

# The Burger Court Opinion Writing Database

## *Oregon v. Mitchell*

400 U.S. 112 (December 21, 1970)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Telegram

western union



BA136 CTC056  
===1124A EDT AUG 21 70

WE063 : =WW NFA036 PE GOVT PDB NF WASHINGTON DC 21 1042A EDT  
=THE HON JOHN M HARLAN, ASSOCIATE JUSTICE OF THE SUPREME  
OLD REDDING RD WESTON CONN.  
COURT =

=YOU HAVE, OR SHOULD NOW HAVE, MOTIONS FOR LEAVE TO FILE  
BILLS : =OF COMPLAINT IN FOUR ORIGINAL CASES CHALLENGING  
VOTING RIGHTS : =ACT OF 1970. TIME BEING CRUCIAL, I SUGGEST  
A VOTE ON THE ENTRY : =OF THE FOLLOWING ORDER WHICH  
PROPOSES A BRIEFING SCHEDULE THAT : =HAS BEEN APPROVED BY  
THE STATES IN QUESTION: ? =

"THE ORIGINAL JURISDICTION OF THIS COURT HAS BEEN  
INVOKED : =IN THESE CASES BY FILING MOTIONS FOR LEAVE TO

WU 1201 (R 5-69)

*Test will be argument & this  
before up to next.*

*43,44,46,47 OKLG*



# Telegram

FILE BILLS OF COMPLAINT WHICH RAISE SIGNIFICANT QUESTIONS AS TO THE VALIDITY OF VARIOUS SECTIONS OF THE VOTING RIGHTS ACT OF 1970. ALL COUNSEL IN THESE CASES HAVE INDICATED THEIR VIEWS THAT AN EARLY DECISION BY THE COURT IS DESIRABLE AND IN ALL CASES MOTIONS TO EXPEDITE HAVE BEEN FILED. ? , =

===== "COUNSEL HAVE INDICATED THEIR WILLINGNESS TO EXPEDITE THE FILING OF BRIEFS SO THAT THE CASES MAYBE SET FOR AN EARLY ARGUMENT. ? , =

"I HAVE CONSULTED WITH ALL JUSTICES, AND I AM AUTHORIZED TO STATE THAT THE COURT WILL HEAR THE ARGUMENT OF THESE CASES ON MONDAY, OCTOBER 19, 1970, SUBJECT TO FURTHER ORDER OF THE COURT IF NEED BE. ? , =



# Telegram

"ANY BRIEFS OPPOSING THE MOTIONS FOR LEAVE TO FILE  
BILLS OF COMPLAINT SHALL BE FILED BY AUGUST 31, 1970.  
THE BRIEFS OF THE PLAINTIFFS SHALL BE FILED BY SEPTEMBER  
12, AND THE BRIEFS OF THE DEFENDANTS SHALL BE FILED BY  
OCTOBER 12, 1970".=

WARREN E BURGER CHIEF JUSTICE.=

607-1633 Adx  
K 135P med

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

October 28, 1970

MEMORANDUM TO THE CONFERENCE

RE: VOTING RIGHTS CASES

I have been troubled somewhat by the point raised in Conference that the Constitution does not place limits on the powers of Congress to fix conditions or qualifications for voters.

My inquiry and results, tentative as they are, may be of interest to others and I pass them on as definitely tentative.

1. Both the debates of the Constitutional Convention of 1787 and the contemporaneous writings by the framers of the Constitution strongly suggest that Art. I, § 4 was meant to give Congress no power to alter state qualifications for voting for Congress. The most succinct statement may be found in The Federalist No. 60 (Hamilton). Responding to the argument that the new Constitution gave Congress the power to favor the "wealthy and the well-born" at the expense of the many, Publius wrote:

The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the legislature.

