



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 42 | Number 1

Article 10

12-1-1963

Civil Rights, Congress and the Constitution -- 1963

Arthur E. Sutherland Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Arthur E. Sutherland Jr., *Civil Rights, Congress and the Constitution -- 1963*, 42 N.C. L. REV. 16 (1963).

Available at: <http://scholarship.law.unc.edu/nclr/vol42/iss1/10>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

CIVIL RIGHTS, CONGRESS AND THE CONSTITUTION—1963

ARTHUR E. SUTHERLAND, JR.*

Very properly, a great deal is being said and written concerning the constitutional power of the Congress to pass legislation directed toward improving the position of Negro citizens in the United States. One might perhaps suppose that the subject had been fully explored long since; that one more voice, one more pen, can only elaborate the familiar. However, the courteous invitation of the *North Carolina Law Review* to write a few pages has stilled these doubts.

Constitutional questions surrounding all civil rights legislation passed since 1865 have tended to divide into two categories. The first of these concerns the effect of the thirteenth, fourteenth and fifteenth amendments of 1865, 1868 and 1870; the second concerns use of other sources of constitutional power to implement the policy of these three amendments. Taken together, the amendments proclaim a new and comprehensive undertaking toward Negro citizens; and primarily to achieve this, a profound revision in the relation of nation and states. Chief Justice Taney's opinion in *Dred Scott's Case*¹ of 1857, insofar as it was a historical review of the attitude of many Americans toward the American Negro in 1789, was an accurate statement, written by a humane judge. To the sorrow of sympathetic and perceptive men in 1857 Taney spoke the truth concerning "the state of public opinion in relation to that unfortunate race"² which obtained in many American states, and concerning the legal institutions which implemented that public opinion. His words profoundly shocked northern opinion, not because they were false, but because they were brutally accurate. One cannot read the *Dred Scott* opinion and the post-war amendments without being struck by the correspondence between them; without realizing that the thirteenth, fourteenth and fifteenth amendments were intended to reform the state of affairs Taney described. The debates in the

* Bussey Professor of Law, Harvard University.

¹ *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

² *Id.* at 407.

Congress which preceded the sweeping Civil Rights Act of 1866,³ and the provisions of that statute, show the frame of mind of the legislators concerning what they hoped to achieve. The first few words of the fourteenth amendment are explicitly directed to overruling the *Dred Scott Case*; and while the courts have given little dispositive effect to the privileges and immunities clause of that amendment, surely the draftsmen meant by it some substantial change in the Negro's status, and intended that change to be a betterment. The fifteenth amendment, probably unnecessary because of the sweeping language of the due process and equal protection clauses of the fourteenth, nevertheless showed the particular concern of the United States for assuring participation of the Negro people in the political process.

Of course the fourteenth amendment was so drawn as to protect against state injustice of any sort, not racial injustice alone. It documented a fact of national life; that we had reached the stage where the federal government must assume a much greater degree of control over local affairs than had previously been the case. The whole nation was becoming close-knit by the railroads, by the abundant production and nation-wide distribution of goods and by the continual movement of people from state to state. The legislative power which the amendment gave to the Congress is only part of a process of extension of the powers and concerns of the federal government, which has been going on by adjudication, by constitutional amendment and by governmental practice ever since the Constitution took effect.

The public life of our nation sometimes moves more rapidly than our understanding of it. For some of us, acceptance of the profound changes brought about by the Civil War amendments has been difficult. Another difficulty, similar and closely associated with the first, has been realization of the sweep of the commerce clause, of the inclusive federal control over the national economy which it necessarily granted, and which is only in our time being fully utilized. One reads comments suggesting that somehow the commerce power is constitutionally usable only where the sole desire of the Congress is to protect the movement of commodities, and associated financial transactions; that it may not constitutionally be used to regulate the national economy where the legislative moti-

³ Ch. 31, 14 Stat. 27 (1866). See also CONG. GLOBE, 39th Cong., 1st Sess. 1118 *passim* (1866).

vation is to rectify social injustice or wrong. This judgment is historically inaccurate: it reflects neither the practice of the Congress nor the decisions of the Supreme Court.

