1968 WL 112559 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Richard ALLEN, et al., Appellants,
v.
STATE BOARD OF ELECTIONS, et al.

No. 3.
October Term, 1968.
August 8, 1968.

On Appeal from the United States District Court for the Eastern District of Virginia

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***1 Opinion Below**

The opinion of the District Court for the Eastern District of Virginia is reported at 268 F. Supp. 218. Copies of the Opinion and Judgment of the District Court are printed in the Appendix pp. 67a-73a.

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of the District Court was invoked under 28 U.S.C. §§1331, 1343, 2201 to enforce rights protected by the equal protection clause of the Fourteenth Amendment and the Voting Rights Act of 1965 (42 U.S.C. §1973, *et seq.).* The complaint sought to restrain the Virginia State Board of Elections and other election officials from enforcing a state statute, Va. Code §24-252, insofar as it authorized the officials not to count write-in ***2** votes unless they were inserted on the ballot in the voters' own handwriting. A statutory three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284 (A. 30).

A final judgment of the court below denying injunctive relief and dismissing the case was entered May 2, 1967 (A. 73). Timely notice of appeal to this Court was filed in the court below on June 29, 1967 (28 U.S.C. §2101(b)) (A. 74-76). The District Court, by order dated August 24, 1967, extended the time for docketing the appeal in this Court to September 28, 1967 (A. 78).

This court postponed jurisdiction by order dated June 10, 1968. Appellants' argument in support of the Court's jurisdiction is set forth as Argument I, *infra,* p. 23, *et seq.*

Constitutional and Statutory Provisions Involved

1. This case involves the validity of Code of Virginia, 1950, §24-252 (Code of Va. 1964 Repl. Vol. 5, p. 271), which provides as follows:
§24-252. *Insertion of names on ballots.*--At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check (??) or cross (X or +) mark or a line (-) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of §24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person. (Code 1919, §162; 1936, p. 278; 1952, c. 581; 1962, c. 536.)

***3** 2. The following additional provisions are material to an understanding of the issues presented.
(a) Code of Virginia, §24-251:

§24-251. *Judges or others to assist certain voters.*--Any person registered prior to the first of January, nineteen hundred and four, and any person registered thereafter who is physically unable to prepare his ballot without aid, may, if he so requests, be

aided in the preparation of his ballot by one of the judges of election designated by himself, and any person registered, who is blind, may, if he so requests, be aided in the preparation of his ballot by a person of his choice. The judge of election, or other person, so designated shall assist the elector in the preparation of his ballot in accordance with his instructions, but the judge or other person shall not enter the booth with the voter unless requested by him, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any elector shall vote. For a corrupt violation of any of the provisions of this section, the person so violating shall be deemed guilty of a misdemeanor and be confined in jail not less than one nor more than twelve months. (Code 1919, §166; 1946, p. 316; 1950, p. 230.)

(b) Constitution of Virginia, §§27, 28:

"§27. *Method of Voting.-All* elections by the people shall be by ballot; * * *

"The ballot box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed or counted, in secret.

***4** So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained."

> "§28. *Ballots.*--The General Assembly shall provide for ballots without any distinguishing mark or symbol, for the use in all State, county, city and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candidates and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another."

(c) Constitution of the United States, Art. I, Section 4, Clause 1:

SECTION 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

(d) Constitution of the United States, Art. I, Section 2, Clause 1:

SECTION 2. Clause 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

(e) Title 2, U.S.C., §9:

§9. Voting for Representatives.--All votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been ***5** duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect. (R. S. §27; Feb. 14, 1899, c. 154, 30 Stat. 836.)

(f) Title 42, U.S.C., §1973b(a), (b), (c):

§1973b. Suspension of the use of tests or devices in determining eligibility to vote--Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no

citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, ***6** determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or ***7** that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Definition of test or device

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(g) Title 42, U.S.C., §1973c:

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgment of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, ***8** prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the

right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub.L. 89-110, §5, Aug. 6, 1965, 79 Stat. 439.

(h) Title 42, U.S.C., §1973***l***(c)(1):

Definitions

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this sub-chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ***9** ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(i) Title 42, U.S.C., §1973i(a):

§1973i. Prohibited acts-Failure or refusal to permit casting or tabulation of vote

(a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this sub-chapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(j) Title 28, U.S.C., §2281.

§2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Questions Presented

I. Whether the Court has jurisdiction of this direct appeal under 28 U.S.C. §1253 because the suit was one required to be heard by a district court of three judges by:

***10** (a) 28 U.S.C. §2281, in that the case presents a substantial question as to the unconstitutionality of Virginia Code §24-252 under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States; or

(b) Subsection 4(a) of the Voting Rights Act of 1965 (42 U.S.C. §1973b(a)) in that this suit to enforce the subsection's ban on the use of tests or devices to deny appellants' right to have their votes counted was thus an action "pursuant to" the subsection so as to invoke its requirement of a court of three judges and its provision for a direct appeal to this Court.

II. Whether Virginia Code §24-252, as written and as administered denies equal protection of the laws to illiterates with

respect to write-in voting in violation of the Fourteenth Amendment to the Constitution of the United States, where:

(a) the illiterates are qualified registered voters;

(b) relevant law purportedly guarantees "absolute secrecy" of the ballot and the right to cast write-in votes;

(c) Section 24-252 as written requires write-in votes in the voter's own handwriting and thus forbids illiterates to cast such votes;

(d) Section 24-252 is administratively interpreted and applied to require illiterates to cast write-in votes only in the handwriting of a state election judge; and

(e) Virginia law makes a crazy quilt of unreasoned distinctions so that significantly more favorable procedures to preserve secrecy of the ballot are available ***11** for blind persons, other handicapped persons, and literate persons, than are available for illiterates.

III. Whether Virginia Code §24-252 has been enforced so as to void appellants' write-in votes in violation of the Voting Rights Act of 1965, in that:

(a) Section 24-252 is a suspended "test or device" which was used to deny appellants' right to have their votes counted in violation of Section 4(a) of the Voting Rights Act, 42 U.S.C. §1973b(a);

(b) the Election Board continues to apply the suspended handwriting requirement of §24-252 in conjunction with a new administrative interpretation requiring illiterates to insert write-in votes in the handwriting of a state election judge;

(c) the newly adopted prerequisite or procedure for voting has no legal effect because it may not be used to deny the right to vote since it has not first been submitted and approved administratively or judicially as required by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

Statement of the Case

This litigation involves the claim of certain illiterate registered voters mainly Negroes, who were made newly eligible to vote because of the provisions of the Voting Rights Act of 1965, that Virginia election law unlawfully discriminated against them. They object to the lack of any procedures for protecting the privacy and secrecy of illiterates' write-in votes from disclosure to state officials.

The issues arose in the context of a general election for members of the House of Representatives which was held ***12** November 8, 1966, in Virginia's Fourth Congressional District. Rep. Watkins M. Abbitt, the incumbent, and Edward J. Silverman were the candidates listed on the ballot. The plaintiff-appellants were supporters of S. W. Tucker, a well-known Negro civil rights attorney in Virginia who was a write-in candidate for Congress. The plaintiffs, as the court below found, were "unable to spell accurately or to write legibly" (268 F. Supp. at 219 (1967)). They sought to vote for S. W. Tucker by pasting a small gummed paper strip or sticker (Pl's Exhibit 1, R. 60), upon which his name was printed, on the official ballot under the names of the listed candidates, and then making the appropriate marking preceding his name (A. 11a-28a). The defendant election officials did not count the votes for Tucker on ballots marked with the Tucker stickers. They disallowed the ballots, relying on Virginia Code section 24-252, which permits the insertion of names on general election ballots in the voter's "own handwriting," and further provides that ballots with a name placed thereon "in violation" of the section shall not be counted for such person. According to the statement published by the defendant Board of Elections, the 1966 congressional election was won by Rep. Abbitt with 45,226 votes; Mr. Silverman drew 14,827 votes, and 7,907 write-in votes were counted (R. 61, Pl's Exhibit No. 2, p. 9).[1]

This action was commenced November 28, 1966, shortly after the election. Plaintiffs prayed in their complaint, *inter alia,* for a judgment declaring Virginia Code section 24-252 invalid and in conflict with the equal protection clause of the Fourteenth Amendment and also the Voting Rights Act of 1965, insofar as the Virginia law "purports to deny any voter, solely because of his inability to write, ***13** the privilege of casting a secret ballot for a person whose name is not printed on the official ballots and having such ballot counted in the appropriate returns; ..." (A. 9a-10a); and prayed that the court enjoin defendants from failing and refusing to count votes inserted on official ballots "by means other than handwriting" in the November 1966 election, and such votes "hereafter given" in future elections (A. 10a). By their subsequent motion for summary judgment which asked for relief under prayers B (1) and (3) of the complaint, appellants indicated that they mainly sought relief for future elections and not for the 1966 election (A. 66a).

A statutory three-judge district court was convened to hear and determine the case (A. 29a-30a). The plaintiffs submitted requests for admissions under Rule 36, Federal Rules of Civil Procedure (A. 44a-52a), none of which were denied under oath by the defendants (A. 53a-58a). The defendant State Board of Elections had the statutory duty to supervise and coordinate the work of county and city electoral boards to obtain uniformity in their practices and proceedings and to make rules and regulations for their functioning. (Code of Virginia, 1950, §24-25.) The other defendants were judges of election and clerks of election in precincts in which the plaintiffs resided. The requests for admissions developed the facts with respect to the use of Tucker stickers by illiterate voters in several areas where paper ballots were used, and that such votes were not counted. The court below treated the facts as undisputed (268 F. Supp. at 219; A. 67a).