2. The Convention's debates support Hamilton's construction. On June 21, 1787, the Convention resolved that "Members of the first branch of the Legislature ought to be elected by the People of the several States." This resolution was adopted by a vote of 9-1.<sup>1/</sup>

1/

1. M. Farrand, The Records of the Federal Convention (1911) 353

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hereafter, the drafting of the proposed Constitution was referred to the Committee of Detail.<sup>2/</sup>

Although no minutes of this Committee were kept, drafts before the Committee have survived. An early draft provided as follows:

The qualification of electors shall be the same with that in the particular states unless the legislature shall hereafter direct some uniform qualification to prevail through the States.<sup>3/</sup>

A subsequent draft provided as follows:

The Qualifications of the Electors shall be prescribed by the Legislatures of the several States; but their provisions concerning them may at any time be altered and superseded by the Legislature of the United States.<sup>4/</sup>

The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislatures of each State; but their Provisions concerning them may, at any time, be altered and superseded by the Legislature of the United States.<sup>5/</sup>

A later draft with the stricken language indicating deletions by the Committee, and underlining indicating additions, reads:

The Qualifications of the Electors shall be prescribed by the Legislatures of the several States; ~~but these Provisions concerning them may, at any time be altered and superseded by the legislature of the United States,~~ the same from Time to Time as those of the Electors in the several States, of the most numerous Branch of their own Legislature.<sup>6/</sup>

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<sup>2/</sup>Id., at 128

<sup>3/</sup>2 Farrand, supra, 139.

<sup>4/</sup>Id., at 153.

<sup>5/</sup>Id., at 155.

<sup>6/</sup>Id., at 163.

The Times and Places and the Manner of Holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may at any time be altered ~~or superseded~~ by the Legislature of the United States.<sup>7/</sup>

On August 6, 1787, the Committee of Detail reported to the Convention a proposed draft, including the following:

Art. IV, Sect. 1. The qualifications of the electors shall be the same from time to time, as those of the electors in the several States, of the most numerous branch of their own Legislature.

Art. VI, Sect. 1. The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.<sup>8/</sup>

On August 7, Gouverneur Morris moved to strike the last clause of the proposed Art. IV, §1 and to either provide a freehold limitation on suffrage or to add a clause permitting Congress to alter the electoral qualifications.<sup>9/</sup>

This motion was opposed by Oliver Ellsworth, George Mason, Madison and Franklin. Ellsworth protested that the proposal favored aristocracy. If the legislature (*i. e.*, Congress) could alter qualifications, it could disqualify a great proportion of the electorate. Leaving the qualifications of electors solely in the hands of the States was proper, <sup>10/</sup>because the right of suffrage was already guarded by most state constitutions. George Mason voiced a similar objection: "A power to alter the qualifications would be a dangerous power in the hands of the legislature."<sup>11/</sup> To the same effect Madison said:

The right of suffrage is certainly one of the fundamental articles of republican Government, and ought not to be left to be regulated by the Legislature. A gradual

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<sup>7/</sup> *Id.*, at 165.

<sup>8/</sup> 2 Farrand, *supra*, at 178-179.

<sup>9/</sup> *Id.*, at 207.

<sup>10/</sup> *Id.*, at 201.

<sup>11/</sup> *Id.*, at 201-202.

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abridgment of this right has been the mode in which Aristocracies have been built on the ruins of popular forms.<sup>12/</sup>

The proposed motion was defeated by a 7 - 1 vote,<sup>13/</sup> and no substantive change in Art. I, § 2 was proposed or made thereafter.

Two days later, it was proposed to strike the power of Congress to alter the time, place and manner of elections. Madison opposed the motion as follows:

Time, places and manner were words of great latitude. Whether the electors should vote by ballot or viva voce; should assemble at this place or that place; should be divided into districts or all meet at one place; should all vote for all the representatives; or all in a district vote for a number allotted to the district; these and many other points would depend on the Legislatures and might materially affect the appointments. Beside the inequality of the Representation in the Legislatures of particular States, would like to produce a like inequality in their representation in the National Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.<sup>14/</sup>

The motion was not adopted, and after the section had been amended to make it clear that Congress could "make" <sup>as</sup> well as alter regulations, the section was approved, without objection.<sup>15/</sup>

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<sup>12/</sup> Id., at 203.

