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Justice William Brennan

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This morning I address the contributions to the law of equal protection of the Warren Court and specifically those of Justice William J. Brennan.[1] Because I am expressing my personal views, however, it is only fair that I state the basis from which I speak. I cannot pretend to be a constitutional scholar. I have never argued a case before the Supreme Court, nor am I a member of the Supreme Court watchers society. My basis is my experience in the Civil Rights Division of the Department of Justice from the summer of 1960 until the end of 1967.

For me the beacon light of the Warren Court's contribution to equal protection rests on five opinions handed down in the short space of about three months between early March and the middle of June 1966.[2] Justice Brennan wrote one of these opinions for the Court.[3] In a second opinion, concurring in part and dissenting in part, he made the first Court pronouncement of what has become an important majority view.[4] From the standpoint of equal protection, these five opinions say it all for me: *South Carolina v. Katzenbach*,[5] decided March 7; *Harper v. Virginia Board of Elections*,[6] decided March 24; *United States v.*

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1. Justice Brennan was born on April 25, 1906. He graduated from Harvard University School of Law in 1931, and became a labor law specialist. He became a New Jersey Superior Court judge in 1949 and a judge of the Appellate Division of the N.J. Superior Court the next year. In 1952 he was appointed to the New Jersey Supreme Court where he remained until 1956 when President Dwight D. Eisenhower appointed him to the United States Supreme Court.

In the areas of equal protection, voting, and other civil rights, Justice Brennan was in the forefront. He wrote the majority opinions in Craig v. Boren, 429 U.S. 190 (1976); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1966) (discussed in detail in the body of this article), and NAACP v. Button, 371 U.S. 415 (1963). C. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES 39-44 (1978).

2. I begin, however, with deference to Brown v. Board of Educ., 347 U.S. 483 (1954), and with respect for Justice Brennan's opinion in Baker v. Carr, 369 U.S. 186 (1962).

3. Katzenbach v. Morgan, 384 U.S. 641 (1966). *See* text accompanying notes 54-58 *infra*.

4. United States v. Guest, 383 U.S. 745, 774 (1966). *See* text accompanying notes 64-67 *infra*.

5. 383 U.S. 301 (1966).

6. 383 U.S. 663 (1966).

Price,[7] decided March 28; *United States v. Guest*,[8] decided March 28; and, *Katzenbach v. Morgan*,[9] decided June 13.

All of the opinions, save one,[10] dealt with the efforts—the specific efforts—of our system of self-government to struggle up to the starting line by breaking the hold that the caste system had on American law and American life for so many years. All of the opinions, save one,[11] dealt with wrongs to black citizens and efforts by the government to right those wrongs. All of the opinions spoke to the central purpose of the fourteenth[12] and fifteenth[13] amendments—equality for black citizens within the American society. Three of the five cases dealt with voting rights;[14] the other two with criminal statutes which were primarily designed to protect black citizens seeking to exercise and to enjoy the same rights and privileges as white citizens.[15] *Katzenbach v. Morgan*, one of the voting rights cases, did not concern the black minority, but rather, involved a literacy requirement which adversely affected the voting rights of Puerto Rican citizens who were educated in Puerto Rican schools and could read only their native language.[16] Yet, even in that case, Justice Brennan declared certain constitutional principles that bore directly on the power of the government—at all levels—to do whatever was necessary to eliminate, once and for all, the effects of the caste system.[17]

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7. 383 U.S. 787 (1966).
8. 383 U.S. 745 (1966).
9. 384 U.S. 641 (1966).
10. *Id.*
11. *Id.*
12. Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
13. South Carolina v. Katzenbach, 383 U.S. 301 (1966).
14. 384 U.S. 641 (1966); 383 U.S. 663 (1966); 383 U.S. 301 (1966).
15. 383 U.S. 787 (1966); 383 U.S. 745 (1966).
16. 384 U.S. 641 (1966). *Morgan* involved a challenge to § 4(e) of the Voting Rights Act of 1965, which provides in part:

> (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school . . . or a private school . . . in which the predominant classroom language was other than English, shall be denied the right to vote in any . . . election because of his inability to read, write, understand, or interpret any matter in the English language . . . .

