by the States, as distinguished from what was being said, at the time of ratification. We look first to those States that remained in the Union.

At the time the Amendment came up for ratification, 10 of the 23 Union States that ratified it before 1870 either disqualified paupers from voting or prescribed payment of taxes as an elector qualification. Some did both. Maine disqualified paupers. Me. Const., Art. II, § 1 (1819). New Hampshire disqualified "paupers and persons excused from paying taxes at their own request." N.H. Const., Part Second, Art. XXVIII (1792). Vermont provided that only a person "whose list shall have been taken" or who should be "exempt

from taxation in consequence of having arrived at the age of sixty years" could vote in town elections. Vt. Gen. Stat., Ch. 15, §1 (1863). This provision resulted in both a requirement of payment of a poll tax of two dollars and in possible exclusion of paupers from voting, since poll taxes in that amount were included upon the list taken annually and since the listers were empowered to "omit the polls of such persons as are extremely poor" from the list. Vt. Gen. Stat., Ch. 83, § 1 (1863).

Massachusetts both disqualified paupers and required payment of "any state or county tax, which shall, within two years next preceding such election, have been assessed... in any town or district of this Commonwealth." Mass. Const. (1780), amend. III (1821). This constitutional provision in effect required payment of a poll tax of not more than $1.50, see Mass. Gen. Stat., Ch. 11, §§ 1, 6, 31 (1860); in fact, the state poll tax was enacted to enable persons to vote, since otherwise the legislature or the localities could disfranchise the populace by failing to assess normal taxes. See Mass. Acts and Resolves 1891, pp. 1113-4 (address of Gov. William E. Russell, urging repeal of the tax payment qualification).*

Rhode Island required either a freehold of the value of $134, payment of town or city taxes of at least one dollar, or service in a state military company. R. I. Const., Art. II, §§ 1-2 (1843). The Constitution required the assessors of each town and city to assess every registered voter with an annual "registry tax" of one dollar "or such sum as with his other taxes shall amount to one dollar." The "registry tax," like the Virginia poll tax, was applied to support of the pub-

* Governor Russell also observed in his address that the tax payment qualification subjected Massachusetts to the second section of the Fourteenth Amendment (*Id.*, 1114). The qualification was repealed in Massachusetts in 1891 by the adoption of Amendment XXXII to the Massachusetts Constitution.

lice schools and was not collectible by compulsory legal process. R. I. Const., Art. II, § 3 (1843).

New York did not disqualify paupers or require tax payment of whites, but in order to be able to vote, a "man of color" had to own a freehold worth $250 upon which a tax was actually paid by him. N. Y. Const., Art. II, § 1 (1846). New Jersey disqualified paupers. N. J. Const., Art. II, § 1 (1844). Pennsylvania required payment of a state or county tax of all voters except men between the ages of 21 and 22. Pa. Const., Art. III, § 1 (1790). West Virginia disqualified paupers. W. Va. Const., Art. III, § 1 (1863).

Nevada's Constitution directed the legislature to enact a poll tax of four dollars and provided that payment of the tax could be made a condition of voting. Nev. Const., Art. II, § 7 (1864). In its first session, the legislature enacted a voter registration law and made poll tax payment a condition of registration. Nev. Stat. 1864-65, Ch. CXXIV, § 16, p. 386. This act was repealed, and another registration law, likewise requiring poll tax payment, substituted therefor, by Nev. Stat. 1866, Ch. XXXVIII, § 16, p. 88. A similar law, repealing the former statute and substituting a law likewise requiring poll tax payment, was enacted in 1869. Nev. Stat. 1869, Ch. XC, § 13, p. 145. Poll tax payment was finally abolished as a condition of registration in 1871. Nev. Stat. 1871, Ch. LXIV, p. 132.

The Fourteenth Amendment was approved by Congress in 1866 and speedily ratified by the overwhelming majority of the Union States in the following twelve months. During this time only one of the Confederate States (Tennessee) ratified the Amendment and it was another year before the necessary ratifications were assembled from the others. It is unrealistic, accordingly, to suppose that the Fourteenth Amendment was a spontaneous movement on the part of the Union States to reform themselves. Quite plainly it was an

effort on their part to reform others. It is, in short, inconceivable that the Amendment would have been promptly adopted by a majority of the Union States had they imagined that by doing so they would automatically invalidate their own cherished and age-old suffrage requirements. They naturally understood the contrary, since they were so assured by the Framers of the Amendment itself.*

Turning now to the former Confederate States, the Court has further contemporaneous evidence in the action of Congress upon their readmission to the Union. The Reconstruction Act of March 2, 1867, 14 Stat. 428, required North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to draw up new constitutions for approval by Congress and to ratify the Fourteenth Amendment as the price of readmission. The South Carolina Constitution of 1868, Art. VIII, §2 disqualified persons kept in alms houses, and the Georgia Constitution of 1868, Art. II, §2, required payment of "all Taxes" as a condition of voting. "All Taxes" included poll taxes of one dollar, levied annually on all males between 21 and 60 by acts of the legislature. Ga. Acts 1868, No. 117, § II(9), p. 153; Ga. Acts 1869, No. 148, § 2(9), p. 160. South Carolina was readmitted upon the condition that it ratify the Fourteenth Amendment by Act of June 22, 1868, 15 Stat. 72; Georgia was readmitted by the same Act upon the same condition and upon the further condition that some obscure provisions of its new constitution be deleted.** Georgia was unconditionally readmitted by Act of July 15, 1870, 16 Stat. 363.

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* For the prevalence of property and tax payment qualifications when the Constitution itself was adopted, see F. N. Thorpe, "Constitutional History of the American People, 1776-1850" (1898), Vol. I, pp. 93-96, and E. McC. Sait, "American Parties and Elections," (3d ed. 1942), pp. 24-25.

** Debate in Congress over this provision, which was believed to violate the Impairment of Contracts Clause, was extensive. See Congressional Globe, 40th Cong., 2d Sess. 2968-70, 2998-3008 (1868).

Again, it is inconceivable that the Congress which was acutely concerned over questions of suffrage, which conditioned readmission of the Southern States upon their ratification of the Fourteenth Amendment and adoption of new constitutions written conformably therewith, and which examined those new constitutions with such care as to perceive a minor flaw in the Georgia Constitution, would have allowed South Carolina and Georgia to rejoin the United States had it believed that the first section of the Amendment made unconstitutional South Carolina's disqualification of paupers or Georgia's requirement that voters pay their taxes, including poll taxes. It is likewise incredible that South Carolina and Georgia would have so written their new constitutions, if they had understood them to be in conflict with the Amendment. No such conflict, but rather clear conformity, was found by Congress. As Representative Bingham declared, during debate over readmission:

> "The constitutions of these several [Southern] States, in accordance with the spirit and letter of the Constitution of the United States as it stands amended by the act of the American people, secure equal political and civil rights and equal privileges to all citizens of the United States, native born and naturalized." Congressional Globe, 40th Cong., 2d Sess. 2462 (1868).

