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AN EXAMINATION OF CONGRESSIONAL POWERS UNDER §5 OF THE 14th AMENDMENT

Gene R. Nichol, Jr.*

I. Introduction

The enforcement clause of the 14th amendment reads as follows: "Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The determination of how far Congress may proceed under the guise of "appropriate legislation" is, however, no simple matter. Moreover, the decisions of the Supreme Court regarding the scope of congressional power under §5 of the 14th amendment have failed to remedy the confused situation. The purpose of this article is to investigate the power given to Congress through the Civil War Amendments and to prescribe a workable manner of judicial review of such congressional activities.

II. Enforcement Powers under the 15th and 13th Amendments

As of this date, the scope of congressional power under the enforcement clauses of the 13th¹ and 15th² amendments appears to be well settled.

In *South Carolina v. Katzenbach*,³ the Supreme Court upheld several provisions of the 1965 Voting Rights Act as being valid exercises by Congress of its enforcement powers under §2 of the 15th amendment. There the Court made it clear that under §2, "[i]t is the power of Congress which has been enlarged."⁴ Moreover, the test to be applied in a case involving §2 was held to be the same as that applied in all cases concerning the express powers of Congress with relation to the reserved powers of the states; that is, Chief Justice Marshall's test formulated in *McCulloch v. Maryland*:

Let the end be legitimate, let it be within the scope of the Constitution, and all means are appropriate which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.⁵

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1 The 13th amendment reads as follows:

Sec. 1. Neither slavery nor involuntary servitude except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. Congress shall have power to enforce this article by appropriate legislation.

2. The 15th amendment reads as follows:

Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

3 383 U.S. 301 (1966).

4 *Id.* at 326.

5 17 U.S. (4 Wheat.) 316, 421 (1819).

This result was further solidified when in *Oregon v. Mitchell*,⁶ the unanimous Court applied the same test to hold the congressional banning of literacy tests to be appropriate legislation under §2 of the 15th amendment.

The scope of the enforcement clause of the 13th amendment was interpreted similarly in *Jones v. Alfred H. Mayer Company*.⁷ The Court held in *Jones* that not only does the 13th amendment apply to private as well as state discriminations, but that the proper inquiry when considering legislation enacted under §2 of the 13th amendment is the same "legitimate ends . . . plainly adapted means" test previously held to apply to §2 of the 15th amendment.⁸

The thrust of these two decisions remains intact, thus enabling Congress to determine the scope of its power under the 13th and 15th amendments. Unfortunately, §5 of the 14th amendment has not received similar judicial construction.

III. Judicial Interpretation of §5 of the 14th Amendment

A. Katzenbach and Guest Decisions

Initially it appeared that §5 of the 14th amendment would follow the course carved out by the Court for her sister amendments. In *Katzenbach v. Morgan*⁹ the Court upheld §4(e) of the 1965 Voting Rights Act which secured the right to vote for any person who had completed the sixth grade in an American flag school, even if he might be unable to pass a required state literacy test. The provision effectively prohibited the application of the New York literacy test with regard to a large bloc of the Puerto Rican minority in that state. Justice Brennan, speaking for the Court, applied the *McCulloch v. Maryland* test to determine the validity of §4(e) under §5 of the 14th amendment.

The *Morgan* decision was even more far-reaching in that the Court was willing to "perceive a basis" for the congressional enactment on two alternative grounds. First, Congress could validly have enacted §4(e) as a "plainly adapted" means of enhancing the political power of the Puerto Rican minority in New York, to ensure that their right to equal protection of the laws was maintained.¹⁰ Alternatively, however, Congress could have properly judged the New York literacy requirement to be an invidious discrimination against the Puerto Rican minority.¹¹ The different approaches are important because though arguably the first ground could be seen as a remedial provision, and therefore read narrowly, the second ground clearly indicates that Congress has the power under §5 not only to enforce the provisions of the 14th amendment, as interpreted by the Supreme Court, but to determine for itself the substantive content of §1 of that amendment. Congress may thus strike down state laws it considers to be in violation of §1. All this was done in light of the fact that the Court itself had only recently held that literacy requirements were not in all

6 400 U.S. 112 (1970).

7 392 U.S. 409 (1968).

8 *Id.* at 443.

9 384 U.S. 641 (1966).

10 *Id.* at 652.