42 U.S.C. § 1973b(2e) (1976).

17. Justice Brennan, speaking for the Court in *Morgan*, applied the McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), formulation to determine Congress' power under § 5 of the fourteenth amendment. Justice Brennan stated that legislation enacted under § 5 of the fourteenth amendment will withstand constitutional attack so long as the Court finds that the enactment is " 'appropriate legislation' to enforce the Equal Protection Clause . . . , is 'plainly adapted to that end' . . . [and is] consistent with 'the letter and spirit of the constitution.' " 384 U.S. at 651. Moreover, Justice Brennan found that "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.*

Together, these cases wiped out the twisted heritage that earlier Supreme Court decisions had given to the post-civil war fourteenth amendment,[18] and forthrightly provided a constitutional foundation from which the legislative branch of our government could take effective action to achieve constitutional equality for all our citizens.

During the summer of 1960, at the beginning of my work with the Civil Rights Division of the Department of Justice, the civil rights movement had extended only to several sit-ins in the state of North Carolina[19] and to some initial legal skirmishes by the Department of Justice in the deep South.[20]

In 1960 the Department of Justice was testing the jurisdictional scope of the Department's authority to insure voting rights for all citizens. For approximately the next five years, continuously up to the decisions in 1966 to which I have referred, I was one of a small group of division lawyers who worked on individual voting cases in the deep South (Ala., Miss. & La.), county by county, state by state. I confess that during that time I was badly confused by the constitutional jungle in which we operated. While, perhaps, I did not altogether appreciate it then, or for that matter now, I suspect that the country was the victim of the twisting convulsions of those legal precedents which, sadly enough but quite successfully, tried to reduce the fourteenth and fifteenth amendments to much less than they were intended to be.[21] The requirement of "state

18. *E.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); Civil Rights Cases, 109 U.S. 3 (1883). The *Civil Rights Cases* declared that the fourteenth amendment could not be used to prohibit private discriminatory action such as excluding blacks from hotels, theaters, and railroads. The fourteenth amendment did not give Congress an affirmative mandate to regulate the activities of individuals. *Id.* at 11-12.

In *Plessy*, the Court upheld a state law that required the separation of blacks and whites on railroad coaches. The standard used was one of reasonableness, viewed in light of the established customs, traditions, and usages, and in light of the objective of public peace and order, 163 U.S. at 550.

19. On Monday, February 1, 1960, four North Carolina A & T College students staged a sit-in at the lunch counter of the local Woolworth store in Greensboro, North Carolina. Throughout that week, enough students joined the original four to occupy most of the seats at the Woolworth counter. By the following week, sit-ins were underway in a half-dozen North Carolina towns. This incident sparked non-violent direct action protests throughout the South. T. BROOKS, WALLS COME TUMBLING DOWN: A HISTORY OF THE CIVIL RIGHTS MOVEMENT 1940-1970, at 146-47 (1974).

20. By the end of February, 1960, sit-ins had spread from Greensboro, North Carolina, to more than 12 cities in Virginia, Tennessee, North Carolina, and South Carolina. By August, sit-ins had succeeded in ending lunch counter segregation in 27 southern cities. One hundred cities in the south and in border states had experienced sit-ins and other forms of direct action. *Id.* at 147.

21. *See* note 18 *supra*. *See also* United States v. Cruikshank, 92 U.S. 542 (1875). In *Cruikshank*, the United States charged three persons with conspiracy to interfere with the rights and privileges granted and secured by the Constitution. More particularly, the conspiracy was to injure blacks for having voted in an election and ended in the lynching of two black men. The Court construed the Enforcement Act of 1870, enacted after ratification of the fifteenth amendment, as requiring state action. *Id.* at 554. *See also* United States v. Reese, 92 U.S. 214 (1875). In *Reese* the Court invalidated the enforcement provisions, §§ 3 & 4, of the Enforcement Act, hold-

action,"[22] the narrow and relatively unimportant concept of the privileges and immunities of national citizenship,[23] and the restrictive but necessary requirement that in judging criminal discriminatory conduct the federal right asserted must be specific and definite[24] are some of those concepts which, when taken together, made the fourteenth amendment an inefficient tool for securing equal rights for all citizens. These long established principles, along with the prevailing view that it was within the peculiar competence of the states to determine basic voting qualifications,[25] eroded my faith that a rule of constitutional law, as such, could contribute much toward bringing about essential change.