These events show that neither the Union States nor the former Confederate States thought Section 1 of the Fourteenth Amendment prevented them from conditioning suffrage as they might see fit, specifically by a requirement for payment of poll and other taxes and a disqualification of paupers. It is equally manifest that Congress was in complete accord.

With these events freshly in mind, the Court was of the unanimous view that this general understanding was correct

and Section 1 of the Fourteenth Amendment had no application to any question of suffrage. *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 175 (1875, discussed more fully below.)

(e) Corroboration by Amendments

Adoption of the Fourteenth Amendment within a two-year period and an intervening election that strengthened the Congressional forces for reform led to a further step, not thought feasible before but judged so now. In 1869 the Fifteenth Amendment was proposed:

> "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 only reason for the Fifteenth Amendment was to reverse, in this respect, the Fourteenth Amendment so as to prohibit, rather than to permit, voter restrictions on specified grounds. By so doing it also made inoperative, to this extent, the deterrent provision in Section 2 of the Fourteenth Amendment, since the prohibition made the penalty needless. The adoption of the Fifteenth Amendment, we submit, was a constitutional reiteration that the Fourteenth Amendment contained no restriction on suffrage qualifications in any respect.

Leaving the troubled days of the Civil War and turning to modern times, it is noteworthy that every attempt to apply Federal power to the determination of the qualifications of voters, a subject otherwise consistently left to the sovereign powers of the several States, has been by specific constitutional amendment. Of these, there have been two.

The Nineteenth Amendment, adopted in 1920, provides:

> "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 sex."

Sex has been with us throughout history and women are undeniably citizens. Had the Fourteenth Amendment conferred any guarantee of voter qualification, the Nineteenth Amendment would have been wholly needless. The adoption of the Amendment is corroboration by Congress and the States that the Fourteenth Amendment had no such effect.

Even stronger is the Twenty-Fourth Amendment, adopted in 1964, and the words, dealing with the precise subject of poll taxes, merit special attention:

> "The right of citizens of the United States to vote in any primary or other election for the President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

These words were chosen with care because it was not thought that a broader amendment would be accepted and many of the sponsors were themselves opposed to such intrusion into affairs of the States. Thus the Report of the House Committee on the Judiciary emphasized that the Amendment

> "... would not prevent a State from imposing a poll tax in purely State or local elections." H.R. Rep. No. 1821, 87th Cong., 2d Sess. 5 (1962).

To the same effect the minority report explained that:

> "[T]he joint resolution owes much of its support to the fact that it does not affect State elections but only Federal elections ..." (*Id.*, 9).

In the hearings on this same proposal at the previous session, Senator Holland, one of the co-sponsors, explained to the Senate Committee on the Judiciary that:

> "... it prohibits poll taxes only with reference to the right to vote for the specific offices of electors for President or Vice-President, Senators, and Representatives in Congress. It does not prevent the imposition of a poll tax as a prerequisite for voting for State or local officials or upon State or local issues. I emphasize this point ... because many of us who are cosponsors of this joint resolution strongly feel that the election of State and local officials ... are properly and more effectively handled on the State and local level, and we would strenuously oppose any effort to control such matters by Federal law." Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 86 (1961).

Clearly this proscribes poll tax requirements in the enumerated Federal elections. Clearly it confirms the power of the States to require poll taxes in State and local elections. To prohibit work on Sunday is to permit work on Monday. That is the very meaning of a line in the law. And if a "bright line" is desired *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 215 (1964), no clearer one could be found. There is no question here of "repeal" (Gov. 26) of the Fourteenth Amendment by implication or otherwise. It is a straightforward matter of repeated Amendments of similar tenor establishing a canon of constitutional construction that corroborates the plain meaning of the Fourteenth Amendment proclaimed alike by its words and its history. We do not here deal with the manipulation or dilution through whatever device of ballots cast by qualified voters (discussed at p. 35 below). Here we deal only with the determination of the qualifications for voting in State and local elections. We submit that this is a subject

left by the original Constitution and all of its Amendments to the exclusive and final choice of the respective States. If a change in that respect be desired, the procedure of amendment is indicated. This was clearly the view of Congress in proposing the Twenty-Fourth Amendment:

> "Since Congress is not given the power by the Constitution to regulate either voting qualifications or the manner of election of presidential electors, their inclusion in the amendment requires the constitutional amendment approach." H.R. Rep. No. 1821, 87th Cong., 2d Sess. 5 (1962).

(*f*) *Judicial Decisions*

These principles were approved as fundamental by the unanimous Court in *Minor* v. *Happersett,* 88 U.S. (21 Wall.) 162 (1875). This was an attack by a female citizen of Missouri on the State constitutional provision restricting the suffrage to "every male citizen," asserting that this provision was overridden by the Constitution and particularly the Fourteenth Amendment. In rejecting this contention, the Court said:

> ". . . the Constitution has not added the right of suffrage to the privileges and immunities of citizenship . . ." (171)
>
> * * *
>
> "When the Federal Constitution was adopted . . . in no State were all citizens permitted to vote. Each State determined for itself who should have that power." (172)
>
> * * *
>
> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage." (177)

The precise operation of the Fifteenth Amendment was made clear the next year in *United States* v. *Reese,* 92 U.S. 214 (1876):

> "The Fifteenth Amendment does not confer the right of suffrage upon any one. 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. *Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education. Now it is not.*" (217-18, emphasis added)

Similarly in *Pope* v. *Williams,* 193 U.S. 621 (1904) the Court unanimously sustained a requirement of Maryland that persons moving into that State had to register one year before they might be permitted to vote, repeating that:

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments." (632)

and emphasizing that:

> "The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one." (633)
>
> * * *
>
> "The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them." (634)

The only instance of possibly reviewable discrimination alluded to by the Court was the capricious and fanciful discrimination of permitting a citizen coming from New York

to vote, but denying the privilege to one coming from Georgia (634).

The crucial importance of this distribution of authority for the survival of our Federalist system was stressed in *Guinn* v. *United States,* 238 U.S. 347 (1915):

> "*Beyond doubt the 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.*" (362, emphasis added)
>
> * * *
>
> "*. . . it 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 . . .*" (*Ibid.,* emphasis added)

The specific subject of the poll tax came to the Court in *Breedlove* v. *Suttles,* 302 U.S. 277 (1937). This was a suit by a Georgia citizen to compel local officials to allow him to vote in a Federal election without the payment of the $1 poll tax required by the Georgia statute, asserting that it was overridden by the Fourteenth and Nineteenth Amendments. This attack was likewise denied by the unanimous Court, saying:

> "Levy by the poll has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the Colonies and later in the States." (281)
>
> * * *
>
> "To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected

> by the Fourteenth Amendment. Privilege of voting is not derived from the United States but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate." (283, citing *Minor* v. *Happersett, supra,* and many other cases)
>
> * * *
>
> "The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States and for more than a century in Georgia." (283-4)

This has been uniformly followed since. *Butler* v. *Thompson,* 97 F. Supp. 17 (E.D. Va.), *aff'd per curiam,* 341 U.S. 937 (1951); *Saunders* v. *Wilkins,* 152 F. 2d 235 (4th Cir. 1945), *cert. den.,* 328 U.S. 870 (1946); *Pirtle* v. *Brown,* 118 F. 2d 218 (6th Cir.), *cert. den.,* 314 U.S. 621 (1941). It is of interest that the finding in *Butler* of non-discriminatory application of the Virginia poll tax requirements (97 F. Supp. at 23-24) was based on a broad survey of the practice of local officials throughout Virginia, introduced in evidence by stipulation.

