1962

The Constitutionality of Federal Anti-Literacy Test Legislation

Minn. L. Rev. Editorial Board

The Constitutionality of Federal Anti-Literacy Test Legislation

Anti-literacy test legislation has been proposed to the Congress during its current session. This proposed legislation raises important constitutional questions concerning the power of Congress to limit the power of the states to establish qualifications for voters. The author of this Note examines this legislation and suggests possible constitutional bases. He concludes that the primary constitutional support for federal limitations is under the enforcement clause of the fifteenth amendment.

INTRODUCTION

"What do we mean by the U.N.?" "Who is in charge of street improvements in Birmingham?" "What is meant by a legal resident of Virginia?" "When is the payment of the poll tax not required?" "What are the requisites necessary for registration in Virginia?" These were some of the questions asked prospective voters as they were given literacy tests in their various states.[1] As the questions fairly indicate, some had difficulty passing. Most were Negroes. Not even educated Negroes could meet the challenge. One, a graduate of Harvard, was asked to read from the Bible, the Constitution, and finally from texts written in Latin and Greek. He did so successively. Exasperated, the registrar handed him a laundry ticket written entirely in Chinese and asked, "now, doggone ye, what does that mean?" "It means," said the Negro graduate, "that you white folks are not going to let me vote."[2]

In an effort to prevent such discrimination in the application of literacy tests, two bills have been introduced in Congress making it unlawful to require anyone who has completed a sixth grade education to take a literacy test as a qualification for voting. The Administration bill, proposed by Senator Mansfield, applies only to federal elections, while the other bill, introduced by Senator

1. Note, *Use of Literacy Tests to Restrict the Right to Vote,* 31 NOTRE DAME LAW. 251, 259 (1956), citing KEY, SOUTHERN POLITICS 572 n.22 (1949) & MYRDAL, 1 AN AMERICAN DILEMMA 485 (1944).

2. EMBREE, BROWN AMERICANS 144 (1943). Perhaps even more unanswerable was this question put to a Negro Ph.D.: "How many bubbles are there in a bar of soap?" His reply, "What kind of soap?" proved unavailing. Verney, *The American Negro,* 26 POL. Q. 128, 130 (1955).

Javits, applies to all elections, federal and state.[3] Because the states have traditionally exercised the power expressly given them by the Constitution to establish qualifications for voters,[4] the assertion of power by Congress to eliminate a state test of voter qualification raises important constitutional questions.

The purpose of this Note is to discuss the constitutionality of the proposed legislation by examining the various provisions of the Constitution under which these bills could be justified.

I. NATURE OF THE RIGHT TO VOTE

Because both article I, section 2 and the seventeenth amendment provide that the qualifications for voters in congressional elections shall be the same as those established by the states for voters in

3. The Administration bill provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such person to vote or to vote as he may choose in any Federal election, or subject or attempt to subject any other person to the deprivation of the right to vote in any Federal election. "Deprivation of the right to vote" shall include but shall not be limited to (1) the application to any person of standards or procedures more stringent than are applied to others similarly situated and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.
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> "Federal election" means any general, special, or primary election held solely or in part for the purpose of electing or selecting any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegate, or Commissioner from the territories or possessions.

S. 2750, 87th Cong., 2d Sess. (1962).

The Javits bill provides:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude, and without subjection to any arbitrary or unreasonable test, standard, or practice with respect to literacy; any constitution, law, custom, usage, or regulation of any State or territory, or by or under its authority, to the contrary notwithstanding. "Arbitrary or unreasonable test, standard, or practice with respect to literacy" shall mean any requirement designed to determine literacy, comprehension, intelligence, or other test of education, knowledge, or understanding, in the case of any citizen who has not been adjudged an incompetent who has completed the sixth primary grade in a school accredited by any State or by the District of Columbia.

