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Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*

Jesse H. Choper**

I. INTRODUCTION

Nearly two decades have now passed since the Supreme Court, in its 1965 Term, rendered four notable decisions—the most controversial being *Katzenbach v. Morgan*—which, for the first time in the modern era, extensively addressed the question of Congress's ability to act under the enabling clauses of the thirteenth, fourteenth and fifteenth amendments to secure the rights guaranteed by the substantive sections of those provisions. In the intervening years, six new Justices have been appointed, and the Court has been provided with several opportunities to refine, explicate, or modify the doctrines first announced in these salient decisions.

During this period, there has also been a distinct (and at least potentially substantial) contraction of Congress's authority to legislate pursuant to other of its regulatory powers. In 1976, in *National League of Cities v. Usery*, the Court held that acts of Congress, otherwise permissible under the commerce clause, violate the tenth amendment if they regulate "the States qua States" and interfere with the freedom of state and local governments "to structure integral operations in areas of traditional governmental functions." Although the *Usery* ruling specifically dealt only with the commerce power, there is

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** Dean and Professor of Law, University of California, Berkeley. I wish to thank Violet Elizabeth Grayson of the class of 1982 for her exceptionally able and valuable assistance in the preparation of this paper and Joseph D. Grano and Paul J. Mishkin for their helpful comments.
3. Id. at 847-48.
4. Id. at 892.
strong reason to believe that its strictures in favor of state sovereignty apply with at least equal force to Congress's taxing power, which has traditionally been subject to even greater—albeit vaguely delineated—restrictions vis-a-vis the states than the commerce clause. Moreover, although the Usery majority deliberately expressed no view as to whether its rationale also affected federal conditional grants of aid to state and local governments pursuant to Congress's spending power, it has been plausibly suggested that Usery may portend new confines on this authority as well—the theory being that Congress may be forbidden to do indirectly through use of the carrot what Usery bars it from doing directly through use of the stick. Finally, less than a year ago, in Hodel v. Virginia Surface Mining & Reclamation Association, both Chief Justice Burger and Justice Rehnquist urged that the Court specify a more restrictive reading of congressional power under the commerce clause as to regulation of private persons and business, as well as to rules that affect "the States qua States."

Despite the Usery decision and its restraining implications, the Court has at the same time unequivocally established that when Congress acts pursuant to the Civil War amendments, Usery's state sovereignty limitation has no force. Thus, as Congress's authority to protect individual rights under its com-

5. Compare New York v. United States, 326 U.S. 572, 582 (1946) ("But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State.") with Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968) ("But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.").

6. 426 U.S. at 852 n.17.


9. Hodel involved a challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. IV 1980), which placed strict limits upon surface mining of private lands. The Court unanimously upheld the Act as a valid exercise of congressional power under the commerce clause. 452 U.S. at 281. Chief Justice Burger and Justice Rehnquist, however, each concurred specially, emphasizing that Congress may act under its commerce power only to regulate activity which has a "substantial" effect on interstate commerce. Id. at 305 (Burger, C.J., concurring); id. at 310-11 (Rehnquist, J., concurring).

merce and taxing powers has diminished, the significance of its enforcement powers under the Civil War amendments has increased. For example, suppose Congress prohibited all state law schools from using either age or the Law School Admission Test (LSAT) as a criterion for admission. If legal education were held to be an "integral government function," under Usery Congress could not, pursuant to the commerce clause, dictate the specifics of the state's conduct with respect to that function. But if Congress acted under the enabling clause of one of the Civil War amendments, Usery considerations would not come into play. The sole question would be whether the hypothetical federal statute came within Congress's Civil War amendments enforcement powers.

This Article examines the doctrines expounded by the Supreme Court in the mid-1960's, and the Court's pertinent holdings since then, to assess the current state of the law regarding Congress's power to define the substantive terms of the Civil War amendments. The discussion is wholly confined to the issue of Congress's ability to expand the scope of the thirteenth, fourteenth and fifteenth amendments beyond the Court's interpretation of those provisions. Although it adverts to Congress's "remedial" authority to accomplish this goal, the Article's central concern is with Congress's "definitional" power to do so. Finally, the Article does not address the validity of acts of Congress—such as the currently pending anti-abortion legislation—11—that arguably dilute the protections that the Court has held the fourteenth amendment provides.12

II. THE SEMINAL DECISION OF KATZENBACH v. MORGAN

The celebrated ruling in Katzenbach v. Morgan13 provides the appropriate starting point. In section 4(e) of the Voting Rights Act of 1965,14 Congress provided that no person who had completed the sixth grade in a Spanish language school in Puerto Rico could be denied the right to vote because of an inability to read or write English. This effectively eliminated New

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12. For a consideration of the problem in general and, in particular, of the complex issue of distinguishing expansion from dilution, see W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1603-05 (5th ed. 1980).
York's English literacy test as applied to many of the thousands of Puerto Ricans resident in that state. The principal argument against the constitutionality of section 4(e) was based on a Supreme Court decision, just seven years earlier, involving North Carolina's English literacy test for voting. In that case, *Lassiter v. Northampton County Board of Elections*, the Court unanimously held that, so long as such state laws are racially neutral on their face and applied nondiscriminatorily, they do not violate the equal protection clause of section 1 of the fourteenth amendment. Thus the crucial question presented to the Court in *Morgan* was: if these state laws do not violate equal protection, how can Congress prohibit them pursuant to its power under section 5 of the fourteenth amendment to enforce equal protection?

Justice Brennan, writing for a majority of seven, offered alternative and significantly different rationales for holding that Congress possessed the authority under section 5 of the fourteenth amendment to enact this provision of the Voting Rights Act. First, Justice Brennan reasoned, Congress may have granted Puerto Ricans the vote because "this enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." In this part of the *Morgan* opinion—which may be characterized as its "remedial" branch—the Court held that Congress might select any means it thought appropriate to combat discrimination against a particular ethnic group, a type of discrimination that the Court itself had long held to violate equal protection. Second, Justice Brennan continued, wholly apart from any deliberately unequal allocation of government services to Puerto Ricans, Congress may eliminate a voter qualification that it finds to be "an invidious discrimination." In this part of the *Morgan* opinion—which may be characterized as its "definitional" branch—the Court reasoned that Congress

16. Id. at 53-54.
17. 384 U.S. at 652.
18. When Justice Brennan speaks of Congress's effort to "secure ... nondiscriminatory treatment" for the Puerto Rican community, it is unclear whether he means that Congress may have been concerned with past discrimination and its likely continuance, as in South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966), or simply the possibility of some future discrimination. Thus, it is uncertain whether Congress's power under this branch of *Morgan* is merely curative or preventive as well.
20. 384 U.S. at 654.
may determine that a governmental practice, which either has not been subject to judicial review or, alternatively, has been reviewed and held constitutional, nonetheless violates the equal protection clause, and that Congress then may act to combat it. Thus, it would appear that Congress may define for itself the provisions that it is empowered to enforce.21

A. THE POTENTIAL BREADTH OF MORGAN’S IMPLICATIONS

As a bold excursion into largely uncharted territory, Katzenbach v. Morgan raises many profound questions. Although its remedial branch is of only peripheral concern in this Article, a brief sketch of just some of the issues left unresolved in this segment of the Morgan opinion illustrates its complexities. Basically, under what circumstances may Congress go beyond enacting traditional remedies—such as criminal penalties and civil liabilities for concededly unconstitutional conduct—and prohibit action that is itself constitutional to cure or prevent constitutional violations? For example, may Congress outlaw neutrally motivated state laws that have a racially disproportionate impact—which the Court has ruled are generally not violative of equal protection22—in order to correct or avoid intentional discrimination that has been held to violate equal protection? If so, is this sort of remedy appropriate only when Congress believes that such intentional discrimination has actually occurred or that there is a special danger that it will take place in the future? Must Congress make “findings” with respect to such existing or potential discrimination? If so, how precise and well documented must these findings be? Must Congress identify a particular culprit and specific unconstitutional incidents, or may it simply cite to the nation’s long history of both official and private racial discrimination? What relationship, if any, must Congress show between its findings with respect to prior or potential discrimination and the remedy it imposes? What degree of deference will the Court grant Congress with respect to any or all of these matters?