It is strange to see the Government assert (Br. 15) that the "only question actually discussed" in *Breedlove* was whether the Fourteenth or Nineteenth Amendments forbade a State to exempt women from the poll tax. It is quite clear from the above quotations that the Court discussed and sustained the substantive authority of the States to impose a poll tax as a prerequisite to the privilege of voting. That this was no excursion beyond the issues presented is plain from the Reporter's summary of appellant's argument, which sounds like a summary of the views urged here by the Government and Appellants:

> "The appellant contends that the privilege of voting for federal officials is one to which he is entitled, un-

> restricted by a tax unreasonably imposed through state invasion of his rights as a citizen of the United States. As such citizen he is entitled to participate in the choice of electors of the President and the Vice President of the United States and of Senators and Representatives in Congress and no State may exercise its taxing power so as to destroy this privilege. If the tax imposed by Georgia were increased to a high degree, as it can be if valid, it could be used to reduce the percentage of voters in the population to even less than eight per cent. as at present, or to destroy the elective franchise altogether. Whatever property and other economic restrictions on the franchise may have been upheld in earlier periods of our history, the admission today that a State has the power to prevent its poorer inhabitants from participating in the choice of federal officials would be totally contrary to the contemporary spirit of American institutions, and inconsistent with the purposes announced in the Preamble to the United States Constitution." (302 U.S. at 279)

Breedlove is, therefore, indistinguishable and dispositive.*

The reapportionment cases, which have stimulated varying expressions from the Court, are not relevant here. *Baker* v. *Carr,* 369 U.S. 186 (1962); *Gray* v. *Sanders,* 372 U.S. 368 (1963); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Reynolds* v. *Sims,* 377 U.S. 533 (1964). All of those cases, as the Government admits (Br. 23), dealt with "the right to vote of persons qualified under State law to vote." The holding was that if a person is qualified to vote and does so, his vote must be fairly counted, and not thrown away or diluted so as to have no proper effect. None of those cases touches on the question of the power of the States to deter-

* It should be particularly controlling in all State elections because in Federal elections the interest of the Federal Government is naturally more intimate. *United States* v. *Classic,* 313 U.S. 299 (1941); *Ex parte Yarbrough,* 110 U.S. 651 (1884). The Twenty-fourth Amendment is sufficient evidence of this special solicitude.

mine qualifications for voting. It is insufficient for the Government to urge (Br. 23) that the "practical effect" of disqualification and dilution is the same. It might just as well be urged that the Twenty-Fourth Amendment, in occupying the field with regard to qualifications in Federal elections, should be read as occupying the field in qualifications for State elections also since the "practical effect" of being disqualified in State elections may be the same as disqualification in Federal elections.

Of much graver nature than these analogies, urged here for the first time, is the long record of history reviewed by Mr. Justice Harlan in the reapportionment cases, especially *Reynolds* v. *Sims,* 377 U.S. 533, 589-632 (1964). Since that history deals in terms with voter qualifications, a subject left to the authority of the States, it is precisely in point on the present issue, even though less so in the reapportionment cases that dealt only with the fair recognition of ballots cast by admittedly qualified voters. While it may be arguable whether the Framers intended the Fourteenth Amendment to govern the weighting of votes after they have been cast, it is certainly clear that they did *not* intend to restrict the power of the States to determine suffrage qualifications, which had been their unquestioned prerogative since before the original Constitution was adopted.

The suffrage cases principally relied on by the Government and Appellants raise no question as to the validity of the Virginia poll tax here in issue.

Carrington v. *Rash,* 380 U.S. 89 (1965) was an instance of invidious discrimination between persons satisfying all the general requirements of residence, some of whom were permitted to qualify as voters, while others were absolutely prevented from doing so. In that case a sergeant in the United States Army, originally from Alabama but on duty in New Mexico, bought a house, made a family and established a business in Texas, with the admitted intention of

residing there permanently. "But for his uniform," Texas conceded his eligibility to vote (91). Indeed he was a resident for divorce actions and other purposes. But,

> "Texas has said that no serviceman may ever acquire a voting residence in the State so long as he remains in service." (91-92)

The Court held this contrary to the Equal Protection Clause as a permanent prohibition against all servicemen as a class, though otherwise complying with all residence requirements. The case, in short, did not establish any qualification requirements with which prospective voters could comply by reasonable effort, but imposed a permanent disqualification on servicemen whatever their circumstances or efforts might be. This is in contrast to a system of qualification requirements open to satisfaction by all the world on reasonable effort as in the case of the Virginia poll tax here in issue.

United States v. *Louisiana,* 380 U.S. 145 (1965), like the previous *per curiam* decision in *Schnell* v. *Davis,* 336 U.S. 933 (1949), affirming 81 F. Supp. 872 (S.D. Ala.), invalidated qualification procedures requiring that the applicant "understand and explain" any article of the Constitution to the satisfaction of local registrars. In both cases the District Courts found that (*i*) the provisions contained no objective standard to guide the registrars, who thus had virtually uncontrolled discretion over registration for voting, (*ii*) the registrars had exercised their broad power systematically to refuse the registration of otherwise qualified Negroes, and (*iii*) the provisions had been intended to deter and actually continued to deter Negroes from voting. On the basis of those findings, both District Courts held the provisions to violate the Fourteenth and Fifteenth Amendments. Both decisions were affirmed. The decision of this Court in *Louisiana* seems principally to have been based on the Fifteenth Amendment and Mr. Justice Harlan concurred

only on that basis (380 U.S. at 156). But once the Fifteenth Amendment prohibited voter discrimination on the ground of race and thus made such immunity a Federal right, it is not difficult to say that the Fourteenth Amendment grew concurrently and thereafter prohibited the denial of equal protection to this new right. The Constitution is to be read as a whole like other documents. By applying the same reasoning to the poll tax issue, the Fourteenth Amendment might correspondingly be deemed to prevent imposition of a poll tax in Federal elections, as now proscribed by the Twenty-Fourth Amendment, but certainly not in State elections, which the Twenty-Fourth Amendment leaves untouched.

Harman v. *Forssenius,* 380 U.S. 528 (1965) merely held that Virginia may not constitutionally compel a Federal voter *either* to pay the poll tax proscribed by the Twenty-Fourth Amendment *or* to file a certificate of residence executed before a witness or notary public, on the ground that this is a substantial burden imposed on those who do not waive their constitutional privilege under the Twenty-Fourth Amendment. As purely a Twenty-Fourth Amendment case, it has no bearing on State election procedure, which alone is involved here.

3.

The Poll Tax Does Not Violate the Equal Protection Clause.