S. 480, 87th Cong., 2d Sess. (1962).

4. WARREN, THE MAKING OF THE CONSTITUTION 399–403 (1928).

state elections,[5] a person has no constitutional right to vote until he is first qualified by the state.[6] Thus, voters have been able to invoke constitutional protection in cases of ballot-box stuffing[7] and irregular vote counting[8] only because they have already been qualified to vote by the state. In establishing voter qualifications, "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."[9] Under this test, the states have been able to use literacy tests as a condition to voting for over 60 years without transgressing any constitutional limitations.[10]

The constitutionality of federal legislation abolishing a state's qualifications for voting has never been tested in the courts because Congress has never enacted such a measure.[11] Fifteen years ago, however, constitutional issues similar to those presented by the anti-literacy test proposals were raised when an attempt was made to have Congress eliminate the poll tax. At that time, several commentators concluded that anti-poll tax legislation was constitutional because it was not a "qualification" within the meaning of either article I, section 2 or the seventeenth amendment; therefore, Congress need not permit the imposition of a poll tax as a condition on voting.[12] However, this analysis does not resolve the issues raised by the anti-literacy test proposals, for the application

5.
> The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

U.S. CONST. art. I, § 2. The seventeenth amendment contains identical language concerning the qualifications for voters in Senate elections.

6. Breedlove v. Suttles, 302 U.S. 277, 283 (1937); Guinn v. United States, 238 U.S. 347, 362 (1915); United States v. Crosby, 25 Fed. Cas. 701, 704 (No. 14893) (C.C.S.C. 1871).

7. *Ex parte* Siebold, 100 U.S. 371 (1879).

8. United States v. Classic, 313 U.S. 299 (1941).

9. Breedlove v. Suttles, 302 U.S. 277, 283 (1937).

10. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); Guinn v. United States, 238 U.S. 347 (1915); Williams v. Mississippi, 170 U.S. 213 (1898). In *Guinn* the Court commented that
> no time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted.

238 U.S. at 366.

11. During the Second World War Congress passed anti-poll tax legislation prohibiting the collection of poll taxes from servicemen during time of war, 56 Stat. 753 (1942), but the constitutionality of this statute was never litigated. The measure has been repealed. 69 Stat. 589 (1955).

12. Christensen, *The Constitutionality of National Anti-Poll Tax Bills*, 33 MINN. L. REV. 217 (1949); Kallenbach, *Constitutional Aspects of*

of a literacy test is a direct attempt to determine a person's qualification to vote.

Yet the power of the states to establish voter qualifications does not necessarily preclude Congress from regulating the exercise of that power. The fifteenth amendment, for example, specifically grants Congress the power to prohibit the states from disqualifying voters on the basis of race or color.

II. CONSTITUTIONAL BASES FOR ANTI-LITERACY TEST LEGISLATION

A. The Fifteenth Amendment

The fifteenth amendment provides that the right 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." It also gives Congress the power to enforce the amendment by "appropriate legislation."

This amendment is clearly phrased as a limitation on state or federal action. Whenever a person is denied the right to vote on account of race or color, not only may relief be sought in the courts, but also Congress may enact "appropriate legislation" to prevent such discrimination. Congress may exercise this power only when state or federal action actually interferes with the amendment's guarantees.[13]

Although by its terms the fifteenth amendment does not confer the right to vote on anyone, it may have that effect. For example, if a state were to restrict its electorate to white persons, the fifteenth amendment, by prohibiting this qualification, would extend the right to nonwhites. But this does not mean that the fifteenth amendment has displaced the states' power to designate voter qualifications. The amendment only prohibits the states from disqualifying voters because of race, color, or previous condition of servitude. It does not purport to eliminate any other qualifications which a state may choose to impose.

The decisive question in analyzing the constitutionality of the proposed anti-literacy test legislation under the fifteenth amendment is whether that legislation is "appropriate" within the meaning of the amendment's enforcement clause. This would seem to require a congressional finding that rights secured by the fifteenth amendment are being denied through the unfair application of

Federal Anti-Poll Tax Legislation, 45 Mich. L. Rev. 717 (1947); Note, 21 N.Y.U.L.Q. 113 (1946).