Pursuant to Morgan’s definitional branch—on which the remainder of this Article will focus—is Congress, in enforcing the fourteenth amendment, limited to outlawing specific state prac-

21. In a footnote to its opinion, the Court emphasized that Congress may so redefine the fourteenth amendment only in ways that expand its provisions: "§ 5 grants Congress no power to restrict, abrogate, or dilute" the guarantees of the amendment. Id. at 651 n.10.

tices such as English literacy tests for voting (or, indeed, perhaps just the literacy tests of some states like New York)? Or does its definitional power extend more broadly to creating new suspect classifications or new fundamental rights that must be subject to strict judicial scrutiny when burdened? May Congress—contrary to such rulings as Washington v. Davis\(^\text{23}\) and Personnel Administrator v. Feeney\(^\text{24}\)—determine that de facto as well as de jure discrimination against judicially declared suspect and quasi-suspect classes is presumptively violative of equal protection? With respect to due process, may Congress overturn decisions such as Bishop v. Wood\(^\text{25}\) and Paul v. Davis\(^\text{26}\) by redefining what constitutes a “property” or “liberty” interest that cannot be denied without adequate procedural protections?\(^\text{27}\) May it alter the result in cases like Matheus v. Eldridge\(^\text{28}\)—which held that no evidentiary hearing is required prior to termination of disability benefits—by striking a new balance in respect to the factors that the Court has held must be weighed in making this judgment? May Congress require the states to use the Federal Rules of Civil and Criminal Procedure on the theory that in its view such use is needed to assure that due process be accorded all litigants? May Congress determine—contrary to the Court’s ruling in Zurcher v. Stanford Daily\(^\text{29}\)—that police searches of newspaper offices for evidence of crimes does abridge the first amendment freedom of the press (made applicable to the states through the due process clause of the fourteenth amendment) and thereby prohibit such practices?\(^\text{30}\) Similarly, may Congress establish a first amendment news reporter’s privilege by ascertaining as an empirical matter—contrary to the Court’s rationale in Branzburg v. Hayes\(^\text{31}\)—that confidential sources will be deterred from providing information to journalists if those journalists may be

\(\text{\textsuperscript{23}}\) Id.
\(\text{\textsuperscript{24}}\) 442 U.S. 256 (1979).
\(\text{\textsuperscript{25}}\) 426 U.S. 341 (1976).
\(\text{\textsuperscript{26}}\) 424 U.S. 693 (1976).
\(\text{\textsuperscript{27}}\) See generally Note, Congressional Power to Enforce Due Process Rights, 80 COLUM. L. REV. 1265, 1278-80 (1980) (suggesting that under Morgan, Congress has the power to expand the class of government entitlements protected by the due process clause of the fourteenth amendment).
\(\text{\textsuperscript{28}}\) 424 U.S. 319 (1976).
\(\text{\textsuperscript{29}}\) 466 U.S. 547 (1978).
\(\text{\textsuperscript{31}}\) 468 U.S. 665 (1972).
compelled to disclose the names of their sources to government investigative agencies? More broadly, may Congress conclude—despite the implications of the Court's summary affirmance in *Doe v. Commonwealth's Attorney*32—that the judicially constructed constitutional right of privacy comprehends all consensual sexual acts performed privately by adults? More generally, may Congress enlarge the concept of "state action"—for example, by extending *Shelley v. Kraemer*33 beyond its present confines34 and declaring that judicial enforcement of any private transaction makes it subject to the constitutional restraints of due process and equal protection? As for the thirteenth amendment, may Congress prohibit all actions—state and private—that have a racially disproportionate impact on the ground that they constitute "badges and incidents of slavery"?35 May it broaden the traditional reach of the anti-slavery prohibition to include discriminations against ethnic minorities and women? Under the enabling clause of the fifteenth amendment, may Congress adopt the minority view in *City of Mobile v. Bolden*36 to bar all electoral systems that have the effect of diminishing black voting power, irrespective of the purpose behind the scheme?

Further, if Congress has the power to effect any or all of such changes in constitutional doctrine, must it make special findings before doing so? If so, must such findings bear any particular relation to judicially established doctrine? For example, if Congress does have the authority to create a new suspect classification, must it determine—as the Court suggested in *San Antonio Independent School District v. Rodriguez*37—that the members of the newly favored group have "the traditional indicia of suspectness: ... saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"?38 At a minimum, must Congress conclude that the suspect class that it has created is a "discrete and insular minority" within the meaning of *United States v. Carolene*

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33. 334 U.S. 1 (1948).
34. See W. LOCKHART, Y. KAMISAR & J. CHOPER, supra note 12, at 1534-36 for a survey of alternative interpretations of *Shelley*.
35. This substantive question has been left open by the Court. See *City of Memphis v. Greene*, 451 U.S. 100, 120 (1981).
38. *Id.* at 28.
Products Co.\textsuperscript{39} Overall, what deference does the Court owe to congressional determinations under Morgan's definitional branch?\textsuperscript{40}

If Morgan's definitional branch were to be construed broadly, and if it enjoyed continued vitality, then the hypothetical federal statute prohibiting state law schools from using age or the LSAT as admissions criteria—and virtually all other conceivable exercises of congressional power (except those that "dilute" constitutionally secured personal rights)\textsuperscript{41}—could be quite easily upheld. First, and most encompassingly, Congress could be said to have designated legal education a fundamental right, contrary to the Court's decision in San Antonio Independent School District v. Rodriguez.\textsuperscript{42} Thus, any state discrimination with respect to exercise of this right would be subject to strict scrutiny. Under this standard, Congress could readily be found to have concluded that neither age nor the LSAT were necessary to any compelling interest in connection with state legal education.\textsuperscript{43} Second, Congress could be found to have decided that age is a suspect classification—again despite existing judicial precedents\textsuperscript{44}—and that state law schools have no compelling interest in excluding older applicants.\textsuperscript{45} Third, given the well known fact that use of the LSAT disproportionately disadvantages members of at least some racial and ethnic mi-

\textsuperscript{39} 304 U.S. 144, 153 n.4 (1938).

\textsuperscript{40} Both branches of Morgan in concert raise an overarching issue. If Congress is granted sufficiently broad power under the remedial branch—that is, if "findings" requirements are lax, and discretion with respect to remedies is plenary—how great a difference is there between what Congress may accomplish under its definitional power as compared with its remedial power? This matter is especially significant because—as this Article will illustrate—there are strong reasons to believe that the definitional branch may in fact afford Congress a much more modest authority than the quite revolutionary reach of the above stated hypothetical questions suggest.

\textsuperscript{41} See infra text accompanying notes 55-57, 105-110.

\textsuperscript{42} 411 U.S. at 35.

\textsuperscript{43} A further ramification of this hypothetical federal statute might be that persons who qualified for admission to state law schools, but who could not afford to pay the required tuition, would contend that this unconstitutionally burdened the exercise of the fundamental right. They would in effect urge that Congress had also overturned the Court's contrary conclusion in San Antonio Indep. School Dist. v. Rodriguez, id. at 18-28, as to this argument, and that they were therefore entitled to a tuition-free state legal education.


\textsuperscript{45} The consequences of designating age a suspect classification would be substantially more far-reaching than designating legal education a fundamental right since it might permit successful challenges to all government rules that burden people on the basis of their advancing years.
nority groups in the admissions process, the hypothetical statute could be upheld on the theory that Congress had rejected the principle of Washington v. Davis—at least where law school admission was concerned—and decided that de facto as well as de jure discrimination against such persons violated equal protection. Finally, Congress might be found to have chosen to ban this type of de facto discrimination by labeling it a "badge or incident of slavery" within the meaning of the thirteenth amendment, thus resolving an issue undecided in the recent case of City of Memphis v. Greene.

B. THE OPINION’S DEFINITIONAL DISCUSSION

The portion of the Morgan opinion expounding its definitional branch is contained in a single paragraph, supplemented by five footnotes. It thus seems oddly sparse and casual in view of the theory’s potentially radical impact. This discussion begins after the Court has already adequately disposed of the case under the remedial rationale—that is, that Congress enacted section 4(e) of the Voting Rights Act in order to secure nondiscriminatory treatment for the Puerto Rican community in obtaining various government services. Rather than end the matter there, however, Justice Brennan advances an alternative holding: "The result is no different if we confine our inquiry to the question whether § 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications." Congress, the Court explains, may have questioned "whether denial of a right deemed so precious and fundamental [as voting] was a necessary or appropriate means [to serve New York’s purported ends] of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise." In doing so, Congress might properly bring its "specially informed legislative competence" to bear in this area, "weigh . . . [the] competing considerations," and then forbid application of the literacy test

47. 426 U.S. 229 (1976).
48. 451 U.S. 100 (1981). See supra note 35 and accompanying text. Note that this theory would readily permit the coverage of the hypothetical federal statute to be extended to all private law schools as well. See Runyon v. McCrory, 427 U.S. 160, 168-75 (1976).
49. 384 U.S. at 653-56 & nn.13-17.
50. Id. at 652.
51. Id. at 653-54.
52. Id. at 654.
pursuant to its power under section 5 of the fourteenth amendment to enforce equal protection.\(^{53}\) Justice Brennan concludes by emphasizing the extreme deference that the Court will afford to congressional judgments of this kind: "[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause."\(^{54}\)

Prominent scholars—and (as shall be seen) Supreme Court Justices—have quite clearly interpreted this passage in Morgan as, to some significant extent, assigning "Congress to the post of constitutional interpreter,"\(^{55}\) and making the national legislative branch "the final arbiter of the meaning of the Constitution."\(^{56}\) Thus, in an early and important post-Morgan analysis, Archibald Cox found that "for the future the decision logically permits the generalization that Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights."\(^{57}\) Indeed, quite apart from the Court's language in Morgan, conventional judicial construction of the scope of congressional power under the commerce clause—which (at least since 1937) effectively authorizes Congress to define "interstate commerce" for itself\(^{58}\) by affording Congress virtually unreviewable discretion to determine whether any local activities affect commerce in more than one state—lends substantial support to granting Congress the same leeway in defining the substantive terms of the Civil War amendments.

But Morgan's definitional branch need not be read so expansively. Indeed, careful parsing of the opinion's abbreviated discussion leads persuasively to the conclusion that it probably stands for nothing more than the proposition that Congress may scrutinize any state regime which the Court has found to

\(^{53}\) Id. at 656.

\(^{54}\) Id. (emphasis added).

\(^{55}\) L. Tribe, American Constitutional Law 266 (1978).

\(^{56}\) Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81, 84.