<sup>13/</sup> Id., at 194.

<sup>14/</sup> Id., at 240.

<sup>15/</sup> Id., at 242.



From the debates it seems to me the Delegates made clear distinction between the manner of "holding elections" and the qualifications for voting elections.

As to Congress power to fix qualifications for voters for President and Vice President, I draw a "blank." That takes me back to the proposition I had always accepted--perhaps without basis--that Presidential electors are State officials somewhat like State Delegates to a Constitutional Convention. On this I would welcome the fruits of any research others have done.

W. E. B.

W E B

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

(received 12/21/70)

Dear John  
apart from  
the soundness of the  
basic position of  
four of us in today's  
case, your eloquent  
presentation will focus  
attention of the news  
media on what the  
case is really about.

I was saddened by  
the intensely political  
aspect of some of the  
oral presentations &  
you were right to  
respond with vigor.

Regards  
Warren

August 21, 1970

43 ORIG etc.

**MEMORANDUM TO THE CHIEF JUSTICE:**

**Re: Mr. Cullinan's memo of August 21 concerning Voting Rights Act of 1970**

**Dear Chief:**

If arguments before the Court are not to be heard until October 19 on the above Bill, then I think the scheduling arranged is excellent. As noted before, however, I would prefer to have the case set in September.

H. L. B.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Harlan  
✓ Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice [unclear]

2

From: [unclear]

# SUPREME COURT OF THE UNITED STATES

NOV 5 1970

No. 46 Orig.—OCTOBER TERM, 1970\*

United States, Plaintiff,

v.

State of Arizona.

Bill of Complaint.

[November —, 1970]

MR. JUSTICE BLACK.

In these suits the States resist compliance with the Voting Rights Act Amendments of 1970 because they believe that the Act takes away from them powers reserved to the States by the Constitution to control their own elections.<sup>1</sup> By its terms the Act does three things. First: It lowers the age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national. Third: The Act forbids States from disqualifying voters in national elections for presi-

\*Together with No. 43 Orig., *Oregon v. Mitchell*; No. 44 Orig., *Texas v. Mitchell*, and No. 47 Orig., *United States v. Idaho*.

<sup>1</sup> In Nos. 43 and 44 Oregon and Texas respectively invoke the original jurisdiction of this Court to sue the United States Attorney General seeking an injunction against the enforcement of Title III (18-year-old vote) of the Act. In No. 46 the United States invokes our original jurisdiction seeking to enjoin Arizona from enforcing its laws to the extent that they conflict with the Act, and directing the officials of Arizona to comply with the provisions of Title II (nationwide literacy test ban) and Title III (18-year-old vote) of the Act. In No. 47 the United States invokes our original jurisdiction seeking to enjoin Idaho from enforcing its laws to the extent that they conflict with Title II (abolition of residency requirements in presidential and vice presidential elections) and Title III (18-year-old vote) of the Act.

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Stylistic Changes Throughout.

Major Changes 67,8,9

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Harlan  
~~Mr. Justice Brennan~~  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

4

SUPREME COURT OF THE UNITED STATES

No. 46 Orig.—OCTOBER TERM, 1970\*

from: Black, J.

Circulated:

DEC 2 19

Recirculated:

United States, Plaintiff,  
v.  
State of Arizona. } On Motion for Leave to File  
Bill of Complaint.

[December —, 1970]

MR. JUSTICE BLACK.

In these suits the States resist compliance with the Voting Rights Act Amendments of 1970 because they believe that the Act takes away from them powers reserved to the States by the Constitution to control their own elections.<sup>1</sup> By its terms the Act does three things. First: It lowers the minimum age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national. Third: The Act forbids States from disqualifying voters in national elections for presi-

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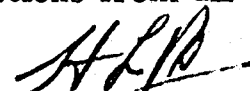
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HUGO L. BLACK

December 15, 1970

MEMORANDUM FOR THE CONFERENCE

I have attached a copy of my opinion in the Voting Rights Cases, which attempts on page two to show the breakdown of the Court on the three major issues involved in these cases. I have on some of the issues anticipated votes based on my Conference notes. Please forgive any errors. The primary purpose of this circulation at this time is to give you a suggested format which will explain the complex divisions which have produced five opinions. Suggestions from all would be welcome.

