In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

Washington, D. C.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, et al.,
vs. Appellants,
JOHN P. MORGAN and CHRISTINE MORGAN,
Appellees.

April 18, 1966

No. 847

NEW YORK CITY BOARD OF ELECTIONS, etc.,
Appellant,
vs.
JOHN P. MORGAN and CHRISTINE MORGAN
Appellees.

No. 877

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Washington, D. C.

Monday, April 18, 1966

The above-entitled matter came on for oral argument at 10:38 o'clock a.m.

PRESENT:

The Chief Justice, Earl Warren, and Associate Justices Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Fortas.

PP

APPEARANCES:

On behalf of the Appellants:

Thurgood Marshall, Esquire, Solicitor General

J. Lee Rankin, Esquire, Corporation Counsel,
Attorney for New York City Board of Elections

On behalf of the Appellees:

Jean M. Coon, Esquire,
Associate Attorney General.

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P R O C E E D I N G S

THE CHIEF JUSTICE: No. 847, Nicholas deB. Katzenbach, as Attorney General of the United States, and the United States, Appellants, vs. John P. Morgan and Christine Morgan, et al.

THE CLERK: Consolidated with the next case, Mr. Chief Justice.

THE CHIEF JUSTICE: Yes, consolidated with 877, New York City Board of Elections, etc., Appellant, vs. John P. Morgan and Christine Morgan.

THE CLERK: Counsel are present.

THE CHIEF JUSTICE: Mr. Solicitor General.

ARGUMENT ON BEHALF OF THE UNITED STATES OF AMERICA

BY THURGOOD MARSHALL, SOLICITOR GENERAL

MR. MARSHALL: May it please the Court, this case involves the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which as here applied allows otherwise qualified Puerto Rican residents of New York who are literate in Spanish to vote, although they cannot read and write English, as required by the laws of the State of New York.

The appellees here are English-speaking voters of New York City, and they have challenged this statute as unconstitutionally diluting their votes and sought an injunction against the Attorney General of the United States and against the City Board of Elections, which was complying with the Federal Law. The Attorney General of New York appeared to defend the state law.

pp A three-judge court was convened in the United States District Court for District of Columbia and, after consideration, held Section 4(e) unconstitutional and enjoined its enforcement in a two-to-one decision, with District Judge Holtzoff holding the statute unconstitutional and Circuit Judge McGowen dissenting from the opinion, and the City Board of Elections, the Attorney General and the United States Government are here on direct appeal.

First, I would like to cover some of the background of this legislation and in doing so we must realize that 4(e) cannot be judged in the abstract -- the historical and factual background against which it was enacted is, in our view, of paramount importance and highly relevant.

We view the statute only as it bears on American citizens now residing on the Mainland who are educated in Spanish language schools in Puerto Rico. That is the only question presented by this case, and it is, as a practical matter, probably the only application of Section 4(e) that will ever arise.

We first rely on Article 4, Section 3 of our Constitution, which provides, "That Congress shall have power to make all needful rules and regulations respecting the territory belonging to the United States." And the Treaty of Paris in 1898, by which Puerto Rico was ceded to the United States, provides specifically that the civil rights and political status of the native inhabitants of Puerto Rico shall be determined by Congress. And this was implemented over and over again by granting citizenship in 1917 to the

residents of that territory.

The question here is whether Congress is now powerless to effectuate its policy with respect to Puerto Ricans who moved to the Mainland, by providing a shield against state laws which disqualify them from voting.

In getting to this, I would emphasize two points.

The fact that Spanish is today and has for several decades been the language of instruction in Puerto Rican schools is ultimately directly attributable to the Congress of the United States which, while it had direct control of the educational policy of Puerto Rico, did make a slight effort to impose English as the predominant language, but abandoned that effort, and with the knowledge of the consequences gave the control to local elected officials, knowing full well that those officials would continue to use Spanish as the language in the schools.

In 1952, the agreement was made, and so as of that date on, there was no question that Congress deliberately set upon the path of having Spanish to be the language spoken in the Puerto Rican schools.

THE CHIEF JUSTICE: General, about what time did the Congress first recognize that the right of Puerto Rico to conduct schools in Spanish? Was that before their constitution or at the time of their constitution?

MR. MARSHALL: It was when we had charge of it, back after the Jones Act.

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THE CHIEF JUSTICE: Yes.

MR. MARSHALL: We tried to get them to put in English as the predominant language, and the reports came back -- I don't remember the exact date -- but the reports came back that -- this ended in 1946 -- but the reports came back that it was not working, you could not establish a bilingual school system, because the large percentage of the community, the home, and everything, spoke Spanish, and the only time the youngsters spoke English was in school. And so they just abandoned it. They did make, some people say, a half-hearted attempt, but an attempt was made. And in 1946 it was just abandoned completely.

Finally, in 1952, we get to the point of the absolute freedom. The fact that we had control of this policy, and the fact that we know exactly what we were doing, and in addition, encouraged the Puerto Ricans to come over to the Mainland, was the responsibility that Congress recognized in considering whether or not it would adopt 4(e). And the fact that Puerto Ricans have come to the Mainland, particularly to New York City and nearby areas, in large numbers, is likewise attributable to Congress -- they having been charged by the Treaty of Cecession with termination of the civil and political rights of the people in Puerto Rico, granted them their citizenship as far back as 1917. After that, this is when they encouraged them to come to the Mainland.

The upshot is that Congress, largely responsible for the present predicament of Puerto Ricans residing in the states who

are educated and otherwise qualified to vote, but who are denied the voice in the political process solely because they do not read and write English.

It was therefore quite natural that Congress should feel a moral obligation to remedy a problem of its own making when the affected states declined to solve it themselves. And in New York, refused to -- even though civil bills were introduced in the last few years.

The legislative history, I submit, is clear that Congress acted in this exact spirit.

Now, the effect of the legislation is simply this.

Section 4(e) does not override the state literacy laws, even for Puerto Ricans -- insofar as the States choose to limit their electorate to those who demonstrate by education or achievement the requisite intelligence and knowledge to participate in the electorate process, Section 4(e) respects that.

In a moment we will take up the one arguable objection that because persons cannot read and write cannot keep abreast of what is going on. Indeed, Section 4(e) poses no serious administrative problems. This is particularly true in New York State.

This law, 4(e), was tailored to the law of New York, which was the most directly affected State.

No Spanish literacy test is required to be administered in New York. New York doesn't have to work out a test or anything. The Spanish-speaking Puerto Ricans are permitted to prove their

literacy, only by demonstrating that they have completed the sixth grade, which is the same grade, incidentally, in English, in the State of New York.

Now, Section 4(e) has an appreciable impact in some parts of four other states -- three other states -- California, Connecticut, and Massachusetts. And there it does not produce any uninformed voters, although 19 states have some kind of English literacy qualification for voting, only the four names have a Puerto Rican population exceeding 5,000.

When there is a substantial Spanish-speaking Puerto Rican population, there also is, as one would expect, Spanish newspapers and radio and television programs to inform that group.

For example, in New York, there are three all-Spanish newspapers. There are three all-Spanish radio stations. There are, indeed, Spanish-speaking television programs, and although it is not directly involved in this, we show that in California there is one wholly Spanish daily newspaper, two other part-Spanish weeklies, 16 radio stations with some Spanish programs, including five wholly devoted to Spanish.

The political candidates, in advertisements appearing in the record, show that they have not had any difficulty in getting their stories over to Spanish-speaking people, either in New York or Connecticut or, indeed, in Texas and California.

Thus, as I see it, Section 4(e) works only a slight impingement on state voting qualifications. It is not an exercise

of federal power riding roughshod over local laws, but rather a careful and reasonable accommodation that respects in every possible way legitimate local preferences.

JUSTICE WHITE: Mr. Solicitor General, by the same token, would the ballot have to be in both languages?

MR. MARSHALL: No, sir. The ballots would be in the same language. The ballots would be in English. There is nothing changed in the ballot at all.

JUSTICE WHITE: Even though the people who choose the English ballot, cannot read it?

MR. MARSHALL: They can read them.

JUSTICE WHITE: How about the Constitution Amendments?

MR. MARSHALL: Well, the Constitution Amendments are only brief -- the whole amendment --

JUSTICE WHITE: They are brief, all right, but if people can read those they could pass an English literacy test.

MR. MARSHALL: Well, the point, Mr. Justice White, is that the informed voter reads the Constitution Amendment some place outside of the booth before he goes in it. And the Spanish-speaking literate person would read it in Spanish and if he decided that he was in favor of proposal No. 1, he would pull the lever down "yes" on one, because one is the same in Spanish as it is in English -- the figure one.

JUSTICE WHITE: So you wouldn't think that if you are right in this case, that New York would have to have the ballots

printed in Spanish?

MR. MARSHALL: I don't know of any place where they have dual ballot systems today. For example, in Puerto Rico, they don't.

JUSTICE WHITE: How about in New Mexico, Mr. Solicitor General?

MR. MARSHALL: I don't know, sir. But I don't think it is necessary. The whole question of the intelligent voter is the study he makes before he goes into the polling booth. And he has access to the Spanish-speaking newspapers. And they will do the same thing as the English-speaking newspapers -- they will print --

JUSTICE WHITE: I suppose if there had to be Spanish-printed ballots, it would really mean paper ballots, not machine-voting?

MR. MARSHALL: Well, it appears to me that Congress was very hesitant of putting any burden on the State that would require the State to do something more for the Spanish-speaking citizen, than for the English-speaking citizen. And it is up to the Spanish-speaking citizen to get his information from the Spanish-speaking sources and the affidavits all show in the record that the areas where they have large Spanish-speaking population, the candidates find a way of getting their information over, by putting the-- advertisements, et cetera -- in the newspapers.

So I think as of today -- I don't know about years ago -- but as of today, the Spanish-speaking citizen could be just as well

informed or advised as the English. They rely on their newspapers, I imagine, and they rely on their radio and television stations, just like so many other voters do.

On the question of the power of Congress, in the absence of prohibitive federal legislation, it is of course clear that the States may condition the right to vote upon reasonable literacy tests if they do not discriminate against the class.

On the other hand, it is equally well settled that States do not have an absolute prerogative to regulate the franchise as they see fit. Their right to fix voting qualifications is subject to Constitutional limitations. There would be no question about it now when we look at Carrington vs. Rash, Louisiana State, Harper against Virginia, and more recently, South Carolina vs. Katzenbach.

The only question is whether, assuming New York's rule is otherwise constitutional, Congress nevertheless has power to qualify it in the prevailing circumstances of people that have come from Puerto Rico.

We find such power in both of the provisions. One, the territorial clause I mentioned awhile ago, and, two, Section 5 of the 14th Amendment. And we believe that the two should not be considered separately, but we would prefer to view them as complementary, one to the other.

There is no question that Puerta Rico was a territory in the full sense until at least 1952, and during that time, as this Court has said, the power of Congress is as broad as possible,

indeed, it was plenary -- I don't care whether you use the word, "broad" or "plenary" or not, but it certainly was full -- and during that half of the century it was done pursuant to the territorial clause, including the establishment of the Spanish Educational Policy -- Congress gave them the grant of citizenship and, finally, the grant of commonwealth status.

Accordingly, it seems wholly appropriate now to invoke the same powers, the same powers of Congress, to carry out a policy in that they can, in the old territorial days of Puerto Rico, by granting Puerto Ricans the immunity from discrimination from voting on account of their language. And that resolving the modern problem affecting the State laws in a modest way is no absolute obstacle. In this respect, it seems to us that the territorial powers, like the power to implement treaty obligations, which clearly may override contrary State laws.

Nor is it a sound objection that Puerto Rico is today a Commonwealth -- certainly, it is a Commonwealth. the Court need not resolve the exact status of Puerto Rico vs. Commonwealth status.

For present purposes, it is enough that Puerto Rico is not an independent nation, and that Section 4(e) does not in the least impinge on Puerto Rico's right to self-government.

Surely, the subsisting force of the territorial clause with respect to Puerto Rico is sufficient to authorize this winding up of the Puerto Rico problem on the Mainland.

And now, on Section 5 of the 14th Amendment -- and I [illegible]

pp emphasize -- we appreciate consideration of the two powers together -- we think that under Section 5 of the 14th Amendment, Congress certainly had the power to pass 4(e). And we point out in quite detail in our brief the legislative history of the 14th Amendment, the early post-civil war legislation of Congress, and the decisions of this Court all indicate that Congress has power, sometimes a duty to determine the contents of equal protection, and that courts are bound to respect such determinations, within proper limits, even if independently they could not invalidate the inconsistent state laws.

We submit this is a peculiarly appropriate application of that principle.

Here, Congress is effectuating its policy and correcting a situation of its own creation. Here, Congress is protecting its former wards towards whom it has special responsibilities. Here, Congress is dealing with the subject matter, the electoral process, which is certainly clearly within its area of special competence.

We submit that Judge McGowen's dissenting blow, in the three-judge court in the companion Monroe County case through Judge Kauffman were correct. The constitutional challenge to 4(e) of the Voting Rights Act of 1965 must be rejected. The majority opinion blow and, indeed, the appellees in this Court, insist that the Lassiter case again, and I found the word, "English" in one spot, and that was in a footnote quoting the statutes. There is no question in Lassiter about whether or not the petitioner in that

case could speak English. It is assumed that if the petitioner was born and raised in North Carolina, that has a compulsory educational system, that he could speak English.

The Lassiter case merely passed on the question of a literacy test. And in New York, New York still has the same protection on literacy, with or without 4(e).

If the person is born and raised in Puerto Rico, in order to vote, that person must be as literate as the English-speaking applicant. Both have to show at least a sixth grade certificate in a recognized school, one being Spanish and the other being English.

I believe, further, as Judge Kauffman said in the Monroe County case, that Congress set out to eliminate all vestiges of discrimination in the voting process. Congress dealt appropriately with the problem in the South, insofar as the Negro was concerned. And once advised of the problem in New York, Congress sought to complete the job and make certain that people who were citizens of the United States, and who were brought up in Spanish-speaking areas, on the territory of the United States, that they in turn should not be discriminated against solely because of the fact that they could not speak and write and understand English, as such.

If I could save time for rebuttal.

THE CHIEF JUSTICE. You may.

General Rankin.

ARGUMENT ON BEHALF OF THE NEW YORK CITY BOARD OF ELECTIONS, APPELLANT, BY J. LEE RANKIN, ESQUIRE, CORPORATION COUNSEL

MR. RANKIN: Mr. Chief Justice, may it please the Court, I will seek to try to avoid any repetition of the argument of the Solicitor General. But I would like to indicate to you the great interest of the City of New York in upholding this action of the Congress of the United States in 4(e).

We are dealing in this case with the power of Congress to act. That is the question, subject to inquiry.