\(^{58}\) See W. Lockhart, Y. Kamisar & J. Choper, supra note 12, at 122-55.
be constitutionally questionable because it involves a suspect classification or a fundamental right. On this reading, Morgan’s definitional branch merely permits Congress to investigate the facts surrounding state action of this type and then prohibit the practice if, in Congress’s judgment, it lacks the compelling basis which the Court demands to uphold it. It is true that under this reading of Morgan’s definitional branch, Congress is free to invalidate government actions that the Court has already upheld or might otherwise uphold in the future. But this would only permit Congress to “expand” on judicial conceptions of equal protection (and due process) in those very limited situations where Congress, with its special competence in the circumstances, has appraised the relevant factors and concluded that the law (already declared vulnerable by the judiciary) is not justified by the required state interest—a decision which differs from that which the Court, with its more limited capabilities, either has already reached or would otherwise make when the issue was presented to it. Thus, in enacting section 4(e) of the Voting Rights Act, Congress might be said to have concluded that, in its judgment, contrary to the Court’s holding in the Lassiter case, there was no compelling basis for states’ denying the franchise to persons not literate in English.

This explanation of Morgan’s definitional branch is not without difficulty. In 1966, when Morgan was decided, the Court had yet to formally proclaim the right to vote to be “fundamental” and thus subject to strict scrutiny under the equal protection clause. That announcement did not come until three years later in Kramer v. Union Free School District. But despite the fact that, as of 1966, the Lassiter ruling—upholding the constitutionality of racially neutral literacy tests that were applied in a nondiscriminatory fashion—was still the law, it is clear that the doctrinal trend that ultimately resulted in the Court’s pronouncement in Kramer was virtually complete when the Court decided Morgan. In 1964, in Reynolds v. Sims, which mandated the rule of one person-one vote, the Court observed that “the right of suffrage is a fundamental matter in a free and democratic society . . . [and,] especially since . . . [it] is preservative of other basic civil and political rights, any alleged infringement . . . must be carefully and meticulously scrutinized.” In 1965, in Carrington v. Rash, in

59. See infra text accompanying note 113.
62. Id. at 561-62.
63. 380 U.S. 89 (1965).
holding that a Texas law was an "invidious discrimination" because it prohibited military personnel stationed in the state from voting in local elections, the Court noted that it dealt "with matters close to the core of our constitutional system."\footnote{4} Similarly, in 1966, in \textit{Harper v. Virginia Board of Elections},\footnote{5} in ruling that Virginia's poll tax was an "invidious discrimination" in violation of equal protection, the Court reemphasized that voting was a "fundamental political right, because preservative of all rights."\footnote{6}

Thus, at the time that Justice Brennan wrote the Court's opinion in \textit{Morgan}, he was plainly aware of the Court's nearly completed march to making voting a fundamental right. As a consequence, in reviewing Congress's decision to enfranchise certain Puerto Rican residents in New York, it was wholly understandable for Justice Brennan to have asked whether Congress might reasonably have concluded that there was no compelling basis for denying these citizens the right to vote. That this was the crux of the rationale for \textit{Morgan}'s definitional branch and that Justice Brennan's opinion presaged the Court's subsequent explicit holding that voting came within the fundamental rights branch of equal protection is forcefully confirmed by a footnote in \textit{Morgan} which invoked \textit{Carrington} and \textit{Harper} to support the following statement: "True, . . . the \[Voting Rights Act\] precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened . . . and Congress is free to apply the same principle in the exercise of its powers."\footnote{7}

An additional indication that the definitional branch of the Court's opinion in \textit{Morgan} does not grant Congress any vast

\footnote{4. \textit{Id.} at 96.}
\footnote{5. 383 U.S. 663 (1966).}
\footnote{6. \textit{Id.} at 667 (citing \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 370 (1886)).}
\footnote{7. 384 U.S. at 655 n.15 (citations omitted). A problem with this analysis arises when one asks how Congress, which was not privy to the \textit{Carrington} and \textit{Harper} decisions at the time that it enacted the Voting Rights Act of 1965, might have been sufficiently familiar with the relevance to voting of the strict scrutiny approach to investigate the issue of whether New York had a compelling basis for disenfranchising persons not literate in English. The answer to this question is two-fold. First, \textit{Reynolds v. Sims} had already been decided. Second, the \textit{Morgan} majority did not ask whether Congress in fact found that New York lacked a compelling basis for denying the franchise to Puerto Ricans not literate in English, but rather, whether Congress could have done so.}
authority to determine the substantive content of the provi-
sions of the fourteenth amendment is contained in approxi-
mately a dozen words of the *Morgan* text which suggest that
New York's literacy requirement was originally enacted for the
racial purpose of disenfranchising persons of non-Anglo-Saxon
descent. In the midst of his skimpy "definitional" discussion,
Justice Brennan appears parenthetically to change the direc-
tion of his argument and mentions the existence of "some evi-
dence suggesting that prejudice played a prominent role in the
enactment of the [literacy] requirement." In a footnote, he
then quotes a statement made at New York's constitutional
convention of 1916, which refers to "the mental qualities of our
race" and plainly suggests that the voter literacy requirement
was enacted to disenfranchise "Southern and Eastern Euro-
pean races." If this fragmentary discussion by Justice Bren-
nan means that the Court itself found New York's literacy
requirement to be the product of intentional racial discrimina-
tion, then its elimination by Congress went no further than ex-
isting judicial doctrine and, therefore, any suggestion in
*Morgan* of Congress's having any "definitional" powers is at
most dicta. As shall be seen, however, this "parenthetical"
aspect of Justice Brennan's discussion may not fairly be so
construed, and, indeed, it implies a significant congressional ca-
pacity to enact "prophylactic" legislation and move beyond the
judiciary's prerogatives in dealing with certain problems of ra-
cial discrimination under the equal protection clause. But de-
spite the potentiality of this part of *Morgan*'s definitional
discussion, it still falls far short of granting the legislative
branch anything like an unbounded authority to interpret for it-
self the substantive terms of the Civil War amendments.

The strongest direct evidence against the view that *Morgan*
grants Congress only a limited "definitional" power begins in
Justice Harlan's dissenting opinion, which Justice Stewart
joined. From this single paragraph containing *Morgan*'s defin-
tional discussion, Justice Harlan draws the conclusion that the
Court has given Congress "the power to define the substantive
scope of the [Fourteenth] Amendment." He then vigorously
protests this doctrine on the ground that it authorizes Congress
"to exercise its § 5 'discretion' by enacting statutes so as in ef-
flect to dilute [as well as expand] equal protection and due pro-

68. 384 U.S. at 654.
69. Id. at 654 n.14.
70. See infra text accompanying notes 154-86.
71. 384 U.S. at 668.
cess decisions of this Court."72 Justice Brennan's response to Justice Harlan, found in a much discussed footnote of the Court's opinion,73 tends to confirm the dissent's characterization of the majority's position. Citing the language used by Justice Harlan to describe and condemn the Court's definitional theory, Justice Brennan denies only that the Court's rationale allows Congress to dilute fourteenth amendment rights, thus implying acceptance of Justice Harlan's assertion that the Court has indeed empowered Congress to define the substantive scope of the rights guaranteed by the fourteenth amendment. It is always dangerous, however, to interpret an opinion of the Court by relying on the meaning attributed by those who disagree with it. The fact that the majority does not expressly refute the dissent's characterization of its views does not reveal that the Court has adopted that description.74 Thus, it is appropriate to look to the Court's subsequent opinions on the point in order to discern more accurately the true nature of Morgan's "definitional" branch.

III. THE RELEVANCE OF JONES v. ALFRED H. MAYER CO.

The most forceful additional evidence of a broad definitional power for Congress under the Civil War amendments may be found in Jones v. Alfred H. Mayer Co.,75 decided two years after Morgan. Jones may be construed as applying—albeit with minimal explanation—Morgan's definitional analysis to the thirteenth amendment. Relying on Congress's authority under the enabling clause of the thirteenth amendment, the Court in Jones upheld the constitutionality of a federal statute, enacted as part of the Civil Rights Act of 1866,76 which the Court interpreted as prohibiting racial discrimination in the sale or rental of housing by private persons as well as governmental officials. After noting that the thirteenth amendment

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72. Id.
73. Id. at 651 n.10.
74. There is no reason to believe that Justice Brennan's pruning of Morgan's definitional branch would have produced a unanimous Court. Although Justices Harlan and Stewart agreed with the basic theory of Morgan's remedial branch, they found the legislative record inadequate to sustain a finding that the Puerto Rican minorities were subject to unconstitutional discrimination requiring remedial legislation. Id. at 669.
75. 392 U.S. 409 (1968).
76. The statute in question, 42 U.S.C. § 1982, was, in its original form, part of § 1 of the Civil Rights Act of 1866. Act of April 9, 1866, c. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981, 1982 (1976)).
governed private action as well as state action, the Court reasoned: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Interestingly, the Court cites neither *Katzenbach v. Morgan* nor any other authority for this extremely fertile principle under which, at the least, Congress would appear to be capable of outlawing virtually all deliberate racial discrimination—private as well as official—in the United States.