  
H. L. B.

To: The Chief Justice  
Mr. Justice Doug  
Mr. Justice Harl  
Mr. Justice Bren  
Mr. Justice Stew  
Mr. Justice Whit  
Mr. Justice Mars  
Mr. Justice Blac

5

# SUPREME COURT OF THE UNITED STATES

No. 46 Orig.—OCTOBER TERM, 1970\*

From: Black, J.

Circulated:

Recirculated:

DEC 15

United States, Plaintiff,  
v.  
State of Arizona.

On ~~Motion for Leave to File~~  
Bill of Complaint.

[December —, 1970]

MR. JUSTICE BLACK

In these suits the States resist compliance with the Voting Rights Act Amendments of 1970 because they believe that the Act takes away from them powers reserved to the States by the Constitution to control their own elections.<sup>1</sup> By its terms the Act does three things. First: It lowers the minimum age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national. Third: The Act forbids States from disqualifying voters in national elections for presi-

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announcing  
the judgment  
of the Court  
in an opinion  
expressing  
his view of  
the case.

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pp. 1, 2, 3, 4, 7

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

6

From: Black, J.

**SUPREME COURT OF THE UNITED STATES**

Circulated: \_\_\_\_\_

No. 46 Orig.—OCTOBER TERM, 1970\*

Recirculated: 12-17-70

United States, Plaintiff, }  
v. } On Bill of Complaint.  
State of Arizona. }

[December —, 1970]

MR. JUSTICE BLACK, announcing the judgment of the Court in an opinion expressing his own view of the case.

In these suits the States resist compliance with the Voting Rights Act Amendments of 1970 because they believe that the Act takes away from them powers reserved to the States by the Constitution to control their own elections.<sup>1</sup> By its terms the Act does three things. First: It lowers the minimum age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amend-

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To: Mr. Chief Justice  
 Mr. Justice Black  
 Mr. Justice Harlan  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun

1

# SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

Circulated: 11/5/70

Recirculated:

State of Oregon, Plaintiff,  
 43 v.  
 John N. Mitchell, Attorney  
 General of the United  
 States.

State of Texas, Plaintiff,  
 44 v.  
 John N. Mitchell, Attorney  
 General of the United  
 States.

United States, Plaintiff,  
 46 v.  
 State of Arizona.

United States, Plaintiff,  
 47 v.  
 State of Idaho.

On Motions for Leave to  
 File Bill of Complaint.

[November —, 1970]

MR. JUSTICE DOUGLAS.

I

I would say that the claims which Oregon and Texas make, that the grant of the franchise to 18-year-olds is unconstitutional, are not substantial.

I suppose that in 1920, when the Nineteenth Amendment was passed giving women the right to vote, it was assumed by most constitutional experts that there was no relief by way of the Equal Protection Clause of the Fourteenth Amendment. In *Minor v. Happersett*, 21 Wall. 162, the Court held in the 1874 Term that a State could constitutionally restrict the franchise to men.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2

1, 6, 7, 12

**SUPREME COURT OF THE UNITED STATES** *Thurgood Marshall, J.*

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

Circulated: \_\_\_\_\_  
Recirculated: 11-6

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

United States, Plaintiff,  
46 v.  
State of Arizona.

United States, Plaintiff,  
47 v.  
State of Idaho.

On Motions for Leave to  
File Bill of Complaint.

[November —, 1970]

MR. JUSTICE DOUGLAS.

I

Oregon and Texas claim that the grant of the franchise to 18-year-olds is unconstitutional. I conclude that that claim is not substantial either as respects state or federal elections.

I suppose that in 1920, when the Nineteenth Amendment was passed giving women the right to vote, it was assumed by most constitutional experts that there was no relief by way of the Equal Protection Clause of the Fourteenth Amendment. In *Minor v. Happersett*, 21 Wall. 162, the Court held in the 1874 Term that a State could constitutionally restrict the franchise to men.