We find ample power for Section 4(e) in the territorial clause alone. We find ample power for Congress to act in Section 5 of the 14th Amendment alone.

We find ample power in combination of those two provisions of our Constitution.

We also find power in the United Nations Charter, Article 55, and the adherence of the United States to that treaty.

In examining this question, we think that the Court should turn to try to determine what Congress was doing -- whether it had the power -- not whether it was justified in the act that it undertook. The wisdom, the soundness of the judgment in passing 4(e) is not a subject that this Court will examine.

JUSTICE HARLAN: Does the legislative history indicate what Congress ought to exercise in passing this section?

MR. RANKIN: It seems to me, Mr. Justice, that the Congress was relying upon Section 5 of the 14th Amendment.

JUSTICE HARLAN: Rather than the powers of the territories?

MR. RANKIN: Yes, Mr. Justice.

THE CHIEF JUSTICE: We have so stated?

MR. RANKIN: Yes, Mr. Chief Justice.

However, I don't think that this Court, if it found that that particular clause of the Constitution did not sustain the Act, would stop there, under its decisions. It would also look to the entire framework of the Constitution to find if Congress had the power any place within that framework to pass this law as a part of its legislative function.

So the question is what Congress was doing within its powers. And I think that under the holdings of this Court, the Congress has -- and this Court has recognized -- a peculiar power to try to ascertain the extent of the facts and the responsibilities that it should exercise in the legislative processes. And turning to that, we should examine the problems that this country had that Puerto Rico had, that New York and New York City had, in connection with this particular matter. Those were the things that Congress was addressing itself to.

First, Puerto Rico, as a territory, was a ward of this country. This Court has recognized, as has the Congress and the Executive of this Government, that there is a peculiar responsibility to such wards.

The United States tried, with considerable care, to

develop a system of education that would incorporate the English language as a basic tool of communication for these people. And it found that it would not work. It found, in fact, that it was interfering with the ability of these people to learn. And it was only after repeated attempts of that kind that Congress, the Congress of the United States, recognized its failure and decided that the primary consideration for these people was to aid them in the learning that was necessary to be good citizens of Puerto Rico and, later, of the Commonwealth, in the development of this area of our country.

And, therefore, proceeding upon the knowledge that Congress had and the knowledge that it gained from the experience that it went through it, finally, in 1946 abandoned all efforts to try to make these people learn English as the basic tool of communication and learning -- and that was a Congressional act -- carefully undertaken in the light of very difficult experience and knowledge of failure.

Now, it appears to us that Congress recognized a responsibility in passing 4(e) in light of this experience in the history of the country.

JUSTICE STEWART: Was that a change of policy with respect to the language a resolution of Congress, an Act of Congress or something decided at the administrative level?

MR. RANKIN: It seems to me that it was done pursuant to the abandonment of the efforts of determining who the secretary or

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the person in charge of education in Puerto Rico would be. And we had, under the supervision of the United States, tried to have that appointment made by the Executive, and the English language taught over a considerable term, I think from 1916 -- and as I recall, we even got to the place where a Commissioner of Education gave up and resigned because of the complete failure of the program. We found that we could not even get people to hold the office, to try to teach these people and develop an adequate learning system, an educational program, if we tried to force English upon them. And I assume -- although I cannot document this -- that they had to deal with everything around them in their life that was denominated, had Spanish names, Spanish experience, Spanish cultures, and tried to convert that -- and we all know the process of translation back and forth is a difficult one for all of us, from one language to another.

If you can think in the language, and if you can become skilled enough, even in a foreign language, to think in it, the process of learning is much easier.

JUSTICE STEWART: I understand the problem. It is an interesting chronicle. But I was wondering where we can find -- who made that change of policy in 1946? Was it our Congress? Was it our Executive, or was it made in Puerto Rico with our acquiescence? Where can we find that, either in the record or some of the briefs?

MR. RANKIN: I think the Government's brief -- it

describes on page 60 the difficulties that the Congress had with the whole subject, and finally concluded that it should abandon the efforts to try to teach these people in English, and allowed them to go back to the Spanish and the Spanish culture as their basic tools.

Then, of course, in 1917, with the Jones Act, the Congress had provided for these people to have citizenship and to be permitted to enter the United States like any other citizen. And it is true that it was after this time that the great influx of Puerto Ricans came into New York, particularly in New York City. I think there were 7,000 or 8,000 in an earlier period and later there came some 700,000 or 800,000.

I want to stop for a moment with the Court and make it plain, the problem is not that large. The problem is something like 8,146, who registered under Section 4(e) in this particular matter and is now involved. It probably is a little larger than that because there is a possibility that others who could register, did not, as is always the case. I think that factually, in regard to Mr. Justice White's question, the treatment of Spanish-speaking people within the New York area is one factor that Congress seemed to be well aware of in connection with the legislation and should be recognized, I think, in the examination of the question by this Court.

The Spanish language papers make a very complete coverage of all political matters in the area. They are eager to cover all

of the happenings of political action in the New York area, and they do. They also cover all of the wire services, they translate them into Spanish, they set out the various provisions of speeches and Constitutional Amendments -- any other particular political action in Spanish -- denominate them so that the Spanish-speaking people can find them on the ballot, and there is no question about these people being able to make an intelligent use of the ballot, even though they are Spanish-speaking.

Therefore, I think that that factor is one that is important for this Court to consider in examining whether or not Congress had the power, and in exercising that power, whether it exercised it within the limits of what Congress may do in considering whether such legislation is proper to preserve the franchise for this substantial group of people who have been and are the wards of this country in their living within New York City.

Now, as I read Lassiter, this Court did not say that the States could pass any kind of limiting legislation upon the franchise as far as qualifications of voters is concerned. This Court was addressing itself, as I see Lassiter, to the basic problem of whether or not the voter could exercise an intelligent use of the ballot, and this Court has addressed itself, within the last few years, to many problems in that field.

But if it had not reached that point earlier, we certainly have reached the point today, where we recognize that one of the greatest rights any citizen of the United States can have is

the right to vote, to participate in a genuine, a full and complete vote on matters, issues, and persons in the electoral process.

So, in light of that, and the loss that it presents, I think that Lassiter can only be read with the idea and the concept that this Court was searching to find whether or not the States were infringing by the qualifications they imposed.

JUSTICE STEWART: As you said at the very outset of your argument, General Rankin, the question here is -- the issue in this case is the power of Congress, the power of Congress to pass a specific piece of legislation. Quite a different issue from the one we had before us in the Lassiter case, isn't it?

MR. RANKIN: Yes, Mr. Justice. But I think it has this factor -- that of whether or not this Court was recognizing that the States had an unlimited power to impose qualifications upon the rights to vote.

JUSTICE STEWART: We all know it is not unlimited.

But, even assuming that the States did have an unlimited power, in the absence of an act of Congress, we have an act of Congress which obviously is in conflict with the New York Statute. And the question is, the power of Congress under the Constitution, which is quite a separate and distinct and different question from the question before us in the Lassiter case, as you said in the outset of your argument. Isn't that right?

MR. RANKIN: Yes -- that's right, Mr. Justice. The only thing I was trying to start with was that Lassiter does not prevent

the Congress from taking this action. And I assume that that would be complete.

Then, it is a question of whether or not Congress had the power to take this action under the provisions of the Constitution. And we find that, as I said, in the territorial clause, and in Section 5, Article 14.

Now, I think that Section 5, Article 14, this Court has recognized, Congress has a peculiar right and opportunity to assess it -- whether or not the provisions of the 14th Amendment are being infringed upon.

JUSTICE HARLAN: Were there any findings by the Congress with respect to the sections such as there were with respect to voting in the South, that New York had used this law to discriminate against Puerto Ricans?

MR. RANKIN: No, Mr. Justice, not that I recall.

JUSTICE HARLAN: What, in effect, Congress said was that we, Congress, regard this, the exercise of Section 5 powers -- we regard this as a denial of equal protection.

MR. RANKIN: Yes, Mr. Justice. And I think that they carefully examined --

JUSTICE HARLAN: The question ultimately, could not Congress say that?

MR. RANKIN: There is no question in my mind that the ultimate question of whether Congress, in saying that, was exercising properly or within the range of its full powers, its

pp authority under the Constitution, is binding for this Court do determine. I am trying to deal with the standards this Court would apply. And it would seem to me that in applying those standards, the Court would inquire -- well, did Congress just literally take this action or did it examine the various factors that would be involved? And one of the factors, it seems to me that the Congress did examine carefully, was whether or not there could be an intelligent exercise over the function of the electoral under, or by, the Spanish-speaking citizen, under the law, as it was being passed in 4(e). And whether that person, despite the fact that he was Spanish-speaking, could be, under the circumstances that Congress reviewedand knew existed in New York -- could be an intelligent voter in the process, and therefore should have some action because of that and, also, because of the loss of the experience of the United States in connection with Puerto Rico over the years, and the further fact that we were responsible in a substantial measure for the fact that these people found themselves in the position they were in about their educational process concerning the Spanish language. And, in light of all those things, whether or not Congress, in deciding under Section 5 that this law should be passed to implement and carry out the provisions of the 14th Amendment.

JUSTICE HARLAN: The equal protection clause?

MR. RANKIN: That's right. Was justified at all, in any way, under the Constitution, in taking such action.

It seems to me that is the basic test. And Congress, having taken that action, and in light of all the circumstances, it seems to me, then, the Court addresses itself -- is there any way that we can find under the whole Constitution, under this provision, that Congress was in fact justified, or if it wasn't justified -- perhaps justified is not a proper measure -- could Congress under the Constitution make a determination that this was a proper exercise of Section 5 power to implement the 14th Amendment under equal protection. And if there is any way that this Court can find that Congress had such a power -- even though this Court would decide, "We certainly wouldn't do that, we would say that everyone in the United States before he can vote, has to be able to speak English." That is not the test.

JUSTICE FORTAS: Suppose Puerto Rico were a federated State of the Union and everything else remained the same, that is, say, the principle language and structure for some reason was Spanish. And Congress passed 4(e) for the purpose of making sure that there was perhaps no discrimination against citizens of that federated State of the Union who might move to New York and satisfy the residence requirements there. What would your view be of the Constitutional result?

MR. RANKIN: I think if you assume the history that Congress was dealing with here, that there would be no question of its power to pass 4(e) in regard to Puerto Ricans who were members of an independent -- or members of a State of the Union. They

could certainly take that action to provide adequately -- assuming the standard is, what are the qualifications that can be imposed upon a voter.

JUSTICE FORTAS: Is it your argument that the Constitutionality of 4(e) is less because Puerto Rico is a Commonwealth, that is to say, if Puerto Rico were a federated State of the Union, if Puerto Rico were a federated State of the Union, I suppose your position would be that the equal protection clause would apply and, perhaps, also, some other privileges of the Constitution might come into play?

MR. RANKIN: Yes. I would say that as a Commonwealth, or when it was a territory, that the obligation of the United States under the Constitution to them was even greater because at that point they were, and are, wards.

JUSTICE FORTAS: That, I must confess, is an argument that baffles me. You are arguing that if Puerto Rico were a territory, and it is now a Commonwealth, if it were a territory, that by virtue of the territorial clause, the obligation of the Congress and power of the Congress with respect to citizens of the United States, residents of Puerto Rico, would be greater than its obligations and power with respect to citizens of the United States who reside in sister states. That must be your argument, is it?

MR. RANKIN: Only in this respect. I think this Court has recognized, in regard to its wards and the territories, that

the United States has had a special obligation to care for them because they didn't -- because the people in those territorites did not have the same kind of rights that people in the States had in the conduct of their own affairs.

Now, under the Commonwealth, the relationship has changed, and there is no question of what Puerto Rico has the absolute right, depending upon the examination by the present Commission, of the full extent of what was done by that relationship. But, generally, as to its internal affairs, that is what that arrangement in the 1958, as I recall the date, was to try to accomplish -- was to give the control of its internal affairs, so it could advance them and develop in the remarkable manner that it has.

But it seems to me this Court has said a number of times that the United States does have a special obligation in regard to territories that it has taken over, and has found people there as its wards. And that is the only distinction that I was trying to make.

JUSTICE FORTAS: I just want to ask you one more question.

Suppose New York State adopted a statute that said people who come to New York State from Massachusetts can vote if they comply with the qualifications A, B, and C -- but if they come to New York State from Illinois, then the qualifications are different. I expect quite clearly that would be inviolate for some constitutional reason, wouldn't you?

MR. RANKIN: No question about it, Mr. Justice.

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JUSTICE FORTAS: Now, it seems to me, that one way to deal with the question here -- and I would like to comment on this -- suppose they were a federated State of the Union, in which the language of instruction in the schools was Spanish. Is it within Congress' power to enact a law that is desired to put those people, arguably, on the same footing so far as voting in New York is concerned, as people who are educated in other federated States of the Union?

MR. RANKIN: Mr. Justice, I think there is no question about Congress having such power. I think that it can proceed to legislate to provide and take care of that kind of situation. Now, it seems to me, that this case is a much easier one than that, because of the situation where you have a history of the language, and you have a history of the Congress examining the question of whether or not these people could be intelligent voters, despite the language differences. And, of course, as the Solicitor General said, it is the same standards -- that is, six years of schooling, that is set for 4(e).

JUSTICE STEWART: There was no consideration of 4(e) in the Committee of either House, was there?

MR. RANKIN: That's my recollection, Mr. Justice, there was not.

JUSTICE STEWART: It was something added, then?

MR. RANKIN: Yes.

JUSTICE STEWART: It was added after consideration of the

pp basic legislation by the Committees, wasn't it?

MR. RANKIN: Yes.

JUSTICE STEWART: This is the only part of the Voting Rights Act of 1965 that is grounded on anything other than the 15th Amendment?

MR. RANKIN: I have not made a careful enough study of that Act to know. But the Government's brief does not indicate that any other part of it was grounded upon it.

JUSTICE STEWART: Basically, it was 15th Amendment legislation, was it not? That was the President's message, that was the consideration -- giving consideration by the Committees of the two Houses, on the 15th -- it was 15th Amendment legislation, was it not?

MR. RANKIN: Mr. Justice, in my recollection of the newspaper accounts, that is all -- that was all that it was about.

JUSTICE STEWART: As you know, recently it was decided in the more generalized provisions of the statute.

MR. RANKIN: Yes.

But I would not hesitate to stand before you and argue to consider that legislation being Constitutionally valid if you could find any place within the Constitution, even though the Congress had decided only the 15th Amendment.

JUSTICE STEWART: Solid grounds.

MR. RANKIN: I am sorry I cannot be more precise about my answer. But I think you are entirely correct, in my general

pp recollection, without examining it carefully.

JUSTICE BRENNAN: Mr. Rankin, may I ask -- in some of your argument on the territorial clause, do we have a problem here, in fact, of 4(c), of not a regulation of anything within the voters of Puerto Rico -- it is a regulation of voting within the State of New York. Is the territorial clause in any respect a limitation to a regulation of the internal affairs of the territory?