13. Guinn v. United States, 238 U.S. 347, 362–63 (1915); *cf.* Civil Rights Cases, 109 U.S. 3, 13 (1883).

state literacy tests. Such a finding should not be difficult to make, for certainly it is true that literacy tests have been used to keep Negroes from the polls.[14] Congress may determine that the only *appropriate* way to eliminate the discriminatory application of a literacy test is to eliminate the test itself. This analysis is suggested by the preambles to both bills. They justify the bills by pointing out that literacy tests have been used extensively to deny persons the right to vote because of race or color.

Moreover, what constitutes "appropriate legislation" under the fifteenth amendment is arguably a political judgment—the type of judgment which the Supreme Court has said Congress is uniquely able to make.[15] While any Negro barred from the polls because of the discriminatory application of a literacy test may obtain relief in the courts, problems of proof and delays in litigation render this remedy impractical.[16] If Congress determines that the only appropriate way to eliminate discriminatory application of literacy tests is to eliminate the tests themselves, then the Supreme Court should defer to that determination.

Yet countervailing considerations can be urged to show that the proposed legislation is not "appropriate legislation." In order to be constitutional, a literacy test must be nondiscriminatory on its face; thus, it is only the application of the test that is discriminatory. But not all literacy tests have been applied in a discriminatory manner. The present proposals would eliminate the fair as well as the unfair use of literacy tests. They would prohibit the states from exercising a power expressly given them by the Constitution—the power to establish a valid literacy test, fairly administered, as a means of determining who shall vote.[17]

Moreover, the use of the sixth grade classification for determining those who should be exempt from state literacy tests seems arbitrary. The corrective commands of the fifteenth amend-

14. See notes 1 & 2 *supra* and accompanying text.

15.

> But the constitution of the United States has not left the right of Congress *to employ necessary means,* for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411–12 (1819). (Emphasis added.)

16. For a discussion of the various remedies available to the voter under recent civil rights proposals and the difficulties inherent in current law, see Heyman, *Federal Remedies for Voteless Negroes,* 48 CALIF. L. REV. 190 (1960); Comment, 22 OHIO ST. L.J. 390 (1961).

17. See note 10 *supra.*

ment may not authorize a partial remedy. If the reason for enacting anti-literacy test legislation is to protect Negroes from discrimination, all literacy tests should be abolished, for it seems elementary that the "illiterate" Negro who has had only a fifth grade education is entitled to the same constitutional protection as the "literate" Negro who has completed six grades. There seems to be no rational basis for distinguishing between these two voters. Unfair application of a literacy test is bad whether the applicant has had no education or has received a graduate degree. Legislation which divides potential voters into such arbitrary groups in order to eliminate discrimination common to both may not only be "inappropriate," but may also contravene the due process provisions of the fifth amendment.

On the other hand, use of the sixth grade classification may be the only practical remedy, and hence it may provide a rational basis for this distinction. If anti-literacy test legislation were to apply to all persons regardless of educational differences, the states would be precluded from establishing any literacy standards. Under the present proposals, the states retain substantial power to keep illiterates from voting since it is likely that most persons who have completed the sixth grade are "literate" and would pass a valid literacy test, fairly administered. In addition, the evil in the discriminatory application of a literacy test is that it prevents otherwise qualified persons from voting. The proposed legislation is premised on a congressional finding that most persons with a sixth grade education are likely to be literate and that a state determination that these persons are "illiterate" is probably due to discrimination. The proposed legislation, therefore, is an attempt to balance the state's interest in disqualifying illiterate persons from voting with the federal interest under the fifteenth amendment in preventing state discrimination against literate Negroes. In balancing these interests, a classification that all persons with a sixth grade education are literate for voting purposes does not seem to be without a rational basis.

Thus, the anti-literacy test proposals appear to be constitutional under the fifteenth amendment.