11 *Id.* at 654.

circumstances prohibited by the 14th and 15th amendments.¹² The clear indication is that as long as the *McCulloch* test is not violated, Congress can reach matters under §5 which the Court itself would not determine to be contrary to the provisions of the 14th amendment.

It is noteworthy that Justice Harlan took a contrary view in his dissent to *Morgan* (the dissent actually appeared in the companion case *Cardona v. Power*).¹³ Justice Harlan argued that although determinations by Congress of factual issues in the equal protection and due process areas were to be given deference by the Court, the determination of what actually violates the 14th amendment is solely within the province of the judiciary. Therefore, after the Supreme Court's rejection of the assertion that literacy tests were per se unconstitutional, Congress was without power to adopt §4(e) of the 1965 Voting Rights Act.¹⁴

In *United States v. Guest*¹⁵ six members of the Court were willing to reject the long-standing doctrine of the *Civil Rights Cases*¹⁶ which had held that "appropriate legislation" under §5 could be used to remedy only invidious state action. In *Guest*, six justices took the position that 18 U.S.C. §241,¹⁷ a federal conspiracy statute, could properly reach under §5 even private conspiracies to deprive citizens of ". . . any right or privilege secured . . . by the Constitution or laws of the United States." It was emphasized that "there now can be no doubt that the specific language of §5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment Rights."¹⁸ Thus, reading *Morgan* and *Guest* together, it would appear that with appropriate legislation Congress could not only reach substantive equal protection and due process violations which the Supreme Court would not invalidate; but when seeking to prohibit 14th amendment violations, Congress may reach private as well as state activities. However, the decision rendered in *Oregon v. Mitchell*¹⁹ sends the scope of §5 powers back into the depths of uncertainty.

B. Mitchell Decision

In *Oregon v. Mitchell*, with five separate opinions running well over 100 pages, the Court considered the propriety of several provisions of the Voting Rights Act Amendments of 1970. As previously indicated, the Court unanimously held the Voting Act provisions banning the use of state literacy tests to

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

13 *Katzbach v. Morgan*, 384 U.S. at 665 (Harlan, J., dissenting).

14 *Id.* at 667-670.

15 383 U.S. 745 (1966).

16 109 U.S. 3 (1883).

17 18 U.S.C. §241 (1970) reads in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, . . . They shall be fined not more than \$5,000 or imprisoned not more than 10 years or both.

18 383 U.S. at 762.

19 400 U.S. 112 (1970).

be proper under §2 of the 15th amendment.²⁰ The Court then was forced to consider the amendments to the Voting Rights Act, which modified residency requirements for federal elections, and lowered the voting age to 18 in state and federal elections. These analyses included a consideration of the scope of congressional power under §5, and revealed a great diversity of opinion in this regard.

1. Modification of Residency Requirements for Federal Elections

The residency modification was ruled constitutional by an 8-1 majority with only Justice Harlan in dissent. However, the rationales are so varied as to add little insight into power under §5 of the 14th amendment. Justices Douglas, Brennan, White, and Marshall, considered the modification "appropriate legislation" under §5 since it was designed to protect the fundamental right to travel, using the same standards announced earlier in *Morgan*. Chief Justice Burger and Justices Stewart and Blackmun agreed that this was proper legislation to protect the right to travel but based their conclusion on the necessary and proper clause—going out of their way to avoid the §5 issue. Lastly, Justice Black upheld the residency provisions on what he perceived to be the general supervisory powers of Congress over federal elections. Thus, although the residency provisions were upheld, a majority of the Court would not conclude that such enactments were supportable by §5 of the 14th amendment.

2. Eighteen-year-old Vote in State and Federal Elections

In its consideration of the provisions lowering the voting age to 18 in both state and federal elections, the Court muddled the water even further. Again Justices Douglas, Brennan, White, and Marshall considered the measures appropriate under §5, with regard to both state and federal elections, since Congress had a rational basis to determine that the present state of the laws constituted a deprivation of a fundamental right to those between the ages of 18 and 21.

Justice Harlan advanced a strong position, based on legislative history of the 14th amendment, that its provisions apply only to civil, not political (*e.g.* voting) rights; and therefore the age reduction could not be justified in either the state or federal context.