For more than sixty years the Congress has used the commerce power to forbid the transportation, in interstate and foreign commerce, of women and girls "for immoral purposes." For half a century the Supreme Court has been upholding that use of the commerce power; and the Mann Act⁴ has been sustained in cases where the offense had no aspect of commercialized immorality.⁵ Surely this legislation was intended to correct some activities other than interstate economic endeavor. Congress has constitutionally excluded lottery-tickets from interstate commerce,⁶ surely not because the tickets adversely affect trade, but because the Congress deemed lotteries evil. The Federal Kidnapping Act⁷ utilizes the commerce power,⁸ but surely its motivation is to prevent kidnapping, not to regulate interstate travel in the interests of trade. Other examples could be cited.

Use of the commerce power, and any other available constitutional power, to correct injustice to the Negro, is supported by the policy newly declared in the five years after the Civil War by the thirteenth, fourteenth, and fifteenth amendments. The Nation, in its most solemn manner of public pronouncement, then announced a revision of attitude toward the Negro; made a sort of national act of contrition; asserted an intention to alter his status and his life for the better. This new resolution so expressed, can and should carry over to legislation under headings of constitutional power other than the post-Civil War amendments themselves. The new policy rightly should affect the attitude of the Congress and the courts toward the use of the commerce power, the power to protect the vote, expressed in article I of the Constitution, the war-power, the power to tax-and-spend, and all the other exercises of national constitutional powers.

One may well further remember that the Congress has in the past recognized that it may use its constitutional powers to allay widespread public distress, and to remove causes of unrest which distress has aroused. The National Labor Relations Act of 1935, upheld

⁴ 18 U.S.C. §§ 2421-24 (1959).

⁵ *E.g.*, *Caminetti v. United States*, 242 U.S. 470 (1917).

⁶ *Lottery Case*, 188 U.S. 321 (1903).

⁷ 18 U.S.C. §§ 10, 1201-to-02 (1959).

⁸ *Gooch v. United States*, 297 U.S. 124 (1936).

by the Supreme Court of the United States in 1937 in the pioneering case of *NLRB v. Jones & Laughlin Steel Corp.*,⁹ had a preamble which is well worth quoting :

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹⁰

⁹ 301 U.S. 1 (1937).

¹⁰ 49 Stat. 449 (1935), 29 U.S.C. § 151 (1959).

Mutatis mutandis these findings and this statement of policy concerning the gravity of labor unrest and disturbance in 1935, are clearly applicable to the racial unrest and disorders which now appear in the columns of every day's newspaper. That such disorders interfere with the orderly and comfortable conduct of the national economy; that they encumber "commerce among the several states," considered in Marshall's terms, seems undeniable. And this patent fact has a bearing not only on the constitutional power of the Congress, but also on the congressional policy which may well implement it.

We have long since passed the time when we supposed that crossing a state border was a precondition of the effectiveness of the commerce power.¹¹ This is dramatically illustrated by the Margarine Act of 1950,¹² in which the Congress has prescribed the shape of margarine of a specified color, which may be served to a customer in a restaurant. The congressional declaration of policy in that margarine statute is eloquent:

The Congress finds and declares that the sale, or the serving in public eating places, of colored oleomargarine or colored margarine without clear identification as such or which is otherwise adulterated or misbranded within the meaning of this chapter depresses the market in interstate commerce for butter and for oleomargarine or margarine clearly identified and neither adulterated nor misbranded, and constitutes a burden on interstate commerce in such articles. Such burden exists, irrespective of whether such oleomargarine or margarine originates from an interstate source or from the State in which it is sold.¹³

Thus one may well approach the study of pending civil rights legislation with a sense of the emphatic policy declaration of the Civil War amendments; with a realization that race tensions are disrupting ordinary life, including economic and commercial life, in certain parts of the United States and with the knowledge that the Congress has not hesitated to regulate entirely local economic matters when these have some relationship with interstate transactions even as remote as those in the Margarine Act. Is the Congress powerless to act decisively and effectively in the current racial matters?

¹¹ Wickard v. Filburn, 317 U.S. 111 (1942).

¹² Act of March 16, 1950, ch. 61, 64 Stat. 20 (codified in scattered sections of 2, 15, 21, U.S.C.).

¹³ 64 Stat. 20 (1950), 21 U.S.C. § 347a (1959).