It is true that there are passages in the *Jones* opinion that may be read to say that the Court would interpret the thirteenth amendment, of its own force, to prohibit private racial discrimination in the sale or rental of property. Under this view, the language in *Jones*, seemingly granting Congress spacious definitional power under the thirteenth amendment, may be construed as being not only an *ipse dixit* but pure dicta as well, that in no way advances *Morgan*’s definitional rationale. But nothing in any Supreme Court case before or after *Jones* suggests that the Court, despite uncounted opportunities to do so, would itself define the coverage of the thirteenth amendment in a fashion broad enough to encompass the kinds of unofficial racial discrimination—regarding such matters as access to private schools or private recreational parks—that the Court has held Congress prohibited (and had power to prohibit) in the Civil Rights Act of 1866. Indeed, in its recent ruling in *City of Memphis v. Greene*, the Court specifically stated that *Jones* "left open the question whether § 1 of the [Thirteenth] Amendment by its own terms did anything more than abolish [formal] slavery."

Nonetheless, *Jones* need not be interpreted as conferring any definitional authority on Congress. Rather, it can be persuasively argued on either of two theories that the Court upheld the Civil Rights Act of 1866 as only a remedial exercise of Congress’s enforcement power under the thirteenth amendment. First, "‘slavery’ may be regarded as a status to be de-

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77. *Id.* at 440.
78. The fact that Justice Stewart, who authored *Jones*, dissented in *Morgan*, probably explains his aversion to any reliance on *Morgan*’s definitional branch.
79. 392 U.S. at 441-43.
82. *Id.* at 125-26.
fined by the Court . . ., and the 'badges and incidents of slavery' may be regarded, not as elements of that definition, but as stigmas and disabilities related to slavery . . . . Thus to say that Congress may rationally determine the badges and incidents of slavery is nothing more than to say that Congress may prohibit certain practices, although those practices themselves do not constitute slavery, when Congress rationally finds that their prohibition will help to prevent slavery. 83 Alternatively, since Congress's power under Morgan's remedial branch encompasses eradicating the effects of constitutional violations as well as preventing future ones, 84 the congressional prohibition in Jones may be readily sustained as an effort to eliminate the persistent legacies of the past condition of slavery. Both of these "remedial" approaches find support in the Court's language characterizing the 1866 Civil Rights Act as seeking to assure that "equal treatment for the Negro would . . . be secured," 85 and in statements by the law's sponsors (quoted by the Court) that "[t]he end is the maintenance of freedom . . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery." 86

This explanation of Jones, which greatly limits its authority for confirming Morgan's broader definitional implications, is substantiated by Griffin v. Breckenridge, 87 decided three years later. In Griffin, the Court relied on the Jones reasoning to uphold Congress's creation of a civil damage action against persons who conspired for purposes of racial animus to deprive black citizens of their constitutional rights. In reaching its conclusion, the Court found the federal statute to be a fulfillment of the thirteenth amendment's promise that "the former slaves and their descendants should be forever free." 88

IV. THE EXPLANATIONS IN OREGON v. MITCHELL

The Justices's most thorough—if not most informative—consideration of the scope of Morgan's definitional branch to date came in 1970 with the case of Oregon v. Mitchell. 89 That

85. 392 U.S. at 429.
86. Id. at 443-44.
88. Id. at 105.
case involved the constitutionality of the Voting Rights Act amendments of 1970 which, among other things, lowered the voting age to eighteen for both state and federal elections. Oregon produced five separate opinions. By shifting majorities, the Court sustained the voting age provision for federal elections, but invalidated it as applied to state and local elections. Although no opinion attracted a majority vote, two of the opinions—each joined in by three Justices—contain the views of five current members of the Court. Thus, scrutiny of those opinions should shed some light on the position the present Court may be expected to take.

A. Justices Brennan, White and Marshall

In Oregon, Justice Brennan, joined by Justices White and Marshall—who were also part of the majority in Katzenbach v. Morgan91—voted to uphold the eighteen year old voting provision in its entirety. This afforded these Justices an excellent opportunity to clarify Morgan's definitional theory.

On the one hand, it would have been possible for Justice Brennan never to have reached the issue of Congress's definitional power. His rationale could have been that the Court's 1969 decision in Kramer v. Union Free School District,92 which held voting to be a fundamental right for equal protection purposes, itself required the states to enfranchise persons between eighteen and twenty-one years of age. Indeed, Justice Brennan begins his consideration of the eighteen-year-old provision by stating that "there is a serious question whether a statute granting the franchise to citizens 21 and over while denying it to those between the ages of 18 and 21 could ... withstand scrutiny under the Equal Protection Clause."93 He then discusses at length why this "admitted restriction upon the franchise ... [is] supported only by bare assertions and long practice, in the face of strong indications that the States themselves do not credit the factual propositions upon which the restriction is asserted to rest."94 But, having laid a firm basis for

91. Apart from Justice Douglas, these three Justices were the only members of the original Morgan majority remaining on the Court at the time that Oregon was decided. Justice Douglas concurred with the result of Justice Brennan's Oregon opinion.
93. 400 U.S. at 240.
94. Id. at 246.
judicial invalidation of a state law denying the vote to eighteen year olds, he then emphatically states that

there is no reason for us to decide whether, in a proper case, we would be compelled to hold this restriction a violation of the Equal Protection Clause. For as our decisions have long made clear, the question we face today is not one of judicial power under the Equal Protection Clause. The question is the scope of congressional power under § 5 of the Fourteenth Amendment . . . .

Careful reading of that part of Justice Brennan's opinion which sustains Congress's power to lower the voting age in state and local elections discloses that its rationale mirrors that which I have suggested was employed in his opinion for the Court in Morgan. In the intervening period, the Kramer decision, although not passing on the question of whether the equal protection clause of section 1 of the fourteenth amendment required the states to enfranchise eighteen year olds, made clear that, as a general rule, denials of the vote would be subject to judicial review under the test of strict scrutiny—that is, the exclusion would have to be "necessary to promote a compelling state interest." In Oregon, the issue for Justice Brennan was whether Congress could properly have found that no compelling basis existed for excluding eighteen year olds.

95. Id.
96. See supra text accompanying note 59.
97. Kramer specifically noted that no attack had been made on the challenged law's requirement that voters "be at least 21 years of age." 395 U.S. at 623 n.2. See also infra note 99.
98. 395 U.S. at 627.
99. One argument that may be raised in objection to this account of Justice Brennan's approach in Oregon is that, unlike most exclusions from the franchise, denial of the vote to persons under the age of twenty-one is not subject to strict scrutiny under the equal protection clause of § 1 of the fourteenth amendment because such discrimination is expressly authorized by § 2 of the fourteenth amendment. (Section 2 provides for reduced congressional representation for any state that denies the vote to its citizens, but exempts several kinds of state franchise limitations from this proscription—including denial of the vote to those under twenty-one years of age and to persons convicted of criminal offenses.) Indeed, the Court's "compelling state interest" formulation in Kramer stated explicitly that it applied to denials of the franchise to "bona fide residents of requisite age and citizenship." 395 U.S. at 627 (emphasis added).

That this point carried no force for Justice Brennan was made plain in the subsequent decision of Richardson v. Ramirez, 418 U.S. 24 (1974), in which Justice Brennan joined Justice Marshall's dissent from the Court's endorsement of this rationale. The majority in Ramirez held that a state's disenfranchising convicted felons was authorized by § 2 of the fourteenth amendment and thus not subject to strict scrutiny under the equal protection clause of § 1. Justices Brennan and Marshall contended that "§ 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment," relying specifically for this proposition on Justice Brennan's opinion in Oregon. Id. at 74-75 (dissenting opinion).
"Regardless of... [the Court's] answer to this question,... it is clear to us that proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases."\textsuperscript{100} Thus, Congress exercised its authority under the definitional branch of Morgan to find that no compelling basis existed for denying the vote to persons between eighteen and twenty-one years of age. To the extent that Congress thereby effected an "expansion" of rights under the Civil War amendments, it did so only by embellishing existing judicial doctrine.

This explanation of Justice Brennan's rationale in Oregon—in terms of Congress's power to find whether there is the compelling basis necessary for state laws that the Court has held are subject to strict scrutiny—is derived quite clearly from the text of his opinion. Justice Brennan opens the key section of his discussion with the statement that "questions of constitutional power frequently turn in the last analysis on questions of fact."\textsuperscript{101} "This," he continues, "is particularly the case when an assertion of state power is challenged under the Equal Protection Clause of the Fourteenth Amendment."\textsuperscript{102} Shortly thereafter, he concludes:

Should Congress, pursuant to... [its section 5] power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter. See Katzenbach v. Morgan, 384 U.S. 641, 654, 656 (1966).\textsuperscript{103} It should hardly be necessary to add that if the asserted factual basis necessary to support a given state discrimination does not exist, § 5 of the Fourteenth Amendment vests Congress with power to remove the discrimination by appropriate means.\textsuperscript{104}

Contrary to my analysis of Justice Brennan's opinion in Oregon, it has been suggested that his discussion either:

\textsuperscript{100} 400 U.S. at 240.
\textsuperscript{101} Id. at 246. Justice Brennan frequently characterizes the process by which Congress determines whether the compelling basis necessary to support a statutory discrimination exists as involving "questions of fact." Id. As his discussion makes clear, this process comprehends both "adjudicative facts" and "legislative facts"—i.e., both empirical and normative judgments. \textit{See generally} 2 K. Davis, \textit{Administrative Law Treatise} § 12:3 (1979); C. McCormick, \textit{Law of Evidence} §§ 328, 331 (2d ed. 1972).
\textsuperscript{102} 400 U.S. at 426.
\textsuperscript{103} The cited pages to the Morgan opinion contain its definitional branch paragraph.
\textsuperscript{104} 400 U.S. at 248.
(a) grants Congress broad authority to actually define for itself the substantive terms of the fourteenth amendment; or (b) vests the legislative branch with comparably vast power to preempt any state statute that draws distinctions which Congress finds to be irrational and therefore violative of equal protection.\textsuperscript{105} It is true that one may infer from some passages of Justice Brennan's opinion that he intended to empower Congress not simply with the modest capacity to invalidate government action where judicially created doctrine requires strict scrutiny, but also with the much larger authority to outlaw state and local rules where existing decisions of the Court would apply only a rational basis test:

When a state legislative classification is subjected to judicial challenge as violating the Equal Protection Clause, it comes before the courts cloaked by the presumption that the legislature has, as it should, acted within constitutional limitations . . . Accordingly, "[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it . . . ."