In its defense, the State Board of Elections offered in evidence several letters or bulletins which it had distributed to local voting officials during 1965 after passage of the Voting Rights Act. One letter to all voting registrars ***14** advised that Virginia's prior registration procedures could no longer be used, and that if applicants were unable to complete registration forms the registrar should orally examine the applicant and assist him in completing the registration forms (A. 60a-61a). The Voting Rights Act provisions which prompted the above mentioned letter were those which temporarily forbade the use of literacy tests or devices in states to which the Act was made applicable. (42 U.S.C. §1973b(a)). And, of course, the Voting Rights Act, designed to end racial discrimination in voting, was applicable in Virginia.[2]

The State Board of Elections also introduced Defendants Exhibit #4, a bulletin to election judges dated October 15, 1965 (A. 64a-65a). The bulletin was supplied to voting registrars and secretaries of electoral boards for them to distribute to judges of elections (A. 63a). The bulletin (Defendants Exhibit #4, A. 64a-65a) stated:

October 15, 1965

BULLETIN FROM STATE BOARD OF ELECTIONS

TO ALL JUDGES OF ELECTION:

On August 6, 1965, the "Voting Rights Act of 1965" enacted by the Congress of the United States became ***15** effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24-251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

These instructions also apply to precincts in which voting machines are used.

The Board offered no evidence indicating to what extent, if any, the public was advised of the policy set forth in the bulletin to election judges. Neither is there anything in the record indicating whether or not any instructions similar to those stated in the 1965 bulletin were reissued at the time of the 1966 congressional election or whether voters had any way of knowing that

election judges were instructed to assist illiterates in completing their ballots. The court below merely found that "The Attorney General of Virginia asserted, and the plaintiffs do not controvert, that these instructions apply while the Voting Rights Act of 1965 is effective in the state." (268 F. Supp. at 221; A. 72a).

The district court denied the relief prayed and dismissed the case. The court rejected appellants' claim of unconstitutional discrimination against illiterates, citing the decision in ***16***Lassiter v. Northampton Election Bd.,* 360 U.S. 45 (1959), for the proposition that discrimination between illiterate and literate voters does not violate the Fourteenth Amendment. (268 F. Supp. at 220; A.69a-70a). The court also rejected appellants' argument that Virginia Code section 24-252 was rendered invalid by the Voting Rights Act of 1965. The court held that the Virginia requirement that the write-in candidate's name be inserted in the voter's own handwriting was "not a test or device defined in 42 U.S.C. §1973b(c)." (268 F. Supp. at 221; A. 72a.) The court said that the requirement did not prevent the appellants from registering and voting, and that the Board of Elections' bulletin provided for them to be assisted by election judges in casting ballots.

After the Jurisdictional Statement was filed this Court invited the Solicitor General to file a brief expressing the views of the United States. 389 U.S. 966. The Solicitor General filed a memorandum urging that the case be decided on the basis of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c), and that the District Court should be directed "to grant such relief as is necessary to guarantee that Virginia will refrain from imposing restrictions upon the manner of casting write-in votes pending compliance with that Section." (Memorandum for the United States, p. 9).

***17** Summary of Argument

I.

A. The Court has jurisdiction to decide the case on direct appeal under 28 U.S.C. §1253 in that it is an appeal from denial of a permanent injunction in a case required by 28 U.S.C. §2281 to be heard by a district court of three judges.

A three-judge court was routinely convened, and its propriety was never challenged or questioned below. Appellants seek to enjoin enforcement of a state statute upon the ground of its unconstitutionality. A substantial federal question is presented whether Virginia Code §24-252 violates the Equal Protection Clause of the Fourteenth Amendment (Argument II, *infra*). A three-judge court is required where the constitutional claim is not "wholly insubstantial" or "foreclosed." *Ex Parte Poresky,* 290 U.S. 30, 32 (1933); *Bailey v. Patterson,* 369 U.S. 31 (1962); *Schneider v. Rusk,* 372 U.S. 224 (1963); *Zemel v. Rusk,* 381 U.S. 1 (1965).

The necessity for a three-judge court is not affected by the fact that appellants also urge separate non-constitutional grounds of attack on the Virginia statute based on the Voting Rights Act of 1965. *Florida Lime & Avocado Growers v. Jacobsen,* 362 U.S. 73 (1960); *Zemel v. Rusk,* 381 U.S. 1 (1965); *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942 (1968); *Paul v. United States,* 371 U.S. 245 (1963); *Brotherhood of Locomotive Engineers v. Chicago R. I. & P. R. Co.,* 382 U.S. 423 (1966). The case otherwise meets the requirements of an equitable action and of the three-judge court statute.

B. Although the need for a three-judge court under 28 U.S.C. §2281 is plain, appellants urge another ground for ***18** three-judge court jurisdiction akin to that urged in three Mississippi voting cases now before this Court. Three judges were also required to decide this case because subsection 4(a) of the Voting Rights Act, 42 U.S.C. §1973b(a) is clear in its requirement that a three-judge court decide certain declaratory judgment actions authorized to be brought by the states against the United States to remove themselves from coverage of the Act. This is not such a case but this case is "an action pursuant to" subsection 4(a) and thus comes within the three-judge requirement of the subsection. Pertinent policy considerations support a construction of subsection 4(a) to require a three-judge court to decide cases involving whether a given state law constitutes a "test or device" suspended by subsection 4(a). There is as much need for a three-judge court to decide the question whether a state law initially fits within the "test or device" category, as there is need for such a court to decide whether the time has come for the suspension of tests to be lifted.

II.

Virginia Code §24-252, as written and as administratively interpreted and applied, denies equal protection of the laws to illiterates with respect to write-in voting. Appellants are illiterates who are qualified registered voters. They sought to cast write-in votes by pasting printed stickers bearing their candidates name on the official ballot. Section 24-252 was applied to invalidate the ballots. Virginia's Constitution grants the right to cast write-in votes and the right to "absolute secrecy" of the ballot.

Appellants' equal protection claims involves a fundamental right, and accordingly must be scrutinized with meticulous care. ***19***Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); *Reynolds v. Sims,* 377 U.S. 533 (1964); *Skinner v. Oklahoma,* 316 U.S. 535 (1942). The Court below rejected appellants' equal protection argument on the erroneous theory that since *Lassiter v. Northhampton Election Board,* 360 U.S. 45 (1959) approved nondiscriminatory literacy tests as constitutional, the Fourteenth Amendment does not bar any discrimination between literates and illiterates. But once the franchise is granted to illiterates, as it has been in Virginia, the State may not draw lines imposing invidious distinctions with respect to the privacy of the ballot box. *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1965); *Rinaldi v. Yeager,* 384 U.S. 305 (1966).

The state law on its face imposes an invidious discrimination between literates and illiterates by in effect confining the latter to voting for listed candidates while providing procedures for all others (including the blind and handicapped) to vote for write-in candidates. The state makes no argument that the statute could still be applied as written. By administrative interpretation the state offers illiterates the choice of voting write-in ballots only in the handwriting of a state election judge. This creates subtle, but serious, discriminations relating to the secrecy of the ballot. There is a crazy quilt of discriminatory relations created by the Virginia scheme. Blind voters may vote write-ins in the handwriting of any person of their choice. Other handicapped persons may be aided only by election judges. State criminal sanctions protect secrecy for both blind and other handicapped voters in this process. Illiterate voters are required to vote in the handwriting of an election judge and are not protected by any criminal sanctions applicable to their assistants. There is discrimination between literates and illiterates, between the handicapped and illiterates, and ***20** between the blind and illiterates. Illiterates are the least favored class.

The classifications made are a crazy quilt; they are not reasonable in light of their purpose, but rather arbitrary and invidious. *Carrington v. Rash,* 380 U.S. 89 (1965); *McLaughlin v. Florida,* 379 U.S. 184 (1964); *Baxstrom v. Herold,* 383 U.S. 107 (1966). Appellants made reasonable efforts to solve the problem created for them by the state's patently void statute-as-written when they used stickers imprinted with their candidate's name. The state has thwarted their effort and offered only a scheme of unreasoned distinctions which make the exercise of the franchise significantly more onerous when an illiterate seeks to cast a write-in vote. No defensible state interest is served by Virginia Code §24-252. *Rinaldi v. Yeager,* 384 U.S. 305 (1966); *Baxstrom v. Herold,* 383 U.S. 107 (1966).

A secret ballot is very valuable in a free society. In addition to recognition of this in Virginia's Constitution §27, secrecy is protected in Congressional elections by 2 U.S.C. §9, which requires secrecy as a necessary and intended consequence of the requirement that voting be by "ballot." This 1871 enactment was aimed at what its framers called "KuKlux outrages" comparable to those which are the target of the 1965 Voting Rights Act. Political dissidents and those who historically have been denied the franchise, need a secret ballot to support write-in candidates. The United States Civil Rights Commission has recently reported on the myriad problems faced by Negro illiterates seeking to vote and seeking to vote for write-in candidates. U. S. Commission on Civil Rights, *Political Participation* (May 1968). They face a variety of frauds and other problems.

The right of a secret ballot is also connected with the right of privacy of association for the advancement of ***21** political beliefs. *NAACP v. Alabama,* 357 U.S. 449 (1958); *Talley v. California,* 362 U.S. 60 (1960); cf. *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 665 (1966).