MR. RANKIN: I find no such limitation in the clause. And I don't find that this Court has ever said that it is.

JUSTICE BRENNAN: Have we ever been confronted with that precise statute before?

MR. RANKIN: No, not that I know of.

I don't know whether the Philippine case could in any way shed any light on that or not. You recall that, in that case, the Court said that after it became -- that persons who were then in the country had become aliens, but I don't believe that involved precisely this.

JUSTICE BRENNAN: That was Boyd case?

MR. RANKIN: Yes.

JUSTICE HARLAN: You would not go so far as to suggest that, in answer to Mr. Justice Brennan's question, that Congress exercised that power to exempt Puerto Ricans from New York State taxes?

MR. RANKIN: No, Mr. Justice. I think that this Court

would examine whatever Congress undertook to do, give grave consideration to whether there is any justification or any power on which the Congress could rely, and would try to determine whether it was properly -- whether it was trying to carry out some responsibility toward that territory. And I think, against that, it would have to weigh whether it was just wiping out the proper area of the State to act, to try to continue and develop as States of the Union. I think it would be that kind of problem. I would not say that you could just -- but I think that is quite a different case than this.

JUSTICE BRENNAN: I think, also, Mr. Rankin, independently of the territorial, there is a source of Congressional authority for 4(e), in Section 5 of the 14th Amendment, standing alone, is that it?

MR. RANKIN: Yes, Mr. Justice.

JUSTICE BRENNAN: And do I correctly understand that that goes something like this? That the purpose of the literacy requirements, limited as they are to the sixth grade education, is largely to give some assurance that a voter will, in fact, intelligently approach his responsibility as a voter, and that if this may be as true of a Spanish-speaking voter as of an English-speaking voter, that Congress may denounce as discriminatory under the equal protection clause -- whether or not this Court independently would say that the clause independently did this -- that Congress at least, under Section 5, can denounce that as discriminatory if it

finds that, indeed, the sixth grade Spanish-speaking education is in terms of assuring what kind of voter you get, which is just as good as a sixth grade English-speaking education, is that it?

MR. RANKIN: Yes, Mr. Justice. And I arrive at that on the assumption that this Court has reached a place where it recognizes qualifications of voters in the light of the fact that the right to vote is so precious under our Constitutional system that such qualifications cannot be made unless they fairly contribute to an intelligent exercise of the ballot, of the electoral process. And any time that the States depart from that kind of a standard, it would not be recognized by this Court as a valid exercise of their functioning in fixing qualifications.

But they are not free to just say, "We shall impose certain qualifications on the right to exercise the franchise." That day is passed -- if it ever existed. And we have reached a point where those qualifications are to reach the basic question as to whether or not this person can exercise the franchise intelligently and properly so as to advance the interests of the State and the Government generally.

JUSTICE BRENNAN: Most recently, if I may ask you this last question, within a week or two, we decided the Gessler case, which of course had something of the scope of Section 5 power, as giving the Congress to do things that perhaps Section 1 of the 14th Amendment, of its own terms, or its own force, would not reach.

Do you find any assistance for your argument in what we

did in that case?

MR. RANKIN: Well, it seems to me a recognition that there is more to Section 5 than is found in Section 1, and that the Congress and the country, in adopting the amendment, intended that there be more. And I think that adds to what you can find to support the action of Congress.

I would just like briefly to say that I think in Article 55 of the United Nations Charter, there is further ground, in the treaty power, of the United States to support this action of the Congress, in trying to carry out the obligations that the United States took upon itself in connection with that entire program under that Charter. And, furthermore, in our representing to the United Nations, in order to induce it to accept the fact that Puerto Rico had different status than mandated or that type of relationship, when we represented to them that Puerto Rico was a Commonwealth, and that we would conduct our relationships in accordance with that standard, and that agreement, and therefore, the United Nations proceeded to decide that it was not in the character of other countries' territories that were subject to its other privileges. And under that treaty power, the United States did take this action, it presented it to the United Nations, and upon that ground, the United Nations acted, and we think it recognized an obligation there to try to carry out the fact that it had agreed under Article 5, not to discriminate against people because of the language they used.

Therefore, may I suggest to the Court that there is ample ground on the three provisions of the Constitution that I have suggested -- the Court will look at the entire Constitution -- with all of the amendments -- and find the power that Congress had the power. That is the only issue here. And it is one more step in our trying to help people of this country to participate in the electoral process where their greatest rights lie.

THE CHIEF JUSTICE: Attorney General Colon.

ARGUMENT ON BEHALF OF THE COMMONWEALTH OF PUERTO RICO,

BY RAFAEL HERNANDEZ COLON, ATTORNEY GENERAL,

COMMONWEALTH OF PUERTO RICO

MR. COLON: May it please the Court, let me present my respectful greetings to this Honorable Court as I appear before you for the first time.

The facts in these cases are undisputed and they have been adequately presented to the Court by the two distinguished solicitors who have preceded me. Therefore, I will not belabor the facts and I will come directly to the matters which bring the Commonwealth of Puerto Rico before you today.

Legislative history of the case at bar: The relationship between Puerto Rico and the United States dates back to the closing of the Nineteenth Century when Spain ceded the Island to the United States as a result of the Spanish-American War. A territorial government was established by Congress in 1900 in the exercise of its territorial powers and of the powers it derived from the Treaty

of Paris. In the insular cases this Court characterized Puerto Rico as an unincorporated territory belonging to, but not a part of, the United States and, therefore, it recognized in Congress plenary powers to legislate for Puerto Rico untrammeled by many of the provisions of the Constitution generally applicable to the state and federal government as a body in union.

In 1917 Congress passed a new Organic Act which granted Puerto Rico a wider measure of self government and which granted American citizenship to the citizens of Puerto Rico. As a result of this legal relationship an increasing number of Puerto Ricans began to migrate to the United States. This migration has continued to the present, when there are almost 900,000 Puerto Ricans who have settled in the 50 States of the Union, with concentration in New York City.

When the United States first assumed its responsibilities over Puerto Rico, it attempted to establish the English language as the language of instruction in Puerto Rican schools. Cultural realities soon forced an abandonment of this policy and Spanish was increasingly used as the educational media. As a result, the Puerto Ricans who migrated to the States, took with them a Spanish cultural and educational background. All of this prevailed through a period which extended up to 1952, wherein the Congress retained plenary powers over Puerto Rico and during which the Commissioner of Education who set the policy regarding the language of instruction, was a presidential appointee.

In 1952 the former legal relationship of Puerto Rico as dependent territory to the United States, and under plenary Congressional power, came to an end. The Congress enabled the Puerto Rican people to ordain and establish their own government through a written Constitution which gave Puerto Rico exclusive control over its local affairs, among which was the education of its people. The new legal relationship that evolved has become known as the compact of association between Puerto Rico and the United States. The nature of this status is not one of the matters at issue today.

This new status permitted the United States to secure exemption from United Nations' supervision over Puerto Rico as "colonial territory" and, pursuant to Article 73(e) of Chapter XI of the United Nations Charter, it was necessary to assure the United Nations, among other things, that Puerto Ricans are not subjected to having any dominant language imposed upon them as a condition to enjoying basic rights of citizenship.

Under the cultural autonomy guaranteed by the new status Puerto Ricans have been educated completely in the Spanish language and English has been taught as a second language. The net result of this policy has been that Puerto Ricans, with only grade school or some with even high school education, are not functional literates in the English language, although they are so in the Spanish language. The new status has preserved the common American citizenship for the Puerto Ricans and the freedom of

pp movement to and from the States. The migratory pattern has continued and a circular movement of persons from Puerto Rico to the States and back to Puerto Rico is an ever present characteristic of the Puerto Rican association to the United States.

Presently, there are about 730,000 Puerto Ricans living in New York City. About 400,000 are of voting age. Less than one-third of these, or approximately 150,000 are registered to vote. There are no exact figures as to how many of the unregistered 330,000 are literate in the Spanish language; it is perhaps relevant to point out that the literacy rate in Puerto Rico is 83 per cent.

It is the policy of the Commonwealth of Puerto Rico to help migrant Puerto Ricans integrate into the mainstream of American life. It maintains a program of instruction for those on the Island who are contemplating to move to the States; it has established offices in major cities to assist both the migrants and their new hosts in the adjustment process and carries on intensive programs in mainland cities to urge Puerto Rican migrants to go to night school, improve skills and learn English, all in order that they may play a more constructive role in the new communities they have chosen to join.

Nevertheless, there is no device more effective in procuring the integration of a people to a community than the free, unrestricted and universal use of the franchise. The power of the vote more than anything else is the key to better living conditions, to better jobs, to better treatment at the hands of officials, and

to better opportunities to enjoy life as a whole in a particular community. But, as pointed out above, out of 400,000 Puerto Ricans of voting age in New York, only 150,000 are registered to vote. The remaining 330,000 may be unregistered for a number of reasons but the principal reason that we know is that New York requires a literacy test in English and that it provides only an education in the English language is presumptive of literacy.

It does not matter to New York State that the Puerto Rican is a natural born citizen; that he has been educated in an American Flag school in Spanish; that he knows civics and government; that he reads Spanish language newspapers and periodicals in New York which inform him fully about issues and candidates; that he listens to Spanish language programs of news and information in radio and television. When it comes to voting, the Puerto Rican cannot show his education as evidence of literacy even though his English speaking brother may show his education in place of taking the literacy test.

JUSTICE WHITE: Mr. Attorney General, what is an American Flag school?

MR. COLON: A school that is conducted anywhere, where the American Flag flies with jurisdiction over the particular area where the flag might fly.

JUSTICE WHITE: Where?

MR. COLON: For instance, Guam; for instance, the Canal Zone; for instance, Puerto Rico.

JUSTICE WHITE: Are all Puerto Rican schools American Flag schools?

MR. COLON: Yes, they are all American Flag schools because American Flag flies over Puerto Rico.

JUSTICE BRENNAN: Then, it is not a matter of American money support necessarily, is it?

MR. COLON: Not necessarily.

JUSTICE BRENNAN: For example, your school system is supported locally, is it not?

MR. COLON: Yes, it is supported locally. Although we get grants from the Federal Government, also.

JUSTICE BRENNAN: Under the general grant-in-aid?

MR. COLON: Yes.

JUSTICE BRENNAN: HEW Program?

MR. COLON: Yes, usually.

Section 4(e) of the Voting Rights Act of 1965 merely removes this unwarranted discrimination. It does not nullify the literacy requirement of New York. It simply allows American citizens educated in Spanish in American flag schools to show also their education as evidence of literacy thus removing the discriminatory inequality to which they were subjected by New York law as against their fellow citizens who were educated in the English language.

Section 4(e) corrects the deep feeling of injustice of the Puerto Rican voters in New York who could see no reason why

their education was not as good as that of their English-speaking brothers for voting purposes. It puts the graduates of Puerto Rican schools on an equal footing with graduates from other American schools as far as literacy is made a requirement for the exercise of the franchise.

The 14th Amendment calls for the equal protection of the laws and section 5 empowers Congress to make that directive effective through appropriate legislation. Historically, both the Congress and the Federal Judiciary have been called upon to enforce the amendment by decision or by legislation. In this case, it was Congress who took the initiative to relieve Puerto Ricans of the unequal burden put upon them by the laws of New York.

That decision of Congress is entitled to all due respect from the Judiciary which has customarily granted the legislative branch wide latitude in making these judgments. In this case, Congress assessed a number of factors, particularly suited to a legislative and political judgment. The factors have been mentioned before in this argument but I will recapitulate the same at this moment, they are: the relationship of Puerto Rico to the United States; the international commitments of the United States; the grant of American citizenship to the Puerto Rican people; the substantial migration of Puerto Ricans into the United States; the cultural autonomy of Puerto Rico fostered by Congress; the struggle of the migrant Puerto Ricans in the United States to integrate into the mainstream of American social-economic and

political life; the requirement of English literacy as it bears upon the intelligent use of the franchise in the linguistic environment of New York.

Having weighed all these factors, Congress concluded that it was necessary to correct the legislation of New York in order to strike out the inequality which resulted for the literate American citizen educated in an American Flag school in Spanish. This judgment is fair and reasonable and the resulting legislation is entirely within the bounds of the fifth section of the 14th Amendment.

This construction of the constitution which the Court is called upon to make today will permit the Congress the necessary latitude to deal with justice towards a people with whom the country is associated in a bond of friendship, mutual respect and goodwill. As technological progress brings all the people of the world closer and as ideological differences tend to divide them, the Court should keep its eye on the needs of this nation for an adequate legal framework with which to face the challenges of tomorrow and with which to adapt to a complex future.

THE CHIEF JUSTICE: Mr. Avins.

ARGUMENT ON BEHALF OF APPELLEES,

BY ALFRED AVINS, ESQUIRE, SCHOOL OF LAW,

MEMPHIS STATE UNIVERSITY, MEMPHIS, TENNESSEE

MR. AVINS: If Your Honors please, I do not intend to argue today the reasonableness of the New York Statute. I leave

this to the Attorney General of New York and to the First Assistant and learned assistant Attorney General, who will argue after me. I intend to spend my time first on the power over the territories, briefly, and then to go into what I feel are the very large questions about the 14th Amendment, very basic and broad questions, which I believe that this statute raises.

In view of the fact that there will shortly be a break, I will go into the power over the territories first, because I intend to talk about that only very briefly, before I go into the 14th Amendment, on which the statute is purportedly based.

Now, I start out with the proposition there is a distinction between local or state or municipal sovereignty -- I prefer to call it municipal sovereignty -- and national sovereignty. The United States has had territories since 1789, or before that -- the Northwest Territories -- which have been considered to be in wardship to the Federal Government.

Under the power of the territories clause, it is my contention that Congress exercises only what we call municipal sovereignty, a sovereignty which is substituted for state sovereignty. In fact, the identical sovereignty which the State exercises as distinguished from national sovereignty under oth[illegible] powers of the Federal Government which Congress exercises for both the territories and the states. And that any power under national sovereignty must be found elsewhere other than in the territories clause.

Now, the Department of Justice has argued, and made much of it, I believe, that in other instances, Congress has exercised extra territorial powers for the territories. I concede that point. But so have the States.

Under the full faith and credit clause, State laws, sometimes, have extra-territorial effects. Hughes against Fenner is a recent fairly good example of this, I would think. And my contention is that Congress' power over the territorial is giving extra-territorial effect in the identical circumstances that a state law would have extra-territorial effect and that the same type of state law would be upheld as it would be upheld under the territorial clause in respect to the extra-territorial effect.

If this were otherwise, it would follow that when a territory, which was always considered to be in temporary wardship, became a state, it would follow that a citizen of the state would lose rights that he had previously enjoyed under the statute, under the Congressional power to govern the territories.