To the above discussion we add only two further elements, first the historical customs that prevailed when the Fourteenth Amendment was adopted, and second, the distinctive function of the Virginia poll tax as an elementary and objective intelligence test.

When the Fourteenth Amendment was adopted, 5 States had tax requirements in effect, mostly in the form of poll

tax requirements* and upon readmission to the Union after screening by Congress to verify compliance with the Fourteenth Amendment the Georgia Constitution contained the same requirement.** As the unanimous Court said in *Breedlove* v. *Suttles,* 302 U.S. 277 (1937):

> "The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States . . ." (283)

We submit that, howsoever much judgment may be at large in appraising any novel restriction on voting that has no precedent in history, it is not desirable or indeed permissible for the Justices, in fulfillment of their oath and office, to reject the teaching of history and utilize the Equal Protection Clause to invalidate what was in general use before, at and after the adoption of the Fourteenth Amendment. It is impermissible, we submit, for the Government (Br. 32-33) to call on this Court for a declaration that particular forms of suffrage requirement long in common usage "can no longer be justified" because they have become antiquated or out of date. Were this Court to sit as an arbiter of fashion and enforce its views of modernity from time to time uniformly throughout the country under the Equal Protection Clause, it would effectually destroy the Federalist system which has given flexibility of judgment in differing areas having different conditions and thus safeguarded the operation and continuance of the Republic.

But if, finally, it were, contrary to our belief, permissible

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*Mass. Const. (1780), Amend. III (1821), Mass. Gen. Stat., Ch. 11, §§ 1, 6, 31 (1860); N. Y. Const., Art. II, § 1 (1846); Nev. Const., Art. II, § 7 (1864); Pa. Const., Art. III, § 1 (1790); R. I. Const., Art. II, §§ 1-3 (1843); Vt. Gen. Stat., Ch. 15, § 1 (1863).

**Ga. Const., Art. II, § 2 (1868), requiring payment of "all Taxes," which included poll taxes. Ga. Acts 1868, No. 117, § II(9), p. 153, Ga. Acts 1869, No. 148, § 2(9) p. 160.

for the Court to discard the precedents of history and freely reappraise particular statutes on request, then we submit that, even in this novel exercise of jurisprudence, the Virginia poll tax here in issue as applied to State elections should be sustained for the following reasons:

1. A tax of fixed amount has been imposed or authorized on every citizen almost continuously throughout the history of the Commonwealth: Acts of Assembly 1775, Ch. 5, p. 65; Acts of Assembly 1776, Ch. XIV, p. 144; Acts of Assembly 1781, Ch. XXXII, Arts. I and II, p. 490, and Ch. XL, Art. II, p. 504; Acts of Assembly 1787, Ch. 1, Art. XXV, p. 431; Constitution of 1851, Art. IV, §24; Constitution of 1864, Art. IV, §22; Constitution of 1867, Art. X, §5; Constitution of 1902, §173.

2. While admittedly some of the most vocal members of the Constitutional Convention of 1902 expressed a desire to disfranchise the Negro by the poll tax provision, *Harman* v. *Forssenius,* 380 U.S. 528, 543 (1965), this is by no means a realistic summary of the prevailing views of the Convention:

> "Even the most violent . . . also expressed an intention to bring about this result by means that were valid under the Federal Constitution. . . . And the expressions of these few can hardly be taken as necessarily voicing the dominant spirit of the Convention. For other voices were raised in the Convention to advance ideas couched in quite a different key." *Butler* v. *Thompson,* 97 F. Sup. 17, 21 (E.D. Va.), *aff'd per curiam,* 341 U.S. 937 (1951).

Actually the tone of the Convention was set by the opening address of its president, John Goode. President Goode acknowledged that one of the main purposes of the Convention was to reverse the provisions for universal suffrage

found in the Underwood Constitution that had been imposed upon Virginia as a condition to readmission to the Union. But, he emphasized, Virginia must so regulate suffrage as not to violate the Constitution of the United States, particularly the Fifteenth Amendment. He then referred to the new constitutions recently adopted by Mississippi, South Carolina, North Carolina and Louisiana, and pointed out that the poll tax and intelligence tests provided in the Mississippi Constitution had been held constitutional by the unanimous Court in *Williams* v. *Mississippi,* 170 U.S. 213 (1898). Finally, President Goode pleaded for a plan of suffrage that would eliminate the fraud, bribery and corruption that had characterized Virginia elections since the adoption of the Underwood Constitution. *Proceedings and Debates of the Virginia Constitutional Convention* (1901-1902), 20-21.

3. Apart from all of this and even on the assumption, which we think untenable,* that the controlling motive of

*The records of the Constitutional Convention of 1902 clearly show an intent to disfranchise illiterate and ignorant whites as well as Negroes. Mr. McIlwaine, delegate from Prince Edward, declared:

> "The need is universal, not only in the country, but in the cities and towns; not only among the blacks, but among the whites, in order to deliver the State from the burden of illiteracy and poverty and crime, which rests on it as a deadening pall. . . ." (*Proceedings and Debates,* 2998)

Many delegates believed that the poll tax would have special effects on the white vote. Mr. Flood, an opponent of the poll tax, declared:

> "I have always maintained and believed that more white people will be stricken from our registration rolls than negroes by such a provision." (*Id.,* 2864).

A supporter, Mr. Gordon, exclaimed:

> "I am in favor, Mr. Chairman, of the capitation tax, and I do not hesitate to say so, because I believe it will disqualify some white men in Virginia who ought to be disqualified. . . . I want to say to the gentlemen of this body that when they undertake to put an additional capitation tax on the people of Virginia and

the Convention was to disfranchise the Negro through the operation of the poll tax, the issue here does not require this Court to condemn or sustain the motives of individuals who have died long ago, but rather to appraise the operation and effect of the poll tax as a governmental measure in the manner actually operating today.

4. It is the policy of Virginia to enforce the poll tax requirement in an even-handed, undiscriminating manner, making "every practical and reasonable effort to assess the capitation tax against and to collect it from all persons assessable therewith under the laws of Virginia, without favor or discrimination toward any, . . . objectively, impartially and totally without regard to race, national origin, economic position, faith or political persuasion" (App. A, p. 3). The payment, moreover, is a periodic affirmation of continuing residence, since otherwise there would be no motive for its payment (App. p. 6).

5. The sum of $1.50 a year, equivalent to about 50 cents in terms of 1902 dollars, is manifestly so trivial that any

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then provide that it shall be a prerequisite to voting, instead of disfranchising the African, they are disfranchising the Anglo-Saxon." (*Id.*, 2871-2).

Another delegate, Mr. Thom from Norfolk, reported that many members of the Suffrage and Elections Committee looked with apprehension upon the poll tax requirement and felt it was impossible to forecast its result. He said:

> ". . . The report comes to us from large, and from diversified, sections of this State that in many of these communities it will be an exceedingly problematic matter as to whether the poll tax will not strike harder upon the white race six months in advance than it will upon the negro." (*Id.*, 2979).