III.

A. Appellants' right to vote was denied in violation of subsection 4(a) of the Voting Rights Act of 1965. They were denied the right to vote, i.e., to have their votes counted, because of failure to comply with Virginia Code §24-252. Subsection 4(a) suspends in Virginia all "tests or devices" as defined in the Act. The handwriting requirement of §24-252 is such a suspended

"test or device." The suspension of tests under the Act was not limited to voting registration. Nor was it limited to casting ballots. The Act also protects the right to have a vote counted properly and included in the appropriate totals of votes cast. Thus, Virginia Code §24-252, which is the only legal support for the election officials' refusal to count appellants' votes, was suspended by the Act. Accordingly, the election officials violated subsection 11(a) (42 U.S.C. §1973i(a)) prohibiting a refusal to count and report the vote of any person otherwise qualified to vote under the Act.

The Election Board continues to apply the suspended handwriting requirement of Virginia Code §24-252 in conjunction with a new administrative interpretation requiring illiterates to insert the names of write-in candidates in the handwriting of a state election judge. The newly adopted procedure affords no relevant defense to appellants' attack on Section 24-252. The subsequent administrative interpretation cannot alter the fact that the law which was used to disallow appellants' votes had been suspended on the date the Voting Rights Act became effective in the state.

***22** B. In any event the Board's defense based upon the newly adopted administrative interpretation and practice must fail because the new rule has no legal effect. Section 5 of the Voting Rights Act (42 U.S.C. §1973(c)) bars the denial of the right to vote based on the Board's new rule since it has not been submitted and approved either by the Attorney General of the United States or by the District Court for the District of Columbia. The Congress intended that Section 5 would be "all-sweeping" and would apply to all kinds of changes of voting laws in covered states. It surely covers the change attempted to be made by Virginia, as the Solicitor General of the United States has urged in this Court.

Appellants differ however from the view, urged by the United States, that it is desirable to decide the case on the basis of Section 5 without considering appellants' other contentions. We believe it inappropriate to leave unsettled the questions relating to protection of the privacy of illiterates' write-in votes, merely on the ground that the State has injected in the case a defense which fails because of Section 5 of the Act. Appellants are entitled to a judgment which affords equal protection in respect to their write-in votes.

*23 ARGUMENT

I.

This Court has Jurisdiction of the Appeal Under 28 U.S.C. §1253 as the Case Was One "Required ... to Be Heard and Determined by a District Court of Three Judges."

The jurisdiction of this Court to decide this case on direct appeal rests on 28 U.S.C. §1253 in that appellants appeal "from an order ... denying, after notice and hearing, [a] ... permanent injunction in [a] civil action ... required ... to be heard and determined by a district court of three judges."

A. A Three-Judge District Court Was Required by 28 U.S.C. §2281.

The complaint in this cause asked that a three-judge district court be convened pursuant to 28 U.S.C. §2281 (A. 9a). The resident district judge (now Circuit Judge), Hon. John D. Butzner, formally requested that the Chief Judge of the Circuit designate a three-judge court in accordance with 28 U.S.C. §2284. (A. 29a). Chief Judge Haynsworth promptly named such a court, noting in his order that the action was one "for the stated purpose of enjoining the enforcement of and declaring unconstitutional portions of §24-252, Code of Virginia, 1950, as being in claimed conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the Voting Rights Act of 1955" (A. 30a). The three-judge district court fully considered the case and deciding both the equal protection claim and the statutory claim on the merits against appellants, denied relief and dismissed the case (A. 67a-73a). There was ***24** nothing in the opinion below suggesting that ally of the three judges below (all of whom are now judges of the Court of Appeals for the Fourth Circuit)

ever questioned the propriety of convening a three-judge court in this case. Nor did the appellees argue in their brief in the court below that the three-judge court was not properly convened.

When a request for a three-judge court is made, the district judge's "inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962). Without question the complaint plainly met the formal jurisdiction requisites. Jurisdiction in the district court was premised on 28 U.S.C. §§1331, 1343, 2201 (A. 4a). Only recently suits based on the same three statutes and filed against the same Virginia State Board of Elections have been reviewed here on direct appeal from three-judge district courts. *Harman v. Forssenius,* 380 U.S. 528, 532-533 (1965) (a suit to enforce the 24th Amendment); *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663 (1966).

The complaint seeks the injunction of enforcement of a state statute "upon the ground of the unconstitutionality of such statute." 28 U.S.C. §2281. The existence of a substantial question of constitutionality must be determined by the allegations of the Bill of Complaint." *Ex Parte Poresky,* 290 U.S. 30, 32 (1933). A three-judge court is not required by Section 2281 "when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent" *Bailey v. Patterson,* 369 U.S. 31, 33 (1962); see *Ex Parte Poresky, supra;* ***25***Turner v.Memphis,* 369 U.S. 350 (1962); *Swift & Co. v. Wickham,* 382 U.S. 111, 115 (1965); *Schneider v. Rusk,* 372 U.S. 224 (1963). However, a three-judge court is required to be convened, and a single judge is "powerless to dismiss the action on the merits" (*Schneider v. Rusk, supra,* 372 U.S. at 225) unless the constitutional question sought to be presented is so plainly insubstantial that it is "no longer open ... foreclosed as a litigable issue" (*Bailey v. Patterson,* 369 U.S. 31, 33 (1962)), or "prior decisions make frivolous" the claim (Id. at 33), or "the constitutional issue presented is essentially fictitious" (Id. at 33), or it is "obviously without merit" (*Ex Parte Poresky,* 290 U.S. 30, 32), or "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky, supra,* quoting from *Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288 (1910).

None of the above quoted characterizations may properly be applied to the equal protection question presented here. On the contrary, petitioners make a substantial claim that Virginia Code §24-252 is inconsistent with the Equal Protection Clause, in that it does not afford illiterates equal protection for the secrecy of their ballots when casting write-in votes. As quite artfully summarized by the Solicitor General:

> "Thereby tendered are such subsidiary issues as whether Virginia may require an illiterate to vote in the handwriting of a state-appointed election judge whose duty of secrecy is not reinforced by the threat of criminal sanctions, while at the same time allowing a literate voter to write his own vote, a physically handicapped voter to be assisted by an election judge who is subjected to criminal penalties if he discloses ***26*** the nature of the vote and a blind person to vote in the handwriting of a person of his own choosing."[3]

These are questions of first impression in this Court. But they are quite clearly questions of a federal nature, involving as they do the right to vote, and to have one's vote counted in the election for a member of the House of Representatives. "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims,* 377 U.S. 533, 562 (1964). "Whatever the ultimate holdings on the questions may be ... [the court should not] dismiss them as insubstantial on their face." *Brotherhood of Locomotive Engineers v. Chicago R.I. & P.R.Co.,* 382 U.S. 423, 428 (1966). Indeed, even if the Court does not accept appellants' equal protection argument, at least it is not "so insubstantial as to compel a district court to read it out of the complaint and refuse to convene a three-judge court." *Zemel v. Rusk,* 381 U.S. 1, 6 (1965).

Nor is the necessity for a three-judge court affected by the fact that "non-constitutional grounds of attack" are also alleged in the complaint, namely appellants' claim under the Voting Rights Act. The Court held in *Florida Lime & Avocado Growers v. Jacobsen,* 362 U.S. 73, 85 (1960) that:

> "Where a complaint seeks to enjoin a State statute on substantial grounds of federal unconstitutionality, then even though nonconstitutional grounds of attack are also alleged, we think the case is one that is *required* by ... Act of Congress to be heard and ***27** determined by a district court of *three judges.*' " 28 U.S.C. §1253 (emphasis is Court's).

The Court has adhered to the view that "a litigant need not abandon his nonconstitutional arguments in order to obtain a three-judge court." *Zemel v. Rusk,* 381 U.S. 1, 5-6 (1965); *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 1947 (1968); *Paul v. United States,* 371 U.S. 245, 249-250 (1963); *Brotherhood of Locomotive Engineers v. Chicago, R. I. & P. R. Co.,* 382 U.S. 423 (1966); see also *Allen v. Grand Central Aircraft Co.,* 347 U.S. 535 (1954); *Sterling v. Constantin,* 287 U.S. 378 (1932). And when the three-judge court is "once convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court." *United States v. Georgia Publ. Serv. Comm.,* 371 U.S. 285, 287, 288 (1963).

The case otherwise meets the requirements of the three-judge statute. There is no question of a law only local in character as the law involved here "applies generally" and statewide in Virginia. Contrast *Sailors v. Kent Board of Education,* 387 U.S. 105 (1967) with *Moody v. Flowers,* 387 U.S. 97 (1967) and *Dusch v. Davis,* 387 U.S. 112 (1967). Indeed the case involves a matter of public importance and significance. The United States Civil Rights Commission has reported on the important problem created in various states by refusal to assist or permit various kinds of assistance to illiterate voters. Report of the United States Commission on Civil Rights, *Political Participation,* pp. 70-74, 111, 128, n. 459 (May 1968). And of course in some areas, including Virginia, where this case arose, write-in candidates for some offices may sometimes win or at least be significant factors in election contests. Write-in candidates are particularly important for political dissidents such as the supporters of S. W. Tucker in ***28** Southside Virginia, who have not been a part of the major political establishment. All too frequently, the problems of race, economic dependency, illiteracy, and lack of political power coincide. The issue whether illiterates' votes shall be kept secret from state officials some of whom have opposed their participation in the electoral process for decades is one of extreme public importance.