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10: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

3

*Change throughout*

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Circulated

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

11/12/70

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Motions for Leave to  
File Bill of Complaint.

United States, Plaintiff,  
46 v.  
State of Arizona.

United States, Plaintiff,  
47 v.  
State of Idaho.

[November —, 1970]

MR. JUSTICE DOUGLAS.

I

Oregon and Texas claim that the grant of the franchise to 18-year-olds by Congress in the Voting Rights Act of 1970 is unconstitutional. I conclude that that claim is not substantial either as respects state or federal elections.

I suppose that in 1920, when the Nineteenth Amendment was passed giving women the right to vote, it was assumed by most constitutional experts that there was no relief by way of the Equal Protection Clause of the Fourteenth Amendment. In *Minor v. Happersett*, 21 Wall. 162, the Court held in the 1874 Term that a State could constitutionally restrict the franchise to men.

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

4

SUPREME COURT OF THE UNITED STATES

Douglas, J.

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

11/16/70

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Motions for Leave to  
File Bill of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

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47 v.

State of Idaho.

[November —, 1970]

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Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

5

SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

Justice Douglas, J.

Disposition:

Rehearing denied: 11/30/70

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[December —, 1970]

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

3, 4, 5  
+ Appendix

SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

Circulated: —

Recirculated: 12-9

State of Oregon, Plaintiff,  
43 v.  
John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.  
John N. Mitchell, Attorney  
General of the United  
States.

United States, Plaintiff,  
46 v.  
State of Arizona.

United States, Plaintiff,  
47 v.  
State of Idaho.

On Bills of Complaint.

[December —, 1970]

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

119

7

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

Circulated: \_\_\_\_\_

Recirculated: 12-17

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
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State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[December —, 1970]

MR. JUSTICE DOUGLAS.

I dissent from the judgment of the Court insofar as it declares § 302 unconstitutional as applied to state elections and concur in the judgment as it affects federal elections but for different reasons. I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.

I

The grant of the franchise to 18-year-olds by Congress is in my view valid across the board.

I suppose that in 1920, when the Nineteenth Amendment was passed giving women the right to vote, it was assumed by most constitutional experts that there was



To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

5, 6, 14, 15

8

From: Douglas, J.

# SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

Revised:

Circulated: 12-18

State of Oregon, Plaintiff,  
43 v.  
John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.  
John N. Mitchell, Attorney  
General of the United  
States.

United States, Plaintiff,  
46 v.  
State of Arizona.

United States, Plaintiff,  
47 v.  
State of Idaho.

On Bills of Complaint.

[December —, 1970]

MR. JUSTICE DOUGLAS.

I dissent from the judgment of the Court insofar as it declares § 302 unconstitutional as applied to state elections and concur in the judgment as it affects federal elections but for different reasons. I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.

I

The grant of the franchise to 18-year-olds by Congress is in my view valid across the board.

I suppose that in 1920, when the Nineteenth Amendment was passed giving women the right to vote, it was assumed by most constitutional experts that there was

November 5, 1970

MEMORANDUM TO THE CONFERENCE

Re: Nos. 46 Orig., 43 Orig., 44 Orig.,  
and 47 Orig. - Voting Cases

Dear Brethren:

In due course I intend to circulate a dissent  
to the opinion circulated by Mr. Justice Black in these cases.

Sincerely,

J. M. H.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2

## SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

From: Harlan, J.

Circulated: NOV 30 1970

Recirculated: \_\_\_\_\_

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[December —, 1970]

MR. JUSTICE HARLAN.

From the standpoint of an era of judicial constitutional revision in the field of the suffrage that was ushered in by this Court's decision of eight years ago in *Baker v. Carr*, 369 U. S. 186 (1962), these cases should go in favor of sustaining all three aspects of the Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314, here challenged. From the standpoint of the bedrock of the constitutional structure of this Nation, these cases bring us to a crossroad that is marked with a formidable "Stop, Look, and Listen" sign: whether this Court is to sanction congressional inter-

December 16, 1970

Re: Voting Rights Cases

Dear Hugo:

I think your "scoreboard" at the outset of your opinion is fine, subject to the suggestions contained in Potter's letter, with which I agree, and further that I would like to have you add in the "residency" lineup the following sentence -- "My Brother Harlan, for the reasons stated in his separate opinion, considers that the residency provisions of the statute are unconstitutional," or something the equivalent thereof.