But . . . this limitation on judicial review of state legislative classifications is a limitation stemming, not from the Fourteenth Amendment itself, but from the nature of judicial review . . . The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overthrow a legislative determination of a factual question only if the legislative finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," or "unreasonable."

Limitations stemming from the nature of the judicial process, however, have no application to Congress . . . Should Congress, pursuant to . . . its section 5 power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter.\textsuperscript{106}

Read literally—and uncritically—this approach grants Congress a virtually boundless prerogative, limited only by those provisions of the Constitution securing individual rights. Since all laws classify (or "discriminate") by imposing special burdens (or granting exemptions from such burdens), or by conferring special benefits on some people and not others,\textsuperscript{107} under this theory Congress may substitute its judgment for that of a state or local lawmaking body whenever it wishes to do so.

\textsuperscript{106} 400 U.S. at 246-48 (emphasis added) (citations omitted).
\textsuperscript{107} See W. Lockhart, Y. Kamisar & J. Choper, supra note 12, at 1245.
Moreover, since it is now clearly established that *Usery's* state sovereignty limitation on Congress's article I powers is inoperative when Congress legislates pursuant to the enabling clauses of the Civil War amendments,108 Congress may, on this interpretation of Justice Brennan's reasoning, freely interfere with the structure of integral state and local government functions. Indeed, this rationale endorses the most generous exegesis of *Morgan's* definitional branch—at least in respect to the equal protection clause—effectively permitting Congress to "formulate[] the applicable legal standard"109 for that provision. To illustrate, it would readily allow Congress "to make its own determination" that age and the LSAT are "'arbitrary,' 'irrational,' or 'unreasonable'" criteria for admission to state law schools and thus eliminate them. Yet more broadly, it would appear to erect no barrier against a federal statute that simply declared that all state discriminations against persons on the basis of age—or sexual preference, or occupation110—are "'arbitrary,' 'irrational,' or 'unreasonable'" and thus invalidated all such regulations.

Closer examination of Justice Brennan's opinion, however, suggests that he proposed no such radical thesis. In a footnote to that section here under discussion, Brennan dispels the notion that Congress is empowered to supersede any state classification that it wishes. On the contrary, the footnote confirms this Article's analysis that Justice Brennan's *Oregon* opinion deals only with the precise issue before the Court—the power of Congress to determine whether state legislation lacks the compelling basis necessary to withstand the strict scrutiny imposed by *Kramer*:111

The state of facts necessary to justify a legislative discrimination will of course vary with the nature of the discrimination involved. When we have been faced with statutes involving nothing more than state regulation of business practices, we have often found mere administrative convenience sufficient to justify the discrimination. E.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487, 488-489 (1955). But when a discrimination has the effect of denying or inhibiting the exercise of fundamental constitutional rights, we have required that it be not

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108. See supra text accompanying note 10.
111. See supra text accompanying notes 96-100.
merely convenient, but necessary. Kramer v. Union School District, 395 U.S., at 627; Carrington v. Rash, 380 U.S., at 96 . . . And we have required as well that it be necessary to promote not merely a constitutionally permissible state interest, but a state interest of substantial importance. Kramer v. Union School District, supra . . . .\(^{112}\)

When Congress finds, contrary to an earlier (or subsequent) judicial determination, that a state classification is not "necessary to a compelling state interest," the congressional judgment is made pursuant to the particularly appropriate legislative task of investigating and evaluating complex factual and policy questions. Since Congress is much more to be trusted in assessing the strength of government interests than in assessing the interests of individuals without substantial influence in the political process,\(^ {113}\) a congressional conclusion of this kind is especially entitled to judicial deference. It rejects government interests that the Court chose not to reject (although the Court could have and almost always does reject such interests under the compelling interest test)\(^ {114}\), and furthermore, it advances individual interests already favored by the Court's having taken the major step of holding that the state classification (involving either a suspect group or fundamental right) should be subject to strict scrutiny. It is but a modest step for the Court in these circumstances to hold that it will accept any "reasonable" congressional determination that the state law being eliminated does not survive strict scrutiny.

It is vastly different, however, for the Court to adopt the principle that it will defer to any "reasonable" congressional determination that a state law is "'arbitrary,' 'irrational,' or 'unreasonable.'" This type of congressional finding is not based on the evaluation of complex empirical and normative issues; it does not constitute a discretionary judgment that the national legislature is specially competent to make. Rather it represents

\(^{112}\) 400 U.S. at 247 n.30.

\(^{113}\) See J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 201-03 (1980).

Although, as indicated supra in text accompanying notes 11-12, the subject is beyond the scope of discussion in this Article, this factor—whether the national political branches may be trusted to produce a satisfactorily fair constitutional judgment—is, in my view, critical in distinguishing the situation under consideration (i.e., Congress's determining that a law is not "necessary to a compelling state interest") from one where Congress concludes that a regulation is "necessary to a compelling state interest" despite the fact that the Court has held (or would hold) otherwise.

a statement in respect to a most straightforward matter—that no "state of facts reasonably may be conceived to justify" the state regulation.\textsuperscript{115} There appears no reason to believe that Congress is any more capable than the Court of making this hypothetical assessment. For the Court to permit Congress any significant leeway in respect to this issue (or in determining that the goal of a state law is not "constitutionally permissible")\textsuperscript{116} despite the Court's judgment to the contrary) is to authorize Congress to overturn any state or local rule with which it disagrees. Congress would have only to conclude that a classification drawn by the law is "'arbitrary,' 'irrational,' or 'unreasonable'" (or that the law's object is not "constitutionally permissible") and thus violative of equal protection—or, since the constitutional standard is identical,\textsuperscript{117} that the link between the law's purported end and the means used to achieve it suffers the same defect (or that the law's end is itself constitutionally impermissible) and thus violates substantive due process. There is very little, if any, meaningful support for this view—so subversive of our traditional ideas about federalism—in either the Court's opinion in \textit{Morgan} or Justice Brennan's opinion in \textit{Oregon}.

**B. CHIEF JUSTICE BURGER, JUSTICE BLACKMUN (AND JUSTICE STEWART)**

Whatever ambiguities may lie in Justice Brennan's \textit{Oregon} opinion concerning the reach of \textit{Morgan}'s definitional branch, Justice Stewart's opinion in \textit{Oregon}—joined by Chief Justice Burger and Justice Blackmun (both of whom were not on the Court when \textit{Morgan} was decided)—leaves few doubts as to their views. Justice Stewart concludes that the eighteen-year-old voting rule is unconstitutional as applied to both state and federal elections. Unwilling to urge outright abandonment of a doctrine that the Court established over his dissent only four years earlier, Justice Stewart's opinion essentially denies the existence of \textit{Morgan}'s definitional branch.\textsuperscript{118}

Initially, Justice Stewart points out that the Court's deci-
sion in *Kramer v. Union School District*\(^\text{119}\) did not reject "the undoubted power of a State to establish a qualification for voting based on age."\(^\text{120}\) Therefore, Congress's eighteen-year-old provision could be upheld only if section 5 of the fourteenth amendment authorized Congress to make its own determination that denial of the franchise to persons between eighteen and twenty-one years of age violated the equal protection clause. In Justice Stewart's view, "neither the Morgan case, nor any other case upon which the Government relies, establishes such congressional power, even assuming that all those cases were rightly decided."\(^\text{121}\)

Justice Stewart explained *Morgan*'s upholding of the statute enfranchising Puerto Ricans on two grounds, both of which he found to be "farreaching."\(^\text{122}\) First, he pointed to *Morgan*'s "remedial" branch: "that Congress could conclude that enhancing the political power of the Puerto Rican community by conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services."\(^\text{123}\) With respect to this theory, he observed that "the Court's opinion made clear that Congress could impose on the states a remedy for the denial of equal protection that elaborated upon the direct command of the Constitution."\(^\text{124}\) As for *Morgan*'s "definitional" branch, Justice Stewart referred only to that part of the pertinent *Morgan* discussion which parenthetically stated,\(^\text{125}\) in Justice Stewart's words, "that Congress could conclude that the New York statute was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans, an undoubted invidious discrimination under the Equal Protection Clause."\(^\text{126}\) Thus, Justice Stewart opined that *Morgan*'s definitional discussion established only that Congress "could override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in

121. 400 U.S. at 293 (footnote omitted).
122. Id. at 296.
123. Id. at 295.
124. Id. at 296.
125. See supra text accompanying notes 68-70.
126. 400 U.S. at 295-96.
an individual lawsuit might not have reached that factual conclusion." Nothing in Morgan, Justice Stewart insisted, empowered Congress to interpret the Constitution.