B. A Three-Judge District Court Was Required to Be Convened by Subsection 4(a) of the Voting Rights Act of 1965 (42 U.S.C. §1973b(a)), Which Also Provides For a Direct Appeal in This Court.

While we believe that the necessity for a three-judge District Court under 28 U.S.C. §2281 has been sufficiently established for the reasons set forth in Part IA of this argument, *supra,* we also urge that a three-judge court was required by subsection 4(a) of the Voting Rights Act of 1965, 42 U.S.C. §1973b(a), set forth *supra,* pp. 5-6. We think it fit to argue this added ground for a three-judge court even though it was not mentioned in the case heretofore, because the question thereby presented is akin to (though not identical to) a question involved in three Mississippi cases to be argued here this term. See, e.g., Oct. Term 1968, No. 25, *Fairly v. Patterson;* No. 26, *Bunton v. Patterson;* No. 36, *Whitley v. Williams.*[4] Furthermore, ***29** decision of this question is desirable in order to clarify an important undecided issue under the Voting Rights Act and to facilitate and thereby expedite its enforcement by the lower courts.

Subsection 4(a) of the Voting Rights Act (42 U.S.C. §1973b(a)), provides in part in its second paragraph:

> "An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of ***30**section 2284 of Title 28 of the United States Code and any appeal shall lie to the Supreme Court."

The question for decision is whether the present case is "an action *pursuant to*" subsection 4(a) of the Act.

Subsection 4(a), quoted in full *supra* at pp. 5-6, broadly prohibits the denial of the right to vote because of a citizen's failure "to comply with any test or device" (as defined in subsection 4(c), 42 U.S.C. §1973b(c)) in any state covered by the Act. This prohibition is in reality a "suspension" of such tests or devices because under subsection 4(a) it applies "unless" the state has obtained a declaratory judgment against the United States in the District Court for the District of Columbia ruling that no tests or devices have been used for five years to deny the vote on racial grounds.

Plainly then, a suit by a State against the United States seeking the kind of declaratory judgment provided for by subsection 4(a) would be "an action pursuant to" subsection 4(a). This, of course, is not that kind of case, but it is a case in which private parties seek to enforce subsection 4(a) against the prohibitions of a "test or device" used to deny their right to east an effective ballot (See Argument III.A, *infra*). The statutory issue tendered to and decided by the court below was whether Va. Code §24-252 requiring that a write-in candidate's name be inserted in a voter's handwriting was a "test or device" suspended by the Act. The court below held against appellants' contention and ruled that the requirement "is not a test or device defined in 42 U.S.C. §1973b(c)" (A. 72a). We believe that this suit is thus one "pursuant to" subsection 4(a).

In common acceptance "pursuant" means "Acting or done in consequence or in prosecution (of anything): ***31** hence, agreeable; conformable; following; according; with *to* or *of*." Websters New International Dictionary (2d Ed. 1959). This lawsuit was filed "in consequence of" and "in prosecution of" the provision of subsection 4(a) suspending tests or devices. The suit is precisely designed to give effect to and to be "in prosecution of" the subsection and hence, is, in pursuance of it.

A reading of the phrase "an action pursuant to" which limited its meaning only to cases for the specific kind of declaratory judgment authorized to be brought to remove a state from the effectiveness of the subsection is' unnecessarily restrictive. A suit which seeks to enforce the principal substantive provision of the subsection is obviously one "pursuant to" it. A central purpose of Congress in enacting the Voting Rights Act was to enforce the Fifteenth Amendment by removing certain "tests and devices" as obstacles to Negro voting. Whether a given state law establishes a prohibited test or device is obviously of critical importance. The Congress by subsection 4(a) quite plainly intended to provide a three-judge court to determine whether the time had come for states to be removed from the effective prohibitions of the Act. It conforms with that purpose to require a three-judge court also, when in a case such as this, a court must determine whether a particular state law is to be subject to the prohibitions of the Act ever, at any time.

In construing the three-judge requirement of 28 U.S.C. §2281 the Court has pointed out that its significant purposes have been to "provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies" (*Swift & Co. v. Wickham,* 382 U.S. 111, 119 (1965)), "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory ***32** scheme ... by issuance of a broad injunctive order" (*Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 154 (1963)), and "to expedite important litigation" (*Swift & Co. v. Wickham, supra,* at 124). These same purposes are served by the three-judge requirement of subsection 4(a) of the Voting Rights Act. But the purposes will only be served fully if the statutory phrase "An action pursuant to this subsection" is construed to reach at least those cases in which subsection 4(a) is invoked as the basis for a requested injunction against the enforcement of a state law alleged to be suspended by the subsection as a prohibited "test or device."

In conclusion we point out first, that the decision in *County Board of Elections of Monroe County, N. Y. v. United States,* 383 U.S. 575 (1965), does not affect the question involved here. That suit by the United States sought to enforce subsection 4(e) of the Voting Rights Act (42 U.S.C. §1973b(e))[5] which unlike section 4(a) does not contain any provision for a three-judge court. The suit was dismissed under the doctrine of *Swift & Co. v. Wickham,* 382 U.S. 111 (1965), because the only ground urged for jurisdiction was the conflict between federal and state statutes. Second, although the Voting Rights Act does not explicitly authorize private individuals to sue to vindicate rights created by subsection 4(a) not to "be denied the right to vote in any Federal, State, or local election because of ... failure to comply with any test or device," nevertheless such private suits are plainly authorized by 42 U.S.C. §1983 and 28 U.S.C. §1343(4) authorizing suits "under any Act of Congress providing for the protection of civil rights, including the right to vote."*Gray v. Main.* ——— F.Supp. ——— (not yet reported) (M.D. Ala. No. 2430N, ***33** March 29, 1968). Third, the provision of the Voting Rights Act of 1965 limiting jurisdiction to the District Court for the District of Columbia (subsection 14(b); 42 U.S.C. §1973***l***(b)) applies only to injunctions against

enforcement of the Act and to Declaratory Judgment suits brought by the states to avoid coverage of the Act. Suits to vindicate the Act may be brought by the Attorney General in the "district courts of the United States" (Section 12(f); 42 U.S.C. §1973j(f)), and private suits to enforce the Act are similarly not limited by the provision restricting attacks on the law to the District of Columbia court. *Gray v. Main,* ——— F.Supp. ——— (not yet reported) (M.D. Ala. No. 2430-N, March 29, 1968).

II.

Virginia Code Section 24-252, on Its Face and as Administered Denies Illiterates Equal Protection With Respect to Write-in Voting in Violation of the Fourteenth Amendment to the Constitution of the United States.

Appellants are registered voters in Virginia who desire to vote for write-in candidates in general elections. But they are unable to spell accurately or write legibly (A. 67a), and Virginia has failed to provide means to protect the secrecy of illiterates' write-in votes equal to the means provided for protecting the write-in votes of other classes of voters. The law appellants challenge on equal protection grounds, Section 24-252 of the Code of Virginia, 1950, provides:

> "At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a ***34** check (✓) or cross (X or +) mark or a line (--) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of §24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

This statutory provision is designed to implement the state constitutional provision allowing voters to cast write-in votes. (Constitution of Virginia, §28, quoted *supra,* at p. 4; "... but any voter may erase any name and insert another.")

The requirement that such write-in votes be in the voter's "own handwriting" was added to the law as a 1952 Amendment.[6] The 1952 handwriting amendment to the write-in vote provision was consistent with other provisions of Virginia law imposing handwriting tests for voters, including a constitutional provision[7] and implementing stat ***35** utes[8] stipulating that unless "physically unable to do so" an applicant for voting registration must complete the required form "in his own handwriting."

FN

Second. That, unless physically unable, he make application to register in his own handwriting, on a form which may be provided by the registration officer, without aid, suggestion, or other memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, tile State, county, and precinct in which he voted last; and, * * *"

On August 7, 1965 Virginia became subject to certain provisions of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. §1973 et seq.[9] Under the Act the handwriting tests for voter registration, just mentioned above were suspended, as the State Board of Elections conceded (A. 60a-61a). A question involved in this case and discussed in Argument III below, is whether this statutory suspension also applied to Virginia Code Section 24-252.

The present controversy about write-in votes arises in the context of Virginia's further reaction to the Voting Rights Act. Appellants sought to cast write-in votes in the 1966 Congressional election[10] for S. W. Tucker, by pasting thin gummed strips of paper or "stickers" upon which his name was printed on to the ballot and then making the appropriate check mark or cross by his name. The appellees refused to count the votes thus attempted to be cast for Tucker. In refusing to count these votes appellees relied upon section 24-252 which states in its last sentence ***36** that ballots with "a name or names placed thereon in violation of this section" shall not be "counted for such person."

The opinion below took note of the provision Virginia has made for assistance to blind and other physically handicapped voters and correctly observed that:

> Section 24-251, Code of Virginia 1950, authorizes a judge of election, upon request, to assist a physically handicapped voter prepare his ballot, and allows a blind voter to be aided by a person of his choice. The assistants are enjoined to secrecy. For any corrupt violation of their duties, they may be punished by confinement in jail for not less than one nor more than twelve months. No provision was made for helping an illiterate person because under Virginia law all voters had to demonstrate ability to read and write. (A. 71a).