This is not an appropriate point to review in labored detail the phraseology of civil rights legislation now pending before the Congress. Quite possibly no measure now pending may reach a final vote with its present wording. This is a time to see the contours of the woods, not to scrutinize twigs. In this paper there is proposed a discussion of four underlying questions: use of federal constitutional powers to ensure to Negroes, or to any other racial minority groups, access to service without regard to race in merchandising establishments, restaurants, hotels, and places of amusement to which the public generally is invited, even when these establishments are privately owned; use of constitutional powers to assure to the Negro and to any other minority group participation in the political process equally with all other citizens; power of the executive to withhold federal benefits where federally financed projects are being conducted with discrimination against the Negro; and finally, the constitutionality of statutory provision for the executive branch of the national government, acting through the Attorney General, or any other executive official, to relieve the individual litigant from the burden, often intolerable, of proper enforcement at his own expense of constitutional and statutory rights by costly, long and complicated litigation.

II

What of the constitutionality of an act of Congress forbidding a store-keeper, a restaurateur, a hotelkeeper, or the proprietor of a theatre, to refuse accommodation to a person on account of his race? Such statutes are long familiar in state law,—a good example is the New York Civil Rights Law, section 40, which, in part, provides,

All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons.¹⁴

The New York statute, originally enacted in 1895 and often extended by amendments, includes within its terms a long list of establishments,—inns, hotels, retail stores, roof-gardens, bowling-alleys, etc. It has counterparts in many other states. The substantial ques-

¹⁴ N.Y. CIVIL RIGHTS LAW § 40.

tion posed by such a statute, if passed by the Congress, would be its inclusion within the constitutionally delegated powers. If the present-day construction of the commerce clause in, say, agriculture, labor, and food-drug cases were followed, there would be little doubt of constitutionality were it not for the *Civil Rights Cases*¹⁵ of 1883. One must agree that the thrust of that opinion is counter to a "public accommodations act." But that decision should inject no doubt if the Congress makes clear its intentions to rely on all available congressional powers, as construed in the last quarter-century.

The *Civil Rights Cases* held unconstitutional the Civil Rights Act of 1875. This act undertook to impose civil and penal sanctions on any person who denied on racial grounds,

full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.¹⁶

The Supreme Court found that the activities in question were purely private, having no element of "state action" in them. Hence the fourteenth amendment had no application. As to whether the Congress might have passed this law with respect to public conveyances passing from one state to another, the Court observed that this question was not before it; "the sections in question are not conceived in any such view."¹⁷ The Court further held over Justice Harlan's dissent that the thirteenth amendment gave no ground for the support of the legislation.

In 1913 another plaintiff attempted to apply the act to a denial of equal accommodations on a ship plying between Boston, Massachusetts and Norfolk, Virginia.¹⁸ The Supreme Court again denied the relief the plaintiff sought, resting its judgment on the precedent of the *Civil Rights Cases*; Mr. Justice Van Devanter wrote of the *Civil Rights Cases*,

upon full consideration it was held [that the sections of the Civil Rights Act of 1875] . . . receive no support from the power of

¹⁵ 109 U.S. 3 (1883).

¹⁶ Act of March 1, 1875, ch. 114, § 1, 18 Stat. 336.

¹⁷ 109 U.S. at 19.

¹⁸ *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126 (1913).

Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power¹⁹

In reaching its decision the Court also relied on *United States v. Reese*.²⁰ Of the *Reese* case the Supreme Court wrote:

That was a prosecution under a congressional enactment punishing election officers for refusing to any person entitled to do so the right to cast his vote. The statute was expressed in general terms embracing some acts which Congress could condemn and others which it could not. As to the latter it was, of course, invalid, and the claim was made that, as the act charged was not of the latter class but of the former, the statute should be sustained as to acts like the one charged, notwithstanding the general terms were in excess of the power of Congress. But the Court held otherwise²¹

The Supreme Court of the United States in 1960 refused to follow *Reese* in an indistinguishable situation. Since *United States v. Raines*,²² a civil rights act is no longer invalid for all purposes simply because circumstances can be conceived, not present in the case at bar, in which application of the statute might be attempted in a manner exceeding the delegated powers. Certainly there are many types of private establishments offering public accommodation which "affect" interstate commerce sufficiently to fall within the federal statutory powers. The Congress might well make clear by the terms of the legislation that the statute is intended to apply to any situation in which power is granted by any clause in the Constitution of the United States, whether that power is specified or mentioned in the statute or not. The Congress might also insert a full separability clause, making clear that if any portion of the statute be held unconstitutional the Congress intends that the remainder shall continue in full force and effect; and that if application of any part of the statute to any specific situation be held unconstitutional, the Congress intends, as the Supreme Court held in *Raines* that the statute shall apply to any other situation where its application is constitutional.²³ If the Court follows its construction of the commerce power in Labor Relations Act cases, in food, drug,

¹⁹ *Id.* at 132.