Sincerely,

J. M. H.

Mr. Justice Black

CC: The Conference

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 2, 5-6, 12-18, 20, 22-23,  
31, 34-36, 39, 41-45, 47-57, 60-66

4

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

## SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

From: Harlan, J.

Circulated: \_\_\_\_\_

Recirculated: **DEC 17 1970**

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[December —, 1970]

MR. JUSTICE HARLAN, concurring in part and dissenting  
in part.

From the standpoint of this Court's decisions during  
an era of judicial constitutional revision in the field of  
the suffrage, ushered in eight years ago by *Baker v. Carr*,  
369 U. S. 186 (1962), I would find it difficult not to  
sustain all three aspects of the Voting Rights Act Amend-  
ments of 1970, Pub. L. 91-285, 84 Stat. 314, here chal-  
lenged. From the standpoint of the bedrock of the  
constitutional structure of this Nation, these cases bring  
us to a crossroad that is marked with a formidable "Stop"  
sign. That sign compels us to pause before we allow  
those decisions to carry us to the point of sanctioning  
Congress' decision to alter state-determined voter quali-  
fications by simple legislation, and to consider whether

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STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 12-14, 17, 36-37,  
42-43, 49-50, 62-63

5

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

## SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

From: Harlan, J.

Circulated: \_\_\_\_\_

Recirculated: DEC 19 1970

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[December —, 1970]

MR. JUSTICE HARLAN, concurring in part and dissenting  
in part.

From the standpoint of this Court's decisions during  
an era of judicial constitutional revision in the field of  
the suffrage, ushered in eight years ago by *Baker v. Carr*,  
369 U. S. 186 (1962), I would find it difficult not to  
sustain all three aspects of the Voting Rights Act Amend-  
ments of 1970, Pub. L. 91-285, 84 Stat. 314, here chal-  
lenged. From the standpoint of the bedrock of the  
constitutional structure of this Nation, these cases bring  
us to a crossroad that is marked with a formidable "Stop"  
sign. That sign compels us to pause before we allow  
those decisions to carry us to the point of sanctioning  
Congress' decision to alter state-determined voter quali-  
fications by simple legislation, and to consider whether

# SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Motions for Leave to  
File Bill of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[November —, 1970]

MR. JUSTICE BRENNAN.

These cases draw into question the power and judgment of Congress in enacting Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 314. The State of Arizona challenges the power of Congress to impose a nationwide ban, until August 6, 1975, on the use of literacy and certain other tests to limit the franchise in any election. The State of Idaho takes issue with the asserted congressional power to find that the imposition of a durational residence requirement to deny the right to vote in elections for President and Vice President imposes a burden upon the right of free inter-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

Monday 11/23

Mr. Justice:

I couldn't find any envelopes here so I used this one. I hope the Post Office doesn't go mad trying to figure out whom to bill for the postage.

No reaction to the circulation so far -- it went out early this afternoon. In the meantime, we are all fascinated by the certs and shudder to think that when you get back you may take some of them away from us. But if you're very nice we won't fight too hard.

Best from everyone. The word here is that you are the best babysitter on the Court.

Deily, Mike, & Rick



# SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[January —, 1971]

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL dissent from the judgment insofar as it declares § 302 unconstitutional as applied to state elections, and concur in the judgment in all other respects.

These cases draw into question the power and judgment of Congress in enacting Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 314. The State of Arizona challenges the power of Congress to impose a nationwide ban, until August 6, 1975, on the use of literacy and certain other tests to limit the franchise in any election. The State of Idaho takes issue

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12-16-70

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SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[December —, 1970]

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL dissent from the judgment insofar as it declares § 302 unconstitutional as applied to state elections, and concur in the judgment in all other respects, for the following reasons.