He cited the decrease that had occurred in the white vote in Mississippi and said this decline may have been brought about at least partly by the poll tax. Another member advised that he had always been against the tax as a suffrage prerequisite because he believed that it would disfranchise, at least in the mountain section and in the cities, as many or more whites as Negroes. (*Id.*, 2970-80, 3010).

claim of discrimination through such a requirement should be dismissed as frivolous. It has, in any event, no particular bearing on the Negro race, since in fact of all persons in Virginia with annual incomes less than $3,000 in 1960, the whites numbered 827,398, while the non-whites numbered only 298,189 (1960 Census of Population, Table 67 for Virginia). So if there is any economic barrier in such a slight sum, it affects nearly three times as many whites as non-whites and is thus, wholly without racial meaning.

6. The tax does not require any astronomical predetermination of election dates, as the Government would imply, but only requires an annual payment of $1.50 by December 4 in every year and this serves as "a simple and objective test of certain minimal capacity for ordering one's own affairs and thus of qualification to participate in the ordering of the affairs of state" (App. A, p. 6). While an intelligence test as such is subject to abuses through administration, "the capitation tax is as mechanical as the calendar" (App. A, p. 7). Bills are in fact sent to all known or knowable persons and, if not, any one is entitled to register and pay on request so that, in short, the poll tax is "the simplest, most equal, non-discriminatory and objective test of minimum intelligence and responsibility that could be devised" (App. A, p. 7). This was specifically anticipated in the Convention:

> "Then we have an educational qualification. The voter has to pay a poll tax, prepare his own application and cast his own ballot. The plan virtually eliminates the incompetent from politics." (*Proceedings and Debates,* 2996.)

7. Finally, as emphasized by Judge Morrissett, the State Tax Commissioner of Virginia for the last 39 years, George Mason, principal author of the first ten Amendments and

also author of the Virginia Declaration of Rights, wrote in Section 6 of the present Constitution of Virginia that all men "having sufficient evidence of permanent common interest with, and attachment to, the community" should have the right to vote and Judge Morrissett "can think of no better way for the citizen and prospective voter, whatever the particularities of his position, to demonstrate his common interest with and attachment to his State and his community than to respect the common requirement for due and timely payment of the trifling and token sum expected of all citizens to qualify themselves for suffrage." (App. A, pp. 7-8).

In accord with 4 above, the Civil Rights Commission has reported twice on the Virginia poll tax. In 1959 it said:

> "... the poll tax is not as serious a restriction as it once was, for it is difficult to administer so as to bar Negroes alone from the ballot box. Any administrative procedure by which the tax would be exacted from the Negro alone would most certainly be invalidated by the Federal courts." (1959 Report, p. 118)

In 1961 it added that various sources of evidence

> "... have led the Commission to conclude that, with the possible exception of a deterrent effect of the poll tax—which does not appear generally to be discriminatory upon the basis of race or color—Negroes now appear to encounter no significant racially motivated impediments to voting in 4 of the 12 Southern States: Arkansas, Oklahoma, Texas, and Virginia." (1961) Report, p. 22).

To the same effect is Ogden, "The Poll Tax in the South" (1958) p. 75. Much is made by the Government of comparative voting statistics (Br. App. B) ostensibly indicating that

repeal of a poll tax tends to increase the number of voters. But this is a superficial inference. The elaborate study of Ogden led to these conclusions:

> "What conclusions about the effect of the poll tax upon voting result from this examination of voting both before and after adoption and repeal? An obvious one is that no single factor affects voting but that turnout is influenced by many interrelated causes. Because of this fact, it is extremely difficult to isolate any one factor and assign a definite weight to it. The investigation also showed that voting tended to decline before adoption and to increase prior to repeal. Thus, in both instances, the action taken with respect to the tax seemed to aid a movement already underway. The tax did not initiate the trend. Poll tax adoption did not cause a permanent decrease in voting; similarly, tax repeal did not produce a steady increase in participation." (*Op. cit.* 137)*

It is axiomatic that a non-discriminatory intelligence test is both frequent and valid. *Lassiter* v. *Northampton County Election Bd.,* 360 U.S. 45 (1959), cited with approval in *Carrington* v. *Rash, supra,* at 91. We learn from *Lassiter* that:

> "Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show" (51).

* The Government in Appendix B to its Brief emphasizes the proportional increase in voting at the 1964 presidential election in Southern States having a poll tax. It fails to mention, however, that there was a similar increase in Southern States which had long ago repealed the poll tax (Georgia, + 14%; South Carolina, + 8%; Florida, + 2%; and Louisiana, + 4%). (Br. App. B 47-48). This indicates most strongly that there were major factors other than the effect of the Twenty-fourth Amendment that caused a general proportional increase in voting throughout the South, one of which may have been that the Republican presidential candidate appealed strongly to some Southern white voters and correspondingly alarmed most Southern Negro voters.

While literacy was not thought synonymous with intelligence and the latter was the touchstone of validity, the Court held unanimously that a State was at liberty to equate one with the other, validating a literacy test on that ground and thus reaffirming the intelligence test:

> "We do not sit in judgment on the wisdom of that policy. We cannot say . . . that it is not an allowable one measured by constitutional standards" (53).

Virginia's poll tax system requires only the minimal intelligence necessary to make the periodic payment of a token sum of $1.50 by December 4th of each year. As her State Tax Commissioner said, this is not the type of intelligence test that is susceptible of administrative abuse, but on the contrary it is "as mechanical as the calendar" (App A., p. 7) and, in short, is "the simplest, most equal, non-discriminatory and objective test of minimum intelligence and responsibility that could be devised". (App. A, p. 7).*

4.

The Question of Paupers Is Not Presented.

The court below held that the question of the constitu-

* We trust that the Court will give no weight to declarations by Congress in Section 10(a) of the Voting Rights Act of 1965, 79 Stat. 442. Whatever weight such declarations may be accorded when the substantive legislation dealing with the subjects they relate to is under attack, see *Block* v. *Hirsh,* 256 U.S. 135, 154 (1921); *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 (1938), it is clear that when (as here) they are offered as proof of matters in issue, they are entitled to no probative significance. See *United States* v. *Silverman,* 132 F. Supp. 820, 830-31 (D. Conn. 1955); *United States* v. *Blumberg,* 136 F. Supp. 269, 274 (E. D. Pa. 1955). In the latter context, in fact, they are nothing more than a bill of attainder—an attempted "substitution of a legislative for a judicial determination of guilt." *DeVeau* v. *Braisted,* 363 U.S. 144, 160 (1960) (concurring opinion). The matter is controlled by Constitutional principle rather than by opinions in Congress.

tionality of Virginia's disqualification of paupers, Va. Const. §23, Va. Code §24-18, was academic, inasmuch as there was no showing that it had ever been enforced to disfranchise anyone. The court's judgment was eminently correct. In *Poe* v. *Ullman,* 367 U.S. 497 (1961), plaintiffs sued to have the Connecticut anticontraceptive law, eventually found invalid in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), declared unconstitutional. By demurrer, the defendant, the State's Attorney, admitted their allegations that he intended to prosecute them for violating the law, in the course of his duty to prosecute all offenders against Connecticut law. The Court, however, viewing the longstanding failure of Connecticut authorities to enforce the law as an "undeviating policy of nullification" 367 U.S. at 502, held that the constitutional question was not properly presented. It declared:

> "If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here. *C.I.O.* v. *McAdory,* 325 U.S. 472, 475. Eighty years of Connecticut history demonstrate a similar, albeit tacit agreement. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality." (507)

These observations are apposite here. The present disqualification for pauperism has been on the books in Virginia for sixty-three years, since adoption of the Constitution of 1902. A similar disqualification existed under the Constitution of 1830, Article III, Section 14, and under the

Constitution of 1851, Article III, Section 1, until adoption of the Constitution of 1869. But we have been unable to find one recorded instance of enforcement of the disqualification to bar a voter from the polls, during any of the periods of its existence. The disqualification, by virtue of the State's "undeviating policy of nullification" has become a dead letter.