²⁰ 92 U.S. 214 (1876).

²¹ 230 U.S. at 133-34.

²² 362 U.S. 17 (1960).

²³ *Id.* at 24-25.

and cosmetic cases, and in Agricultural Act cases, such new legislation would apply to a very large proportion, if not to all public accommodations establishments.

III

The power of Congress to authorize effective federal aid to a citizen denied voting privileges guaranteed by the fifteenth amendment is no longer in doubt. *United States v. Raines* upheld the power of the Attorney General to institute a civil suit for injunctive relief, under such a statute, against state officers discriminating against Negroes who desired to vote in elections.²⁴ The right of the Congress to substitute graduation from the sixth grade in an accredited school for any other literacy test imposed by a state seems to me to be equally clear. The basis for this opinion has been previously stated by me in a recent published letter which read in part:²⁵

THE CONSTITUTIONAL CLAUSES ON WHICH SUCH A STATUTE COULD BE SUSTAINED²⁶

The most explicit clause is article I, section 4, which provides that, ". . . the Congress may at any time by Law make or alter such Regulations" * * * as to the * * * "Manner of holding Elections for Senators and Representatives . . ."

However, there is a further reservoir of power in the Congress in the 15th amendment to, ". . . enforce . . . by appropriate legislation" * * * the "right of citizens of the United States to vote . . ." [despite denial or abridgement] ". . . by the United States or by any State on account of race, color, or previous condition of servitude."

Likewise there is a source of congressional power in section 5 of the 14th amendment which authorizes the Congress "to enforce, by appropriate legislation * * *" the provisions of that amendment, which include, "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

²⁴ *Id.* at 27.

²⁵ The author has taken the liberty of here reproducing, with a few minor changes, parts of a letter which he wrote to Senator Sam J. Ervin, Jr. Chairman of the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary on Feb. 26, 1962. See note 45 *infra*.

²⁶ Citations which were included in the author's original text have been removed and placed in the footnotes in standardized form. As indicated in note 25 *supra*, the author has made minor changes in order that the letter may fit better within the context of the instant article. These minor changes have *not been* indicated. [Ed.]

deny to any person within its jurisdiction the equal protection of the laws."

Applicable also is the last clause of article I, section 8 of the Constitution which gives the Congress power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

REASON, SUPREME COURT ADJUDICATIONS, AND THE 1961 REPORT OF THE CIVIL RIGHTS COMMISSION ALL INDICATE THAT A SIXTH-GRADE STANDARD WOULD BE CONSTITUTIONAL

This question can be approached by stating a hypothetical Federal statute, which would impose civil or criminal liability on any State official who should willfully apply a State "literacy, comprehension, intelligence, or other test of education, knowledge, or understanding" in such a way as "arbitrarily or unreasonably" to deny the right to vote to otherwise qualified persons on account of race or color. Such an act of Congress is clearly *intra vires* under the 15th and 14th amendment clauses authorizing legislation. The Supreme Court in *Ex Parte Virginia*²⁷ . . . sustained a Federal indictment of a State judge for violating a Federal statute penalizing exclusion of any man from jury service because of his race. *Lane v. Wilson*,²⁸ . . . and its predecessor *Guinn v. United States*,²⁹ . . . upheld Federal legislation outlawing State statutes which used the grandfather clause as a pretext for excluding Negroes from voting. The opinion of the Supreme Court in the *Lane* case includes this significant language:

"The reach of the 15th amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color has been amply expounded by prior decisions . . .³⁰ The amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race * * *."³¹

More recently in *Schnell v. Davis*³² . . . the Supreme Court affirmed per curiam a decision of a three-judge Federal district

²⁷ 100 U.S. 339 (1880).