Chief Justice Burger and Justices Stewart and Blackmun contended that *Morgan*, "even if rightly decided," could not be read as allowing Congress to determine "what situations fall within the ambit of the clause, and what state interests are 'compelling.'" ²¹ Thus, like Justice Harlan, they considered the age provisions unconstitutional *in toto*.

Justice Black provided the curious twist which accounted for the final holding that the 18-year-old provisions could be validly applied to federal elections, but not state contests. Justice Black considered the provisions viable for

20 Justice Douglas upheld the literacy test prohibition as a valid exercise of §5 of the 14th amendment—aimed at protecting the privilege and immunities of the citizens in question. By joining in the majority opinion in *Morgan*, however, he indicated that the provisions would have been valid under §2 of the 15th amendment as well.

21 400 U.S. at 296.

federal elections because of Congress' supervisory powers over national elections. Yet, with regard to the states, the provisions could pass constitutional muster only if sustainable under §5 of the 14th amendment. Justice Black then announced a test of §5 power more restrictive than that proposed by the majority in *Morgan*, yet broader than the position taken by Justice Harlan in the dissent to that case. He essentially called for a weighing of the proximity of the law in question to racial concerns (the driving force behind all three Civil War Amendments) against the proposed intrusion upon states' rights. Since the 18-year-old vote intruded upon the states' right to set voter qualifications, yet was not closely tied to racism, Justice Black considered it to be unconstitutional.

Despite the confusion inherent in such a diverse set of judicial opinions, it is clear at least that *Mitchell* marks a retreat from the broad pronouncements of congressional power under §5 contained in *Morgan*. Moreover, the Congress today would be unlikely to base pervasive legislation on its enforcement powers under the 14th amendment because of the uncertainty of the Supreme Court's approach. The remainder of this article will consider the factors and competing interests which should be taken into account in determining a workable standard for judicial review of congressional activity under §5.

IV. Considerations in Construing §5

A. Impact of Legislative History

Before turning to the specific factors which play an important role in the determination of Congress' powers under §5, it is important to consider the position advocated by Justice Harlan in his dissent in *Mitchell*. Justice Harlan argues persuasively that the framers of the 14th amendment did not intend its provisions to apply to voting rights. He presents extensive legislative history which indicates that the 14th amendment did not include any intrusion upon the states' power to control elections.²² Therefore, he concludes that §5 cannot be seen to provide Congress with the power to overrule voter qualifications set by the states.

Justice Harlan's position is subject to attack on several grounds. The position can be contested, as was done by Justice Brennan in *Mitchell*,²³ by offering conflicting statements by the various framers of the amendment which indicate that there is no clear-cut legislative policy. Also, it can be attacked by pointing out the inconsistency of Justice Harlan's adherence to the *Marbury v. Madison* assertion that it is "emphatically" the province of the judiciary to say what the law is, while indicating that legislators who are long dead can dictate to the judiciary the hidden meaning of their words as framed in the constitutional amendment. In a recent law review article Professor Orloski stated:

In Justice Harlan's view, therefore, the fourteenth amendment provided that no state shall deny any person the equal protection of the laws except

²² *Id.* at 152-200 (Harlan, J., concurring in part, dissenting in part).

²³ *Id.* at 252-275.

in the instance of state laws setting voter qualifications for state and federal elections where the states can establish as many discriminatory practices as they see fit.²⁴

These criticisms go to the merits of Justice Harlan's position. Yet Justices Douglas, Brennan, White and Marshall also attacked the use of the legislative history of the 14th amendment in general. Justice Douglas, in his dissenting opinion, stated: "Hence the history of the Fourteenth Amendment tendered by my Brother Harlan is irrelevant to the present problem."²⁵ This assertion presents something of a dilemma when one considers the scope of congressional power under §5, as well as the propriety of a multitude of Supreme Court decisions employing the new equal protection doctrine. If the Court can disregard the intent of the framers when interpreting the amendment, what limitations exist on the power of the Court?