For these reasons, the Department of Justice turned away from test cases before the Supreme Court and concentrated on building strong, detailed, and massive factual cases of voter discrimination before both the federal district courts[26] and the Court of Appeals for the Fifth Cir-

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ing that those provisions swept within their realm wrongful acts which lay outside the jurisdiction of the fifteenth amendment. *Id.* at 221. *See also* James v. Bowman, 190 U.S. 127 (1903). In *James* the Court invalidated another section of the 1870 Enforcement Act on the ground that the fifteenth amendment did not contemplate wrongful individual acts, but only wrongful action by the United States or by an individual state. *Id.* at 136.

22. *See* Civil Rights Cases, 109 U.S. 3 (1883):

> [C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority . . . . [The] abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied [by the Civil War amendments].

Id. at 17-18. *See also*, United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875).

23. U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1. The fourteenth amendment states that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." The Supreme Court has interpreted the rights secured by this clause to include rights of national citizenship. In Twinning v. New Jersey, 211 U.S. 78 (1908), the Court enumerated these rights of national citizenship to include the right to travel from state to state, to petition Congress, to vote for national offices, to enter public lands, the right to be protected from violence while in the lawful custody of a United States marshal, and the right to inform the United States authorities of violations of its laws. *Id.* at 97. These are rights "dependent upon citizenship of the United States, and not citizenship of a State." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1872).

24. *See* Screws v. United States, 325 U.S. 91 (1945).

25. *See, e.g.*, Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). Justice Douglas, for a unaninous Court, rejected a black citizen's attack on the North Carolina literacy test. He emphasized that states had a wide discretion in setting voting qualifications:

> Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex. . . .

Id. at 51 (citations omitted). Justice Douglas added: "Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.* at 53.

26. *E.g.*, United States v. State of Louisiana, 265 F. Supp. 703 (E.D. La. 1966); United States

cuit.[27] This tactic, we believed, offered the best chance of achieving an honest system of self-government. We put aside the frustration of having to prove the obvious. In order to bring about change in the deep South, we had to get judges to express their findings of facts in strong, powerful, and direct language that could not be misunderstood. We respected those judges within the federal system who had the courage to face the facts squarely, to master those facts stubbornly, and to spell out their rulings to Southerners clearly and with style. Fortunately, there were five judges in the Fifth Circuit who did this.[28] Those judges and what they did for this country, during that period and within the limits of the law as then defined, will be remembered as long as our nation survives.

Yet, after four years of strenuous activity before those judges, the Department of Justice had accomplished very little. The federal government had demonstrated a seeming inability to make significant advances during the seven years since the passage of the Civil Rights Act of 1957,[29] and had been unable to make the right to vote a reality for blacks in Mississippi, large parts of Alabama and Louisiana, and in scattered counties in other states.[30]

At about the same time—partly in frustration and partly as a result of imagination, dedication, and courage—the Student Non-Violent Coordinating Committee, known as SNCC, decided to sponsor a summer in Mississippi. Early in the summer of 1964, three civil rights workers were murdered in Chauva County, Mississippi.[31] The Justice Department was called upon to draft a legal theory that would overcome the old precedents inhibiting federal prosecution for civil rights crimes.[32] In the following spring came Selma.[33] All of the forces that had been attacking the caste system came together and, out of Selma, came the

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v. State of Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964); United States v. Atkins, 210 F. Supp. 441 (S.D. Ala. 1962).

27. *E.g.*, United States v. Duke, 332 F.2d 759 (5th Cir. 1964); United States v. Lynd, 321 F.2d 26 (5th Cir. 1963).

28. Judge Elbert Tuttle of Atlanta; Judge Richard T. Rives of Montgomery; Judge John Minor Wisdom of New Orleans; Judge John R. Brown of Houston; and District Court Judge Frank Johnson, Jr. of the Middle District of Alabama.

29. Pub. L. No. 85-315, 71 Stat. 637 (codified at 42 U.S.C. § 1971 (1976)). This observation was made in 1964 by Burke Marshall, Assistant Attorney General of the Civil Rights Division.