To be specific, let us assume that Puerto Rico became a State. Thereafter, Congress could not pass this statute, because -- under the territories clause -- because in respect to that, it would have no more power. Accordingly, the citizens of Puerto Rico who moved into New York would lose rights. And I think it anomalous to think that, under the territories clause, persons who moved from one State -- citizens of a territory that gained statehood status, go down in their rights, rather than up. I think it

was always deemed that citizens of territories certainly had no greater rights than citizens of states, whatever lesser rights -- whatever the question of whether they had lesser rights or not, which I don't think it is necessary to go into, they certainly had no greater rights.

Now, I look at the question this way. What would happen even if the State of Louisiana passed a law saying that all citizens of Louisiana educated in the French language who moved into the State of New York, or some other State which had an English language literacy test, would be entitled to vote, provided they have the same level of education. Now, I think it crystal-clear that if one State passed such a law, it would not be enforceable in another state under the full faith and credit clause, because I do not think a State can give its own law extra-territorial effect. Therefore, I conclude that if that is so, the identical point follows, that in respect to a law of Congress under the territories clause, and accordingly, the point I therefore make is that Congress could not, as it said, it didn't say it was -- but could not have passed this statute under the territories clause. And for this reason, even if it were permissible to consider this statute merely under the territories clause -- a point which I deny -- even if it were permissible to do so -- the statutes would not be valid under the territories clause for the reason that it is in excess of Congress' power to pass, because it is not an exercise of municipal legislation --

it is not an exercise of legislation similar to a statute, for example, which says that a guest in an automobile who had an accident in Puerto Rico, who is guilty of contributory negligence, could not recover against the hospital. New York, of course, would probably be required to enforce that under the full faith and credit part. And I concede that the supremacy clause simply carries over the notion of the full faith and credit clause in relation to this matter --to wit, it is the identical type of clause in respect to this matter.

THE CHIEF JUSTICE: We will recess now.

(Whereupon, at 12:00 o'clock noon, the Court recessed, to reconvene at 12:30 o'clock p.m.)

AFTER RECESS

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12:30 p.m.

THE CHIEF JUSTICE: Mr. Avins, you may continue with your argument.

MR. AVINS: Thank you, Your Honor.

At this time, Your Honor, I intend to devote the remaining period of my time to the general question of the meaning of the Fourteenth Amendment and its application in this case, and what I respectfully concede to be this Court's duty and Congress' duty in respect to the Fourteenth Amendment, taken broadly and without regard to the question of reasonableness.

THE CHIEF JUSTICE: Will you discuss the treaty clause?

MR. AVINS: No, Your Honor. In my estimation, the reason I am not discussing that is because I concede that the treaty clause gives Congress no independent power, and that if the treaty is outside the general scope of Congress' power elsewhere, Congress cannot increase its power by making a treaty with a foreign country.

I believe that Your Honors observed this fact in Reid v. Covert, and therefore I do not believe, in accordance with long settled precedent -- and I think in accordance with the general nature of the government -- that the treaty power is not a grant of substantive power above and beyond that which Congress is allowed to conduct foreign affairs which it were to have by statute.

Therefore, I will not argue -- in addition, as I believe I mentioned before -- I will not argue the question of reasonableness of the New York State statute, leaving it to the Attorney General of New York.

I might note preliminarily the Department of Justice's brief has a great many statistics on Puerto Rico. I believe that the habit of using statistics in briefs started with Mother v. Oregon, by the late Mr. Justice Brandeis, then attorney, and I think it has increased to the point in which appendices are now all statistics and no constitution.

As Your Honors know, I have made a distinct departure from that. My appendix contains all constitution and no statistics. I leave to the Attorney General of New York and to the Department of Justice the question of how many immigrants there were, average annual rainfall in Puerto Rico, and all sorts of other statistics which in my estimation are wholly irrelevant.

The general question, as I conceive it, is what was the scope of the Fourteenth Amendment in questions of this character.

Before I go into that, I intend to start out -- which I consider to be a useful starting point -- with the Dred Scott case, which was cited by Judge McGowan below, but in a somewhat different context than I am going to discuss it.

I might say that I consider these questions fundamental, and as broad as the hills, and not nearly as narrow as I believe

my learned opponents contend.

First of all, what were the questions decided in the Dred Scott case? One, the Missouri Compromise was unconstitutional because it was in violation of the Fifth Amendment. Two, that Negroes were not citizens under Article IV, Section 2, the old State privileges and immunities clause.

Both of these decisions were contrary to what I call egregious historical facts -- notwithstanding the fact that at the present time it is believed that they were supposed to be in accordance with history.

Now, the two things the Radical Republicans cite to show that these decisions were contrary to egregious historical facts were, one, as to the Fifth Amendment the fact of the Northwest Ordinance, which it could not be presumed Congress intended to repeal by the Fifth Amendment, though it was contemporaneous, and two, with respect to Article IV, Section 2, the fact that on June 25, 1778, the South Carolina delegation moved to insert the word "white" in the predecessor privileges and immunities clause, and this was defeated by a vote of eight to two, with one State divided.

Now, the Radicals charged and repeatedly throughout the congressional debates, that the Dred Scott decision was not in fact a judicial decision, that it was a political decision designed to support the Buchanan version of the great society and slave holding ideology, and that it was designed to, one,

permit the extension of slavery into the territories, and, two, most important, in respect to Article IV, Section 2, which is necessary to an understanding of the Fourteenth Amendment -- was designed to keep free Negroes who were believed to be the natural leaders of slave revolt out of Southern States. And I think the situation which Your Honors may remember existed in 1884 is a good example of the dread which the Southern States had for having free Negroes declared citizens under Article IV, Section 2.

Now, what was the Radical reaction to this? It was, in blunt terms, that the Taney court was making political speeches to support the Buchanan and Pierce administration.

Now, when the Radicals swept into power, the political tide turned, of course, and the political supportsof this court as an institution were withdrawn, and the decisions had to stand on the question of whether they were on the bedrock of the Constitution.

I think history supports my position, or the position of the Radicals, that what the Taney court did was to mortgage the political future of the court with the then current ideology which swept away -- swept away the only assets that this court had, to wit, prestige among lawyers of all political factions based on decisions, based on the law. And once those mortgages were foreclosed, the court was left without assets of a political nature, because Congress retains its power over the person, but this

court has nothing but power over the law.

And I think the Radicals in their speeches pointed out that as long as this court -- that as long as the political branches of the government support this court's position, that the question of whether it makes decisions based under law in current ideology is irrelevant, but that if these are withdrawn by a change in ideological currents, the result is that decisions are swept away and the court -- the decisions are then exposed to the gaze of whether they are based on the law. And the fact that the Taney court did in fact sheer itself from the power to do anything is, I think, exemplified in ex parte Meredith, where the Lincoln Administration tore up Mr. Justice Taney's writs and used it for confetti and in ex parte -- where it barred this court from any review -- a very legitimate one of protecting the South against the excesses of reconstruction.

Now I want to say to Your Honors very respectfully that I see analogies to that case today.

I want to say that in this case there are egregious historical facts which support the position that I take that the Fourteenth Amendment covers only what were known in 1866 as civil rights and not political rights at all. These facts are contained in approximately 100 pages of legislative history appendix which I have filed with Your Honors. And I will say that I think it would be necessary for the Department of Justice to burn the Congressional Globe debates if they were to convince

anybody that the original understanding was in accordance with this statute.

Now, I believe what is ultimately at stake is the ratification of the Fourteenth Amendment which, as Your Honors may know, rests upon the historical compromises of 1876 and 1894, in which the South generally agreed not to contest ratification in return for a construction which was strictly in accordance with the original understanding, which is very narrow.

I think the Erie Railroad Company v. Tompkins, and the opinion of the late Mr. Justice Brandeis is a prototype of what happens, because in that case the flowering of Swift v. Tyson, as I see it, in response to the needs of big business after the Civil War --and I think I may say the excesses under that decision -- were such as to lay the groundwork for an examination of the original understanding. And of course the tail going with the hide, the Fifteenth Amendment ratification rests with the Fourteenth.

Now, I feel entirely justified in saying that this statute cuts a deep gash in the original understanding of the Fourteenth Amendment, and it is that I want to go to, and that to which I want to spend my time because -- and I would like to make my position as clear as I can in respect to this question of original understanding.

I do not view the Fourteenth Amendment as an accordion

which expands or contracts in respect to who is playing the tune. I view it in respect as a fixed document. And my position is that the beginning, middle and end of all constitutional inquiry is the original understanding of the framers, and if the legislative debates are clear, they are conclusive, cases in the court are superfluous, and those contrary erroneous. And for this reason, I intend to go to the original understanding and to that alone.

Now, I would start off by saying that trying to load the statute on the equal protection clause is like trying to carry the Washington Monument in a wheelbarrow. Your Honors cannot make it fit, because the equal protection clause is much too narrow.

By my estimation, it would require plastic surgery on the equal protection clause to sustain this statute.

JUSTICE WHITE: I gather, then, you would think the reapportionment cases are the Washington Monument in that sense.

MR. AVINS: Well, I think, Your Honor, that they are at least a piece of the Washington Monument. How much, I am not certain.

JUSTICE WHITE: And Carrington --

MR. AVINS: I take the position that the original understanding of the Fourteenth Amendment had nothing whatever to do with what were known in 1866 as political rights.

JUSTICE WHITE: And so Carrington v. Rash could not

be supported --

MR. AVINS: Under the original understanding, that is correct.

JUSTICE WHITE: Nor the reapportionment cases.

MR. AVINS: Nor those. There are others.

JUSTICE WHITE: Nor Classic?

MR. AVINS: Well, as far as that case is concerned, Your Honor, as I understand it it is an amalgam of more than one power. There was also, I believe, the power to control Article I, I believe, Section 2, Federal power over the times, places, and manners of holding election. Therefore I am not sure that that is not an entirely different inquiry. But I am now going to the basic question of --

JUSTICE DOUGLAS: Poll tax cases.

MR. AVINS: Yes, Your Honor. If I may raise one point. The Department of Justice raised it in its brief, but in a different way.

The Department of Justice cited in support of those cases the Enforcement Act of 1870. Now, I did not notice this in any place, but I want to make one point about that.

As reported out and passed in the House, it was reported out from the Judiciary Committee of the House, chaired by Congressman John A. Bingham of Ohio, who drafted the first section of the Declaration of Citizenship -- it was made a criminal offense for State officials to fail to collect poll

taxes from Negroes. The only other offense I think was Section 2 -- was the failure -- I am sorry -- failure to register. Failure to register or to collect poll taxes. It was broadened by Senator Stewart in the Senate, from the Judiciary Committee, on the ground that Southern States might dream up other pre-requisites. But originally the very Act passed to enforce the Fourteenth and Fifteenth Amendments made it a criminal offense for State officials, election officials, to fail to collect poll taxes from Negroes.

JUSTICE WHITE: What about other rights besides political rights that the Fourteenth Amendment excludes? How about economic rights?

MR. AVINS: Well, Your Honor, I want to get into that in terms of the original meaning of equal protection. And I do fully intend to get into this question.

JUSTICE WHITE: All right.

MR. AVINS: The due process clause I don't think anybody considers to be relevant. I see nothing that anybody considers to be relevant. So I deal with the privileges and immunities clause, and which grants privileges and immunities to citizens of the United States -- citizens only -- an equal protection, which grants them to all persons -- a distinction which I think is very significant.

Now, I start out by detailing what I believe the original understanding of the word "protection" is. Now, this

is a key word. Not equal -- it does not mean equal rights, equal benefits, equal privileges. It means equal protection.

It does not mean the protection of equal laws. It means the equal protection of laws. Just as a pair of alligators is different from an alligator pear.

The word "protection" comes from the original draft of Bingham's speech, and Bingham's draft, giving Congress the power to enforce the privileges and immunities of citizens of the United States derived from Article IV, Section 2, and equal protection of life, liberty and property.

Bingham's speeches, I think, read carefully, show that it meant protection of the right to live, which every person, even an alien, a baby, is entitled to -- you could not take the life of a baby. Protection of liberty -- which I think every person is entitled to. And protection of property.

Bingham's speeches show it means property acquired lawfully, obtained lawfully, personal property -- as in the cases like Rose v. Slaughter, which he cited in his original speeches.

So, Your Honors -- originally protection, the equal protection clause was designed not only for aliens, but travelers, resident aliens, for everybody. That is why the word "person" is there. And of course I might say this -- that under the original concept of the equal protection clause, no reasonable classification is necessary, because every -- I think one can see that every person is entitled to the same protection of life,

liberty and property which every other person is entitled to.

In other words, what I am suggesting is that the equal protection clause has nothing whatsoever to do with this case, as far as the original understanding is concerned. That is to say, it is confined exactly -- was merely a redraft -- Your Honors may recall that the Bingham draft was postponed in the House. It was postponed because many of the Republicans -- Hotchkiss and Hale, and other Republican Congressmen -- felt that it gave Congress too much power. So it was postponed and redrafted, to be a negative limitation on the States similar to the limitation which the old limitations in Article I, Section 10 were.

Therefore, in my estimation, the equal protection clause has nothing whatsoever to do at all with this case of any kind. I take that broad ground. I realize it is a broader ground than perhaps has been put forth in recent years. But I think it is the correct ground, if one goes back to the original understanding.

Now let me give some illustrations.

In 1870, the Enforcement Act was passed. It was passed largely to protect Chinese in California, who were not permitted to be witnesses in cases, and the right to be a witness was a protection because, of course, if a person could not be a witness it means -- and some of these speeches show that he could be robbed with immunity -- and therefore it was necessary to

protect him in this right.

This is part, I think, of the word "protection".

I therefore deem that reasonable classification has nothing to do with the equal protection clause.

Now I turn to what I consider to be the more important clause, to wit, the privileges and immunities clause. Where did it come from, what was it meant to do.

Now, the reason for the privileges and immunities clause was -- according to Bingham -- was the defect in the original Constitution that Congress had no power to enforce Article IV, Section 2, the necessary and proper clause did not give it any power to enforce Article IV, Section 2. Its derivation comes from two different sources. Although originally drafted to give the consent -- the derivation comes straight from Article IV, Section 2. And Bingham's speeches indicate very clearly he believed there was an ellipsis in Article IV, Section 2, unlike the Democrats who felt it was just designed to prevent discrimination against out of State residents. He believed that the words "citizens of the United States" should be inserted after the word "privileges" so it should read that citizens of each State shall be entitled to all privileges and immunities of citizens, and after that, of the United States in the several States, "of the United States" being the ellipsis.

The question therefore boils down to what was Bingham's concept of privileges, where does he get it from, what did he

believe it contained -- because even if it contained something different, by the old framers, the question is what about the Fourteenth Amendment. But also what did the Radicals believe it contained.