[T]he federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power has been committed, and it has violated the constitutional structure which it is its highest duty to protect.²⁶

If we are to accept Justice Harlan's position, however, and base our 14th amendment determinations on the state of mind of the framers, the overruling of Supreme Court decisions within the last two decades regarding sexual discrimination, equal educational opportunities, rights of criminal defendants, *etc.* seems a necessary result. Moreover, under Justice Harlan's analysis, a state could presumably deny black citizens the right to run for office since that, like voting, is a political right, and the 15th amendment applies only to voting, not holding public office. Therefore, we must base our interpretations on the wording of the amendment. Through we should be cognizant of the possibility for abuse when basing either legislative or judicial activity on an amendment as nebulous as our 14th amendment:

We must . . . conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record and cease to interpret the Amendment as this Court has always interpreted it.²⁷

24 Orloski, *Enforcement Clause of the Civil War Amendments: A Repository of Legislative Power*, 49 ST. JOHN'S L. REV. 493, 503 (1975).

25 400 U.S. at 140 (Douglas J., dissenting in part). See also *id.* at 278 (Brennan, White, Marshall, J.J., dissenting in part, concurring in part).

26 *Id.* at 203 (Harlan, J., concurring in part).

27 *Id.* at 278.

B. Enforcement, Not Dilution, of 14th Amendment

A careful reading of the §5 cases indicates that at least one factor of the test applied in *Morgan* survived the *Mitchell* decision with a majority of the Court, that being the limitation on congressional power under §5 to "enforcement" rather than "dilution" of 14th amendment rights. In a footnote to the *Morgan* opinion, Justice Brennan stated for the majority:

Contrary to the suggestion of the dissent . . . , §5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under §5 is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants no power to restrict, abrogate or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by §5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.²⁸

This "dilution prohibition" was preserved in *Mitchell* because Justices Douglas, Brennan, White, and Marshall strictly adhered to the rationale of *Morgan*, and Justice Black, in his enunciation of his compromise test, stated as follows:

As broad as the Congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil Rights Amendments . . . Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the amendment's guarantees of personal equality and freedom from discrimination, see *Katzenbach v. Morgan*. . .²⁹

Justice Harlan attacked this prohibition against the dilution of the 14th amendment in his dissent in *Cardona v. Power*.³⁰ He argued that it was inconsistent with the majority's position that under §5 it is appropriate for Congress to define the substantive scope of the 14th amendment:

I do not see why Congress should not be able as well to exercise its §5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred and the final decision is one of judgment.³¹

Harlan's analysis is persuasive. If indeed §5 increases the power of Congress and not that of the Court, and if we are to review congressional activities under §5 to determine only if a basis can be perceived for such actions, is it not inconsistent to argue that Congress' "discretion" can be exercised in only one direction? In *Morgan* the Court effectively states that Congress has the power to inter-

28 384 U.S. at 651, n.10.

29 400 U.S. at 129.

30 384 U.S. at 665.

31 *Id.* at 668.

pret the substantive provisions of the 14th amendment, yet such interpretations will be honored only if they do not retreat from the protections already announced by the Court.

The key to a proper analysis is found in the word "enforcement." In the context of §5, the power of "enforcement" must be regarded as extending to Congress the power to do what it considers necessary to *promote* the provisions of §1. Therefore the Court in *Morgan* is not really saying, "We will yield to Congress' discretion in interpreting the substance of the 14th amendment, but only so long as Congress agrees with us." Rather, the very provision upheld in *Morgan* (effective ban on literacy tests) was in contradiction to the previous position taken by the Court on the constitutionality of such tests.³² Section 5 is a grant of power to Congress to act in the due process and equal protection areas, but the power arises only when the activity in question can be determined to be in furtherance of the overall policy of the amendment. Indeed, if the rationale behind the enforcement clause was that Congress had greater expertise in determining what is a due process or equal protection violation, the "inconsistency" described by Justice Harlan would be a true one. Yet the enforcement clause enlarged the power of Congress in the realization that the scope of congressional action is not limited to a particular case or controversy, as is the action of courts. Instead, Congress can deal with problems, and fashion remedies, on a nationwide basis.

In summary, any action taken by Congress in the area of due process or equal protection is not necessarily "enforcement" of the amendment. If Congress legislates under §5, the Court must first determine whether the provision is indeed an "enforcement" of the amendment, *i.e.*, whether it seeks to promote the spirit of §1. It is only after such a determination has been made that the "discretion" spoken of in *Morgan* applies.