These cases draw into question the power and judgment of Congress in enacting Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 314. The State of Arizona challenges the power of Congress to impose a nationwide ban, until August 6, 1975, on the use of literacy and certain other tests to limit the franchise in any election. The State of Idaho takes issue

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 16, 1970

RE: Voting Rights Cases

Dear Hugo:

I agree with your "line-up" in the  
Voting Rights Cases as amended by  
Potter.

Sincerely,

*Bill*  
W. J. B. Jr.

Mr. Justice Black

cc: The Conference

1, 9, 12, 16, 25-26, 28,  
30, 32, 34, 36, 37, 38.  
41-42, 47, 49

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

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## SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970 From: Brennan, J.

State of Oregon, Plaintiff,  
43 v.  
John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.  
John N. Mitchell, Attorney  
General of the United  
States.

United States, Plaintiff,  
46 v.  
State of Arizona.

United States, Plaintiff,  
47 v.  
State of Idaho.

Circulated: \_\_\_\_\_  
Recirculated: 12-15-70

On Bills of Complaint.

[December —, 1970]

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and  
MR. JUSTICE MARSHALL dissent from the judgment in-  
sofar as it declares § 302 unconstitutional as applied to  
state and local elections, and concur in the judgment in  
all other respects, for the following reasons.

These cases draw into question the power and judg-  
ment of Congress in enacting Titles II and III of the  
Voting Rights Act Amendments of 1970, 84 Stat. 314.  
The State of Arizona challenges the power of Congress  
to impose a nationwide ban, until August 6, 1975, on the  
use of literacy and certain other tests to limit the fran-  
chise in any election. The State of Idaho takes issue

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WD

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

Re: Voting Rights Cases, Nos. 43, 44, 46 and 47 Orig.

Memorandum to the Conference

Instead of an opinion in my name, the opinion will be headed:

Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall dissent from the judgment insofar as it declares § 302 unconstitutional as applied to state elections, and concur in the judgment in all other respects.

Hugo, John, and Potter may wish to change any references in their opinions accordingly.

W.J.B.

[Insert on p. 22]

C.

Our

My brother Harlan has set out in some detail the historical evidence which persuades him that the framers of the Fourteenth Amendment did not believe that the Equal Protection Clause, either through judicial action or through congressional enforcement under § 5 of the Amendment, could operate to enfranchise <sup>(Negroes)</sup> ~~whites~~ in States which denied them the vote. Ante, at \_\_\_\_\_. From this he has concluded "that the Fourteenth Amendment was never intended to restrict the right of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications in either state or federal elections." Ante, at \_\_\_\_\_. This conclusion, if accepted, would seem to require as a corollary that although States may not, under the Fifteenth Amendment, discriminate against <sup>(Negro)</sup> ~~black~~ voters, they are free so far as the Federal Constitution is concerned to discriminate against <sup>(Negro)</sup> ~~black~~ or unpopular

## SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

State of Oregon, Plaintiff,  
43 v.John N. Mitchell, Attorney  
General of the United  
States.State of Texas, Plaintiff,  
44 v.John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[December —, 1970]

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL dissent from the judgment insofar as it declares § 302 unconstitutional as applied to state and local elections, and concur in the judgment in all other respects, for the following reasons.

These cases draw into question the power and judgment of Congress in enacting Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 314. The State of Arizona challenges the power of Congress to impose a nationwide ban, until August 6, 1975, on the use of literacy and certain other tests to limit the franchise in any election. The State of Idaho takes issue

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

2 1970

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

On Bills of Complaint.

[December —, 1970]

MR. JUSTICE STEWART.