I think it very clear that the Radicals believe that the privileges and immunities clause, which was of course broader than the equal protection clause -- because they had to be citizens to derive any protection from the immunities and privileges clause -- protected what were known in 1866 as civil rights -- that is to say, not political rights, but civil rights, as they were known in 1866.

Now, I think I am supported by a multitudinous number of citations, which I have in my appendices and which I shan't, unless Your Honors are particularly interested, read the legislative appendices which I have filed with this court.

But I want to call Your Honors' attention, for example, to a footnote which I added on the report of the Joint Committee on Reconstruction of 1866, which I think shows very clearly that the Fourteenth Amendment was reported out to protect only civil rights.

Civil rights at that time were believed to be what are known today as natural rights -- I'm sorry -- what were known then as naturalrights. Today the concept "natural rights" might be a good deal different. But they were intended to protect what were known at that time as natural rights.

They were derived from two sources. One, the decision of Mr. Justice Washington on circuit in 1823 in Corfield v. Corio, which I assume Your Honors are all familiar with, and I shan't go through; and two, protections existing already in the Constitution itself. That is all the privileges and immunities were deemed to be those protections which existed in the Constitution -- protection against bills of attainder and so forth -- the many protections. I don't want to get into the discussion of reciprocity, about whether all the bills or rights or just part were -- but I think at least some of them went into the privileges and immunities clause. I don't think any went into the due process clause.

For this authority I cite a statement by Senator Pomeroy in 1870 that aliens had no right to petition the United States Senate -- it was a privilege of citizens alone -- one of the many aspects I think which shed light as far as the understanding of the framers is concerned.

Now, what were considered to be civil rights -- the right to work, the right to travel, the right to raise a family, the right to do business and own property -- that is what were secured -- and have security therefor, the right to bring a suit, a lawsuit -- all the things that were considered in 1866 to be civil rights.

Among the things excluded were what are known as conventional rights, and I might say again I am supported in

this -- if Your Honors may know of the colloquy that Senator Lyman, Chairman of the Senate Judiciary Committee in 1872, had with George Edmunds, a member of the Judiciary Committee, in which he said this was confined to civil rights -- did not include the right to go to school, the right to vote -- he did not include any conventional rights, but just included what were known as basic or natural rights.

Now, I suppose the question must be asked why, then, put that back into -- if it is Article IV, Section 2, why put it with the Fourteenth Amendment. The short answer was that as part of the guarantees, post-Civil War guarantees, the Radical Congress demanded that the South give the power to enforce in full these rights.

Now, that brings me to the fifth section which I believe has been argued at some length in this case. My position as to the fifth section is, I think, quite simple.

The power to enforce does not include the power to amend. The power to enforce does not include the power to define. The power to enforce is simply the power to enforce what is in the other sections. In fact, there are some arguments by Democrats that the power to enforce has nothing to do with the first section at all, because it is the third section, the really controversial question, in which Congress denied the power to enforce, to keep ex Confederates out of public office.

Now, my contention is that since in 1866 and 1868 States

were free, under the Fourteenth Amendment, to make up such qualifications for voting as they chose, that they have the identical freedom today. That is to say, the Constitution, or the principles of the Constitution remain fixed until amended in the manner, the precise manner which is set out in Article IV. This is what I think is the basic issue in respect to this statute and in respect to this case -- is to say that the historical intent remains fixed.

I think I can draw an analogy with a favorite little story.

The Radical Republicans were fond of citing the decision of a Vermont judge, during the 1850's, who was asked to return a fugitive slave under the Fugitive Slave Law. When he asked for proof of ownership, the owner produced a bill of sale from the prior owner. The judge said, "I will recognize only a bill of sale from his Maker." And so I say the same thing in respect to the Constitution -- that the powers must be found under the authority of the makers -- that is the only place.

Now, in my estimation the statute is such novel theory that it could be patented at the Patent Office, except that I do not know that it would meet this court's test of utility. But I certainly think that this is the first time that Congress has ever tried to amend the Fourteenth Amendment under the guise of enforcing it, especially in respect of political rights.

I might say this. I believe in the legislative history

appendix which I submitted, which I wrote -- and also in my article in the Stanford Law Review, and in the appendix which I submitted here, I pointed out very clearly that during the debates on the Fifteenth Amendment, repeated attempts were made to ban States using qualifications based on literacy, property, religion -- I might say in respect to religion there was a very raw example, because Roman Catholics were forbidden to hold office in the State of New Hampshire -- a very raw example -- one that is often cited.

With respect to an English literacy test, we don't have to look very far. The State of Massachusetts as well as Connecticut had an English language literacy test, and its purpose was not as benign as the New York statute is here. Its purpose was to keep our Irish Democratic immigrants -- away from the polling booths. It was a know-nothing product. It was constantly talked about during the Reconstruction period. And yet it was maintained during this entire period.

Rhode Island had a better trick. They required that all naturalized citizens own land in Rhode Island, and as Senator Blair said, of Missouri, there wasn't very much land in the State of Rhode Island for anybody to own. The Rhode Island Senator, Anthony of Rhode Island, said he would not vote for the Fourteenth Amendment, the Rhode Island Legislature would not ratify it, unless Congress took out the property qualifications, the ban on property qualifications. So they did.

In respect to others -- the nativity qualifications -- the West Coast Republicans were dead set against letting any Chinese vote. That is why the nativity was taken out, according to Senator Sargent of California, Republican -- and now I am citing the majority of Republicans, I am not citing Democrats for these propositions.

And so the original draft of the Fifteenth Amendment was whittled away.

Now, there was a proposed draft in the Fifteenth Amendment to give everybody an equal vote, as the original Bingham draft, and it was defeated very resoundingly.

Now, if Bingham had put in the Fourteenth Amendment was entitled to an equal vote, or an equal vote based on a reasonable classification, why should he make the same amendment in the Fifteenth, two years later? It is superfluous. I think it defies common sense to say that the original framers would make all these enactments, which would absolutely be nonsense in comparison with what they actually did thereafter. That is to say, the original debates in 1866 are reinforced by everything that the framers did, from one end to the other, and it is on this that I rest as to the original meaning of the Fourteenth Amendment.

The Department of Justice has submitted four little items on which they want to stand. I believe one of them is a little tidbit from Senator Howard, which is, I think, so broad and

vague as to be virtually meaningless. I have material from Senator Howard which I shan't read to Your Honors. It is in the appendices which I filed -- which show very clearly repeatedly he said the Fourteenth Amendment had nothing to do with the franchise.

They also have a couple of statements by Democrats in some of the States saying what a horrible thing this is going to be -- I think included in political speeches -- and I think we can ignore them.

The Department of Justice's brief does not cite, but I think I ought to go into it for a moment -- because it is probably familiar to Your Honors -- an article by Mr. Van Alsteen in the Supreme Court Review last year. Unfortunately he has had an unfriendly habit of putting in only material he finds favorable. I have put in material in these appendices which is favorable, and a little bit which I deem to be unfavorable, to wit, Botwell's speech right before the enactment of the Fifteenth Amendment -- and Senator Edmunds'. I want to take up these two people because they are the only people who are unfavorable to my position, I think, except for the Democrats.

As to Botwell, I think I can explain this very easily. Though he was admitted to the bar, he never practiced law until long after he left the Senate and the House. So he really was not a lawyer.

As to Edmunds, though he said originally that the

privileges and immunities clause -- not the protection clause -- did grant Congress some power over the right to vote, to wit, the right to prevent discrimination against Negroes, thereafter he changed his position in 1872 and concurred with the rest in saying that the privileges and immunities clause had nothing to do with the right to vote. And therefore I take the broad ground that there is really no substantial material in the debate. It's not a question of weighing them. There is no substantial material in the debate which is contrary to the position that the original understanding had nothing whatever to do with anything other than what was known as a civil right in 1866 and 1868.

Therefore I plant my feet firmly on the original understanding of these amendments.

Now I might say that several of the gentlemen who have preceded me have indicated --

JUSTICE WHITE: What is your own view of why they chose this particular form of words to get across this idea?

MR. AVINS: Which words -- protection or privileges and immunities?

JUSTICE WHITE: Equal protection of the law.

MR. AVINS: Equal protection of the laws. Because it seems to me that what was originally intended was clearly protection. That is to say, if one goes back to the mischief, it is not difficult to realize why the word "protection" was

used. Let me give Your Honor an example, a single example I think will suffice -- of both the use of the word "person" in the equal protection clause and the use of the word "protection."

In 1850 the Supreme Court of California decided that under the law of California the Chinese were similar to Indians, and were not permitted to testify in court. In 1860 I think it was Mr. Justice Field, later in this court, who held that under the law if a white man beat up a Chinaman and robbed him in California, and the only witnesses were Chinese, the white man had to go free. Now, Senator Conitz said this was becoming a very serious problem because Southern born Confederates became highwaymen in California -- he used another term, and then he just said plain highwaymen -- they would go around robbing Chinese, and of course they could never be brought to book because the only witnesses were Chinese, and they were excluded as witnesses.

Your Honor may remember that under the old slave codes, Negroes could not be witnesses where whites were parties, whether for or against.

This was one of the objects of the equal protection clause.

Of course these things are all forgotten, because these laws are obsolete and have not been in existence for a hundred years, and so of course the original mischiefs have been forgotten.

But at that time this was the original -- these were the original mischiefs, that there was not the same protection.

JUSTICE WHITE: I take it you think the equal protection clause, if it were replaced with the words that those States denying a person his civil rights -- it would be expressly the meaning that you think Congress intended.

MR. AVINS: I'm afraid to say that it is now even not that. That is to say the privileges and immunities clause could be substituted for civil rights and in fact the Civil Rights Act -- there is a lot of discussion and debate about the Thirteenth Amendment. I think it is very clear, and Senator Lottmore in 1872 made quite clear that the civil rights -- that the Act of 1866 really rested on Article IV, Section 2.

There have been quarrels whether Congress could enforce Article IV, Section 2. That is to say, if Negroes were freed, whether they therefore ipso facto were entitled to the benefits of Article IV, Section 2. That is why you have a declaration of citizenship in the first sentence of the Civil Rights Act of 1866.

Now, the word "civil rights" was taken out of the Act, as Your Honors may remember, because there was a lot of discussion on the subject of whether voting was a civil right, and Congressman Wilson, later Senator Wilson, of Iowa, Chairman of the Judiciary Committee, said no, and Bingham said yes, and it was said there may be -- or maybe it is too broad.

Columbus Delano of Ohio said this was pretty broad -- and who knows what it is going to be interpreted as. So Wilson finally said -- all right, we're going to take the word "civil rights" right out, and just list the rights.

But my contention is that the privileges and immunities clause -- you could replace the privileges and immunities clause with the word "civil rights", which as I say included, one, the rights in Corfield v. Corio, and two, rights derived from the Constitution itself.

As to the equal protection clause, it is narrower still. Not all civil rights are protected by the equal protection clause -- just those which give protection to life, liberty or property.

It is a very narrowed, and it is a very little clause.

I might say that the whole first section was utterly uncontroversial. The second section was not very controversial. The big fight was on the third section, on whether ex-Confederates should be disabled from holding office. But nobody cared about the first section -- it was deemed to be surplusage, it was a little, unimportant clause, very basic.

JUSTICE WHITE: But if the privileges and immunities clause was replaced by civil rights, what was the equal protection clause, according to your interpretation -- what did it protect in addition to that?

MR. AVINS: It would protect persons. First of all, it would protect aliens, it would protect travelers. As early as

Bingham's speech against the admission of Oregon in the 35th Congress, second session, about page 900 something, in 1859, he indicates very clearly that even strangers are entitled to some protection, and he repeats this as a recurring theme, like a broken record, over and over through the debate -- that even strangers get something.

In fact, the word "persons" has been so broadly interpreted that I might say this -- that in President Johnson's vetc of the Civil Rights Act of 1866, he makes the point that he concedes the word "persons" to include corporations.

So that -- but I think it was conceded on all sides that they included aliens. That's the reason for in effect duplicating some of the rights in the privileges and immunities clause into equal protection and due process; namely, aliens get something. Because it was believed that the States would not protect aliens in these basic rights.

I think the State of California is an excellent example, the history of the State of California is an excellent example, the pre-ante-bellum history of the State of California -- perhaps even the post-bellum to some extent -- whenever it was under the Democratic legislation -- and this constant discussion about Democratic legislatures discriminating against Chinese, refusing them protection, permission to testify. In some States they could not be parties, they could not sue at all. The man hit you in the nose, it's tough luck, you could not sue in court.

So if you go back to the original mischief, there is a very good reason for these clauses. And my contention is that -- and I may say this. I consider this a contention -- I'm almost attempted to say a contention of the galley. That is to say that it is the requirement of the galley that a constitution be interpreted in accordance with the original understanding.

As I once said in the Alabama Lawyer, "A Constitution must be construed as a Constitution -- it is not to be interpreted like a blank check". That is, it means exactly the same as it meant in 1866. Of course scientific changes simply mean that you substitute one scientific method for another -- an airplane is the same as a train for purposes of general principles. But the general principles remain the same. Voting was known in 1866, people voted -- schools were known -- all these things were known. That's my point.

Now, I might say that some of the gentlemen on the other side have said that voting -- they think voting is very fundamental. I don't know that voting is as fundamental as my learned opponents believe.

I think the right to drive a car is more fundamental than the right to vote, because in most places in the country you can never even get to the polls without a car. And I might say I think if you took a survey of the country as to whether people would rather hitchhike to the poll or pay a dollar fifty, they would certainly be glad to pay a dollar fifty rather than

hitchhike to the polls.

Besides I might say I think in New York City, they would tax even walking to the polls if they found a way to tax walking and collect it.

I think that -- I don't think that the right to vote is as fundamental, for example, as the privilege of not being barred from getting a job, which was certainly involved in 1866, because you had Negroes who were forbidden to engage in certain occupations in some of the black codes, or to have a home -- the same thing was forbidden. Or for example the black code laws which made it a criminal offense, punished by, I think, in Virginia five years in the penitentiary to teach a Negro to read and write, to prevent again enforcement of the slave revolts.

And I might say personally that -- for example -- I might say personally that all the candidates I voted for in the last general election lost, but I don't feel personally affected at all, although of course I am over 26.

I also say as far as this particular statute is concerned that I don't see the slightest degree of difference in principle between Congress saying that Puerto Ricans educated in Spanish in Puerto Rico may vote in New York, and that Puerto Ricans who are taught to drive on the left hand side of the road in Puerto Rico may drive in New York on the left hand side of the road. I think they are exactly the same. True, there is an argument about inconvenience. I think there is an argument about inconvenience

that goes both ways. It is inconvenient to print materials in Spanish. It is also inconvenient to dodge opposing traffic. But I will say that a person who has lived in Manhattan -- that I think any New Yorker who is resourceful to find a parking space in Manhattan is resourceful enough to be able to avoid and dodge opposing traffic.