For example, on March 17, 1972, President Nixon sought to overrule the numerous Court decisions ordering busing by making the following proposal:

The 14th Amendment to the Constitution . . . provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Until now, enforcement has been left largely to the Courts—which have operated within a limited range of available remedies. . . . I propose that the Congress now accept the responsibility and use the authority given to it under the 14th Amendment to clear up the confusion which contradictory court orders have created. . . .³³

If such a comprehensive scheme of remedies were to be forthcoming from the Congress under §5, the initial determination for the reviewing Court would be whether the enactment was indeed an enforcement of the 14th amendment or a dilution of it. If the Court decided that the scheme did not promote the spirit of the equal protection clause, it could not properly be characterized as an "enforcement" under §5 and thus no power could be derived therefrom.

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

33 118 Cong. Rec. 8929 (1972).

C. State Action Requirement?

As previously stated, in *United States v. Guest*³⁴ six justices took the position that Congress could reach private conspiracies to deprive persons of constitutional rights under §5. It is important to note that this determination is only dicta and is not the holding of the case. In *Guest*, the indictment alleging a violation of 18 U.S.C. §241³⁵ was dismissed because the trial court held that there was an insufficient allegation of state action. The Supreme Court reversed, saying that the allegation of state action was indeed sufficient, and specifically reserved the question of whether or not a state action requirement must be read into 18 U.S.C. §241.³⁶ Justices Black, Clark and Fortas joined in the opinion of the Court but stated that the majority opinion could possibly be read *sub silentio* as a statement that Congress does not have power under §5 to reach private conspiracies. Therefore, the concurring Justices stated:

Although the Court specifically rejects any such connotation . . . it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of §5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.³⁷

Chief Justice Warren and Justices Douglas and Brennan felt the *sub silentio* aspects of the case to be so strong that they dissented in part stating:

I believe that §241 reaches such a private conspiracy, not because the Fourteenth Amendment of its own force prohibits such a conspiracy, but because §241, as an exercise of congressional power under §5 of that Amendment, prohibits *all* conspiracies to interfere with the exercise of a "right . . . secured . . . by the Constitution". . .³⁸

Justice Brennan made it clear that six members of the Court in *Guest* read §5 as allowing Congress to enact such laws as it considers "reasonably necessary to protect a right created by . . . that Amendment. . ."³⁹—thus specifically rejecting the interpretation of §5 offered in the *Civil Rights Cases*.⁴⁰ Therefore, although there has been no specific holding on the issue of whether state action is required in the exercise of §5, the very strong sentiment of *United States v. Guest* is that Congress, when seeking to protect a right insured by the 14th amendment, may reach private as well as state action.

The wisdom of this position, however, is doubtful. The 14th amendment states in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property.

34 383 U.S. 745 (1966).

35 18 U.S.C. §241 (1970).

36 383 U.S. at 755.

37 *Id.* at 762 (Clark, J., concurring).

38 *Id.* at 777 (Justice Brennan's emphasis).

39 *Id.* at 782.

40 109 U.S. 3 (1883).

Sec. 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. (Emphasis added).

To state that Congress may "enforce" the provisions of the 14th amendment by appropriate legislation without regard to the key requisite of the amendment itself, *i.e.*, state action, is to ignore the language and distort the meaning of the amendment.

Assume for discussion that a constitutional amendment is adopted, similar to the Sherman Antitrust Act, which prohibited "all combinations, contracts and conspiracies which have a detrimental effect on free competition." Assume further that such an amendment has an enforcement provision identical to §5. Would it not be strange to say that, while enforcing this hypothetical amendment, Congress could reach any activity "detrimental to free competition" regardless of whether it amounted to a "contract, combination or conspiracy"? Clearly *any* activity "detrimental to free competition" would not be prohibited by such an amendment. Analogously, *any* deprivation of constitutional rights is not prohibited by the 14th amendment. Instead, only those deprivations sanctioned by the states are prohibited. There is no support in the 14th amendment for the reaching of private activity unless we are willing to cast aside the wording of the amendment and read into it what we desire. If such is the case, why bother with the amendment at all, why not be more honest and say we can reach private conspiracies because it sounds like a good idea? Certainly, Congress is not "enforcing" the 14th amendment when it reaches admittedly private conspiracies which do not even arguably come within the purview of that amendment.

