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IN THE

Supreme Court of the United States

October Term, 1965

No. 877

NEW YORK CITY BOARD OF ELECTIONS, etc.,
Appellant,

vs.

JOHN P. MORGAN and CHRISTINE MORGAN

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTARY AND REPLY BRIEF FOR APPELLANT

Appellees contend that the Equal Protection Clause is not an "open-end cornucopia of federal power," that it is wrong to use it "as a peg on which to hang decision * * * thus deceiving the public" and "by-passing the political process," and that "a judiciary which amends a constitution under the guise of construing it" will eventually find its decisions swept "into the ash can of history" (Appellees' Br., p. 20; Appendix "Literacy Tests, the Fourteenth Amendment and District of Columbia Voting: the Original Intent," pp. 2, 5).

Claiming that since an English-literacy requirement has already been upheld by this Court as a valid state voter qualification (*Lassiter* v. *Northampton Election Bd.,* 360 U. S. 45 [1959]), appellees, joined by the Attorney General of the State of New York, urge that Congress has no power to reject such standard as a curtailment of fundamental rights violative of the Equal Protection Clause. As to the internationally accepted standards to which this Nation has subscribed—proscribing denial of fundamental rights on the basis of race, sex, language or religion (Article 55, Charter of the United Nations)—the Attorney General says that this was rejected in *Camacho* v. *Rogers,* 199 F. Supp. 155 [1961] (Amicus Br., p. 33). It is also said that "no agreement with a foreign nation can confer power on the Congress * * * which is free from the restraints of the Constitution," citing *Reid* v. *Covert,* 354 U. S. 1, 16 [1957] (Appellees' Br., p. 20; Amicus Br., p. 47). In short, "the Tenth Amendment is clear; powers not delegated to the federal government are reserved to the states" (Appellees' Br., p. 20), and it is the "constitutionally reserved right of the States to determine the qualifications of electors in the States" (Amicus Br., pp. 43, 47).

Appellant Board of Elections has sufficiently briefed the point that Congress has the primary responsibility for determining whether or not state-fixed voter qualifications are based on standards that effectively secure, or actually deny, basic rights of suffrage in violation of the Equal Protection Clause, and of taking appropriate remedial action where such violation is found (City's Main Br., pp. 7-15). As to the contention that in *Camacho* v. *Rogers,* 199 F. Supp.155 (1961), the Court rejected Article 55 of the

Charter of the United Nations and the standards therein acceded to by 117 nations, that rejection was predicated solely on the proposition that the Article was not self-executing but required Congressional action for its effectuation. As will be shown, acceptance of Article 55 pursuant to the treaty-making power, and the execution thereof, are not violative of any constitutional restraints upon federal power since that Article neither (a) diminishes any of the rights of the individual secured by the Constitution, nor (b) usurps any of the "constitutionally reserved powers of the States" (Amicus Br., p. 47).

a. Accession to Article 55 represents a valid exercise of the treaty-making power since it infringes none of the rights of individuals secured by the Constitution.

As has been held by this Court, while the treaty-making power "does extend to all proper subjects of negotiation between our government and other nations. *Geofroy* v. *Riggs,* 133 U. S. 258, 266, 267; *In re Ross,* 140 U. S. 453, 463; *Missouri* v. *Holland,* 252 U. S. 416"—it "does not extend 'so far as to authorize what the Constitution forbids'" (*Asakura* v. *Seattle,* 265 U. S. 332, 341 [1924]). Thus, as stated in *Reid* v. *Covert,* 354 U. S. 1, 22 (1957), where the Constitution imposes restraints upon Congress, requiring "that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions," a Status of the Armed Forces agreement with another nation, authorizing military trial of civilians, "is inconsistent with both the 'letter and spirit of the constitution'." And (*ibid.,* at p. 40), "[w]e should not break faith with this Nation's tradition of keep-

ing military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution.'' Hence, such treaty ''[h]aving run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper clause cannot extend the scope of clause 14'' authorizing Congress to regulate ''the land and naval forces'' (at p. 21).