JUSTICE FORTAS: I don't think they drive on the left hand side of the street in Puerto Rico.

MR. AVINS: I agree with Your Honor. They do in the United Kingdom. But I'm suggesting Congress has the power under the Territories to permit Puerto Ricans to drive on the left hand side of the road; and two, under the Territories argument, they would have the power to, let's say, that Puerto Ricans coming to New York can drive on the left hand side of the road because that's what they learned at home. So I think it's entirely similar.

THE CHIEF JUSTICE: If they did that, they would not live long.

MR. AVINS: Well, I don't know about that, Your Honor. As I said before, having driven in New York City, I'm not sure that New Yorkers are not really quite resourceful about driving.

Now, I might say that in my estimation if this court has the power to set standards of reasonableness, it means that in fact and in effect this court would be setting voting qualifications. Likewise if Congress has the power to set

reasonableness -- it just shifts the power from one to the other, for the reason that in my view one man's reasonableness is another man's lunacy. I think if we polled every person in this room as to what would be reasonable voting qualifications, we might find some very diverse ideas on the subject.

Now, perhaps if it was left up to me alone, I might be able to limit this suffrage to only people who have two doctorates in law, one American and one English, and then I could elect myself President. Or I think there would be people who would dissent from that statute. So I think everybody has his own idea of what is reasonable.

Now, I think in conclusion that proper government structure, like a proper automobile, needs brakes as well as gas pedals, and I think that the original function of this court was to brake the popular branches of the government, and not to serve as an impetus to forward movement. And I think though it may be a lot of fun to drive a car with three gas pedals and no brakes, I think sooner or later we would go off the constitutional road and have a crackup.

But I am seriously concerned about -- I submit to Your Honors that unless original understanding is followed, original understanding -- and I don't think that my contention about the original understanding has been refuted in the least by either of the three of my learned opponents -- that the result would be ultimately the government would be going off the constitutional

road.

I cannot say that we need to give the original understanding at the present time a high requiem mass, but I think perhaps extreme unction may shortly be in order if this court holds that Congress has the power to ignore the very clear understanding that occurred in this case.

If Your Honors have no questions, I would like to save the remainder of my time for any rebuttal which may be necessary.

THE CHIEF JUSTICE: I don't think you have any rebuttal. This is the time for you to make your argument. The other side has the rebuttal.

MR. AVINS: I see, Your Honor.

Well, in that case all I can say is -- well, I think perhaps if I have made myself clear as to this particular point, I might go on to the question of -- one question which I don't think the Attorney General of New York has covered, which I just left to my brief, but perhaps I will make a point or two about that, and that is the discrimination involved in this statute between American citizens who are born in New York and educated in a foreign language outside of New York, and American citizens who are born in Puerto Rico or New York and educated in Spanish in Puerto Rico.

Now, to me it seems that the Federal statute itself is irrational. That is to say, we are getting into irrational distinctions -- and I am not getting into the question of whether

the New York distinction is irrational, but I think the Federal distinction is irrational.

The point I am making is this. It's entirely possible, under the Fourteenth Amendment, which makes all persons born in the United States citizens at the moment of birth, for a citizen of the United States, a baby, to be taken to a non-American flag school and educated in a foreign language. It is not inconceivable, and I'm sure it happens in a number of cases.

In fact, I may say I have a second cousin whose child is in fact being educated in Chile, although an American citizen born in the United States. It not only can happen, but it has happened.

Supposing that person comes back, educated in Chile, able to read and write Spanish just as well as any Puerto Rican in the United States -- comes back to New York, wants to vote, can read the Spanish newspapers just as well as any person educated in Puerto Rico can read the Spanish newspapers. What happens? Sorry, Congress has made a distinction.

Now, is this a distinction that has any rational basis to it at all? They are both American citizens. They are both now citizens of New York, because under the Fourteenth Amendment all American citizens are citizens of the State in which they reside.

Therefore my point is that being citizens of the State in which they reside, they are now New Yorkers, and there is

absolutely no rational distinction to say a New Yorker educated in Puerto Rico shall be entitled to vote and a New Yorker educated in Chile shall not.

JUSTICE STEWART: That is an argument in favor of the appellant in the next case, isn't it -- the Cardona case?

MR. AVINS: No, I think it is an argument against the appellant in the next case. I think it's an argument against the appellants here. Perhaps I have not made myself clear, Your Honor. My contention is this -- that if you are going to let persons literate in a non-English language in New York vote, you have got to let them all vote. Why let only the people vote who are educated in American flag schools?

JUSTICE STEWART: That is Mr. Cardona's challenge. I mean if Cardona prevails in the next case, then your niece in Chile could vote in New York.

MR. AVINS: Well, yes -- except that the Federal statute -- you see -- I am not saying that it is irrational to let -- again, I apparently have not made myself clear. I am not saying it is irrational not to make a distinction between people who speak English and people who speak Spanish. Not to let the child of my cousin vote in New York literate only in Spanish would be perfectly rational, providing your dividing line is Spanish-English.

JUSTICE FORTAS: But you think it is irrational to make a distinction between a person educated in American flag

vs32 schools and non-American flag schools -- that is irrational.

MR. AVINS: Right. And the reason for it is this.

Now, I know it was argued below that a person educated in Puerto Rico learned something about cities, about the national government, et cetera. But certainly they learn nothing about the issues in the New York City municipal election -- if I may take a specific case, who should be borough president of the Bronx. This is not a question that one learns in civics in Puerto Rico -- what the local issues regarding the sewers are in the Bronx.

JUSTICE DOUGLAS: That would be true of a person coming from my home town in the State of Washington, moving to New York.

MR. AVINS: Yes -- but you see, of course, that is the question of the reasonableness of the distinction in terms of the English language. A person coming from the State of Washington, assuming he is literate in the English language, would be able to read all this material about what is going on in the Bronx. My contention is --

JUSTICE STEWART: Presumably it is the residence requirement that takes care of your point.

MR. AVINS: Yes. Although of course a person moving from Washington may stay in New York for twenty years and keep himself totally uninformed of what's going on. That is, the residence does not guarantee that the person know what's going on. He may just be as ignorant to vote on local affairs as anybody in the world.

JUSTICE DOUGLAS: The New York Times is not necessarily the bible for everybody in New York City.

MR. AVINS: No, it's not. The number of newspapers keeps condensing every couple of years. I cannot keep up with it.

JUSTICE DOUGLAS: Spanish publications?

MR. AVINS: There are some Spanish newspapers. Of course there are none in Kingston, and upstate New York cities. What about a Spanish language voter who tries to vote in the Third Ward in Ossining? There is no Spanish newspaper there, or the radio station does not cover the issues in the Third Ward in Ossining in Spanish.

JUSTICE DOUGLAS: I suppose there are campaign speeches.

MR. AVINS: Yes, there are, in English. Maybe there are two Spanish language voters in the Third Ward in Ossining. Of course the candidate speaks in English. Let me get into this. I'm sort of backing into this issue by the tail. I suppose I might as well -- I ought to get into this in one way or another.

Let me look at something that was submitted in the record below.

The Department of Justice has affidavits from candidates in Spanish districts -- an affidavit by Herman Cadillo who was elected on votes registered -- in all probability registered by this particular Act. And I might say with all due respect to him, I've never heard a man who thought the people voting for him did

not understand the issues.

But the point that I'm making you see is this. True -- in the Spanish areas there will be Spanish material. But one of the cases was in Rochester. What about Rochester? What about Ossining? There are other cities besides New York City in New York State, even though many New Yorkers don't think so. What about all these localties? A person speaking only Spanish is free to move there, free to live there, and under the statute free to vote there. How is he going to know what is going on in the Fourth Ward in Ossining? And nobody is going to print a pamphlet in Spanish to reach two voters. Nor can he get a translator to translate all the campaign literature that comes out two days before the election.

As a practical matter, it is impossible to tell a voter in the Fourth Ward in Ossining, two Spanish language voters, what's going on in the Fourth Ward in Ossining.

There are all these upstate New York cities, all with school elections. Also there is the State of Connecticut. There are Spanish voters in Connecticut -- 5,000 -- with no Spanish language newspaper.

The problem is all the attention has been concentrated on New York City, as though New York City were not only the hub of the universe, but the only place in the universe.

JUSTICE FORTAS: Does Connecticut have an English literacy requirement?

MR. AVINS: Yes, it does, Your Honor.

JUSTICE FORTAS: How about California?

MR. AVINS: I don't know, Your Honor. I'm not familiar with that. There are other States. And Puerto Ricans live in other States -- natives of Puerto Rico live in other States. The record shows here that some of them were registered in Connecticut -- 50, 60, whatever the case may be. And of course if this court upholds the statute it has to uphold it for all the States. Your Honors cannot say this statute is constitutional as to the 71st election district of New York and it is unconstitutional as to the 69th election district, or the 42d, or the 12th in Albany -- that it is constitutional as to one and it is not as to another, and the constitutionality of this statute depends upon the circulation, and how much the issues are discussed.

JUSTICE DOUGLAS: I remember when I was in India, Nehru was campaigning. He usually campaigned in English. There are many different languages.

MR. AVINS: Yes -- Telugu and Tamil, Hindi.

JUSTICE DOUGLAS: When the campaign speeches were over, they had to be translated into all the other languages.

MR. AVINS: Yes.

JUSTICE DOUGLAS: So it would go by word of mouth.

MR. AVINS: Yes, that's true, Your Honor. But this is the point that I'm making. First of all, of course, the Indian

languages are regional. Now, for example, Tamil is spoken in Madras State. You find very few people speaking good Gurage in Madras State.

I'm glad Your Honor raised the question of India, because I expect to publish a book on India. I can file a supplementary brief if Your Honor wants, pointing out cases where it is illegal to transfer an employee from Bombay to Madras, who speaks only the native language -- because he would not understand what is going on in Madras.

JUSTICE DOUGLAS: I will wait for your book.

MR. AVINS: Thank you.

THE CHIEF JUSTICE: Suppose Puerto Rico had a law like New York, to the effect that no one could vote in Puerto Rico unless he understood or could read the Spanish language. Would Congress have any power to say, as they did in 4(e), that they would have a right to vote if they had adequate education in this country?

MR. AVINS: Do you mean under the Territories Clause or under the Fourteenth Amendment?

THE CHIEF JUSTICE: I ask you if they would have the right to do it.

MR. AVINS: Your Honor -- under the Territories Clause, Congress is just a super-legislature for Puerto Rico. I do not want to get into what I conceive to be a difference between the learned Solicitor General and the Attorney General of Puerto

Rico as to the precise distribution of power. Assuming it is a territory pure and simple, Congress is nothing but a super legislature for Puerto Rico.

THE CHIEF JUSTICE: I'm not asking for any quarrel between the people of Puerto Rico. I asked you the plain question. Suppose Puerto Rico had a law like New York, to the effect that no one could vote there unless he could read and understand Spanish. Would Congress then have a right to say that other Americans who spoke only English could vote over there?

MR. AVINS: Your Honor, my conception of the Territories power is that Congress has absolute and plenary power to legislate for the Territories. Therefore it necessarily follows -- except of course the Bill of Rights and certain other general limitations -- they could not pass a bill of attainder in the Territories -- it has absolute power over the Territories subject to the general limitations of the Constitution, and can act as if it were the Legislature of Puerto Rico. Therefore of course it could abolish any action by the Puerto Rican Legislature which I conceive to bear the same relationship to Congress as the City Council of New York bears to the State Legislature of New York.

The Puerto Rican Legislature does not exercise any kind of sovereignty. It is a deligated power, which Congress can always revoke.

THE CHIEF JUSTICE: The answer is yes.

MR. AVINS: My answer is yes, but for a very special reason which would not apply the other way.

JUSTICE FORTAS: Going under the assumption which you mentioned, which serves as an assumption for the purposes of testing the theory -- if New Mexico passed a statute that only persons who were literate in Spanish could vote, would Congress have the power to override that?

MR. AVINS: No. My contention is that there is absolutely no power whatever. I'll go even further. I'll make an assumption which I think is probably more absurd than that. If the State of Hawaii decided that all Caucasians were flabby and that no person ought to be entitled to vote in Hawaii unless he could do 20 pushups, and applied that to everybody -- that Hawaii would be perfectly sound, on sound constitutional grounds, however much I think this would be an absurd requirement. I'm talking now about the protection of power. And Congress could not do a thing about it.

JUSTICE FORTAS: Your theory about the right to vote being a right that is not protected except by the strict language of the Fifteenth Amendment.

MR. AVINS: Or the Nineteenth, yes. Of course, that is those special amendments which directed their attention to this -- those special amendments. And I might say this. One that I think would be even more raw would be a discrimination

based on religion.

JUSTICE FORTAS: So you think that a State could confine the right to vote to Catholics or Jews or Protestants, whatever it might be.

MR. AVINS: Yes, as wrong as I think it is.

JUSTICE FORTAS: And Congress could not override it.

MR. AVINS: As wrong as I think it would be to do so.

JUSTICE FORTAS: And that this court would not have the power to declare that illegal.

MR. AVINS: As personally wrong as I think it would be.

JUSTICE FORTAS: Do you think that Congress would have the power to override it -- and the answer to that is no.

MR. AVINS: That's correct.

JUSTICE FORTAS: And this court could not properly declare that unconstitutional.

MR. AVINS: That's my position, Your Honor. My position is that it is a question simply of power. That is if I may make -- that is the Congress cannot chop up the Fourteenth Amendment and make a tossed green salad out of it because it doesn't like the original recipe. If it doesn't like the original recipe, it has to get a new one. And the way that you get a new recipe is Article V -- you amend the Constitution. There have been amendments proposed, some enacted -- a number, probably more in recent years than any other time. And there may be amendments that I would be much in favor of. But I would be

much against Congress exercising the power in an unconstitutional manner which it might be very desirable to exercise in a constitutional manner.

JUSTICE WHITE: I take it you would reject invalidating a State law on the grounds that the means it chose to accomplish an end -- it really had no rational basis at all -- there was no rational connection between the end and the means. You would say that is an improper application of the due process clause.

MR. AVINS: No, Your Honor. My position is this. It's a question of original understanding, you see.

JUSTICE WHITE: What about the original understanding and due process?

MR. AVINS: Congressman Bingham said that the original understanding of the due process clause -- he was asked the question by Congressman Rogers, a rather young Democrat from New Jersey, considered sort of a wild, young Democrat -- and he replied that the gentleman can go and read the decision; it has been decided by the courts and he can read the decision.

Therefore I will do exactly as Congressman Bingham's suggestion. I would read all the decisions on due process before the Civil War.