The court went on to acknowledge that Virginia had in 1965 directed its registrars to help illiterate persons register to vote after the Voting Rights Act was enacted (A. 71a). The opinion also quoted the text of the election board's October 15, 1965 bulletin (A. 72a) directing judges of election that illiterates who sought aid should be aided in the preparation of their ballots by one of the election judges selected by the voter. Virginia has not enacted any statute since the Voting Rights Act to deal with this subject. The election board's distribution of an internal bulletin to secretaries of electoral boards and judges of elections (A. 63a-64a) thus apparently represents the full extent of the state's attempt to adjust its laws and practices to accommodate the newly enfranchised illiterates in casting their write-in ballots. There was no evidence by the board indicating to what extent if any the election ***37** officials made known to the community or to individual illiterates either the contents of the October 15, 1965 bulletin, or that assistance was available.

The Court below, construing section 24-252 as a legislative prohibition against the use of stickers,[11] said in its opinion that the propriety of stickers was a matter for "legislative, not judicial determination" (A. 68a). The equal protection attack on §24-252 as an unconstitutional discrimination against illiterates was rejected by the Court below which reasoned that the "*exclusion* of illiterates from voting ... does not violate the Fourteenth Amendment," in reliance upon this Court's decision in *Lassiter v. Northampton Election Board,* 360 U.S. 45 (1959) (A. 69a; emphasis supplied). Thus finding constitutional support for discrimination against illiterates in the *Lassiter* case, *supra,* the Court below held "*we* conclude that §24-252 does not violate the Fourteenth Amendment by discriminating between literate and illiterate voters" (A. 70a).

By way of further background, we add two observations. First, it is agreed by all the parties to this case that appellants are entitled to vote in their respective counties, notwithstanding their illiteracy. This is, thus, not a controversy involving the state's right to set the qualifications of voters. Cf. *Lassiter v. Northampton Election Board,* 360 U.S. 45 (1959). Second, Virginia law recognizes the value of a *secret* ballot; the State Constitution provides that "elections shall be by ballot" and that "the absolute secrecy ***38** of the ballot shall be maintained" (Constitution of Virginia, §27).

With this background, and with the case in this posture, we address the equal protection claim against Code section 24-252.

At the outset we emphasize the fact that appellants' equal protection claim involves the "precious" and "fundamental" (*Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670 (1966)) right to vote. These are "matters close to the core of our constitutional system." *Carrington v. Rash,* 380 U.S. 89, 96 (1965). Mr. Chief Justice Warren wrote for the Court that "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). And so the court has

applied strict conceptions of equal protection where voting rights are at stake. As the Court said in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670 (1966):

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully examined. *Skinner v. Oklahoma,* 316 U.S. 535, 541;*Reynolds v. Sims,* 377 U.S. 533, 561-562;*Carrington v. Rash,* 380 U.S. 89;*Baxstrom v. Herold,* 383 U.S. 107;*Cox v. Louisiana,* 379 U.S. 536, 580-581 (Black J. concurring)."

In *Reynolds v. Sims, supra,* at 561, 562 the court stressed the same theme, stating:
"Like *Skinner v. Oklahoma,* 316 U.S. 535, such a *case* 'touches a sensitive and important area of human ***39** rights,' and 'involves one of the basic civil rights of man,' presenting questions of alleged 'invidious discriminations ... against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.' 316 U.S., at 536, 541. Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins,* 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S. at 370."

The references to the Oklahoma compulsory sterilization case, *Skinner v. Oklahoma,* 316 U.S. 535 (1942) in *Harper* and *Reynolds, supra,* highlight a case where the seriousness of the right involved, and of the injury threatened, weighed heavily in the consideration of the equal protection claim. Voting rights cases present problems of a similar dimension as the court has recognized in *Harper* and *Reynolds, supra.*

As written, §24-252 allows literate persons to cast write-in votes but prohibits such votes by persons unable to insert the candidates' names in their own handwriting. Viewed simply as written, without the gloss of the administrative interpretation placed upon the law by the State Board of Elections in the October 15, 1965 bulletin, the law is, we think, plainly unconstitutional in violation of the equal protection clause. It may well be (as we assume for the purpose of this argument) that under the doctrine of ***40***Lassiter v. Northampton Election Board,* 360 U.S. 45 (1959),[12] Virginia formerly could require literacy and a handwriting test such as that in section 24-252 as a prerequisite to casting a valid write-in vote. That circumstance is, we submit, no longer relevant once the state's power to impose a literacy test is removed, as it has been by the Voting Rights Act of 1965, and all voters literate and illiterate are enfranchised. Once illiterates are enfranchised, the state may not invidiously discriminate against them. "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 665 (1966). Compare the analogous problem dealt with in *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966), where the Court said:

"This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois,* 351 U.S. 12;*Douglas v. California,* 372 U.S. 353;*Lane v. Brown,* 372 U.S. 477;*Draper v. Washington,* 372 U.S. 487."

No more serious, invidious and irrational discrimination may be postulated than one which allows all literate persons the option to vote either for listed candidates or write-in candidates, but operates to limit illiterates to voting for persons listed on the ballot. This is precisely the discrimination which results from §24-252 as written. Such a rule could serve no legitimate function. No relevant ***41** difference between literates and illiterates supports a rule confining the latter to vote for listed candidates while others, including blind and handicapped persons equally unable to write for themselves (Code §24-251), are

permitted to cast write-in ballots.

While the breadth of the language of the court below would lend itself to a reading that any form of voting discrimination in favor of literates and against illiterates is constitutional, we do not understand that the Virginia State Board of Electons now seeks to justify such a proposition. By the October 15, 1965 bulletin the Board partially accommodates to the new situation created by the Voting Rights Act of 1965. However in so doing the Board has created more subtle, but nonetheless, equally serious and invidious forms of discrimination between literates and illiterates. These discriminations, which we analyze in some detail below relate to the secrecy of the ballots of the various classes of persons affected by the statutory scheme.

Section 24-252 as it is administered for illiterates in accordance with the October 15, 1965 bulletin and in conjunction with §24-251 presents a complicated pattern of classifications and relationships. Illiterates who desire to vote for write-in candidates are, as we shall demonstrate, the least favored class. With respect to secrecy of write-in votes these classes appear as follows:
1. Literate voters can still vote write-in ballots and can do so in "absolute secrecy" as guaranteed by Virginia's Constitution, Article 27.

2. Blind voters may vote write-ins, and because they must necessarily sacrifice their secrecy to some extent they are permitted to be aided by any persons they ***42** choose including judges of elections or others. State criminal sanctions are available to punish any such assistant who "corrupt[ly]" violates the command that the voter be assisted "in accordance with his instructions" and that the nature of his vote not be divulged. This enables the blind voter's ballot to be secret against all the world save for the assistant chosen by the voter himself.

3. Physically handicapped voters (other than the blind) may also vote write-ins, but if they require assistance to write on their ballots it must be given by "one of the judges of election designated by" the voter. The judge of election is subject to the same criminal sanctions described above as pertaining to the blind voter's assistant. Thus the physically handicapped are required to disclose their write-in votes to a state official, but are protected by criminal sanctions.

4. Illiterates unable to spell or write legibly because of educational handicaps are permitted (under the election board's bulletin) to vote write-in votes. But the assistance must come from one of the judges of elections selected by the voter. The administrative bulletin, but no state criminal law, directs judges to follow voters' instructions and not divulge their votes (A. 64a). Illiterates must give up their right to "absolute secrecy" to a state election judge who is under no threat of criminal sanctions to follow instructions or preserve secrecy.

As this analysis makes clear, illiterate voters are plainly the least favored class with respect to secrecy of the ballot. This is further emphasized when the groups are analyzed in terms of their opportunity to insure that their ***43** instructions are followed and that the vote is actually cast for the candidate of their choice. Literate and physically handicapped voters have no problem in this regard as they can see and understand how their ballots are marked. An illiterate unable to read must rely on a state official, while a blind person can at least choose a trusted friend in whom to place confidence and responsibility. And the "trusted friend" is subject to criminal sanctions while the illiterate's assistant is not.

Further analysis of the four classes with respect to their need for assistance when they support a listed candidate as against a write-in candidate shows that the regulatory pattern also tends to penalize support of write-in candidates to the extent that it does differentiate between candidates. Thus for literate voters and blind voters the pattern imposes no apparent advantage or disadvantage in voting for a listed or unlisted candidate. Conditions of secrecy or lack of secrecy remain the same in both groups no matter what type of candidate is selected. This is also true with respect to almost all physically handicapped voters as well. (The only exception would be the group of handicapped persons who were physically unable to write a candidate's name, but could make a mark by a listed candidate's name or operate a voting machine without assistance.) For illiterates able to recognize names on a ballot, or able to memorize in advance their place on the ballot or voting machine the system introduces a significant advantage in voting for a listed candidate. Such votes can be cast without surrendering secrecy as must be done if an illiterate votes for a write-in candidate. So in still another dimension the regulatory scheme penalizes the illiterate who seeks to cast a write-in more than it penalizes any other group, and thus penalizes a write-in candidacy.