V. THE STATUS OF MORGAN'S DEFINITIONAL BRANCH AFTER OREGON

A. CONGRESSIONAL REASSESSMENT OF THE STRENGTH OF GOVERNMENT INTERESTS

An examination of Justice Brennan’s discussion of Congress's definitional authority—in his opinion for the Court in Morgan and for three Justices in Oregon—discloses that Congress is empowered to reassess instances in which the Court has subjected a state law to strict scrutiny and has upheld it on the ground that it is “necessary to promote a compelling state interest.” If Congress, upon making its own investigation of the matter, finds that the state rule fails this test, it may prohibit the rule. To what extent does this grant of congressional revisionary power extend beyond the Court’s equal protection decisions? For example, may Congress also overturn state and local regulations on the ground that they abridge the protection of the first amendment’s freedoms of expression and association, the constitutional right of privacy, or the fourteenth amendment’s guarantee of procedural due process?

1. Freedom of Expression and Association

The first amendment cases provide a close analogy because

127. Id. at 296.
128. Id. at 295. Justice Stewart appears to attempt to narrow the holding under Morgan's definitional branch while simultaneously denying its existence. His aversion to it is perhaps best revealed by his concluding remark: "I concurred in Mr. Justice Harlan's dissent in Morgan . . . [which], as I now read it, gave congressional power under § 5 the furthest possible legitimate reach. Yet to sustain the constitutionality of . . . [the eighteen-year-old provision] would require an enormous extension of that decision's rationale." Id. at 296 (emphasis added).

In discussing both the majority opinion in Morgan and Justice Brennan's opinion in Oregon, Justice Stewart tends to characterize the concept of congressional power to interpret the Constitution in terms of congressional power to determine what are and what are not compelling state interests for equal protection purposes. See, e.g., Oregon, 400 U.S. at 293, 295, 296. This, as this Article has suggested, is the most persuasive and sensible interpretation of Justice Brennan's position. See supra text accompanying notes 96-100, 111, 112. Only once, at the very end of his Oregon opinion, does Justice Stewart consider the concept in terms of Congress's power to "determine as a matter of substantive constitutional law what situations fall within the ambit of . . . [the equal protection] clause." 400 U.S. at 296.
their method of reasoning is similar to equal protection analysis. When the Court finds that a state or local rule burdens the freedoms of expression or association (made applicable to the states by the fourteenth amendment), the law is ordinarily held invalid unless the government sustains a heavy burden of justification. Indeed, the judicial standard of review is often expressed in language—such as “closest scrutiny”130 and “necessary to a compelling state interest”131—that is virtually identical to that used under the equal protection clause for appraising laws that draw suspect classifications or burden fundamental rights. Thus, under Justice Brennan’s reasoning, it would seem that if the Court were to uphold such a law, Congress could reevaluate the state interest that the Court found sufficient and, if it were to disagree with the Court’s conclusion, effectively “reverse” the Court and enact a federal statute prohibiting the offensive state law.

The 1925 decision in Gitlow v. New York132 provides an apt illustration. Gitlow involved a challenge to New York’s “criminal anarchy” statute, under which defendant, a member of the left wing section of the Socialist Party, was convicted for arranging to print and distribute a “Left Wing Manifesto” advocating the “Communist Revolution” through such devices as mass political strikes. The Court acknowledged that the first amendment freedom of expression was implicated, but nevertheless sustained the conviction on the ground that “utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of ... [the state’s] police power.”133 Had Congress determined that advocacy of this kind did not pose a sufficient “danger of substantive evil,” it could, under Justice Brennan’s definitional theory, have legislated pursuant to section 5 of the fourteenth amendment to preempt the criminal anarchy statute of New York (and of other states as well).

The recent case of Zurcher v. Stanford Daily134 affords an example directly in point. In Zurcher, the police searched the

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132. 268 U.S. 652 (1925).
133. Id. at 668.
Stanford Daily's files, pursuant to a warrant, seeking evidence in the form of photographs and film to establish the criminal culpability of persons (not associated with the newspaper) who had been involved in an unlawful demonstration that the newspaper had covered. The Daily contended that this abridged its first amendment freedom of the press to gather, analyze and disseminate news. The Court seemingly conceded that "First Amendment interests would be endangered by the search," but held that "[p]roperly administered, the preconditions for a [search] warrant . . . should afford [the press] sufficient protection." Two years later, Congress, directly responding to the Court's ruling, enacted the Privacy Protection Act of 1980, which prohibited the type of police search upheld in Zurcher. Consistent with the definitional approach I have attributed to Justice Brennan in Morgan and Oregon, the Privacy Protection Act may be understood to reflect Congress's judgment that, on balance, the state's interest in apprehending criminals is inadequate to justify the chilling effect that police searches of newspaper files may have on the exercise of first amendment rights.

Although the legislative authority sketched in the above illustrations would permit Congress to alter the result in those instances in which the Court has found (or would find) that a freedom of expression or association claim is outweighed by a competing government interest, it would not authorize unlimited congressional power to liberalize the Justices' conclusions in regard to first amendment concerns. For example, the Court has long held that "obscenity is not within the area of constitutionally protected speech or press." Thus, this kind of verbal or visual expression receives no first amendment protection, not because the state has an overriding interest in shielding the public from sexually explicit matter, but rather because obscene material a priori has simply not been held to be "speech" within the meaning of the first amendment. If Congress, acting pursuant to section 5 of the fourteenth amendment, were to prohibit state or local obscenity regulations that had passed (or would pass) judicial muster, it would not be

135. Id. at 565.
136. Id.
simply reevaluating the strength of the government's interest in suppressing pornography, but would rather be redefining the meaning of the term "speech" as construed by the Court under the first amendment. Thus, such a hypothetical federal statute could only be upheld under a much broader reading of Morgan's definitional branch than may properly be inferred.

2. Right of Privacy

Analogous problems arise with respect to the constitutional right of privacy. In Roe v. Wade, which ruled that the fourteenth amendment grants women a constitutional right to terminate pregnancies, the Court also held that, after the point of viability is reached, the privacy right is outweighed—"except where it is necessary . . . for the preservation of the life or health of the mother"—by the state's compelling interest in preserving fetal life. Under Morgan's definitional theory, Congress would presumably be free to readjust this balance to favor maternal privacy rights after viability over the state's interest in protecting potential life—at least to the extent that this did not itself violate the individual constitutional rights of the fetus (an issue beyond the scope of this discussion). By contrast, the issue posed in Doe v. Commonwealth's Attorney is analogous to the obscenity example under the first amendment. The Court's summary affirmance in Doe implied that, according to the Justices' interpretation of the Constitution, consensual homosexual activity simply does not fall within the right of privacy secured by the fourteenth amendment. Thus, under my understanding of the scope of Morgan's definitional branch, Congress could not alter that conclusion.

3. Procedural Due Process

As in the first amendment and right of privacy areas, some procedural due process cases present basic interpretive questions of substantive constitutional coverage, while others involve only the balancing of individual rights against government interests where judicial decision has already established the applicability of the constitutional principle. Bishop v. Wood typifies the category of cases that Con-

140. 410 U.S. 113 (1973).
141. Id. at 165.
142. See supra text accompanying notes 11-12.
gress cannot reverse without itself defining the terms of the Constitution. In *Bishop*, the Court rejected a policeman's asserted denial of procedural due process in connection with the termination of his employment. The Court did not reach the issue of whether the fourteenth amendment required that any particular procedures be used in the termination process. Instead, it concluded that since, under state law, the policeman "held his position at the will and pleasure of the city," he possessed no "property" interest in his continued employment entitled to be protected by due process. Thus, Congress could not change the result in *Bishop* without redefining the Court's concept of "property" for purposes of due process.

The case of *Mathews v. Eldridge* falls into the other category. In *Mathews*, the Court agreed that plaintiffs possessed a "property" interest in continued Social Security disability benefits, but held that procedural due process did not require an evidentiary hearing prior to termination. In reaching this judgment, the Court weighed three factors: 1) the importance to the individual of the property interest affected; 2) the risk associated with denial of the requested procedural safeguards and the probable benefits to be derived from their implementation; and 3) the government's interest, including the function involved and the fiscal and administrative burden that the requested procedure would entail. It is true that the congressional reevaluation required under the *Mathews* three pronged formula may be seen as somewhat more unbounded than Congress merely concluding that a state lacks a compelling or overriding basis for its regulation. But, since the judicially established process in *Mathews* calls for open balancing of values rather than simply finding a rational basis for the legislative judgment, and since one of the factors to be balanced is the strength of the government interest, which Congress is ideally

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145. *Id.* at 345.
146. *See also* Paul v. Davis, 424 U.S. 693, 701 (1976) ("reputation alone, apart from some more tangible interests such as employment" is neither "'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause").
148. As the disability benefits at issue were provided by the federal government, rather than by a state, *Mathews* is relevant to the present discussion only by way of analogy.
149. 424 U.S. at 349.
150. *Id.* at 341-43.
151. *Id.* at 343-47.
152. *Id.* at 347-48.
suited to discount. Morgan's definitional branch, as explained by Justice Brennan in Oregon, appears broad enough to empower Congress to "reverse" the decision. Unlike a "reversal" of Bishop, such a reassessment requires no reinterpretation of constitutional concepts by Congress.