JUSTICE WHITE: So what is your answer? If you decided there was absolutely no connection whatsoever between forearm strength and voting, and therefore no connection between doing pushups and voting -- you still would not say that that law of

Hawaii violated the due process clause.

MR. AVINS: No it wouldn't -- because the original understanding in respect to voting is it was entirely outside --

JUSTICE WHITE: All the cases that have invalidated municipal legislation on this basis under the due process clause are wrong.

MR. AVINS: I don't understand Your Honor's question. You mean the legislation or the right to vote? I thought Your Honor was talking about the right to vote. As for the right to vote, it has nothing to do with the Fourteenth Amendment. In respect to the question of whether a particular item of legislation violates due process, the concepts, the general basic concepts, my contention is -- one goes back to the pre-Civil War cases -- and distills the general basic concepts of due process at that time. They are carried into the Fourteenth Amendment due process clause by Bingham's intent, which I consider to be very clear from his statement made in the 39th Congress. And then that is the content of the due process clause. The general principles, of course -- now, what they are -- for example, I think there was a New York case in 1856 which supported the proposition that there was a concept of substance in due process. In fact there have been innumerable cases on due process. I have an article --

JUSTICE WHITE: Even if there was -- even there were, you would say it would not apply to voting.

MR. AVINS: No, it would not.

JUSTICE WHITE: Voting is out, no matter whether you are talking about due process, privileges and immunities, or equal rights.

MR. AVINS: Or equal protection, yes. That's my contention. I might say of course due process applies to all persons -- which is another good reason. Bingham was dead set against letting aliens vote. In fact, in the admission of Oregon, one of his two reasons for voting against the admission of Oregon -- he made a long speech on the subject and said this was a recent new innovation which he was dead set against, contrary to the Constitution that all aliens were permitted to vote in Oregon. He said it was a recent innovation which pertained in Illinois or one or two of the Western States. He said he was dead set against it. And therefore it is inconceivable that he intended to permit aliens to vote -- contrary to his own long, well-settled convictions, and therefore since the due process clause protects aliens, as well as citizens, to me it is inconceivable that the due process clause would protect the right to vote for the reason that otherwise aliens would be entitled to the right to vote -- because of course as far as the protection of life, liberty and property, you could not take that without due process from aliens anyway. I think every alien would be entitled if he came to this country not to have life, liberty or property taken from him without due process of law.

So you see the Fourteenth Amendment in fact brought back to its historical understanding fits very neatly. That is, it makes sense. You don't need to try and figure out some of these oddities. What would happen if you gave everybody equal protection and a person 99 years old were entitled to go to a first grade school. So you have to have reasonable classification, you have to have all sorts of qualifications.

But if you go back to the original understanding, I think you would not need to have any qualification.

Now, I think I have a bit more time, and I just want to say a word -- since Your Honors originally asked me -- I thought perhaps it was obvious, but as I have a few minutes -- to say one or two words just about the question of treaties.

I do not consider Congress' power under the treaty clause -- and I think this is well settled -- to add to any substantive power Congress has under the Constitution.

Now, I have set forth as early as the decision in Mr. Chief Justice Marshall -- and I think perhaps it's worth reading a little squib from Pollard v. Hagan, in 3 Howard.

"It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not

according to those of the government ceding it."

Therefore the treaty with Spain gives the United States no power over the territories it would not have otherwise. My contention is it would have the same power by statute. And therefore I say that the statute gains no additional efficacy by the United Nations Charter or by world rule of law conventions or by treaties or by statements by the United Nations Secretary General, or resolutions or anything. It is either constitutional, within Congress' power, or it is not. And it seems to me that the issue is clearcut -- that statute reserves power to the States.

Thank you, Your Honors. That's all I have to say.

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THE CHIEF JUSTICE: Mrs. Coon.

ARGUMENT ON BEHALF OF LOUIS J. LESKOWITZ, AS ATTORNEY GENERAL, IN SUPPORT OF APPELLEES, BY MRS. JEAN M. COON, ASSISTANT ATTORNEY GENERAL

Mrs. Coon. May it please the Court, because of the scheduled argument in Cardona following this, this appeal is a presentation as amicus curiae in this case and is somewhat in reverse order from the arguments presented on brief. Because issues which are similar to the issues in Cardona, if not reached in this argument can be handled by the counsel for appellees in that case.

I think it would be somewhat significant at this point to discuss a few statistics with this Court.

The record in this case contains affidavits by various people stipulating the numbers of Puerto Ricans in New York State or in the City of New York who are affected by 4(e). But these affidavits are no more than estimates. The record in this case contains only one factual basis for these figures, and that is the 1960 census report -- the last authorative counting of Puerto Ricans in New York State. That census report showed that in 1960 there were 641,600 and some Puerto Ricans in the entire State of New York, of whom 194,000 were mainland born and may be presumed literate in English, if adults.

In the City of New York, in 1960, there were 612,000 Puerto Ricans, 182,000 of whom were mainland born.

The percentages which the census figures developed for

the State as a whole showed that approximately 50 per cent of the total Puerto Rican population in New York State were of voting age, and that approximately 60 per cent of the Puerto Ricans of that age had attained an education, either in Spanish or English, of seventh grade or higher -- at least seventh grade.

Thus, if we take these figures of the State as a whole, and apply them to what we know as the total population of the City of New York, we would find that in 1960 there were approximately 300,000 Puerto Ricans of voting age in the City of New York. Adopting the 60 per cent figure which the census figures applied to the State as a whole, in the attainment of a seventh grade education we would find that in 1960 it could be estimated that had 4(e) then been enacted, and could Puerto Ricans vote by proof of literacy, either in English or Spanish, then approximately 200,000 Puerto Ricans would have been eligible to vote in New York City at that time.

Now, how many Puerto Ricans actually were registered in the City of New York in 1960? In 19 -- approximately 1960, the City of New York, the migration division of the Commonwealth of Puerto Rico, various civic organizations put on a massive campaign to specially register the Puerto Rico population of New York in compliance with New York State's English literacy requirement.

On November 2, 1960, the New York Times reported that this effort had resulted in the registration of 230,000 Puerto Rican and Spanish residents of the City of New York, complying

with the English literacy requirements of New York State.

In 1961, the New York Mayoralty election, it was reported that 200,000 Puerto Ricans registered and voted for Mayor of the City of New York and the conclusion which could be drawn from this, if the majority of Puerto Rican residents of the City of New York were complying with New York's English literacy requirement, is reinforced by the fact that last November, with New York City complying with Section 4(e), only 0,107 Puerto Ricans were registered in the City of New York, and that this figure would include new immigrants to the City who might equally be able to comply with New York's English literacy requirement.

The studies which were conducted in the middle 1950's by the New York City Board of Education demonstrated that students coming into the New York City Public School System directly from Puerto Rico in the elementary grades did have a reading knowledge of the English language, in addition to a speaking knowledge. Although, English is no longer the major language of instruction in the schools of Puerto Rico, English is taught as an additional language from the first grade on in the schools of Puerto Rico. Puerto Ricans do not come to the Mainland totally devoid of any knowledge of English, either spoken or written.

Now, let us look to the genesis of the two statutes which are involved here.

New York's English literacy requirement was put into its laws at a time when there were only 7,000 Puerto Ricans in the

City of New York. It was not put into law to prevent Puerto Ricans from participating in the elected franchise in New York. Significantly, at the time they became part of New York's law, English was the major language of instruction in Puerto Rico, and it could have had no bearing upon Puerto Rico. It was put into the law as a part of New York's solution to what had to come, as the result of information discovered in World War I of the horrible situation of draftees who could not take oral orders in English, of the hundreds of thousands of persons of draft age in the United States who were not literate in any language. It was put into the law in answer to the problem which had arisen of industrial safety, because the many immigrants who had joined the labor force in the State were not able to understand the safety regulations in English.

And it was put into the law as part of a package which involved also the intensified adult education programs in English. It was proposed that the adult education programs be provided in the places of employment of these immigrants, so that the English language and the advantages to them that would come from learning this would be brought to them, they would not be asked to go to the schools.

There was additional training proposed and put into the law for an adult, or for non-adult children who had passed beyond the maximum requirements for remaining in school -- the groups between 16 and 21 -- for additional after-working-hours instruction.

So that the New York statute was not put into our laws as a part and parcel of any discriminatory program. It was put into our laws in order to promote industrial safety, promote education, promote intelligent participation in the government of the State, and to encourage the learning of English by the immigrant population which had come into New York.

Significantly, at this point, even in 1960, 47 per cent of the population of the City of New York was either foreign born or the children of foreign born persons. New York State still has a very large immigrant of first generation American population.

JUSTICE STEWART: Nineteen sixty?

MRS. COON: Nineteen sixty.

Now, for section 4(e).

THE CHIEF JUSTICE: Would you mind stating again very briefly what the purpose of -- the exact purpose of this New York Act?

MRS. COON: The New York Act's purpose was to promote the participation, the intelligent participation by immigrant groups, in American life, both political and economic. It was part of a package proposal, package legislation which involved increased adult ecuation in English and government, which involved reaching out to this large immigrant group, and trying to bring them into intelligent participation in the State of New York.

JUSTICE FORTAS: As of what day was this?

MRS. COON: As of 1919, 1920, 1921.

JUSTICE FORTAS: At that time, there was, accompanying this English literacy provision, provisions for adult education?

MRS. COON: Yes, there was, Your Honor. This was, incidentally bi-partisan. It was put into effect at a time when the legislation was Republican and the Governor was Al Smith, a well-known liberal Democrat and, himself, a child of immigrant parents.

THE CHIEF JUSTICE: I was wondering what you would do with some of the exceptions to the Act. Let me put it in this language.

Suppose a Puerto Rican who didn't understand the English language was in the Army, and then came out and went into Veterans' Hospital. How could that purpose be affected if his wife and his parents and his children were permitted under your statute to vote because of his status? How does that conform to this purpose that you speak of?

MRS. COON: Well, of course, this is part of the argument, of course, that has been raised in Cardona.

THE CHIEF JUSTICE: I beg your pardon.

MRS. COON: It is part of the argument raised in the Cardona case.

THE CHIEF JUSTICE: I know it is part of the argument, but you are defending the Act here.

MRS. COON: As to the veteran, himself, this goes to the fact that in order to be inducted into the Army, he must initially have been literate in English. The Army -- the Armed Forces

provide that for induction into the Army from Puerto Rico, that he take first a Spanish language test, and then if they pass that, they then take an English language test -- must demonstrate literacy in English to be inducted.

JUSTICE FORTAS: Does that include more than an oral test?

MRS. COON: Yes, sir, it is a written test -- written English test. Additionally, as to the families, this becomes, let us say, one more of the instances where special legislation has been enacted for the benefit of Armed Forces veterans. The fact that you exclude a group for a legitimate reason does not make the regulation itself unreasonable.

For example, New York provides for your physically handicapped. You may take an affidavit that, except for the physical handicap, you can read and write English. In other words, a man who is not able physically to write, has lost a hand, may say -- may file an affidavit to the effect that he could write when he had that hand or would be able to write. A blind man may say, no, he hasn't learned Braille, but before he went blind, he could have read English.

THE CHIEF JUSTICE: I think that is thoroughly understandable. But how about his wife, how about his parents, how about his children?

MRS. COON: Well, as to the -- those who are physically disabled --

THE CHIEF JUSTICE: No, I am not talking about that. I am talking about the soldier who is in the hospital. How about all those relatives of his?

MRS. COON: I think that is -- I am not sure that goes to the parents. I think it goes to the wife and children. It carries along with it many of the same things which we have done in similar situations to veterans and members of the Armed Forces, the rights that they have to carry on through their families, and there is no rational relationship between it. It is simply a carrying over to the families of veterans some of the rights we have given to the veterans.

For example, Congress has done this in connection with purchasing materials, that the families of Armed Service men can purchase in post exchanges, not just service men themselves. Incidentally, I think it is very interesting that an immigrant from a foreign country who comes into Puerto Rico as an immigrant and becomes a naturalized citizen from Puerto Rico cannot be naturalized there unless he can prove literacy in English.

JUSTICE FORTAS: That is a federal law?

MRS. COON: That's a federal law.

THE CHIEF JUSTICE: How about your grandfather clause?

MRS. COON: Our grandfather clause is not a true grandfather clause in the first place. In other words, because the true definition of a grandfather clause is a clause which gives to the grandchildren rights possessed by the grandparents. In this

case, what New York is doing here is saying, as to those who are now voters, in 1921, those who are voters in 1921 which will not be disenfranchised by this provision. You must remember, also, that a good share of New York State has not personal registration as of this time. In other words, persons who had registered for the first time prior to 1921, in a good portion of New York State, would not at that time have been required to reregister at any time in the future. I think had New York -- there is a possibility that had New York, after 1921, said in their statute that everybody will have to register and demonstrate literacy in English, it might have been a Constitutional question as to whether the State would have the power to disenfranchise those who already were voters.

What New York was saying, as to future voters, as to those who will become voters after this act takes effect, after this Constitutional Amendment takes effect, that you will have to demonstrate literacy in English. I do not believe this is a true grandfather clause to any extent.

THE CHIEF JUSTICE: Where is the grandfather clause so limited by definition?

MRS. COON: This, I think, is what has been usually referred to as a grandfather clause -- is one which refers to the past. I do not think that it is a grandfather -- most of the statutes which have been called grandfather clauses are ones which refer to giving the descendants rights of the ancestor.

THE CHIEF JUSTICE: In all the contexts, aren't they called grandfather clauses to permit someone to continue as he has because he was doing that business at the time the law was established?

MRS. COON: Loosely, this may be a term as used. I don't think it is accurate -- it is an accurate term. I think in any event that it is a question of law not depriving someone of the right they already have. I think you raise Constitutional questions when you deprive people of rights they have. For instance, in a professional licensing provision where they have -- where somebody has been practicing a profession and then the State comes along and licenses the profession, frequently they will provide that those who are now practicing may continue because you raise a question as to whether a State may deprive somebody of what has almost been a property right at this point when they already exercised that right. That is what New York's statute does, reserves the right which existed. It does not confer future rights. For example, somebody who was, in 1921, over 21 years of age and could have registered but had not, that person would not -- would still have had to prove English literacy in order to register after 1921.

As to the territorial powers of Congress, I want to make only one observation. While the power of Congress to legislate as to the territories is plenary, it is not limited by the relationship which the Federal Government has to the States. And the

pp11 Congress may act as to the territories in ways in which it may not act as to the States. That, therefore, we must remember that 4(e) does not legislate as to the territory of Puerto Rico. It confers no rights upon residents of Puerto Rico. It confers no governmental powers upon the Commonwealth of Puerto Rico. It acts only as to the States, in limiting the act that the States may take in setting what would be otherwise legitimate voter qualifications. Because at the time the people affected, or the people are affected, they are not citizens of Puerto Rico, they would at that point be citizens of the State in which they reside, and that there is no further legitimate territorial interest.