***44** The question remains whether Virginia has offered any rational justification for this "crazy quilt"[13] of discrimination. It is true that the state has treated all illiterates with an equal hand. "And mere classification, as this Court has often said, does not of itself deprive a group of equal protection." *Carrington v. Rash,* 380 U.S. 89, 92 (1965). We must inquire "whether the classifications drawn in a statute are reasonable in light of its purpose ... whether there is an arbitrary or invidious discrimination...." *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964); *Carrington v. Rash,* 380 U.S. 89, 93. The distinctions that are drawn must have "some relevance to the purpose for which the classification is made." *Baxstrom v. Herold,* 383 U.S. 107, 111 (1966); *Rinaldi v. Yeager,* 384 U.S. 305, 309 (1966). We examine in turn the discriminations between the illiterate and literate, the illiterate and the blind, and the illiterate and the physically handicapped. We think none of them founded in rationality. Rather the resultant crazy quilt is a capricious remnant of the state's now forbidden policy prohibiting all voting by illiterates.

We think there is no justification for providing the literate voter absolute secrecy, while giving the illiterate voter no protection for the secrecy of his write-in vote save an election board bulletin asking voting judges to respect it. All the more is this true when the secrecy must be surrendered to a state official. The appellants devised a method for completely protecting the secrecy of their ballots. Their entirely reasonable solution to their dilemma, which they face in future contests unless they prevail in this case, was to use voting stickers. The election board ***45** had no valid interest in having votes cast in the handwriting of any particular person. Using stickers is a method approved in a number of state courts, without very specific legislative enactments directed to the issue. *Pace v. Hickey,* 236 Ark. 792, 370 S.W. 2d 66 (1963); *O'Brien v. Election Comm'rs.,* 257 Mass. 332, 153 N.E. 553 (1926); *Dewalt v. Bartley,* 146 Pa. 529, 24 Atl. 185 (1892); *State v. Anderson,* 191 Wise. 538, 211 N.W. 938 (1927). Contra see *Fletcher v. Wall,* 172 Ill. 426, 50 N.E. 230 (1898), *Blackman v. Stone,* 101 F.2d 500, 504 (7th Cir. 1939), and *Morris v. Fortson,* 261 F.Supp. 538 (N.D. Ga. 1966). Faced with Virginia's failure to provide for them to cast write-in votes secretly, and indeed with the state legislature's failure to provide for them at all, appellants' use of voting stickers to accurately and consistently indicate the name of their favored candidate was entirely reasonable under the circumstances.

When the discrimination against the illiterate vis-a-vis physically handicapped and blind voters is examined with an eye to rational legislative justification the state scheme really fails. No valid purpose is served by allowing some voters to protect their votes from disclosure to state officials and requiring such disclosures of others. Nor is any legitimate end served by protecting the secrecy of some voters' ballots by criminal sanctions and denying this protection to illiterates. There is "no defensible interest served" (*Rinaldi v. Yeager,* 384 U.S. 305, 309 (1966)) by such "unreasoned distinctions" (Id. at 310) as Virginia has made in this case. It cannot be said that the classification made is "reasonable in light of its purpose" (Cf. *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964)), where the only discernible purpose is to make the exercise of the franchise significantly more onerous when an illiterate seeks to cast a ballot for a write-in candidate. The state may not protect the secret ballot for some and "arbitrarily ***46** withhold ... [protection] from some" *Baxstrom v. Herold,* 383 U.S. 107, 111 (1966).

The value of a secret ballot, in a free and democratic society is self-evident. Virginia's Constitution pledges "absolute secrecy". The right to a secret ballot also finds support in relevant federal law. Nearly 100 years ago Congress enacted the law which is now codified as 2 U.S.C. §9, quoted supra at p. 4. This law says that votes in Congressional elections "must be by written or printed ballot" and has been construed to require a *secret* ballot. See *Johnson v. Clark,* 25 F.Supp. 285 (N.D. Tex. 1938); *cf. Voorhes v. Dempsey,* 231 F.Supp. 975 (D.Conn. 1964). When Congress enacted 2 U.S.C. §9, in 1871, it intended to provide a secret ballot as opposed to the *viva voce* method of voting, which was seen as the alternative. During the debates on §9 (this section was originally section 19 of the Act of Feb. 28, 1871, 16 Stat. 440, c.99, §19), Congressman Bingham said: "What objection can there be to the ballot? ... It occurs to me that there is but a single State in the Union today that tolerates the old method of voting viva voce." Cong. Globe, 41st Cong., 3d Sess. 1284 (1871). The evils Congress was concerned with in 1871 bear a direct relationship to the problems addressed by the Voting Rights Act of 1965 as the debate quoted below indicates.[14]

***47** Secrecy was clearly a part of the contemporary 19th century understanding of the word "ballot" as is evidenced by judicial usage. See *In. Re Massey,* 45 F. 629, 634-635 (E.D. Ark. 1890):

> That the word "ballot" implies secrecy is unquestioned, and, if it was provided that the election shall be by ballot, and nothing further was said, then it would be without doubt the right of the elector to have the secrecy of the ballot preserved from impertinent or improper inspection ....

The right of a secret ballot is of considerable practical moment for political dissidents, such as appellants, who were supporters of a write-in candidate opposing an incumbent who had served ten consecutive terms.[15] In such circumstances the right to keep one's vote secret from a state election judge belonging to the dominant political group is of more than abstract importance. Virginia election judges are appointed by local electoral boards under a statute which directs that representation be given to the two leading political parties in the last election, Va. Code §24-30.

***48** Illiterates who support unpopular dissident candidates are the ones who will feel the pinch of Virginia's discriminatory denial of a secret ballot. It would take no great courage for an illiterate to seek aid from an election judge to vote in favor of the State's dominant political forces. But it would be another matter entirely when the illiterate supporter of a dissident minority candidate--the black supporter of a civil rights leader like S. W. Tucker for example--arrives at the polls in some areas of Virginia Fourth Congressional District such as Prince Edward County.[16] The Civil Rights Commission has made a finding which demonstrates the scope of the problem still faced by Negro illiterates in areas subject to the Voting Rights Act. The Commission recently reported (U. S. Commission on Civil Rights, *Political Participation,* May 1968, 183-184):

In some areas, even though Federal observers have been present, local election officials have engaged in various practices resulting in the denial of adequate assistance to Negro illiterates or in the disqualification of their ballots. These practices include (1) failing to inform Negro illiterates of their right to assistance; (2) refusing to assist Negro illiterates; (3) refusing to assist Negroes who call sign their names but are otherwise functionally illiterate; (4) refusing to supply the proper number of voting officials to assist Negro illiterates; (5) humiliating Negro illiterates who need or request assistance; (6) marking the ballots of Negro illiterates contrary to their wishes; (7) permitting Negro illiterates to mismark their own ballots; (8) failing to instruct Negro illiterates ***49** on the use of voting machines; (9) failing to point out to Negroes disqualifying errors in the marking or casting of their ballots; (10) denying to Negro illiterates the right to use sample ballots where permitted by State law; and (11) denying to Negro illiterates the right to have the assistance of by-standers where permitted by State law.

Nor has the State of Virginia been entirely free of difficulties. In Nansemond County, Virginia, in the 4th Congressional District in July 1967, the Ku Klux Klan conducted a campaign of intimidation and confusion which caused many Negroes to stay away from the polls on primary day. Civil Rights Commission Report, pp. 127131. The problems caused by economic dependence are considerable.[17] The United States has prosecuted litigation designed to assure assistance to illiterates. *United States v. Louisiana,* 265 F.Supp. 703 (E.D. La. 1966), aff'd per curiam 386 U.S. 270 (1967); *United States v. Mississippi,* 256 F.Supp. 344 (S.D. Miss. 1966); *United States v. Executive Com. of Dem. Party of Greene Co., Ala.,* 254 F.Supp. 543 (N.D. and S.D. Ala. 1966). Private plaintiffs also have been litigating the problems of Negro illiterates in such circumstances. *Gray v. Main,* ——— F.Supp. ——— (not yet reported) (M.D. Ala. No. 2430-N, March 29, 1968).

Moreover, the right to a secret ballot is obviously intimately connected with the right of privacy of association ***50** for the advancement of political beliefs, a right plainly protected by the First Amendment. *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958); *Talley v. California,* 362 U.S. 60 (1960); *Shelton v. Tucker,* 364 U.S. 479 (1960); *Bates v. Little Rock,* 361 U.S. 516 (1960); *Gibson v. Florida Investigation Committee,* 372 U.S. 539 (1963); cf. *Zwickler v. Koota,* 389 U.S. 241 (1967). The exact relation between voting and political expression has not yet been canvassed by the Court, *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 665 (1966), but quite plainly the secret ballot is a valuable privilege which cannot be denied or infringed on a discriminatory basis consistent with the Equal Protection Clause. The Virginia discrimination against illiterates serves no overriding governmental purpose which can justify the pattern of differential treatment.

III.

Virginia Code §24-252 Is in Conflict With the Voting Rights Act of 1965.

A. Virginia Code §24-252 Is a Prohibited "Test or Device" Which Was Used to Deny Appellants' Right to Vote in Violation of Section 4 of the Voting Rights Act of 1965 (42 U.S.C. §1973b).

Mr. Chief Justice Warren wrote for the Court in *South Carolina v. Katzenbach,* 383 U.S. 301, 308, wherein the Court upheld the constitutionality of the principal portions of the Voting Rights Act, that the law "was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." Among the "stringent new remedies" (Id. at 308) designed by Congress an important feature is subsection 4(a) suspending "literacy tests and similar devices for a period of five years from ***51** the last occurrence of substantial voting discrimination" (Id. at 334).