B. The Fourteenth Amendment—Equal Protection

As applied to the states' power to establish qualifications for voters, the equal protection clause of the fourteenth amendment guarantees that the states will not disqualify a voter on the basis of a test which is arbitrary.[18]

18. U.S. Const. amend. XIV provides in part: "No State shall . . . de-

The equal protection clause has often been used to invalidate a state statute which confers "a naked and arbitrary power to give or withhold consent" even though the statute is nondiscriminatory on its face.[19] Thus, while a state literacy test which requires the applicant to "understand and explain any article of the constitution of the United States in the English language" is nondiscriminatory on its face, it violates the equal protection clause because of the arbitrary power it confers upon the election registrars.[20] Not all literacy tests confer arbitrary power, however, and the Supreme Court has recently upheld the validity of a test which requires the applicant to "read and write" any section of the state constitution.[21]

Section 5 of the fourteenth amendment gives Congress the power to enforce the amendment by "appropriate legislation." Even if a literacy test is nondiscriminatory on its face, the discriminatory application of the test violates the equal protection clause because voters of different races or colors are treated differently. Congress may legislate to prevent such discrimination, for there is little doubt that the registrar's action when he discriminates is the action of the state even though he is exceeding the authority given him under an otherwise valid literacy test statute.[22] Thus, the question here is the same as that raised under the fifteenth amendment—whether the proposed legislation is "appropriate."[23]

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ny to any person within its jurisdiction the equal protection of the laws." The equal protection clause permits classifications which are "not arbitrary, but [are] based on a real and substantial difference having a reasonable relation to the subject of the particular legislation." Powers Mfg. Co. v. Saunders, 274 U.S. 490, 493 (1927). See also Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (classification need only have "a basis in reason").

19. Yick Wo v. Hopkins, 118 U.S. 356, 366 (1886).

> Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373–74.

20. Davis v. Schnell, 81 F. Supp. 872, 877–78 (S.D. Ala.), *aff'd mem.*, 336 U.S. 933 (1949).

21. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). The Court distinguished the *Davis* case as follows: "The great discretion it vested in the registrar . . . was merely a device to make racial discrimination easy. We cannot make the same inference here." *Id.* at 53.

22.

> There can be no doubt . . . that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.

Monroe v. Pape, 365 U.S. 167, 171–72 (1961).

23. The privileges and immunities clause of the fourteenth amendment

C. Congressional and Presidential Election Provisions

1. Article I, Section 4

By providing that the states may regulate the "manner" of holding congressional elections while permitting Congress to "make or alter" such regulations, article I, section 4 confers a legislative power on Congress which—in contrast to the power to enforce the fourteenth and fifteenth amendments—is not conditioned on the existence of state action.[24] This power extends only to congressional elections; state and presidential elections are beyond its reach. Congress may therefore regulate the manner of holding congressional elections as it wishes, and if congressional action conflicts with state regulation, the supremacy clause of article VI dictates that the action of Congress will prevail.[25]

In determining whether the proposed anti-literacy test legislation derives this limited constitutional support under article I, section 4, the basic issue is whether a federal statute exempting certain persons from state literacy tests is a regulation of the "manner" of holding an election for Congress. The cases are not clear as to whether the power to regulate the manner of holding an election includes the power to abolish state created qualifications for voters. In *Ex parte Siebold,*[26] the manner of holding an election was held to include the method by which votes were counted. Thus, Congress had the power to punish state election officials who were charged with stuffing ballot-boxes in a congressional election. But this case involved only the rights of qualified voters; it did not raise the issue of federal control of voter qualifications.

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may also serve as a constitutional basis for the bills. However, ever since the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), this clause has secured only the rights of citizens of the United States, and not those of citizens of the states. Thus, the privileges and immunities clause protects only those rights derived from the Constitution or from federal statutes.

Certainly there is a federal right under the fifteenth amendment to be free from discrimination in the application of a literacy test, and any state which uses a literacy test in a discriminatory fashion undoubtedly violates the privileges and immunities clause. Yet heretofore the Supreme Court has not accepted the analysis that there is a federal right to vote absent state qualifications which are valid. Breedlove v. Suttles, 302 U.S. 277, 283 (1937). See text accompanying note 6 *supra.* Once again, the question is whether it is "appropriate" to eliminate a valid literacy test in order to prevent recurrence of those instances in which the test has been used unfairly.

24. U.S. Const. art I, § 4 provides in part:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

25. *Ex parte* Siebold, 100 U.S. 371, 384 (1879).