30. *See* UNITED STATES COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER (Jan. 1975).

31. *See* text accompanying notes 61-62 *infra*.

32. *See* Civil Rights Cases, 109 U.S. 3 (1883), where the Court held that an individual act, though wrongful and harmful to a citizen, is only a private wrong or crime. The Court held that for an individual to violate another's civil rights, he must be supported "by state authority in the shape of laws, customs, or judicial or executive proceedings." *Id.* at 17.

33. For a discussion of the events that occurred in Selma, see T. BROOKS, *supra* note 19, at 253-57.

Voting Rights Act of 1965.[34]

Within months three cases involving the Voting Rights Act were pending in the Supreme Court: *South Carolina v. Katzenbach*,[35] *Harper v. Virginia Board of Elections*,[36] and *Katzenbach v. Morgan*.[37] At the same time, cases had been briefed and argued regarding the sufficiency of the indictments in the two conspiracy cases, one involving the murders of the three civil rights workers in Mississippi,[38] and the other involving the murder of Colonel Samuel A. Penn, who had been killed in Georgia while he was driving home to Washington from an army camp in Louisiana.[39] Thus, in the spring of 1966 a group of cases which together held the key to an honest and effective construction of the fourteenth amendment were presented to the Supreme Court.

In *South Carolina v. Katzenbach*, however, the Court considered not the fourteenth amendment, but the constitutionality of the Voting Rights Act of 1965 under the fifteenth amendment. In that Act, Congress provided for the automatic suspension of tests and devices[40] pursuant to a triggering device[41] based on historical voting statistics in various southern states. In a revolutionary manner, Congress authorized the Attorney General to send federal examiners and observers to southern counties without prior judicial approval.[42] The Act also reflected a finding by Congress that the poll tax was a barrier to voting; that it did not bear a reasonable relationship to any legitimate interest the state may have had in conducting an election; and that, in some areas, it had the purpose and effect of denying persons the right to vote because of their race or color.[43]

The issue before the Court was the extent of Congress' power under section 2 of the fifteenth amendment[44] to enforce the amendment by appropriate legislation. The Court held that Congress' power to enforce the amendment was not limited to preventing or redressing illegal

34. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1973-1973p (1976)).
35. 383 U.S. 301 (1966).
36. 383 U.S. 663 (1966).
37. 384 U.S. 641 (1966).
38. United States v. Price, 383 U.S. 787 (1966).
39. United States v. Guest, 383 U.S. 745 (1966).
40. 42 U.S.C. § 1973(b) (1976). Subsection (a) provides:

> [N]o citizen shall be denied the right to vote . . . because of his failure to comply with any test or device in any [covered jurisdiction] . . . unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such [covered jurisdiction] . . . has determined that no such test or device has been used during the seventeen years preceding the filing of the action . . . .

41. *Id. See* Comment, *Federal Intervention into Voting Rights: Sections 4(a), 4(b) and 5 of the Voting Rights Act of 1965*, 12 N.C. CENT. L.J. 461 (1981).
42. 42 U.S.C. § 1973(d) (1976 & Supp. III 1979).
43. 42 U.S.C. § 1973(h)(a) (1976).
44. U.S. CONST. amend. XV, § 2. Section 2 provides that "Congress shall have power to enforce this article by appropriate legislation."

conduct.[45] The power could be used for prophylactic measures: Congress could use any rational means to regulate or to prohibit any conduct that erected a barrier of discrimination in voting.[46]

Thus, the Court read the language of section 2 of the fifteenth amendment in the same way that it read the necessary and proper clause in article I of the Constitution.[47] Because the several states had traditionally held a preferred place in defining voter qualifications,[48] this principle was vitally important. It went beyond the issue before the Court and beyond the necessary construction of section 2 of the fifteenth amendment.