Appellants invoke subsection 4(a) seeking redress for the refusal of Virginia election officials to count their ballots in 1966 and in future elections. In this case appellants' write-in votes were not counted as votes for S. W. Tucker because Tucker's name was placed on the official ballot by printed stickers rather than in the voters' "own handwriting" as required by Virginia Code §24-252. Under the last sentence of §24-252: "No ballot, with a name ... placed thereon in violation of this Section, shall be counted...." This action violated the Voting Rights Act of 1965 because the legal effectiveness of §24-252, upon which the election officials relied for their action in disallowing the votes, had been suspended by the federal statute on August 7, 1965.

Subsection 4(a) of the Voting Rights Act of 1965, quoted *supra,* pp. 5-6, provides that "... no citizen shall be denied the right to vote in any Federal, State or local election because of his failure to comply with any test or device in any State ...," which is subject to the Act's coverage formula, with certain exceptions and provisos not material here.

Our inquiry then is to determine whether appellants were "denied the right to vote in [a] ... Federal ... election," and, if so, whether that denial was "because of ... [their] failure to comply with any test or device ..." If these questions are answered affirmatively (as we urge below) it would follow that appellants were entitled to judicial relief to enforce Section 11(a) of the Voting Rights Act of 1965 (42 U.S.C. §1973i(a), which says:

> "No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to ***52** vote under any provision of this subchapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote."

The District Court took note of the Election Board's defense based on its October 15, 1965 bulletin (quoted in Statement, *supra,* at 14-15; A. 64a), and rejected appellants' statutory argument by saying:
"The requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. §1973b(c). The requirement did not preclude the plaintiffs from registering or from voting. Under present Virginia statutes and regulations of the Board of Elections, an illiterate can cast a valid write-in ballot by enlisting the assistance of a judge of election. No evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he is entitled." (A. 72a).

We discuss, first, whether the handwriting requirement of §24-252 is a "test or device." We think that it has the attributes described in the statutory definition of "test or device." Voting Rights Act subsection 4(c), 42 U.S.C. §1973b(c) defines "test or device" in part to mean "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, *write,* understand, or interpret *any matter,* (2) demonstrate any educational achievement or his knowledge of any particular subject ..." (emphasis added). Section 24-252 is such a test because it does make it a prerequisite for voting a valid write-in ballot that the voter demonstrate the ability to write the candidate's name on the official ballot.

53** It is equally plain that the statute operated so that appellants were "denied the right to vote in [a] ... Federal ... election." To be sure appellants were allowed to register, and they were allowed to *attempt* to vote but they were denied the "vote," because as defined in section 14 (c) (1) of the Act, 42 U.S.C. §1973l***(c)(1), quoted at p. 8, *supra,* the term "vote" includes "having such ballot counted." The 14(c) (1) definition of "vote" and "voting" is framed to "include all actions necessary to make a vote effective ... including, but *not limited to registration,* listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast...." (Id., emphasis added).

Thus, the test suspension was "not limited to registration" of voters, and not even limited to the casting of ballots. The Act also suspended every "test or device" that might prevent a vote from being counted properly and included in the appropriate totals of votes cast. The District Court said that Virginia "did not preclude the plaintiffs from registering or from voting" (A. 72a). This answer is insufficient in a case where their votes were not counted because of a statutory provision admitted to contain a prohibited "test or device." The statutory definition by which "voting" is deemed to include "having a vote counted" is consistent with normal usage and with the usage of this Court over a long period of time. See *United States v. Mosely,* 238 U.S. 383 (1915); *United States v. Classic,* 313 U.S. 299, 315 (1941). Thus it follows that Section 24-252 was used to deny appellants right to "vote" in violation of the Voting Rights Act.

The Board seeks to avoid the thrust of appellants' argument that the handwriting requirement used to invalidate their ballots is a prohibited test or device under ***54**Section 4(a) by pointing to the fact that on October 15, 1965 the Board ordered election judges to aid illiterates. However this argument is unresponsive to the question whether §24-252 was suspended as a matter of law on August 7, 1965 several months before the election board's reaction. If §24-252 was suspended the only statutory basis for disallowing appellant's votes disappears and the command of Voting Rights Act §11(a) that the votes must be counted is controlling. The Board argues the case as if there were some Virginia law other than §24-252 which prohibits the use of stickers. But the only prohibition in Virginia law against stickers is the suspended requirement of §24-252 that ballots must be in the voter's own handwriting.

This controversy involves the "manner of holding elections for Senators and Representatives," a matter which under the Constitution of the United States (Article 1, section 4, clause 1) is committed to the ultimate control of the Congress. Congress is fully authorized under the Constitution to "make or alter" rules regarding the manner of conducting a federal election. A federal law intended to be protective of the right to vote in federal elections should be liberally construed as against a state enactment which narrowly and technically restricts the right to cast effective votes. As the whole area of federal election mechanics is committed to Congressional control there is no problem of infringement of States' rights underlying the controversy. Furthermore "the right to vote in federal elections is conferred by Art. I, §2, of the Constitution" *Harper v. State Board of Elections,* 383 U.S. 663, 665 (1966); *United States v. Classic,* 313 U.S. 299, 314-315 (1941).

The policy against rules which thwart the right to vote on the basis of the technicalities of state law has been stated very plainly by the Congress. The provisions of ***55**42 U.S.C. §1971(a)(2)(B), forbid the denial of the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election.[18] There is no justification, in terms of administrative convenience, for disallowing ballots on such an overly technical ground as that used by appellees. As the Court said a few terms ago in another context involving a threat to the right to vote in *Carrington v. Rash,* 380 U.S. 89, 96 (1965).:

We deal here with matters close to the core of our constitutional system. "The right... to choose," United States v. Classic, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. Oyama v. California, 332 U.S. 633.

The appellants' use of stickers to indicate their votes was entirely reasonable under the circumstances and the States' invalidation of their ballots was unreasonable. The Voting Rights Act should be construed to block unreasonable measures which disenfranchise voters where it may be reasonably construed to accomplish this end. Appellants faced a dilemma in the

1966 election; they face the same problem in future contests. They desired to vote write-in ballots for S. W. Tucker. They also sought to keep their votes secret. Virginia law, on the face of the statute books, still absolutely forbade them to vote except ***56** in their own handwriting. The statutes made no exception for illiterates to be aided even by election judges. An Election Board bulletin directed election judges to aid them on request. But the Election Board had no power to enact any criminal law which might be a deterrent to a voting judge breaching a voter's confidence, and did not purport to do so. Thus, illiterates were not offered the protections which were offered to handicapped and blind voters by Virginia Code section 24-251.[19] Voters who could not read had the problem, which physically handicapped voters did not have, of not having any available means of knowing whether or not the election judge was faithfully carrying out their directions. Blind voters were offered the option of being assisted by a trusted friend; appellants were not given this choice. Voters with physical handicaps other than blindness could observe and comprehend the actions of the election judges who cast their votes. Only illiterate voters were placed entirely at the mercy of election judges who were not even bound by any statute of the state to follow their instructions or keep their confidence.

***57 B. Section 5 of the Voting Rights Act (42 U.S.C. §1973c) Nullifies the Election Board's New Procedures Which the Board Asserts in Defense of Its Action.**

The Board's rebuttal to the appellants' statutory attack on Section 24-252 places heavy reliance on the new procedure reflected in the Board's October 15, 1965 bulletin (A. 63a). The Board argues this case as if this internal agency bulletin were in effect an amendment to Virginia Code Section 24-252, and the Court below seems to have accepted the bulletin more or less on that basis. We have urged above in part III. A., that the bulletin provides no relevant response to the appellants' contention that Section 24-252 has been suspended by the Federal Act, and that it is not in the power of the State to resuscitate it for the time being. Section 5 of the Voting Rights Act provides an equally conclusive surrebuttal to the Board's argument.

Section 5 of the Act (42 U.S.C. §1973c) prevents any new state rule with respect to voting procedures from taking effect in certain states pending appropriate federal administrative and/or judicial review to determine that the new rule does not have a racially discriminatory purpose or effect. See *South Carolina v. Katzenbach,* 383 U.S. 301, 319-320, 333-334 (1966). In upholding this admittedly "decisive" measure against arguments by the affected states that it was unconstitutional, the Court pointed to the fact that "Congress knew that some of the States covered by §4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina v. Katzenbach,* 383 U.S. 301, 335 (1966). Section 5 was designed to give "further appropriate assurance that 15th Amendment ***58** rights will not be denied, either by laws currently in force, or by fertile imaginations." 111 Cong. Rec. 8303, April 22, 1965 (remarks of Senator Hart).

The October 15, 1965 bulletin, and the procedure it announces are ineffective to save Virginia Code §24-252 because the new procedures are still precluded by Section 5 of the Voting Rights Act. Section 5 requires review of any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." Virginia has not submitted its new procedures to the Attorney General for review, or obtained an appropriate declaratory judgment approving these new procedures. Accordingly, under Section 5 "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure."

The Solicitor General has stated for the United States that Virginia has made no attempt to comply with the notice and review procedures of Section 5, and that the United States does not regard the matter as "a purely formalistic rite." (Memorandum for the United States, pp. 6-7). The legislative history of Section 5 makes it clear that the provision was intended to apply to all kinds of changes of a covered state's voting machinery. Its coverage is "all-sweeping"[20] though truly trivial changes would of course obtain the consent of the Attorney General of the United States upon the requisite notice of the change from the State's legal officer. In the House Hearings Attorney General Katzenbach agreed that a variety of hypothetical ***59** changes would be subject to the review requirement such as a change of voting age, a change of residence requirements, a change from paper ballots to machines, changes of property requirements, and changes in the dates and hours for registration.[21]

The Board has advanced no adequate explanation for its failure to comply with the requirements of Section 5. The Board's argument that the procedure is too time-consuming is merely an attack on the policy and wisdom of the legislation itself. Disagreement with Section 5 is no excuse for failure to follow its notice procedures.