Moreover, there is not present in this case even a threat that the disqualification will be resurrected and enforced against the Appellants. If the statements of counsel in argument, made "under provocation of litigation," *Poe* v. *Ullman, supra,* at 509 (concurring opinion), are satisfactory evidence, those of the Assistant Attorney General here prove only that he believes the disqualification to be "valid, constitutional and enforceable" (R. 25), and that it applies to Appellants. (R. 27-30). This statement of belief, we think, considering the circumstances in which it was made, does not constitute a real or immediate threat of enforcement. In addition, it may be noted that the Assistant Attorney General, unlike the representative of Connecticut, is not *ex officio* charged with enforcing the elector qualification laws; that duty devolves solely upon election judges. Va. Code §24-253. Finally, owing to the utter lack of controlling authority, stemming in turn from the fact that the laws in issue have never been enforced, it would be necessary to refer the question who are paupers to a Virginia court for resolution before the Court could determine that the Appellants are proper parties to challenge the constitutionality of the pauper disqualification. Compare *American Federation of Labor* v. *Watson,* 327 U.S. 582, 597-98 (1946).

In sum, the court below acted quite properly in refusing to entertain the Appellants' complaint against the pauper disqualification, and its judgment should be affirmed.

CONCLUSION

The central thesis of the Government's Brief (14) is that "*any* tax levied on voting, and carrying the sanction of disfranchise for non-payment" is unconstitutional, regardless of any reduction in amount or simplification of procedure, invalid, that is, without regard to detail but intrinsically and absolutely. This concept, pressed now on the Court for the first time in history, is of revolutionary nature, since it strikes at the heart of the very principle of Federalism which succeeded in creating the Union and maintaining it as the marvel of the modern age. The underlying question is not the individual preferences of the Justices for or against a poll tax of any particular kind as such, or indeed the adoption or rejection of any particular voter qualification, but whether this Court shall undertake by its own word to overturn basic constitutional principle on the distribution of power between the Federal government and the States that has been considered beyond challenge throughout the ages. Undoubtedly the Government urges what it conceives to promote a more just and orderly society. But the Federal Government was not constituted to make these judgments for every issue, howsoever domestic, in every quarter of the land, howsoever remote from the Federal City. The zeal for reform, in seeking immediate satisfaction of particular objectives, should not be allowed to endanger those distributions of authority that, duly respected, have sustained our republic to the present, but abandoned may well presage

its disappearance among the empires of the past whose names are now but history.

The judgment of the court below should be affirmed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General

RICHARD N. HARRIS
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

GEORGE D. GIBSON
JOSEPH C. CARTER, JR.
Special Counsel

Attorneys for Appellees

HUNTON, WILLIAMS, GAY, POWELL
& GIBSON
1003 Electric Building
Richmond, Virginia 23212

October 9, 1965

APPENDIX A

Direct Testimony of Judge C. H. Morrissett in
United States of America v. *Commonwealth of Virginia, et als,* E.D. Va., Civil Action 4423, taken on September 27, 1965.

APPENDIX A

DEPOSITION OF C. H. MORRISSETT
September 27, 1965

C. H. MORRISSETT, after being first duly sworn, deposed and said as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q Mr. Morrissett, for the record, state your full name.

A Carlisle Havelock Morrissett.

Q And your position with the State of Virginia?

A State Tax Commissioner.

Q How long have you held that position?

A Since April 1926.

Q And prior to that time would you tell us what position you held with the State?

A From 1919 to 1926 I was the Director of the Legislative Reference Bureau; from 1914 to 1919 I was employed by the Code Commission of 1914 to assist in the revision of the general laws of Virginia.

Q Would you state the general nature of your duties as Director of the Legislative Reference Bureau?

A As Director of the Legislative Reference Bureau it was my duty to draft bills for the members of the General Assembly and for the Governor, all done at the request of the members or the Governor. It was also my duty to give legal information to the members of the General Assembly relating to legislation.

Q I assume you hold a Law Degree?

A I am a graduate of the Law School of Washington and Lee University, Class of 1914.

Q Would you tell us the general scope of your duties as Tax Commissioner?

A As State Tax Commissioner, I am the chief executive officer of the State Department of Taxation; my duties are prescribed by the statutes of Virginia. Some categories of state taxes are assessed and collected directly by my office. In other cases, I have general supervision over local Commissioners of Revenue, insofar as their duties with respect to State taxes are concerned.

Q Are you familiar with the Virginia capitation tax?

A I am. This tax is assessed and collected by local revenue officials under the general supervision of my office.

Q Have you any reason to believe that the capitation tax is administered in such a manner as to discriminate against any taxpayer or class of taxpayers?

A None whatever.

MR. POLLAK: Mr. Harris, would you have the witness state the basis of the opinion which he has been asked to render?

BY MR. HARRIS:

Q Mr. Morrissett, would you state the basis of the opinion which you have been asked to render?

A The basis of my opinion is 39 years of service as State Tax Commissioner of Virginia.

Q All right, sir. Now I will ask you the question again. Have you any reason to believe that the capitation tax is administered in such a manner as to discriminate against any taxpayer or class of taxpayers?

A None whatever. During the 39 years I have been State Tax Commissioner, it has never been reported to me

or to my office that any local revenue official has wilfully neglected to assess the capitation tax against or refused to accept its payment from any person assessable therewith on account of the taxpayer's race, national origin, economic position, faith, or political persuasion. Nor has it been reported to me or to my office that any local revenue official has attempted in any manner to dissuade any person from paying his capitation tax for such reasons. Any local revenue official guilty of such conduct would be subject to severe criticism. It is my firm conviction, based upon my years of experience in office, that local revenue officials make every practical and reasonable effort to assess the capitation tax against and to collect it from all persons assessable therewith under the laws of Virginia, without favor or discrimination toward any, and that the capitation tax is administered objectively, impartially and totally without regard to race, national origin, economic position, faith, or political persuasion.