Thus the state action requirement of the 14th amendment must be met even when Congress exercises its "enlarged" powers under § 5. This does not mean, however, that it would be impossible for Congress to reach activities which the Court has found do not constitute state action. If the courts are able to find the requirement satisfied in situations where something less than affirmative and overt state involvement is present, it seems clear that Congress can go at least as far under § 5. Further, once a reviewing court determines that the activity in question is an enforcement, rather than a dilution, of the amendment, the same "rational basis" review used in *Morgan*⁴¹ should be applied. Thus, if the court could perceive a rational basis for the congressional position that the activity sought to be regulated constitutes state action—the requirement would be met.

Under this test, legislation in areas involving "borderline" state action, *e.g.*, public utilities, public foundations, private schools, self-help repossession under the U.C.C., *etc.*, could be properly enacted by the Congress under § 5. Yet, unlike an interpretation allowing purely private actions to be reached under § 5, the wording of the amendment would retain its vitality. Private conspiracies to deprive citizens of constitutional rights, like those prohibited in 18 U.S.C. § 241, however, are more properly reached by Congress under § 2 of the 13th amendment.

41 384 U.S. at 653.

V. The Search for an Appropriate Standard of Review

The difficulty in determining a proper standard of review for congressional actions under § 5 is compounded greatly by the broad terms employed in the 14th amendment itself. As previously discussed, it is well settled that the "necessary and proper" standard will be applied to congressional enactments under the enforcement clauses of both the 13th and 15th amendments. However, since the substantive provisions of those amendments are tied closely to race, this limited type of review seems acceptable to a majority of the Court. The 14th amendment, however, refers to deprivations of due process and equal protection of the laws without specific limitation to the racial context. It is likely, for this reason, that several members of the Court have been reluctant to give Congress the free hand that such limited review entails.

A. Justice Harlan's Position

In his dissent in *Cardona v. Power*,⁴² Justice Harlan offered his position on the proper scope of congressional power under § 5. He argues that Congress has the power to proceed with appropriate legislation only after the "existence of the evil" has been determined by the judiciary. He takes strong opposition to the language in *Morgan* indicating that Congress may properly interpret the substantive content of the 14th amendment in order to determine that certain state practices are in violation of its provisions. According to Justice Harlan, such interpretations are questions "for the judicial branch ultimately to determine." Therefore, after the Court held in *Lassiter v. Northampton Election Board*⁴³ that literacy tests were not in all instances unconstitutional, his conclusion was that Congress had no power to enact such a ban on literacy tests.

Seemingly, Justice Harlan would limit the enlargement of congressional power under § 5 to a deference by the Court to Congress' legislative fact-finding expertise. Admittedly, such a rationale greatly minimizes what the Court might foresee as a danger of abuse by the legislative branch if Congress is allowed to interpret the substantive provisions of the amendment. However, it likewise minimizes the power which would seem to be inherent in an express provision authorizing "appropriate legislation." Justice Harlan, in effect, gives no weight to § 5 whatsoever. He states that congressional expertise should be given due respect by the Court. But would not this be the case regardless of § 5? Moreover, in *Cardona v. Power* he states that congressional findings should *not* be given precedence over the findings of the state legislatures. Therefore, Justice Harlan's interpretation effectively reads § 5 out of the Constitution. The requirement that Congress act only upon judicially declared evils seems clearly inconsistent with the notion that it is the legislative power that has been increased by § 5. Clearly § 1 of the 14th amendment is self-enforcing and, just as clearly, the inclusion of § 5's grant of legislative power was not meant to be duplication or empty language. For this reason, Justice Harlan's interpretation of congressional power under § 5 is unacceptable.

⁴² 384 U.S. 672 (1966).

⁴³ 360 U.S. 45 (1959).

B. *The Morgan Test*

The test applied by the majority in *Morgan*, and by four justices in *Mitchell*, is the same broad standard used to review legislation under the necessary and proper clause.⁴⁴ That test, as formulated by Chief Justice Marshall in *McCulloch*, requires that the ends be legitimate and within the scope of the Constitution, and that the means be plainly adapted to those ends and consistent with the letter and spirit of the Constitution.⁴⁵

Such a test is consistent with the broadest reading of the grant of congressional power under § 5. As previously stated, under it Congress is not limited to remedial measures after the courts have declared state actions improper, but may decide for itself which state activities are violative of the 14th amendment. For the reasons discussed in the last section, any test consistent with the express provision for "appropriate legislation" in § 5 must attribute to Congress the power to interpret the substantive provisions of the 14th amendment. However, in line with the following discussion, the broad test offered by the majority in *Morgan*, though generally acceptable, should be significantly qualified when the congressional activity in question intrudes upon the areas of power traditionally exercised by the states.