Appellants urge that the consequence of the application of Section 5 to this case is merely to establish the insufficiency of a ground urged by the Board in reply to Appellants' attack on Code Section 24-252. Appellants do not agree, as urged by the United States last term before the case was set down for argument, that the Court should decide the Section 5 issue, and use it to avoid decision of the appellants' other challenges to Section 24-252. We believe that any resolution of the litigation which leaves it still open to the State to enforce Section 24-252, or to unduly jeopardize the secrecy of illiterate's ballots fails to meet the vital issue properly presented by this litigation. The issues properly presented should not be avoided merely because the State has injected into the case a defense which fails under Section 5 of the Act. Appellants are entitled to obtain equal protection for their secret ballots in the suit they brought for that purpose.

*60 CONCLUSION

WHEREFORE it is respectfully submitted that the judgment of the Court below should be reversed and the district court directed to grant injunctive and declaratory relief as prayed for in the complaint to invalidate Section 24-252 insofar as it purports to deny any voter, solely because of his inability to write, the privilege of casting a secret ballot for a person whose name is not printed on the official ballots, and to enjoin the appellees from refusing to count votes solely because the name of the candidate was not inserted on the ballot in the handwriting of the voter.

Footnotes

[1] Citations to "R." refer to the Record of original papers on file in this Court.

[2] The designation of Virginia under §1973b(b) was published in the Federal Register on August 7, 1965, 30 Fed. Reg. 9897. In describing the history which led to passage of the Act this Court said in *South Carolina v. Katzenbach,* 383 U.S. 301, 310-311 (1966):

> Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. (Footnotes omitted.)

[3] *Allen v. State Board of Elections,* Oct. Term 1967, No. 661, Memorandum For The United States, p. 4.

[4] In the Mississippi cases the contention is made by the United States (in a memorandum submitted last term) that Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c) required three-judge courts. The cases involve whether the phrase in the last sentence of Section 5 "any action under this section" includes only suits instituted by states seeking a declaratory judgment provided for by Section 5 or whether "any action under this section" also includes private suits to vindicate the substantive prohibition of Section 5, i.e., where Section 5 is invoked as a basis

for invalidating a state law.

The arguments by appellants in the present suit concerning whether Section 4 required three judges are somewhat like those which the United States has made concerning Section 5. We note that the Memorandum of the United States in the above mentioned eases does distinguish between the language of Section 4(a) ("an action pursuant to this subsection") and that in Section 5 ("any action under this section") and suggests that there is a better case for a more inclusive coverage in the latter usage. But we think, as we urge, *infra,* that there is a reasonable argument on the facts of the present ease that Section 4(a) required a court of three judges.

We are doubtful of the direct applicability of the jurisdictional argument made by the United States based on Section 5 to the present case. While we agree with that argument and find it persuasive, the issue about Section 5 in this case arose in a different way than it did in the Mississippi eases. The Mississippi eases were premised on Section 5 from the outset. However, Section 5 was not invoked specifically in the complaint in this case because the appellants attack in the complaint was aimed at action taken by Virginia officials in refusing to count ballots under Va. Code Section 24-252, which was enacted long *before* the Voting Rights Act and thus is not susceptible to attack on the basis of Section 5 which is aimed at post-Nov. 1, 1964 enactments. An issue under Section 5 was first thrust into this case when the state defended by relying on a new administratively adopted practice for assisting illiterates which was offered and accepted by the trial court as justification for the states action in disallowing appellants' ballots. We think it proper for the court to consider the effect of Section 5 upon the state's defense, particularly in view of the insistence of the United States, which is charged with direct responsibility in administering that provision, that it be followed. See Argument III. B., *infra.* But we think it unnecessary to rely on Section 5 to establish the jurisdictional point here.

[5] Subsection 4(e) is the provision relating to persons literate in Spanish which was upheld by this Court in *Katzenbach v. Morgan,* 384 U.S. 641.

[6] Virginia Acts 1952, c. 581. The Editorial note to section 24-252 in the Virginia Code 1964 Repl. Vol. 5, p. 271 states: "The 1952 amendment deleted from the first sentence the words 'the name or names of any person or persons' and inserted in lieu thereof the words 'the name of any person in his own handwriting thereon and to vote for such other person.' The amendment also added the proviso and the last sentence."

[7] Constitution of Virginia, section 20, provides in part, as follows:

§20. Who may register.--Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

[8] See e.g., Virginia Code of 1950, section 24-68, which restates the constitutional requirement quoted in the preceding footnote and provides a statutory form for registration, etc. See also Virginia Code of 1950, section 24-71 providing *inter alia* that while making application to register to vote an applicant "shall not be permitted to refer to any pamphlet, booklet or other memorandum, printed or written, nor to discuss with any person any matter concerning the requirements..."

[9] Virginia was designated under 42 U.S.C. §1973b (b) on August 7, 1965 by appropriate publication in the Federal Register. 30 Fed. Reg. 9897.

[10] Note that the election contest which precipitated this suit occurred in 1966 more than 15 months after enactment of the Voting Rights Act and not in the elections immediately following passage of the Act in 1965.

[11] Appellants argued below in their brief that the use of stickers was permitted as a matter of Virginia law by virtue of Sections 27 and 28 of the Virginia Constitution guaranteeing a secret ballot and the right to make write-in votes. (R. 73-75). They pointed out that in the *1964* general election Virginia's voters had defeated a proposal designed to add some of the language of section 24-252 including the handwriting clause to the state constitution in lieu of the current provision of Virginia Constitution, Section 28 about write-in votes (R. 74).

[12] But Cf., *Louisiana v. United States,* 380 U.S. 145 (1965); *Schnell v. Davis,* 336 U.S. 933 (1949), affirming 81 F.Supp. 872 (S.D. Ala. 1949).

[13] Cf. *Reynolds v. Sims,* 377 U.S. 533, 568 (1964) where it was said the reapportionment schemes were "little more than crazy quilts, completely lacking in rationality and could be found invalid on that basis alone." And see Id. at 588 (Mr. Justice Clark, concurring).

[14] The problems confronted by the 41st Congress were reflected in the debate over 2 U.S.C. §9:

"Sir, we all know that KuKlux outrages have been committed, not only in North Carolina ... but in other states of the South; and that in more than one city of this Union enormous frauds have been perpetrated upon the ballot-box." Cong. Globe, 41st Cong. 3d Sess. 1275 (1871) (Remarks of Rep. Lawrence).

"Your 'repeaters,' your 'ballot-box stuffers,' your 'KuKlux Klans,' intimidation of loyal citizens--these and numberless other agencies of wrong and fraud on the ballot, overturning the power and will of the people, will continue to run riot in the land unless prevented by some such legislation as this. ... We have seen the electors of States defrauded out of the honest expression of their choice of candidates at the ballot-box, and in others we have seen similar results from terrorism, intimidation and violence." Id. at 1276 (Remarks of Rep. Lawrence).

"The object of the bill is very manifest, and in my judgment just as it is manifest. It is to prevent, under the law and by virtue of the law, any violation of the rights of the citizen by fraud or corruption on the part of any one to whom is intrusted the conduct of the election or the registration of voters." Id. at 1284 (Remarks of Rep. Bingham).

[15] The Hon. Watkins Abbitt, Representative from Virginia's Fourth Congressional District, has served in that office since the 80th Congress.

[16] See *Griffin v. School Board,* 377 U.S. 218 (1964) for the story of the extreme local resistance to school desegregation by closing all schools.

[17] See also Civil Rights Commission Report at 70-74, 111, 126-127. The Commission noted the problem caused for illiterates by economic dependence at 128, n. 459: "Illiterates must be assisted in casting their votes. In States such as Mississippi, where they may not have the assistance of friends or bystanders, they must be assisted by election officials, who usually (especially in rural areas) are white and are associated with the white political and economic power structure. In these circumstances, Negro illiterates cannot be assured of a secret ballot."

[18] The right to "vote," in that statute also, includes "all action necessary to make a vote effective," including having the ballot "counted and included in the appropriate totals of votes cast." See 42 U.S.C. §1971(a)(3)(A), incorporating the definition in 42 U.S.C. §1971(e).

[19] The existence of such criminal sanctions was thought by a Virginia court to be essential to the validity of a similar 19th century Virginia law which was challenged because of the threat to the secret ballot. *Pearson v. Board of Supervisors of Brunswick County,* 91 Va. 334, 21 S.E. 483 (1895). In *Pearson,* the Court sustained an 1894 Virginia law which included a provision that at the request of an elector physically or educationally unable to vote a special constable could aid him in preparing his ballot. The law was attacked as an infringement of the secret ballot. The Court acknowledged "that very great power is placed in the hands of this special constable, that a great trust is reported in him, and that wherever confidence is given it is liable to be abused" (*Pearson, supra,* 21 S.E. at 485). But, the Court sustained the law relying on the fact that the constables were "under the sanction of an oath" and were subject to "severe penalties" for violating their duties.

[20] The characterization "all-sweeping" was that of Chairman Celler of the House Judiciary Committee. Attorney General Katzenbach agreed to that characterization of the provision for review of new rules. Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter House Hearings), p. 60.

[21] House Hearings, pp. 60-62.