²⁸ 307 U.S. 268 (1939).

²⁹ 238 U.S. 347 (1915).

³⁰ *Myers v. Anderson*, 238 U.S. 368 (1915); *Guinn v. United States*, 238 U.S. 347 (1915) (citations by the Court).

³¹ 307 U.S. at 275.

³² 336 U.S. 933 (1949).

court enjoining the misuse of a State literacy test in order to exclude otherwise qualified voters on racial grounds. Surely the 15th and 14th amendments authorize the Congress to forbid what they authorize a Federal court to forbid. The supposed statute penalizing misuse of literacy tests on racial grounds in individual cases would be clearly constitutional.

Congressional legislation appears equally constitutional when devised not only to correct such misuse in individually demonstrated cases, but to eliminate the whole system of State literacy tests which Federal courts and the Civil Rights Commission have already found, and which the Congress in the supposed legislation would find are subject to misuse and are actually misused to deny the vote, on racial grounds, to otherwise qualified persons.

The Civil Rights Commission, acting under congressional authority, was recently sustained by the Supreme Court in conducting an investigation of State voting practices which may be used to deny the vote on racial grounds to otherwise qualified voters. . . .³⁸ That Commission, in 1961, reported:

"9. A common technique of discriminating against would-be voters on racial grounds involves the discriminatory application of legal qualifications for voters. Among the qualifications used in this fashion are requirements that the voter be able to read and write, that he be able to give a satisfactory interpretation of the Constitution, that he be able to calculate his age to the day, and that he be of good character.

"10. The U. S. Constitution leaves to the State the power to set the qualifications for voters in Federal, as well as State, elections. This power is not, however, unlimited. The 15th amendment prohibits the States from denying the right to vote to any citizen on grounds of race or color, and empowers the Congress to enforce this prohibition by appropriate legislation. Therefore, if Congress found that particular voter qualifications were applied by States in a manner that denied the right to vote on grounds of race, it would appear to have the power under the 15th amendment to enact legislation prohibiting the use of such qualifications. Section 5 of the 14th amendment similarly empowers Congress to enact appropriate legislation to enforce the provisions of that amendment. One of these provisions is section 2 of the 14th amendment, which authorizes Congress to reduce the congressional representation of any State in proportion as citizens of that State are denied the right to vote on any grounds other than age or conviction of crime. The effect of these provisions of the 14th amendment may be to empower

³⁸ *Hannah v. Larche*, 363 U.S. 420 (1960).

Congress to prohibit the use of any voter qualification other than those specified. . . .³⁴

A State literacy test, fairly administered, would be constitutionally permissible in the absence of such Federal legislation as that proposed. . . .³⁵ But if the Congress finds the system of such State tests widely misused for racial reasons, the Congress can substitute its own criterion of literate voting capacity. Congress is not without the power to forbid a system of tests which is subject to demonstrated misuse, solely because in some instances such a test might be fairly used.

Here, at the risk of undue repetition, one must again emphasize the respect which the Supreme Court properly pays to acts of Congress, and the great reluctance with which that Court entertains any suggestion that an act of Congress may be invalid for unconstitutionality. The House of Representatives and the Senate are the popularly elected representative lawmaking agencies of the people of the United States. If a sixth-grade standard should be enacted, the statute would express the considered judgment of those two representative bodies that a federally prescribed sixth-grade completion test should be substituted for any State exclusionary test based on literacy grounds. The Congress would have found that this substitution was necessary and proper for correction of a substantial arbitrary and unreasonable practice, used extensively to deny voting rights on racial grounds.

Instances are not infrequent where the Congress has so proscribed a whole area of State activity, though part may have been used legitimately. Thus, for example, the National Labor Relations Act as construed by the Supreme Court in *Guss v. Utah Labor Board*³⁶ . . . displaced all similar State labor measures affecting interstate commerce, even where the National Labor Relations Board declined to exercise its jurisdiction and had not ceded jurisdiction to the State. Surely in many instances State labor board activity might here be beneficial and just. Yet, as the congressional will was interpreted by the Supreme Court, Congress had expressed its judgment in favor of uniformity, and the Supreme Court found no difficulty in upholding the Act of Congress, forbidding good and bad State intervention together, in order to achieve an overall Federal goal.