This appellant contends, however, that the international obligation assumed by this Nation, in Article 55, *i.e.,* to effectuate ''universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'' (58 Stat. 1045) is consistent with both the letter and the spirit of this Nation's Constitution, and that there is, in fact, an inner unity between them that secures all the more effectively the fundamental human rights which it was the object of the Bill of Rights to safeguard. Prior to subscribing to the Charter of the United Nations, the United States had recognized, on the basis of a recent and devastating world war, that unless these fundamental human rights could be secured for the people of all nations, free of the discriminatory tenets upon which undemocratic forces thrive, the recent experience that gave rise to the U. N. would have been in vain.

It was, in fact, the United States and its three principal allies that formulated the Charter at Dumbarton Oaks, in 1944, to which the 51 original members subsequently subscribed at San Francisco the following year. And as stated in the Preamble to the Charter, the motivating force therefor was the determination of ''The People of the United Nations''—''to save succeeding generations from the

scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'' (Preamble to the Charter of the United Nations). Each member nation pledged itself to ''fulfill in good faith the obligations assumed by them in accordance with the present Charter,'' and to take ''joint and separate action'' for the ''achievement of the purposes set forth in Article 55'' (Arts. 2, §2; 56).

It is obvious that none of the specific rights of the individual, safeguarded to the people by the Bill of Rights, by subsequent amendments to the Constitution, or by that fundamental law itself are in the least infringed, threatened or diluted by the provisions of Article 55 of the Charter of the United Nations, invoked herein as a valid exercise of the treaty-making power fully supporting Congressional execution, via Section 4(e) of the Voting Rights Act of 1965, of the obligation undertaken by the Nation in subscribing thereto (*Neeley* v. *Henkel* [No. 1], 180 U. S. 109, 121 [1901]). To the contrary, the ''treasured constitutional protections'' of the individual (*Reid* v. *Covert,* 354 U. S. 1, 21 [1957]), are strengthened by that treaty to the extent that all member nations of the United Nations fulfill their obligations to observe ''human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'', thereby promoting truly representative government in contrast to the military governments de-

plored in *Reid* v. *Covert, supra,* at p. 40, and which obviously pose a threat to peace and derogate from "human rights and fundamental freedoms."

But in addition to being consistent with the *express* constitutional rights of the individual, it is equally clear that the *spirit* of the Constitution is not violated by the provisions of Article 55. It can scarcely be doubted that representative government by the people is the bedrock purpose of the system of government created by that document, and that under the Constitution "each and every citizen has an inalienable right to full and effective participation in the political processes" of his state and Nation (*Reynolds* v. *Sims,* 377 U. S. 533, 565 [1964]). Insofar as the Constitution can be said to have been based on political compromise, tolerating slavery and deprivation of fundamental rights on the basis of state classifications of citizens of the United States, subsequent amendments thereto, and particularly the Fourteenth Amendment, have secured to every citizen immunity from discriminatory denial of fundamental rights inclusive of the most basic right of all, that of suffrage (City's Main Br., pp. 7-15).

The intent of the framers of the Constitution was "to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses" (*United States* v. *Classic,* 313 U. S. 299, 316 [1940]; see, *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 443 [1934]). And that instrument "was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues" (*Hur-*

tado v. *California,* 110 U. S. 516, 530-1 [1884]). Insofar as the fundamental rights of the individual are secured by the Constitution, Article 55 derogates from neither the letter nor the spirit thereof.

b. The powers reserved to the states can neither defeat the sovereignty of the United States nor a treaty undertaken to preserve peace by securing basic rights of mankind.

Since it is clear that none of the rights of the individual secured by the Constitution are in any way diluted or jeopardized by Article 55 of the Charter, it remains but to determine whether the rights and powers reserved to the states by the Constitution have been usurped by the treaty. Where the constitutional rights of the individual were not involved, the only question being the possible infringement of powers reserved to the states by the Tenth Amendment, this Court stated, with respect to the supremacy of a treaty under Art. VI, §2 (*Missouri* v. *Holland,* 252 U. S. 416, 434 [1920]): "[t]he only question is whether it is forbidden by some radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved."

In *Missouri* v. *Holland, supra,* legislation enacted in enforcement of a treaty was upheld despite constitutional restraints upon federal power over commerce, which, in the absence of treaty, had been held to bar such legislation. As stated by this Court with respect to the powers reserved to the states by the Tenth Amendment (*United States* v. *Darby,* 312 U. S. 100, 124 [1940]), "[t]he amendment states

but a truism that all is retained which has not been surrendered." The power to enter into a treaty with a foreign nation having been surrendered to the United States, the only question is whether Article 55 represented a valid exercise of the treaty-making power.