One of the counsel today spoke of -- and this is 4(e) -- as winding up the problem of Puerto Rico. I submit to this Court that Section 4(e) winds up nothing as to Puerto Rico or the problems of Puerto Ricans coming to the Mainland. As long as Puerto Ricans coming to the Mainland have -- get lower incomes when employed, have a lower rate of unemployment, and are subjected to more inadequate housing than are even non-whites in New York City -- and we must remember that 19 per cent of the Puerto Ricans coming into New York State are white -- that the problem is greater than voting. The problem is a question of their language handicap, which they have in competing economically on the Mainland. Because an elementary education, or even high school education in Spanish, in Puerto Rico, opens few doors in the Mainland economy. That, we believe, that the New York statute would be reasonable, even if we

take it only as to Puerto Ricans, because it is one more incentive to learn English, so that they may participate, compete successfully economically on the Mainland.

JUSTICE FORTAS: Are you saying that the incentive, the State limits voting rights in order to provide an incentive for some laudible purpose such as economic improvement, that that is the reason for limitation of the franchise?

MRS. COON: I would say this. That the removal -- referring to Congress -- the removal of the English literacy test, by the proponents of the 4(e), suggested that the removal of the English literacy test in New York would add an incentive to Puerto Ricans to learn English. I think it is to the contrary. That it reduces the incentives to learn English. I do not believe that you could impose a voter qualification -- or you could limit a right for the purpose of giving someone an incentive. But I think that where you are -- here you are removing one more incentive to learn English, which if it is such a tremendous right, would encourage people to learn English, and which this would help them in competing economically in New York.

I think this is one of the big problems that New York has been faced with -- the problem of dealing with this tremendous Puerto Rican population, where 8 per cent of the population of the City of New York is either from Puerto Rico or children of Puerto Rican parentage. And that the City and the State have gone out and tried to reach these people. Additional money has been given by

the State to school systems to provide additional aid in non-English-speaking groups, to teach them to speak English.

Someone pointed out in some of the literature on the subject, that the great immigrant populations we had at the end of the last century and at the beginning of this, were not given the same effort -- the same effort was not put in by State and local governments to stimulate them as is being done today in the case of Puerto Ricans.

JUSTICE FORTAS: Addressing yourself to the theoretical considerations here, suppose the State of New Mexico passed a law saying that only persons literate in Spanish could vote. Would it be your position that Congress would not have the power to override that, and that this Court would not have the power to declare it unconstitutional?

MRS. COON: I would have two answers to that, based upon different assumptions.

Assuming that in the State of New Mexico, by far the majority of the material available by which a voter could exercise independent opinion was available only in Spanish, that the Government of the State of New Mexico was conducted in Spanish, and that by far the greater language of understanding in New Mexico was Spanish, then I would say that New Mexico's law was valid and that Congress would have no power to override it, and that it would be a reasonable classification of the 14th Amendment to require literacy in Spanish in New Mexico. However, were the

converse true, were the Government of New Mexico, as is conducted in English, were the multitude of opinion published in New Mexico, published in English, was by far the greater proportion of the language of the people in New Mexico English, then I would say that to establish a classification such as you suggest, that only those that are literate in Spanish may vote, is itself unreasonable, because it has no reasonable relationship to the intelligent exercise of the franchise.

JUSTICE FORTAS: I want to be very clear about this. Would it flow from that, in your opinion, that the Congress would have the power, on your second hypothesis, to enact something like 4(e)?

MRS. COON: I would say it would, under the 14th Amendment, because it would be an unreasonable classification.

JUSTICE FORTAS: Then, therefore, Congress has the power to override it?

MRS. COON: Yes.

JUSTICE FORTAS: It is not merely a matter of a law being -- a law itself being Constitutional?

MRS. COON: No. I think it is an unreasonable classification under the law.

JUSTICE STEWART: It would be a legislative correction by the national legislative body acting under Section 5 of the 14th Amendment, to correct an invidious discrimination imposed by State law, is that right?

MRS. COON: Yes, Your Honor.

JUSTICE STEWART: Under your second hypothesis, is that it?

MRS. COON: Yes, Your Honor.

JUSTICE BRENNAN: Mrs. Coon, do I correctly infer from what you said, then, that there is an area of Congressional determination of what constitutes invidious discrimination?

MRS. COON: I would say that Congress may experiment in its suggesting what Congress feels is an area of discrimination in violation of what either the equal protection clause or of the denial of privileges and immunities. But I think it is only for this Court to determine in the ultimate result whether the Congress is right or not.

JUSTICE BRENNAN: That is to say, we start with the premise, or rather, that Congress makes a determination of a given requirement, to wit here, the literacy requirement -- constitutes invidious discrimination against those who have only a Spanish-speaking education. You start with that premise, do you?

MRS. COON: Well, I don't know -- of course, the problem with 4(e) here is that we don't know what Congress started with, because there is no legislative history.

JUSTICE BRENNAN: This is just what I am trying to get into. I don't quite follow. If Congress has this power to determine what is an invidious discrimination, I would have trouble knowing how we can second-guess that determination.

MRS. COON: I think I would point out the distinction possible between this case and the rest of the Voting Rights Act which this Court discussed in the South Carolina case. This Court pointed out -- as to the rest of the Voting Rights Act -- the long amount of testimony before the Committees in Congress, the evidence that what Congress was doing was fashioning a remedy to take care of what this Court described as pervasive evil -- none of this evidence exists here.

There was no committee --

JUSTICE BRENNAN: Does that suggest a presumption against a determination that this does constitute an invidious discrimination?

MRS. COON: Well, I think that part of the confusion here is the fact, that is, the Justice Department itself has based this argument mostly upon the territorial powers and ignored the determination of Congress, or the statement of Congress under the 14th Amendment. But I don't think Congress can create a new violation. The Congress may say what it thinks a violation would be. But it is for this Court to determine whether or not it will actually constitute a violation.

JUSTICE BRENNAN: By what standard do we review that Congressional determination?

MRS. COON: I think by the same standard that this Court has applied in many other cases, in the past -- it has reviewed certain acts, acts of the States themselves, to determine whether

or not they violate these provisions of the Constitution. I think that in order to uphold 4(e) under the 14th Amendment, this Court must review New York State's provisions as to English literacy and say that they are unreasonable and in violation of the 14th Amendment, because if they do not violate that --

JUSTICE BRENNAN: Have we ever done this before?

MRS. COON: Congress has never done this before.

JUSTICE BRENNAN: Congress has done things like this in other areas.

MRS. COON: Congress has done it under the 15th Amendment. Congress has enacted legislation under the 14th Amendment which primarily reenacted things -- those things which the Courts had already determined were privileges and immunities of citizenship under the original provisions of the Constitution.

JUSTICE BRENNAN: You are suggesting that this case does pose a problem I frankly have not seen. That is, assuming this is an equal protection problem, assuming that Congress has made the determination of an invidious discrimination, now this confronts us with how far we may review the Congressional decision.

MRS. COON: I would point out to this Court something that you said in the South Carolina case -- which dealt with the 15th Amendment rights. That this Court has held that when Congress has attacked evils which were not included in the 15th Amendment, that the Court has held those acts of Congress to be unconstitutional. I think that the same thing applies here in these 14th

Amendment cases -- that where Congress has -- if it oversteps the power of acting as to those things which are included in the 14th Amendment, then this Court has the power to say to Congress, you are wrong, you cannot create new violations, but only fashion remedies as to those things which are violations.

JUSTICE BRENNAN: I think I can understand this -- if you had to reach the conclusion that this creates no equal protection problem at all. That is one thing. But once you start with a premise, which I thought was the premise of your argument, that it may be, and that Congress has an authority to determine what is invidious discrimination, once you get to that, I think it is another thing.

MRS. COON: I think, if Your Honors please, our brief carries to a very great degree that this is not an equal protection problem posed by this situation.

THE CHIEF JUSTICE: Mr. Solicitor General.

REBUTTAL ARGUMENT

BY SOLICITOR GENERAL MARSHALL

MR. MARSHALL: Mr. Chief Justice, may it please the Court, I feel obliged to point out, as I did in the beginning, that we are not trying to have the New York literacy test declared unconstitutional. They still will keep the literacy test. And 4(e) allows for the exact same test. The only difference is the language.

Secondly, on the question of the Fourteenth Amendment, and what Congress was thinking about, in our brief on pages 14 and 15 we point out the sponsors of the bill, Senators Kennedy and Javits, and in the House Representatives Ryan and Gilbert, in which they set forth the same thing we are talking about in our brief, about the fact that Congress itself sustained the education in Spanish, sustained it over a period of years, gave them citizenship, and then brought them over to the mainland and urged them on.

So Congress did consider the treaty point as well as the Fourteenth Amendment point.

Secondly, this is not the only provision of the voting rights bill on the Fourteenth Amendment. The provision as to the poll tax, you will remember, was also on the Fourteenth Amendment.

On the question of the abandonment of English in the

schools in Puerto Rico -- the Commissioner was appointed by our government who originally decided that it could not be done any longer. And so it was actually our government that took responsibility for it.

I think that the one point that is significant in the opposition here today is that they make no basis of justification for the requirement that the literacy test be held in English. I've heard no argument whatsoever about it, except the State of New York which says that this will be a stimulus to get the Puerto Ricans to learn English. That's a very interesting proposition -- because it would appear to me that getting the right to vote and being able to participate in the municipal elections might bring about a little more employment and a little more schooling and a few other items. I'm completely at a loss on that.

Finally, to make our position clear, it is our position that under the Fourteenth Amendment, and despite what has been said here, that the only rights we have under the Fourteenth Amendment are the civil rights that were recognized in 1866, is almost unbelievable argument to be made today.

I was also most interested, since some have been delving into these debates, that the equal protection clause was for the purpose of protecting Chinese people in San Francisco -- and I don't believe I remember a single one of the cases that interpreted the Fourteenth Amendment from Slaughterhouse through

Plessy v. Ferguson that have had anything to say about the Chinese in San Francisco. To the contrary, this court says over and over again what the purpose of the equal protection clause was for -- to protect the newly freed slaves.

We say Congress, with its power recognized under Section 5 of the Fourteenth Amendment, then drew upon its knowledge of what had happened as a result of the action of Congress in regard to Puerto Rico, and realized that there were over 700,000 American citizens in New York and its vicinity, and a large proportion of them unable to speak English, but literate otherwise, who were being denied the right to vote and with the least friction against the State fashioned a provision that would not in any way injure the State of New York or its right to require that its voters be literate, and to pass 4(e) and it to be applied.

I believe that the question of the right of Congress to legislate in this area has been so often passed upon that we do not have to worry about that point.

Secondly, that what they did was reasonable, was required, and therefore that the judgment of the court below should be reversed --

JUSTICE BRENNAN: Mr. Solicitor General, may I ask you what I talked with Mrs. Coon about. Insofar as it does at all, in the light of the rather skimpy record, Congressional Record we have behind this -- but insofar as that rests on a congressional

determination that this works invidious discrimination against Puerto Ricans in New York, how far are we precluded by that congressional determination?

MR. MARSHALL: The real problem is the statements that came out in the debate which sort of went to the conscience of Congress. I don't think they should be completely ignored. But it's my understanding, under at least two opinions in the Guest case that Section 5 of the Fourteenth Amendment gives Congress sufficient authorization to find what they themselves determined to be a violation of the first section.

JUSTICE BRENNAN: And is it your point that once that determination is made that is it?

MR. MARSHALL: No, sir. I don't take that position at all. I think this Court eventually passes upon the authority of Congress to act.

JUSTICE WHITE: For example, I suppose if Congress said we are here enforcing the equal protection clause and we decre that no State may impose any age qualifications on voting -- that is an invidious discrimination between the old and the young.

MR. MARSHALL: Well, I think then you would have to find out as to whether or not it was. But the ultimate authority on the constitutionality of an Act of Congress, as far back as Chief Justice Marshall, is in this court. This court has to pass on the constitutionality. And as a matter of

fact, Congress recognized that when they made the specific provision for the three-judge court to try originally the constitutionality of this bill.

JUSTICE WHITE: On what cases has this court ever said to Congress -- this law is invalid because your determination of what amounts to a violation of the equal protection clause is not valid. The civil rights cases I suppose are close to it.

MR. MARSHALL: The civil rights cases went off a little on a tangent.

JUSTICE WHITE: Another aspect. But generally it was of that type.

MR. MARSHALL: No, sir, I don't know of one. I am not saying there aren't any.

JUSTICE BLACK: Is the government raising any contention of any kind on the Fifteenth Amendment?

MR. MARSHALL: No, sir -- Fourteenth Amendment and the treaty clause.

JUSTICE BLACK: It is not an invasion -- it is not discrimination on account of color.

MR. MARSHALL: No, sir. The provision itself is in the early part of our brief. The Congress hereby declares that to secure the rights under the Fourteenth Amendment -- it says nothing about race at all.

JUSTICE BLACK: Is there anything in the record on which it could be inferred that this was done in discrimination

against people on account of their color?

MR. MARSHALL: No, sir, not on the basis of their color. And although the figures were cited by Mrs. Coon about some percentage of Puerto Rican that come to New York are white, I understood that every Puerto Rican was white -- there is no difference as to my understanding.

JUSTICE STEWART: I suppose there must be some Negroes over there.

MR. MARSHALL: They are not classified as Negroes. They just don't recognize them, color, as a basis of distinction.

JUSTICE STEWART: Is anybody there Asiatic?

MR. MARSHALL: I should assume so.

JUSTICE STEWART: I would, too. And they would be of the yellow race.

MR. MARSHALL: I just say, Mr. Justice Stewart, on the record they tell you "I'm either American or Puerto Rican, but don't call me a Negro".

JUSTICE STEWART: Well, that might be true. In fact I suppose there may be some American Indians over there --

MR. MARSHALL: I wouldn't doubt it.

JUSTICE STEWART: -- and they may as a matter of practice in their mores say, "Don't call me an American Indian -- I'm a Puerto Rican".

MR. MARSHALL: Well, that's possible.

The other point I would like to make, if it please the

Court, on the question of the enlistment and the draft and the test in the Army -- the Attorney General of Puerto Rico advises me that they take the Spanish test, and then they take the English test. But if they fail the English test, they are not discarded -- they are put in a special classification, solely on the grounds that they can speak Spanish only.

JUSTICE BRENNAN: But they are inducted.

MR. MARSHALL: Yes, they are inducted.

JUSTICE STEWART: I didn't understand that last point.

MR. MARSHALL: They are inducted.

JUSTICE STEWART: Into the Army.

MR. MARSHALL: Yes, sir, under a special classification.

(Whereupon, at 2:35 o'clock p. m., the Argument in the above-entitled case was concluded.)

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