B. CONGRESSIONAL FINDINGS OF IMPERMISSIBLE MOTIVATION

This Article has several times adverted to, but not seriously considered, another aspect of Morgan's definitional discussion—the principle parenthetically stated by the Court which, by Justice Stewart's description in Oregon, held that Congress "could override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached the factual conclusion." Although it appears to be true, as Justice Stewart contended, that this does not broadly empower Congress to "determine as a matter of substantive constitutional law what situations fall within the ambit" of the equal protection clause, nonetheless, this part of Morgan's definitional discussion—which may be denominated as "definitional" primarily because it appears in that paragraph of the Morgan opinion—affords Congress a potentially important power to combat state action that has a racially (or sexually) disproportionate impact.

1. Congress's Institutional Advantages

Under the rule of Washington v. Davis and Personnel Administrator v. Feeney, de facto discrimination against suspect or quasi-suspect classes is presumptively violative of equal protection if the rule producing it can be shown to have been promulgated for "an invidious discriminatory purpose." For several reasons that are rooted in Congress's institutional structure, its authority to make determinations of discriminatory purpose, and thereby "override state laws," carries significantly more farreaching consequences than the judiciary's ability to do so.

First, federal courts may address themselves only to cases

153. See supra text accompanying note 113.
154. See supra text accompanying notes 69-70.
155. 400 U.S. at 296.
156. Id.
159. Davis, 426 U.S. at 242.
properly brought before them and ordinarily grant relief only with respect to the specific state or local practices under attack. By contrast, Congress may, at its own initiative, undertake a comprehensive study of the challenged rules. If Congress finds that they are often enacted, maintained, or utilized for discriminatory purposes, or that they nearly always produce a discriminatory impact and have only scant legitimate justification, then Congress may conclude that such practices are "instruments of invidious discrimination" and prohibit them on a broad scale. Thus, after Congress concluded that literacy tests in a number of states had been "specifically designed to prevent Negroes from voting," the Voting Rights Act of 1965 suspended all such tests and similar voting qualifications in all political subdivisions that met the objective criteria found in those areas "for which there was evidence of actual voting discrimination." And, five years later, Congress went the final distance, extending the ban on such voting "tests and devices" nationwide.

Second, it has been generally recognized that since "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," it is extremely difficult for plaintiffs challenging state or local action under the fourteenth or fifteenth amendments to carry their burden of proving discriminatory intent. Moreover, in many judicial proceedings, the plaintiff may be unable to prevail even if one or more state officials actually admit to impermissible motivation or accuse their colleagues of such misconduct. For, under the Court's holding in Village of Arlington Heights v. Metropolitan Housing Development Corp., "[p]roof that the decision . . . was motivated in part by a racially discriminatory purpose" simply shifts to the state "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." Congress, however, is not limited by this judicially constructed evidentiary rule of "but for" causation.

161. Id. at 330.
162. See Oregon, 400 U.S. at 112.
165. 429 U.S. at 271 n.21.
166. See infra text accompanying notes 167-75.
Nor is it as unseemly for Congress, which is composed of representatives from the states whose officials effectively stand accused, to find that state and local practices are in deliberate defiance of the Constitution.

In sum, when Congress bans a state or local practice that it has found to be an instrument of invidious discrimination, it may not only be saving the victims of that practice the inconvenience and delay associated with proving discriminatory intent to a court's satisfaction, but it may also be affording relief to many challengers who could not have shouldered the burden of proof mandated by the Court's decisions. Thus, Congress may eradicate much that is in fact unconstitutional which would otherwise go undetected or uncured.

2. The Relevance of City of Rome v. United States

The recent decision in City of Rome v. United States\(^{167}\) provides an excellent illustration of a congressional statute barring state de facto discrimination for "remedial" or "prophylactic" purposes. In City of Rome, the city was subject to a provision of the Voting Rights Act of 1965 that mandated preclearance of any new voting regulation by either the Attorney General or a three-judge federal district court in the District of Columbia.\(^{168}\) When the Attorney General refused to approve various changes in the city's electoral system on the ground that they failed the Voting Rights Act requirement that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,"\(^{169}\) the city sought judicial relief. The three-judge federal court found that the city had not intentionally erected any barriers to black voting or black candidacy in the past seventeen years and had proved that the electoral changes were not the product of discriminatory motivation, but nonetheless ruled against the city because the "disapproved electoral changes . . . did have a discriminatory effect."\(^{170}\) The Supreme Court affirmed, rejecting the city's challenge to the constitutionality of the Voting Rights Act as applied to these facts.

Justice Rehnquist, joined by Justice Stewart, dissented, arguing that, pursuant to the enabling clauses of the Civil War amendments, Congress may—"if necessary to effectively pre-

\(^{167}\) 446 U.S. 156 (1980).


\(^{169}\) Id.

\(^{170}\) 446 U.S. at 172.
vent purposeful discrimination by a governmental unit"—prohibit a state or local practice "which may not itself violate the Constitution." They acknowledged that

Congress had before it evidence that various governments were enacting electoral changes . . . to prevent the participation of blacks in local government by measures other than outright denial of the franchise. Congress could of course remedy and prevent such purposeful discrimination on the part of local governments . . . . And given the difficulties of proving that an electoral change or annexation has been undertaken for the purpose of discriminating against blacks, Congress could properly conclude that as a remedial matter it was necessary to place the burden of proving lack of discriminatory purpose on the localities. See South Carolina v. Katzenbach, 383 U.S. 301 (1966). But all of this does not support the conclusion that Congress is acting remedially when it continues the presumption of purposeful discrimination even after the locality has disproved that presumption. Absent other circumstances, it would be a topsy-turvy judicial system which held that electoral changes which have been affirmatively proved to be permissible under the Constitution nonetheless violate the Constitution.

Justices Rehnquist and Stewart concluded that "the result of the Court's holding is that Congress effectively has the power to determine for itself . . . [what] conduct violates the Constitution," and that—any implications in Morgan's definitional branch to the contrary notwithstanding—this "violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government."

Properly understood, however, the City of Rome decision does not rely on the broad thrust of Morgan's definitional branch. It is true that the City of Rome rationale permits Congress to create a "conclusive presumption" of racial motivation with respect to specified state or local practices that Congress finds have been widely or consistently employed for the purpose of disadvantaging racial minorities—and thus effectively authorizes a congressional conclusion that such practices violate the substance of the fourteenth amendment. But this is a much narrower license than empowering Congress to declare that all state or local rules with a racially disproportionate impact violate equal protection for that reason alone. Rather, City of Rome invokes the parenthetically stated aspect of Morgan's definitional discussion that I am now exploring. As noted

171. Id. at 213.
172. Id. at 214-15 (footnote omitted).
173. Id. at 211.
174. Id. at 220 n.8.
175. Id. at 211.
above, a variety of factors make it extremely difficult for plaintiffs to prove that a state legislative or administrative body has acted with discriminatory intent and make it much more appropriate for Congress than for the judiciary to combat the problem of illicit motivation. Thus, there are powerful reasons for Congress to choose not to rely upon district judges for the highly sensitive task of ascertaining racially discriminatory intent on a case by case basis in respect to state or local schemes whose real purpose Congress has grounds to suspect. The Court’s opinion in *City of Rome* did no more than recognize this reality when it upheld the Voting Rights Act, as applied, on what is principally a remedial or prophylactic rationale:

> The Act’s ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrated history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.176

3. Congress’s Factfinding Obligations

A critical issue remains, applicable to all exercises of congressional power under the Civil War amendments, but highlighted by this part of *Morgan*’s definitional branch. Since Congress’s authority to prohibit practices that it finds to be intentionally discriminatory is intimately connected to the legislative branch’s superior factfinding ability, to what extent will the Court require that Congress follow any particular factfinding procedure? Will the Court attempt to determine whether Congress engaged in any factfinding activity at all, or will it simply assume that Congress found whatever facts might be necessary to support the legislation?

In *Morgan*, the Court apparently operated on the latter assumption. It is true that Justice Brennan noted that “Congress was aware”178 of the inculpatory statements made at New York’s 1916 constitutional convention indicating that “prejudice played a prominent role in the enactment of the [literacy] requirement.”179 But this implication that some type of congres-

176. Id. at 177 (emphasis added) (footnote omitted).
177. The issue is specifically referred to *supra*, in the text following note 36 and pertains, for example, to much of the discussion *supra* in text accompanying notes 154-76.
179. Id. at 654. *See supra* text accompanying notes 68-69.
sional consideration of the pertinent facts must take place is refuted by the fact that there is nothing in the "remedial" branch of the Morgan opinion which even hints that Congress ever affirmatively considered whether (much less formally found that) Puerto Ricans had ever been discriminated against, were presently being discriminated against, or were in any future danger of being discriminated against with respect to government services by any organ of New York state or local government—the constitutional violation which the Court thought that the Act of Congress might have been designed to cure. Indeed, a major point in Justice Harlan's dissent in Morgan was that, since "there were no committee hearings or reports referring to this section [of the Voting Rights Act], which was introduced from the floor," there was "simply no legislative record supporting such hypothesized discrimination" against Puerto Ricans.

One can only speculate whether the present Court would permit Congress to ban a state or local practice pursuant to its Civil War amendments powers without first making at least some findings. But there is substantial indication in the opinions of Chief Justice Burger and Justice Powell in Fullilove v. Klutznick that, although the Court will probably demand some "reasonable" factfinding activity by Congress, the requirement will not be a very rigorous one. Thus, Justice Powell observed that the Court cannot treat Congress as if it were a lower federal court.... Congress is not expected to act as if it were duty bound to find facts and make conclusions of law. The creation of national rules for governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.