The problem with the *McCulloch* test is that it seems almost without limits. The scope of congressional power to legislate "appropriately" under the commerce clause alone would seem to be so pervasive as to include the regulation of almost anything, as is demonstrated by *Heart of Atlanta Motel v. United States*⁴⁶ and *Katzenbach v. McClung*.⁴⁷ Moreover, the potential range of the due process and equal protection clauses would seem to be even greater than that of the commerce clause. Consider the following examples.

Suppose that Congress passed a national criminal justice administration procedure act. Under this hypothetical plan, Congress might attempt to regulate every phase of the state judicial process. Uniform court systems would be imposed upon the states, from the justice of the peace court to the supreme court level, including uniform rules of evidence and trial procedure. It seems arguable that such a plan would be supportable under § 5 of the 14th amendment according to the *Morgan* test. In light of the greatly divergent state procedures, some of which offer greater protection of the rights of criminal defendants than others, and a possible finding by Congress that these state systems have resulted in repeated deprivations of liberty without due process, such a plan might be considered a "plainly adapted means" of achieving a "legitimate" goal, *i.e.*, ensuring due process to criminal defendants.

Suppose that, as an attempted answer to the continual problems resulting from confusing busing orders by federal courts, and continuing efforts by state governments to impede the progress of integration, Congress announced that the creation of a national public school system was an "appropriate" means of enforcing the equal protection clause.

44 384 U.S. at 651.

45 *Id.* at 650.

46 379 U.S. 241 (1964).

47 379 U.S. 294 (1964).

Hopefully, the point of these examples is clear. Conceivably, under the *Morgan* test Congress could, by "enforcing" the due process and equal protection clauses, effectively change our entire structure of government. Powers traditionally in the hands of the states could be assumed by the federal government as long as the means in question are plainly adapted to a legitimate end consistent with the Constitution. As Justice Black stated in *Mitchell*:

My Brother Brennan's opinion, if carried to its logical conclusion, would, under the guise of ensuring equal protection, blot out all state power, leaving the 50 States as little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the states' powers . . .⁴⁸

C. *Consideration of States Rights*

The 14th amendment seeks to assure equal protection of the laws and to prevent deprivations of life, liberty and property; yet it is not aimed at creating an all-powerful federal government resulting in the elimination of state autonomy. For this reason, when determining the constitutional propriety of congressional activity under § 5, one of the factors which should be considered is the extent to which the proposed legislation intrudes upon exercises traditionally left to the states. Justice Black sought to include such a factor in his opinion in *Mitchell*. There he stated that, although Congress' power to "enforce" the 14th amendment is broad, there are at least three specific limitations upon its exercise: "Congress may not repeal other provisions of the Constitution, dilute the amendment in question, or strip the states of their power to govern themselves and thus create a central government of unrestrained authority. . . ."⁴⁹

He further suggested that the power of Congress under the Civil War Amendments is greatest when it is used to remedy racial discrimination and only then may it properly intrude upon areas reserved to the states. Thus, he concluded that the provisions extending the vote to 18-year-olds in state elections were unconstitutional:

Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections.⁵⁰

However, if the states' right in question is not one expressly reserved in the Constitution, the enforcement powers need not be so closely tied to racism.

Justice Black's suggestion that the extent of intrusion upon states' rights be considered in determining the constitutionality of congressional activity seems a wise one. Only through such a weighing process can abuses of federal power be avoided. However, for many of the same reasons that Justice Harlan's position, that the legislative history of the 14th amendment prevents Congress from en-

⁴⁸ 400 U.S. at 126.

⁴⁹ *Id.* at 128.