Another example occurs in the field of State income taxation. By act approved September 14, 1959, the States were forbidden to impose any income tax on income derived, under stated cir-

³⁴ 1 U.S. COMM'N ON CIVIL RIGHTS, REPORT, VOTING 1961 at 137 (1961).

³⁵ See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

³⁶ 353 U.S. 1 (1957).

cumstances, from interstate commerce³⁷ The legislative history demonstrates the concern of the Congress for the national economy, in view of at least 35 States, the District of Columbia and at least 8 cities taxing such income by statutes or ordinances expressing different formulas. Surely not every such tax can have damaged the national economy; yet the Congress found it necessary to prohibit the entire defined class. A previous tax decision of the Supreme Court³⁸ . . . had upheld two such State taxes. Yet the Congress determined to forbid a whole class of such taxation by the act of 1959, even though some instances might be constitutional.

The Congress has acted similarly by restricting States from damming certain watercourses, and, on the other hand, by authorizing Federal licenses to construct dams even where States forbid³⁹ In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,⁴⁰ . . . the Supreme Court held that Federal licensee might proceed to build a dam despite State opposition. Undoubtedly some State-built dams would be harmless to the national interests; yet the Congress found it necessary and proper to take over the control of all damming of streams affecting interstate commerce. See for the Federal control even of nonnavigable parts of streams under this legislation *Citizens Utilities Co. v. Federal Power Commission*⁴¹

The wide sweep of the 15th amendment in protecting the right of citizens of all races to vote was demonstrated by the Supreme Court in *Smith v. Allwright*,⁴² . . . in *Terry v. Adams*⁴³ . . . and in *Gomillion v. Lightfoot*⁴⁴ As the fifth section of that amendment gives the Congress power to enforce the amendment, the congressional power is co-extensive with the amendment as interpreted by the Supreme Court.⁴⁵

IV

Withholding of federal funds presents other and difficult questions. A statute authorizing the President to withhold federal funds

³⁷ 73 Stat. 555 (1959), 15 U.S.C. §§ 381-84 (Supp. III 1962).

³⁸ *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

³⁹ Federal Water Power Act, ch. 687, § 210, 49 Stat. 846 (1935), 16 U.S.C. § 817 (1959).

⁴⁰ 328 U.S. 152 (1946).

⁴¹ 279 F.2d 1 (2d Cir.), *cert. denied*, 364 U.S. 893 (1960).

⁴² 321 U.S. 649 (1944).

⁴³ 345 U.S. 461 (1953).

⁴⁴ 364 U.S. 339 (1960).

⁴⁵ Letter from Arthur E. Sutherland, Jr. to Senator Sam J. Ervin, Jr., Feb. 26, 1962, printed in *Hearings on S. 480, S. 2750 and S. 2979 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 629-31 (1962). See note 25 *supra*.

allotted to a state, which the state is using in an unconstitutional manner seems not only constitutional, but in fact a restatement of a duty which under his oath of office rests upon the President of the United States. A state utilizing federal funds to deny equal protection of the law—for example using some future federal aid appropriated for public schools to maintain schools in which one racial group is treated less favorably than another—would be an unconstitutional misuse of those funds; the duty of any federal officer under his constitutional oath would require him to withhold the transmission of funds which he knew were being so used. In reasonable caution I point out that here I am not purporting to pass on a blanket withdrawal of all federal funds of every sort from any state; I discuss only a known use in an unconstitutional manner of any federal funds allotted to a state by the Congress. If such a situation should arise, the right, and indeed the clear duty, of every federal official from the President down, appears quite clear. The Congress can restate what the Constitution requires.

V

The arguments in the earlier parts of this paper make clear the appropriateness of intervention by federal officers to assure constitutional rights, and the evident constitutionality of a statute expressly authorizing such intervention. This paper has repeatedly referred to *United States v. Raines* which, decided less than four years ago, directly decided this question. No reason appears why the Congress may not constitutionally authorize the Attorney General to intervene to enforce any one of the rights guaranteed by the thirteenth, fourteenth or fifteenth amendments, or indeed guaranteed by any other constitutional provision. Even if the *Raines* case had never arisen, the point seems almost too clear for argument; in any event that decision has settled the matter. The constitutional problems are insubstantial. The question is what Congress is willing to do for our Negro Americans.