By reading into the enforcement provision of the fifteenth amendment the familiar necessary and proper clause principle, that Congress may use any rational means to effectuate constitutional prohibitions,[49] the Court opened the way for a similar holding under the parallel enforcement provision of the fourteenth amendment.[50] The question remained whether Congress had the power to regulate an activity that did not violate the prohibition of the fourteenth amendment, if that power was exercised as a rational means of effectuating one of that amendment's prohibitions. The holding in *South Carolina v. Katzenbach* suggested that there was another answer to the old argument that Congress could not regulate private conduct under the fourteenth amendment.[51]

Several weeks after the decision in *South Carolina v. Katzenbach*, the Court invalidated the Virginia Poll Tax in *Harper v. Virginia Board of Elections*. The Court held that "[i]n determining what lines are uncon-

45. South Carolina v. Katzenbach, 383 U.S. 301 (1966). Chief Justice Warren, speaking for the Court, stated:

> We . . . reject [the] argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms . . . . Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment . . . .
>
> . . . Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting . . . .

Id. at 327-28.

46. *Id.* at 330-31.

47. U.S. CONST. art. I, § 8, cl. 18, provides that Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ."

48. *See* Oregon v. Mitchell, 400 U.S. 112 (1970); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); note 25 *supra*.

49. South Carolina v. Katzenbach, 383 U.S. 301, 326. According to the Chief Justice, the test to be applied in determining congressional power to legislate pursuant to § 2 of the fifteenth amendment, was "the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." *Id.* The classic formulation was laid down fifty years prior to the ratification of the fifteenth amendment by Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

50. U.S. CONST. amend. XIV, § 5 provides that "congress shall have power to enforce, by appropriate legislation, the provisions of this article."

51. *See* notes 18 & 22 *supra*.

stitutionally discriminatory, [the Court has] never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."[52] The equal protection clause of the fourteenth amendment requires absolute equality for rich and poor in matters pertaining to the franchise.[53]

The third voting rights case, *Katzenbach v. Morgan*, involved the New York literacy test.[54] Justice Brennan, writing for the majority, applied the same principle to the fourteenth amendment that the Court had applied to the fifteenth amendment in *South Carolina v. Katzenbach*.[55] His opinion indicated that the Court was ready to allow Congress to reach its full potential under the fourteenth, as well as the fifteenth, amendment. Justice Brennan wrote that section 5 of the fourteenth amendment gives Congress the power to determine "whether and what legislation is needed to secure the guarantees" of the amendment.[56] This is true even where Congress attempts to restrict conduct that is within the reserved powers of the states,[57] so long as the purpose of the federal statute is to secure the states' performance of the fourteenth amendment duties, regardless of past compliance or the lack of it. The Court also held that it is within Congress' power to decide whether a particular state voting requirement is unconstitutionally discriminatory in violation of the fourteenth amendment; that is, Congress can decide how the general principles of the equal protection clause apply to actual conditions.[58] This case cleared the way for a potentially vast expansion of Congressional legislation promoting and protecting human rights in voting, public education, criminal procedure, housing, and many other areas.

There still remained the question of whether Congress could regulate unofficial private discrimination. *South Carolina v. Katzenbach*[59] and *Katzenbach v. Morgan*[60] had dealt specifically and precisely with official state conduct, but the question of private conduct arose in two other cases that were before the Supreme Court at the same time.

52. 383 U.S. 663, 669 (1966).

53. *Id.* at 666.

54. 384 U.S. 641 (1966). At the time of this opinion, the election laws of New York required an ability to read and write English as a condition of voting. *Id.* at 644.

55. *Id.* at 651. *See* notes 17 & 46 *supra*.

56. *Id.* at 651. U.S. CONST. amend. XV, § 1 states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

57. *Id.* at 651. U.S. CONST. amend. X provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

58. *Id.* at 656.

59. 383 U.S. 301 (1966).

60. 384 U.S. 641 (1966).

These were both criminal cases—terrible criminal cases regarding conspiracies which took the lives of three civil rights workers and a Colonel in the United States Army.