⁵⁰ *Id.* at 130.

forcing "political" rights, was unsatisfactory, so also may objection be made to Justice Black's argument that Congress may exercise its full powers under the 14th amendment only when it legislates against racial discrimination.⁵¹

Justice Black was willing in *Mitchell* to severely limit congressional power under § 5 when the remedy in question was not closely tied to race. However, in the past few decades, the Supreme Court has been extremely unwilling to limit its own power of review under the equal protection clause when the discrimination in question was other than racial. The Court has specifically rejected various discriminations based on alienage,⁵² nationality,⁵³ wealth,⁵⁴ sex⁵⁵ and legitimacy of birth.⁵⁶ It seems late in the game to seek to limit congressional power under the 14th amendment to racial discriminations, especially since it is the "power of Congress which has been enlarged."⁵⁷ Moreover, the Court has repeatedly stated that:

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.⁵⁸

Section 5 of the 14th amendment contains no limitation to issues of racial discrimination. Moreover, in light of the use made of the equal protection and due process clauses by the Supreme Court over the past four decades, it is incongruous that in 1977 Congress cannot act with equal vitality to erase discriminations based on race, sex, alienage and nationality under § 5.

Therefore, although Justice Black's decision to weigh the intrusion upon states' rights should be retained, his insistence that Congress may exercise its full § 5 power only when seeking to remedy racial discrimination is inconsistent with judicial interpretation of the 14th amendment. Instead, in determining whether Congress has legitimately exercised its § 5 power, the Court should consider the gravity of the deprivation or the arbitrary nature of the classification at which the congressional activity is aimed. This should then be weighed against the seriousness of the intrusion upon the powers traditionally exercised by the states in our federal scheme.

Such a balancing process would serve the aims of the 14th amendment in that it would allow Congress to take the initiative to prohibit discriminatory activity and abuses of due process by the states. Yet, it would, when possible, seek to preserve to the states those functions traditionally exercised by them. Under this balancing test, only the most serious denials of due process, or classifications of a clearly arbitrary nature, would merit intrusion upon those powers expressly

51 See text accompanying notes 42-43 *infra*.

52 *Graham v. Richardson*, 403 U.S. 365 (1971).

53 *Hirabayashi v. United States*, 320 U.S. 81 (1943).

54 *Griffin v. Illinois*, 351 U.S. 12 (1956).

55 *Reed v. Reed*, 404 U.S. 71 (1971).

56 *Levy v. Louisiana*, 391 U.S. 68 (1968).

57 *Ex parte Virginia*, 100 U.S. 339, 345 (1880).

58 *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966).

reserved to the states in the Constitution. When a congressional enactment intrudes upon an area traditionally reserved to the states, the violation of the due process or equal protection clause must be of a more serious nature than if a traditional state activity were not involved. Such congressional intrusions may be acceptable, when necessary, for the 14th amendment changed the entire Constitution—including those provisions reserving power to the states. Moreover, this balancing process would provide the Court with ample leeway in considering the propriety of congressional activity under the “changing” concepts of the due process and equal protection clauses.

This balancing of interests is consistent with the decision of the Court in *Mitchell*. The modification of residency requirements for federal elections, which was upheld in *Mitchell*, represented a limitation by the states on the fundamental right to travel. At the same time, state governments can be seen to have little interest in maintaining longer residency requirements for voting in federal elections.

The decision with regard to the 18-year-old vote, of course, reflects the justices’ differences of opinion concerning the magnitude of the deprivation to 18-year-olds and on the rationality of the classification. Most noteworthy, however, is the fact that the split outcome (upholding the provision with regard to federal elections, but striking it down in the state context) may be seen to turn on the relative importance of the states’ interest in the matter.

Further, in the two hypothetical situations spoken of earlier,⁵⁹ the states’ interest and traditional role in criminal justice administration and public education would clearly outweigh all but the most flagrant abuses in those areas by the states.

VI. Conclusion

When reviewing the constitutionality of congressional enactments under § 5, the court should first determine whether the law in question is properly characterized as an enforcement or a dilution of § 1. Having determined the enactment to be an enforcement, the Court should decide whether it can perceive a basis for a finding by Congress that the evil sought to be remedied constitutes state action. Thereafter, the legislation should be reviewed under the *McCulloch* test, recognizing Congress’ power to both remedy evils prohibited by the Supreme Court and to interpret the substantive provisions of § 1 for itself. However, when the activity in question threatens intrusion into powers traditionally held or exercised by the states, the seriousness of the deprivation or the arbitrary character of the classification must be weighed against the intrusion. Under such a balancing procedure, the twin aims of adequate enforcement of the 14th amendment and preservation of powers traditionally exercised by the states would be better served.

59 See text following note 47 *infra*.