26. *Ibid.*

Probably the most direct support for the constitutionality of the proposed legislation under article I, section 4, is the Court's language in *United States v. Classic* that "the states are authorized by the Constitution, to legislate on [the right to vote] as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 . . . ."[27] Although this language arguably endorses congressional regulation of voter qualifications, it probably should not be interpreted so broadly. *Classic* involved charges against state election officials for falsely counting ballots; only the rights of qualified voters were at stake, and the Court noted this fact several times.[28]

While the language in *Classic* appears to support congressional regulation of voter qualifications, *Newberry v. United States*[29] indicates that Congress does not have this power. There the Court said that the states' power to establish voter qualifications was a limitation on the power of Congress to regulate the manner of holding an election.[30] On the other hand, this statement was dictum since the issue before the Court was the ability of Congress to limit campaign expenditures, not its power to abolish qualifications for voters established by the states.

Thus, the cases do not make it clear that anti-literacy test legislation can be constitutionally supported by article I, section 4. Although the Court has never expressly denied Congress the power to abolish state voter qualifications under its power to regulate the "manner" of holding an election, it seems unlikely that the Court would permit the proposed anti-literacy test legislation to be upheld on such grounds, for this would, in effect, give Congress the direct power to establish qualifications for voters—a power not expressly granted to Congress by the Constitution. Furthermore, this would contradict not only the well-established view that the Constitution permits the states to create voter qualifications,[31] but also the clear implications of article I, section 2.[32]

27. 313 U.S. 299, 315 (1941).

28. "Obviously included within the right to choose, secured by the Constitution, is the right of *qualified* voters within a state to cast their ballots and have them counted at Congressional elections." *Ibid.* (Emphasis added.) For similar references, see *id.* at 307, 310.

29. 256 U.S. 232 (1921).

30. *Id.* at 256.

31. WARREN, *op. cit. supra* note 4, at 399–403.

32. See note 5 *supra*. If article I, section 4 does support anti-literacy test legislation, then a sixth grade classification would be permissible because it would simply be a qualification for voters established by Congress, and not corrective legislation designed to prevent discrimination.

2. Article II, Section 1

The power of Congress to regulate presidential elections differs radically from its power to regulate congressional elections. Article II, section 1 provides that the states may appoint presidential electors "in such Manner as the Legislature thereof may direct . . . ." All states choose electors by a general election, and these electors later elect the President. Congress is not given any express power to regulate presidential elections other than the power to establish the day on which the electors shall be chosen, and the day on which those electors shall choose the President.[33] Thus, nothing in article II, section 1 suggests that Congress has the power to establish qualifications for electors in presidential elections, or for the voters who select these electors.

Yet the power of Congress to regulate presidential elections under this clause may not be as limited as this analysis suggests. In upholding a federal statute which required presidential campaign committees to report all financial contributions, the Supreme Court, in *Burroughs & Cannon v. United States,* recognized that Congress had the power to protect itself and to preserve the government from "impairment or destruction, whether threatened by force or corruption."[34] As applied to the present proposals, Congress could find that because literacy tests are being used to prevent otherwise qualified persons from voting, the representative character of the federal government is being threatened, and that literacy tests must be abolished altogether in order to protect against this threat. On the other hand, the *Burroughs* decision probably does not authorize federal control over the qualifications for voters and electors in presidential elections. This question was not raised by the facts. Thus, neither *Burroughs* nor article II, section 1 seem to offer any constitutional support for anti-literacy test legislation.

3. The Guarantee Clause

The preambles to the Administration bill ("Congress finds that it is essential to our form of government that all qualified citizens have the opportunity to participate in the choice of elected officials"), and to the Javits bill ("Congress finds that the right to vote is fundamental to free, democratic government . . . .") indicate that Congress may seek to justify anti-literacy test legislation under the guarantee clause of article IV, section 4. It provides that

33. See McPherson v. Blacker, 146 U.S. 1, 35 (1892).
34. 290 U.S. 534, 545 (1934).

"the United States shall guarantee every state in this Union a Republican Form of Government . . . ."