It is obvious that no state could have acted in the interests of preserving its citizenry from another world holocaust, such as had been experienced at the time the United States acceded to the Charter of the United Nations, by initiating and acceding to treaty provisions designed to promote and secure basic human rights and freedoms for all people so as to encourage representative governments and preserve peace in accordance with international law. As "a member of the family of nations, the right and power of the United States * * * are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign" (*United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 [1936]). Clearly, only the United States could have layed a foundation for preserving the Nation, the states thereof and the basic constitutional rights of the people via a treaty creating a permanent international organization to preserve peace and to promote and encourage "respect for human rights and for fundamental freedoms for all" (Charter, Art. 1, §3; Arts. 55-56).

In *Missouri* v. *Holland,* 252 U. S. 416, 435 (1920), this Court recognized that the individual states were powerless to effect the preservation of birds since the active cooperation of another nation was required, saying (at p. 435): "[h]ere a national interest of very nearly the first magnitude is involved. It can be protected only by national action

in concert with that of another power." With actual experience of the havoc that various doctrines of racial, national and cultural superiority can lead to on the international scene, and with the ultimate in weaponry available to mankind, it is clear, that at least the same can be said of the preservation of mankind, i.e., that unless concerted action be taken to encourage observation of basic human rights and freedoms by the nations of the world, peace, as a national interest of the first magnitude, would be jeopardized. In short, it was proper and fitting, and a valid exercise of the treaty-making power, to accede to Article 55 of the Charter, the individual states of the Nation being incompetent and powerless thereto. "If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const. art. 1 sect. 10" (*Hauenstein* v. *Lynham,* 100 U. S. 483, 490 [1879]; see, also, *Kolvorat* v. *Oregon,* 366 U. S. 187, 197-8 [1961]; *Hines* v. *Davidowitz,* 312 U. S. 52, 67-8 [1941]; *Asakura* v. *Seattle,* 265 U. S. 332, 341 [1924]).

"Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate." *United States* v. *Belmont,* 301 U. S. 324, 331-2 (1937); see, *Missouri* v. *Holland,* 252 U. S. 416, 432 (1920); *Neeley* v. *Henkel* (No. 1), 180 U. S. 109, 121 (1901); *Chew Hong* v. *United States,* 112 U. S. 536, 540 (1884); *Gibbons* v. *Ogden,* 9 Wheat. 1, 210-11 (1824). And "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *United States* v. *Pink,* 315 U. S. 203, 230-1 (1942).

Thus, the supremacy accorded a valid exercise of the treaty-making power (Art. VI, §2) provides a firm pillar of support for Section 4(e) of the Voting Rights Act of 1965, since fulfilling the obligations assumed under Article 55 of the Charter of the United Nations infringes none of the constitutionally guaranteed private rights of the people —which rights "go to the roots" of all power—nor does it represent a constitutionally invalid curtailment of state power to classify citizens of the United States for purposes of bestowing or denying basic rights of citizenship. See, *Constitution of the United States of America* (1963), pp. 479, 481, Library of Congress.

As to the Attorney General's contention (Amicus Br., p. 48), that "[s]ection 4 (e) is itself discriminatory in that it prefers one class of native-born citizens over another," suffice it to say that (1) the "Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power" [*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46 (1937)]; and (2) Article 55 clearly leaves to legislative discretion the time at which, and the extent to which, its provisions shall be enforced.

"So while the right of suffrage is established and guaranteed by the Constitution (cases cited) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers has imposed" (*Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 50 [1959]). The restrictions upon state-imposed discriminatory standards with respect to the right of suffrage, contained in Section 4(e), were enacted pursuant to a valid

exercise of constitutional powers (Art. VI, cl. 2; Art. I, §8, cl. 8; Fourteenth Amendment, §§1, 5; Art. IV, §3), and that section of the Voting Rights Act of 1965 should be declared constitutional.

CONCLUSION

The order appealed from should be reversed and Section 4(e) of the Voting Rights Act of 1965 declared a valid enactment.

April 13, 1966

Respectfully submitted,

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