In *United States v. Price*,[61] a unanimous Court held that the indictment drawn by the Justice Department was sufficient to state a claim against seventeen members of the conspiracy although only three of the conspirators were state officials.[62] The language of the opinion is so clear and so complete that I question whether anyone could quarrel with the legal reasoning supporting the conclusion. The opinion was thorough and it was sound. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. . . . It is enough that he is a willful participant in joint activity with the State or its agents."[63]

United States v. Guest[64] involved a conspiracy in Georgia. Justice Brennan, himself, faced the issue of whether the criminal statute, 18 U.S.C. § 241,[65] applies to actions of private citizens where the state is not involved. Although Justice Brennan did not write the majority opinion, he did point out that six of the Justices, in various opinions, had held that it did.[66] He made it clear:

> I do not accept—and a majority of the Court today rejects—this interpretation of section 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary . . . .
>
> [S]ection 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. . . . And I can find no principle of federalism nor a word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.[67]

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61. 383 U.S. 745 (1966).

62. 383 U.S 787, 799 (1966). The state officials included a sheriff, a deputy sheriff, and a patrolman. *Id.* at 790.

63. *Id.* at 794.

64. 383 U.S. 745 (1966).

65. 18 U.S.C. § 241 (1976) provides:

Conspiracy against rights of citizens.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years for life.

66. 383 U.S. at 774, 779-80.

67. *Id.* at 783-84.

Thus, this decision laid the foundation for new federal legislation that enabled the Justice Department to more adequately protect blacks who sought to exercise their constitutional right to equality. The decision showed that an impartial rule of law could, and would, prevail.

The Warren Court's declaration that Congress has the power to take action to promote and secure the equality of all citizens was monumental to the law of equal protection. Having stressed the importance of that declaration, a discussion of the extent to which Congress authorized intrusion into the affairs of the states through the Voting Rights Act[68] seems necessary. The extent of the intrusion suggests that there is constitutional authority to make severe and substantial intrusions into state affairs where Congress determines that such intrusions are needed and appropriate. The cases I have discussed provided that authority.

One of the least known and perhaps the least understood sections of the Voting Rights Act of 1965 is the provision for federal observers at polling places in the deep South.[69]

I wonder how many people realize that the first election following the passage of the Act in 1965 and the Court's sustaining its constitutionality, was an election for Sheriff of Dallas County, Alabama—Selma. The day of the election, over five hundred federal observers were in Dallas County—observers from New York, Milwaukee, Denver, and San Francisco.[70] They were civil servants from all over the country sent to the various polling places in Dallas County to observe and insure that the elections were properly held. I can think of no particular act by the federal government that could be a greater intrusion, even though it was for the limited duration of one day and one election. The fact remains that a considerable number of people acted under the authority and direction of the federal government to insure effective constitutional equality was provided for all citizens in Dallas County. It was thrilling to see. Remarkably large numbers of black citizens, men and women, voted for the first time and, for the first time, had their votes counted and counted fairly.

Finally, I offer my appraisal of Justice Brennan. His opinions in *Katzenbach v. Morgan*[71] and *United States v. Guest*[72] demonstrate that he

68. 42 U.S.C. §§ 1973-1973p (1976).

69. 42 U.S.C. § 1973d (1976). Federal examiners may be sent to any jurisdiction covered by the provisions of the Voting Rights Act when the Attorney General has received 20 meritorous written complaints alleging voters are being discriminated against because of race, or when the Attorney General believes that the appointment of examiners is necessary to enforce the guarantees of the fifteenth amendment. UNITED STATES COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 30-31 (Jan. 1975).

70. *Id.* at 398.

71. 384 U.S. 641 (1966).

72. 383 U.S. 745 (1966).

is blessed with a remarkable grasp of the Constitution.[73] He sees the contours of the Constitution clearly and accepts no compromise to his concept of the scope of congressional power. At the same time, when there is an issue pitting the government against the individual citizen, he refuses to sacrifice any of the constitutional guarantees of justice and fair play. He believes strongly in the limits of power and in the separation of powers, but he also believes that, in spite of clashes on the Court concerning the limited authority of government over the individual and in spite of clashes between the executive, legislative, and congressional powers, the perfection of the Constitution can be demonstrated when his country is faced with a constitutional crisis. In recognizing the inherent dignity of the individual and the equal rights of all citizens, as well as the duty, the power, and the potential of our system of self-government to achieve the goal of equal rights for all, Justice Brennan embodies a clarity of vision that is worthy of the finest of the Justices on the Supreme Court.

73. *See* notes 54-58, 66-67 *supra*.