In these cases we deal with the constitutional validity of three provisions of the Voting Rights Act Amendments of 1970. Congress undertook in these provisions: (a) to abolish for a five-year period all literacy tests and similar voting eligibility requirements imposed by any State in the Union (§ 201); (b) to remove the restrictions imposed by state durational residency requirements upon voters in presidential elections (§ 202); and (c) to reduce the voting age to a maximum of 18 years for all voters in all elections throughout the Nation (§ 203). By virtue of the prevailing opinion of MR. JUSTICE BLACK, the Court today upholds § 201's nationwide literacy test ban and § 202's elimination of state durational

7  
1302

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SEE P. 115, 16

STYLISTIC CHANGES THROUGHOUT.

3

## SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

From: Stewart, J.

Circulated:

Recirculated:

DEC 10 1970

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

On Bills of Complaint.

[December —, 1970]

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

In these cases we deal with the constitutional validity of three provisions of the Voting Rights Act Amendments of 1970. Congress undertook in these provisions: (a) to abolish for a five-year period all literacy tests and similar voting eligibility requirements imposed by any State in the Union (§ 201); (b) to remove the restrictions imposed by state durational residency requirements upon voters in presidential elections (§ 202); and (c) to reduce the voting age to a maximum of 18 years for all voters in all elections throughout the Nation (§ 302). By virtue of the prevailing opinion of MR. JUSTICE

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

4

## SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

Circulated: \_\_\_\_\_

Recirculated: **DEC 15 1970**

State of Oregon, Plaintiff,  
43 v.

John N. Mitchell, Attorney  
General of the United  
States.

State of Texas, Plaintiff,  
44 v.

John N. Mitchell, Attorney  
General of the United  
States.

On Bills of Complaint.

United States, Plaintiff,  
46 v.

State of Arizona.

United States, Plaintiff,  
47 v.

State of Idaho.

[December —, 1970]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In these cases we deal with the constitutional validity of three provisions of the Voting Rights Act Amendments of 1970. Congress undertook in these provisions: (a) to abolish for a five-year period all literacy tests and similar voting eligibility requirements imposed by any State in the Union (§ 201); (b) to remove the restrictions imposed by state durational residency requirements upon voters in presidential elections (§ 202); and (c) to reduce the voting age to a maximum of 18 years for all voters in all elections throughout the Nation (§ 302). The Court today upholds § 201's nationwide literacy test

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

December 15, 1970

No. 46 Original, U. S. v. Arizona

Dear Hugo,

The preamble you have inserted in your opinion in these cases seems to me very helpful. I have the following minor editorial suggestions:

(1) That, for reasons of symmetry, the phrase "For the reasons expressed in separate opinions," be inserted before the word "all" in the 3rd line from the bottom of the last full paragraph on page 2.

(2) That the phrase "of this opinion" be inserted after "Part III" in the first line of the paragraph beginning on the bottom of page 2.

I also have the following substantive suggestion: That the Chief Justice be added to the list of Justices at the top of page 3.

Sincerely yours,

P.S.  
1.

Mr. Justice Black

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

August 21, 1970

The Chief Justice  
Supreme Court of the United States  
Washington, D. C. 20543

Re: Voting rights cases

Dear Chief:

As I advised your office by telephone today, I vote in favor of the entry of the order proposed in your telegram of August 21, 1970.

Sincerely,

H. A. Blackmun

cc Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

December 8, 1970

Re: Nos. 43, 44, 46, 47 Orig. - Voting Rights Cases

Dear Potter:

I am glad to join the opinion you have prepared for these cases. I am also advising John that I would be pleased to join Parts I and III, and most of what is said in Part II, of his opinion.

Sincerely,

H. A. B.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 8, 1970

Re: Nos. 43, 44, 46, 47 Orig. - Voting Rights Cases

Dear John:

If acceptable to you, I would be pleased to have you add a note at the foot of your opinion substantially to the following effect:

"Mr. Justice Blackmun joins Parts I and III, and most of what is said in Part II, of this opinion."

Sincerely,



Mr. Justice Harlan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 15, 1970

Re: Voting Rights Cases

Dear Hugo:

I, too, feel that the preamble you have inserted in your opinion is very helpful. I have read Potter's suggestions and noted the omission of the Chief Justice's name in the list at the top of page 3. I have no additional comment of my own.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal stroke extending to the right.

Mr. Justice Black