If any particular person assessable with the tax should not be assessed, it would not be because the assessors wilfully or negligently fail to assess it, but only because they have no information indicating that he is assessable. In the overwhelming majority of cases where any other tax is collectible, the capitation tax is punctually collected. The primary instances in which the tax is not collected are instances where the individual also fails to pay other taxes which are due. In cases where the tax is three years past due, the cost of collection of the capitation tax alone would exceed the amount that could be recovered, and to enforce collection of the capitation tax alone by legal process would simply be economically unfeasible. The only time it would not be economically unfeasible is where other taxes are to be collected from the taxpayer at the same time. And Treasurers, in their efforts to collect other taxes which have become past

due, and in their hands for collection, include State capitation taxes in their efforts, but, of course, cannot threaten legal process at the time as to the State capitation tax.

Collection is economically unfeasible for many reasons. When a person's name appears on a delinquent capitation tax list for one year, the collector could not rely on that, but would be compelled to check to see if the item was paid subsequently. Moreover, many, many persons move from one locality to another in a three-year period (the time during which the collection of the capitation tax cannot be enforced by legal process), to say nothing of removals within a locality, or persons who have moved to points without the State, or persons who have died, with or without leaving estates. In addition to these considerations, the problem of identification would be acute, because a collector would find it necessary to do more than rely on a mere name in calling on a taxpayer to pay a delinquent capitation tax. There is a great confusion of names. The over-all cost of identifying true delinquents and ascertaining their whereabouts would of itself probably be greater than the tax involved, and certainly this would be the case where the cost of identification is added to the cost of actually collecting the tax. In my opinion, taxpayer resistance would be strong and resort to legal process by the collector would be the necessary rule rather than the exception.

Of course, § 58-1163 of the Code of Virginia provides that a person assessable with the capitation tax but not assessed therewith may apply to his local Commissioner of Revenue and have himself assessed with omitted taxes. The Commissioner of Revenue must make the assessment and issue to the taxpayer a certificate of assessment; thereupon, the local Treasurer must receive payment of the taxes set out in the certificate from the taxpayer. Anyone who desires to pay his capitation taxes may do so, even if he has not been assessed at the usual time.

Q Mr. Morrissett, what in your opinion, is the function of the capitation tax in Virginia?

A The capitation tax has gone through a marked evolution since its adoption in the Constitution of 1902. Many of the most vocal members of the Constitutional Convention at that time expressed approval of the capitation tax on the ground that it would tend to retard or prevent voting by members of the Negro race. That result may have prevailed for some years. But the capitation tax certainly is not administered discriminatorily at the present time nor has it been for many years. Realistically viewed, the capitation tax in Virginia today serves three purposes, as follows:

MR. POLLAK: Pardon me, Mr. Morrissett. Mr. Harris, the witness is reading the answers, and I don't wish to interrupt him, but perhaps it would facilitate my understanding and hearing of the statements that are being made if, at least upon conclusion of his testimony in chief, I could review the written statement, because, otherwise, it's moving so rapidly—

MR. HARRIS: You can have one to follow. Would you want the comments on the record?

MR. POLLAK: Yes.

MR. HARRIS: We have equally a comment, that you were instantly supplied with one.

BY MR. HARRIS:

Q Mr. Morrissett, I believe you were about to tell us what, in your opinion, were the three purposes that the capitation tax serves?

A Yes, sir. Realistically viewed, the capitation tax in Virginia today serves three purposes, as follows:

(1) In the first place, it provides revenue for the State and localities. During the fiscal year 1962-63, capitation

tax revenues were $1,837,646, of which one-third was to be returned to the localities in which it was collected. The balance of about $1,200,000 is almost 1% of the $130,381,661 expended by the Commonwealth for public free school purposes in that year (to which two-thirds of capitation tax revenues are required by Section 173 of the Virginia Constitution to be applied). While this is not a major proportion, the sum of nearly $1.2 million is certainly not without importance to the educational program of the Commonwealth.

(2) In the second place the capitation tax serves as a method of keeping the rolls of registered voters up to date. Registration in Virginia is not annual, but permanent. It follows that there is no way except the capitation tax for proving the continued life and residence of any particular voter. But since the capitation tax is assessable only against residents of Virginia, and is assessed and paid locally, a person who pays it thereby indicates continuing maintenance of his residence in the State and in his locality. The appearance of his name on both the list of persons who have paid the tax and the roll of registered voters provides substantial, objective and credible evidence that he is a qualified resident when he offers to vote. It is not to be expected that a non-resident would pay the tax. If there are exceptions, I believe they constitute a small minority which would exist no matter what plan of verification were followed.

(3) In the third place, and perhaps most important of all, the capitation tax provides a simple and objective test of certain minimal capacity for ordering one's own affairs and thus of qualification to participate in the ordering of the affairs of state. Any intelligence test as such may be interpreted subjectively by the administrative officials and thus applied in a discriminatory manner, as we learn from

Louisiana v. *U.S.,* 380 U.S. 145 (1965) and *U.S.* v. *Mississippi,* 380 U.S. ——, both decided in 1965. But the capitation tax is as mechanical as the calendar. There is no need for any voter to predetermine the date of any ordinary or special election. All he has to do is pay his $1.50 every year by December 5 and, assuming registration, he is entitled to vote at every election that takes place. If he has income or taxable property, he will in all probability be billed for the capitation tax. If he has neither but can still be identified by the Commissioner of Revenue, he will also be assessed and billed. Failing any of these, he can nevertheless, if he is interested, give his name to the Commissioner of Revenue, receive the assessment and pay the tax and having done this once, he will in all probability be billed every year from then on. This is, in short, the simplest, most equal, non-discriminatory and objective test of minimum intelligence and responsibility that could be devised.

Q Now in addition to those purposes, does the capitation tax have any other purpose, in your opinion?

A Yes, I believe that payment of the capitation tax is in accord with the standard proclaimed in the Virginia Declaration of Rights, written by George Mason in 1776; that all men "having sufficient evidence of permanent common interest with, and attachment to, the community" shall have the right to vote. This is in Section 6 of the Constitution of Virginia. As I pointed out previously, payment of a capitation poll tax does supply evidence of residence within the community, but of even more importance, in my judgment, is the evidence it supplies of common interest with and attachment to the community. I can think of no better way for the citizen and prospective voter, whatever the particularities of his position, to demonstrate his common interest with and attachment to his State and his community than

to respect the common requirement for due and timely payment of the trifling and token sum expected of all citizens to qualify themselves for suffrage.

MR. HARRIS: Your witness.

APPENDIX B

History of State Action

APPENDIX B

History of State Action

In most States, ratification or rejection of the Amendment was perfunctory. Normal procedure was that the Amendment was transmitted to the legislature together with a brief message from the governor commenting upon it and urging ratification or rejection; the legislature usually acted swiftly in accordance with the governor's recommendations. A few states published committee reports in their legislative journals; Pennsylvania was the sole state to publish the debates of its legislature.

Most governors' messages merely praise the Amendment and press ratification; those that go any further into the matter are to the same effect as the debates in Congress. Governor Chamberlain of Maine expressed disappointment that the Amendment did not confer the right to vote upon the Negro. He said

> "Imperfect as this [Amendment] was, as hazarding one of the very fruits of our victory by placing it in the power of the South to introduce into the Constitution a disability founded on race and color, still . . . good faith doubtless requires us to support it." Me. House J. 20 (1867).