Questions arising under the guarantee clause have usually been dismissed by the Supreme Court under the "political question" doctrine.[35] That doctrine is a rule formulated by the Court whereby it will not decide certain cases on the merits even though they involve an interpretation of the Constitution which is necessary to a decision. The rule is designed to prevent unnecessary conflict between the Court and other branches of the government, and it is based on the concept that a final decision in certain cases should be left to either Congress or the President.[36] Because the Supreme Court has said that problems arising under the guarantee clause "are for the consideration of the Congress and not the courts,"[37] if Congress decides that anti-literacy test legislation is necessary for the maintenance of a republican form of government, there is a possibility that its decision will not be reviewed.

However, it is doubtful whether the Court would apply the political question doctrine to anti-literacy test legislation. Ever since *Marbury v. Madison,*[38] the Supreme Court has acted as the final arbiter of congressional legislation. While it is true that the Court has generally declined to review congressional legislation enacted under the guarantee clause, it has done so because the claims for relief in those cases rested only on a deprivation of rights secured by that clause.[39] For example, if legislation deprives a person of his constitutional rights (violations of which are normally reviewable), the guarantee clause and the "political question" doctrine will not be applied to prevent judicial review.[40] Since any challenge to anti-literacy test legislation will undoubtedly involve

35. Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150 (1912).

36. For a discussion of the political question doctrine, see Baker v. Carr, 82 Sup. Ct. 691, 705–20 (1962); Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1924); Frankfurter, *John Marshall and the Judicial Function,* 69 HARV. L. REV. 217, 227–28 (1956); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 7–9 (1959); Weston, *Political Questions,* 38 HARV. L. REV. 296 (1925); Comment, 61 COLUM. L. REV. 704, 705–06 (1961); Note, 1960 WASH. U.L.Q. 292.

37. Ohio *ex rel.* Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 80 (1937).

38. 5 U.S. (1 Cranch) 137 (1803).

39. Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916); Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867). See also Baker v. Carr, 82 Sup. Ct. 691, 714 (1962).

40. This distinction was drawn in Baker v. Carr, 82 Sup. Ct. 691 (1962).

> Finally, we emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define "political questions," and no other feature, which could render them nonjusticiable. . . .
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> When challenges to state action . . . have rested on claims of constitutional deprivation which are amenable to judicial correction,

constitutional questions under the fifteenth amendment, it will probably not be dismissed under the "political question" doctrine.

Assuming, then, that the Supreme Court would not uphold the constitutionality of anti-literacy test legislation merely by refusing to review it, the issue is whether such legislation is necessary to preserve a "republican" form of government. To make this determination, Congress must find that those states which use literacy tests to disqualify certain voters no longer have republican forms of government. It seems unlikely that the Court would accept this determination, for just recently it has declared:

> Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.[41]

Thus, anti-literacy test legislation seems to derive no constitutional support from the guarantee clause.

CONCLUSION

Over the past 25 years, the Supreme Court has not been afraid to reject old concepts, especially as they pertain to the rights of Negroes. Perhaps the best example is the Court's decision declaring school segregation unconstitutional.[42] Another is the line of decisions frustrating various white primary plans.[43] And just recently, the Court has declared that due process does not require cross-examination of those who file charges of discrimination with the Civil Rights Commission, since that commission's function is investigative, not adjudicative.[44] Finally, not even the well-established "political question" doctrine prevented the Court from ordering a decision on the merits when a city, in restricting the electorate for a municipal election, effectively zoned out practically every Negro by enacting an ordinance which redefined the city's boundaries into a peculiar 28-sided figure.[45] Thus, not only the provisions of the Constitution but also the trend in the Supreme Court supports anti-literacy test proposals.

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this Court has acted upon its view of the merits of the claim. *Id.* at 716.

41. Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 52 (1960).

42. Brown v. Board of Educ., 347 U.S. 483 (1954).

43. The Supreme Court has consistently applied the concept of state action to outlaw almost any attempt to disfranchise the Negro through the use of white primaries. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

44. Hannah v. Larche, 363 U.S. 420 (1960).

45. Gomillion v. Lightfoot, 364 U.S. 339 (1960). See Comment, 61 COLUM. L. REV. 704 (1961).