Governor Brownlow of Tennessee, the first former Confederate State to ratify the Amendment and the third in the nation to do so, said, shortly after the legislature had acted, in a message recommending enfranchisement of Negroes,

> "While it is true that this amendment leaves with the States, as heretofore, the regulation of the elective franchise, it is equally true that it encourages the enfranchisement of all loyal male citizens of whatever color." Tenn. House J., App. 4 (1866).

Significantly, the governors of Kansas, Minnesota and Nebraska recommended in the same messages in which they recommended ratification of the Amendment that the State constitutions be amended so as to allow Negroes to vote. Kan. Sen. J. 45 (1867); Minn. Exec. Doc., Doc. No. 1, 25 (1865-66); Neb. House J. 27 (1867). Likewise, the incoming governor of Iowa, in his inaugural address delivered shortly after the address of the incumbent urging ratification, recommended enfranchisement of the Negro. Iowa Sen. J. 47 (1868). It is more likely that this was to avoid the penalty of proportionate reduction in representation than merely to remove void material from the books.

The only governor to take a contrary view of the Amendment was Governor Orr of South Carolina.[1] He declared that the first and last sections of the Amendment "confer upon Congress the absolute right of determining . . . who shall exercise the elective franchise." S. C. House J. 34 (1866). This statement may be discounted, however, for it was made in a speech urging rejection of the Amendment, and the alarmist views of opponents of a legislative measure cannot be considered in questions of construction.[2] Moreover, Governor Orr's statement appeared to be based upon a theory that suffrage is one of the "privileges and immunities" of citizens of the United States protected from State interference by the first section of the Amendment and consequently subjected to Congress' jurisdiction by the fifth—a theory repudiated by the Court only seven years

[1]South Carolina rejected the Amendment in 1866, but subsequently ratified it in 1868.

[2]*Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951):

> The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

after the ratification of the Amendment was proclaimed, in *Minor* v. *Happersett,* 88 U.S. (21 Wall.) 162 (1875).[3]

The majority reports of State legislative committees on the Amendment are generally brief recommendations for ratification. One exception is the report of the Massachusetts House Committee on Federal Relations, Mass. Legis. Doc., House Doc. No. 149 (1867). The Committee was highly dissatisfied with the Amendment, although it recommended that it be retained on the legislative agenda. The first section, the Committee held, merely restated what it conceived to be constitutional verities and was thus superfluous. The second section was objectionable because it permitted the States to deny the right to vote to Negroes, and thus confirmed a constitutional doctrine with which it (and Senator Sumner of Massachusetts) disagreed: that under the unamended Constitution, the States had the exclusive right to regulate suffrage. The penalty for disfranchisement was deemed inadequate. Finally, the Committee noted that provisions of the Massachusetts Constitution which disfranchised paupers and nontaxpayers would bring Massachusetts under the second section. It said:

> "[I]f the supreme court should decide, as it must be admitted it could legitimately do, that the requirement of the payment of a tax is an abridgment of the right to vote, our entire basis of representation is annihilated at one fell swoop." Mass. Legis. Doc., House Doc. No. 149, at 14 (1867).

The Committee never suggested that the requirements themselves were rendered unconstitutional by the first section of the Amendment. Its understanding was clearly that

[3]This argument was also advanced by other opponents of the Amendment. See Globe 2538 (remarks of Representative Rogers); N.C. Sen. J. 96-99 (1866-67); Tex. Sen. J., App. 421-22 (1866); Tex. House J. 578 (1866); Pa. Legis. Rec., App. XXV, LI, LII, LIV, LX, LXVII, LXXX (1867).

Massachusetts would retain the power to disfranchise for pauperism or failure to pay taxes, but if it continued to exercise that power, it would suffer the penalty of reduced representation in Congress.

The minority report of the New Hampshire Select Committee on the Constitutional Amendment, N.H. House J. 176-78 (1866) is also interesting. The Amendment was first said to be self-contradictory. After suggesting that the right to vote is a privilege protected by the first section, the minority noted that the second section, by inference, allowed the States to "restrict the right of suffrage if willing to submit to the consequent disabilities." (176) Also, the Amendment was objectionable because its second section penalized the States

> "for regulating, in their own way, the right of suffrage —clearly, a State right; a right vital to the theory of our government, and most carefully guarded by the framers of the Constitution." (177)

Again, the second section was bad because its effect, if adopted,

> "must be to degrade that priceless boon,—the elective franchise,—and cause a race and scramble in all the States to remove those time-honored restrictions upon the right of voting which the experience of the past has proved to be necessary and just. . . ." (177)

Thus, except for the brief and subsequently implicitly abandoned suggestion that the first section's "privileges and immunities" clause embraced the right to vote, the minority report holds that it is the second section alone that affects suffrage—the "time-honored restrictions" on the right to vote are not voided by the first section; instead, pressure for their removal is applied by the second.

The only other committee report of a "loyal" State legislature to go into the matter in any depth is the minority report of the Wisconsin Committee on Federal Relations. Although the minority professed to favor Negro suffrage, it objected to the compulsive effect of the second section of the Amendment. There was no suggestion that the first section automatically prevented the States from denying the right to vote to the Negro. Wis. Sen. J. 102-03 (1867).

Discussion of the Amendment in the Pennsylvania legislature parallels the discussion in Congress. It was repeatedly affirmed by proponents of the Amendment that it did not affect the States' control over suffrage. The following excerpts from the remarks of Senator Landon are typical:

> "I will say that I dislike the second [section of the] amendment. We cannot change it; but if I had been in the body which drafted it, I would have fought it to the very utmost. I shall vote for it, because we must vote for or against them all. It proposes to leave the four millions of colored people in the South at the disposal of the white rebels. It says to them, you may determine whether these men shall vote or not." Pa. Legis. Rec., App. IX (1867).

To the same effect are the remarks of Senator Bigham:

> "It is especially unkind in the Senator . . . to make an onslaught on the second [section of the] amendment. Suffrage is a natural right belonging to the States. Now, the object of the second [section of the] amendment is precisely what the Senator . . . is in favor of; it ratifies and confirms, for all future time, the power of the States to regulate this question of suffrage. Now, if that Senator believes in his own argument, he is compelled to go for the second [section of the] amendment, for it guarantees to each State for all future time, just what he argues each state ought to have." Pa. Legis. Rec., App. XVI (1867).

and of Senator Taylor:

> "The second section, when stripped of all legal technicality and verbosity, simply provides that if a State shall choose to disfranchise any class or portion of its citizens, such State shall suffer a diminution of representative power in the Federal Union, in exact ratio to the number of her citizens so disfranchised. . . . [I]t is clear that the subject of suffrage is left, by the provision of this section, to regulate itself in each State. . . ." Pa. Legis. Rec., App. XXII (1867).

and of Representative Day:

> "We refer the whole question of suffrage to the States. We enforce negro suffrage nowhere, but we do say to the late slaveholding States, and to all States, if you deny the ballot to the freedmen, you shall not usurp it for yourselves." Pa. Legis. Rec., App. LXVI (1867).