And Chief Justice Burger opined that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." Since it would seem that this factfinding element will not pose

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180. 384 U.S. at 669 n.9.
181. Id. at 669.
182. 448 U.S. 448 (1980).
183. See 449 U.S. at 503 n.4 (Powell, J., concurring).
185. 448 U.S. at 502-03.
186. Id. at 478.
a substantial obstacle, there is reason to believe that the parenthetically stated part of Morgan's definitional branch could effectively support future congressional efforts to address at least some instances of state action that produce de facto discrimination.

VI. TANGENTIAL DEVELOPMENTS SINCE OREGON

Justice Stewart's emphasis in Oregon on Morgan's remedial branch has tended to foretell the future of the definitional branch. Since the Court's 1970 decision in Oregon, two major cases have sustained the constitutionality of congressional exercises of power under the enabling clauses of the fourteenth and fifteenth amendments. In both decisions, the Court relied almost exclusively on Morgan's remedial branch, ignoring its farreaching definitional approach altogether. Although the federal statutes in both cases—Fullilove v. Klutznick,187 involving a set-aside of government contract funds for minority businesses, and City of Rome v. United States,188 involving a provision of the Voting Rights Act prohibiting certain states from enacting new voting regulations that were discriminatory in either purpose or effect—could have readily been upheld under the narrower remedial or prophylactic theories, each could as easily have been sustained by invoking Morgan's definitional rationale, at least as spaciously conceived.189

The absence of recent decisions upholding federal legislation under Morgan's broad definitional branch, taken in isolation, may suggest that the Court is retreating from any theory that might be read as empowering Congress to interpret the Constitution. Yet opinions in a few cases involving constitutional provisions other than the fourteenth and fifteenth amendments—although concededly not free of ambiguity—permit the inference that reports of the death of the definitional rationale may be premature.

188. 446 U.S. 156 (1980).
189. Washington v. Davis, 426 U.S. 229 (1976), holds that government practices that are not racially discriminatory in intent but only in effect are not subject to strict judicial scrutiny under the equal protection clause. Id. at 242. Therefore, under the Court's standard, the allocation of government funds in Fullilove (without any preference for racial and ethnic minorities) and the state voting regulations in Rome would appear to be valid despite their producing racially disproportionate impacts. Nonetheless, Congress's corrective measures could arguably have been sustained as exercises of congressional power to expansively define the substantive scope of the equal protection clause.
A. CASE OR CONTROVERSY

In Trafficante v. Metropolitan Life Insurance Co.,\textsuperscript{190} decided in 1972, the issue was whether white residents of an apartment complex had standing to complain that the owner racially discriminated in violation of the Civil Rights Act of 1968.\textsuperscript{191} The Court held that plaintiffs satisfied the conventional "injury in fact" requirement for standing because of their allegation that they were stigmatized by living in a white ghetto and were deprived of the social and economic benefits of living in an integrated community.\textsuperscript{192} Justice White, joined by Justices Blackmun and Powell, concurred. They expressed skepticism about the Court's ruling—that the white plaintiffs had sustained sufficient injury to satisfy the article III "case or controversy" requirement—but agreed that the suit could nonetheless be maintained. In but a single sentence, Justice White cryptically implied that Congress, in enacting the Civil Rights Act, chose to carve a special exception to article III standing requirements in order to permit a broader class of persons to sue, and that this was a valid exercise of congressional power—citing those pages in Katzenbach v. Morgan and in Justice Brennan's Oregon v. Mitchell opinion enunciating Morgan's definitional theory.\textsuperscript{193}

There is, of course, nothing extraordinary in Justice White's reliance on this authority—despite its enigmatically expansive use of Morgan's definitional branch\textsuperscript{194}—for he agreed with both the Court in Morgan and Justice Brennan in Oregon. But Justice Blackmun's joining Justice White's concurrence is more difficult to explain since, in Oregon, Justice Blackmun voted with Justice Stewart in rejecting Morgan's definitional branch. Conceivably, Justice Blackmun's action in Trafficante

\textsuperscript{190} 409 U.S. 205 (1972).
\textsuperscript{192} 409 U.S. at 209-10.
\textsuperscript{193} Id. at 212.
\textsuperscript{194} It has been urged that Justice White's opinion does no more than "give due respect to Congress's empirical judgment that the denial of interracial contacts to tenants of segregated housing constituted an injury in fact. It does not mean that he would submit to Congress's legal conclusion that there is an article III case or controversy." Gordon, The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court, 72 Nw. U.L. Rev. 656, 658 n.13 (1977). But the line between these alternatives may well be too thin to deny Justice White's implicit grant of substantial definitional power to Congress.
may be understood in terms either of his intermittently expansive interpretation of the Court's "traditional concepts of standing," or of an increasingly generous conception of congressional power in general under the Civil War amendments, as evidenced by his association with the Court's opinion in City of Rome.

Justice Powell's concurrence with Justice White in Trafficante is even more perplexing. Justice Powell, unlike Justice Blackmun, did not sit in Oregon and thus could not join Justice Stewart in condemning broad definitional theories of congressional power under the fourteenth amendment. Yet in City of Rome, Justice Powell dissented (as did Justices Rehnquist and Stewart), taking a relatively narrow view of congressional power, even under Morgan's remedial branch. It is possible to explain Justice Powell's position in Trafficante as resting on a special congressional capacity to address constitutional issues of separation of powers between the judicial and political branches. But, to the extent that Justice Powell is wary of Morgan's relatively conservative remedial branch, it would seem that he would probably be even less favorably disposed toward Morgan's more generous definitional branch.

B. THE RELIGION CLAUSES

In Welsh v. United States, decided the same year as Oregon, petitioner challenged section 6(j) of the Universal Military Training and Service Act, which exempted from combat only those persons whose conscientious objection to war derived from "religious training and belief." The Court avoided the constitutional question of whether this constituted an estab-


196. See infra note 206.


ishment of religion by construing the statute to exempt a very broad class of conscientious objectors. Justice White, joined by Chief Justice Burger and Justice Stewart, dissented from this interpretation of the draft law and, confronting the constitutional problem, reasoned that it could only be resolved through a balancing of Congress's power to raise armies and the competing values embodied in the first amendment's establishment clause and free exercise clause. "[T]his Court," Justice White wrote,

is not alone in being obliged to construe the Constitution in the course of its work; nor does it even approach having a monopoly on the wisdom and insight appropriate to the task . . . . It is very likely that § 6(j) is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause. That judgment is entitled to respect.

Justice White then relied on Morgan's definitional branch to control the outcome in Welsh:

It is surely essential . . . in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause. If this was the course Congress took, then just as in Katzenbach v. Morgan, . . . where we accepted the judgment of Congress as to what legislation was appropriate to enforce the Equal Protection Clause of the Fourteenth Amendment, here we should respect congressional judgment accommodating the Free Exercise Clause and the power to raise armies. This involves no surrender of the Court's function as ultimate arbiter in disputes over interpretation of the Constitution. But it was enough in Katzenbach "to perceive a basis upon which the Congress might resolve the conflict as it did," . . . and plainly in the case before us there is an arguable basis for § 6(j) in the Free Exercise Clause since, without the exemption, the law would compel some members of the public to engage in combat operations contrary to their religious convictions . . . . There being substantial roots in the Free Exercise Clause for § 6(j) I would not frustrate congressional will by construing the Establishment Clause to condition the exemption for religionists upon extending the exemption also to those who object to war on nonreligious grounds.

As is true in Trafficante, Justice White's position in Welsh grants Congress a quite generous authority to define the terms of the Constitution and appears to reflect a broader interpretation of Morgan's definitional branch than this Article has attributed to Morgan's author, Justice Brennan. The decisions of

201. 398 U.S. at 370-71.
202. Id. at 371-72.
203. The interpretation suggested by this Article is that the Court's opinion in Morgan (and Justice Brennan's opinion in Oregon) sought only to empower
Chief Justice Burger and Justice Stewart to join Justice White, however, are puzzling. In the very year that Welsh was decided, they voiced strenuous opposition in Oregon to the idea that Congress could define the terms of the Constitution pursuant to the enabling clause of the fourteenth amendment.

A possible, if not very persuasive, explanation is that Welsh involved congressional balancing of judicially approved constitutional values, whereas Oregon involved congressional creation of new constitutional doctrine. Yet Justice White's opinion in Welsh contains no elucidation of why Congress is institutionally better adapted to balancing constitutional doctrines than to extending or creating them. In any event, it may be fair to conclude that Welsh poses some question as to the strength and nature of Chief Justice Burger's future opposition to a broad reading of Morgan's definitional branch.

C. The Thirteenth Amendment

Some further possible exceptions to the view that the Court has abandoned any vast authority that may have existed under Morgan's definitional approach may be found in two recent decisions involving the scope of Congress's power to enforce the thirteenth amendment. These cases invoke the principle of Jones v. Alfred H. Mayer which grants Congress authority "rationally to determine what are the badges and the incidents of slavery, and to translate that determination into effective legislation." The first is McDonald v. Santa Fe Trail Transportation Co., decided in 1976, raising the question of whether the Civil Congress to make legislative findings regarding the non-existence of the compelling basis necessary to support a state discrimination in respect to suspect classifications or fundamental rights.

204. In a sense, Trafficante may also be explained under the "balancing" theory of Welsh, Justice White deferring to Congress's decision to strike a balance between article III and fourteenth amendment values.

205. Indeed, to the extent that Welsh involved questions of individual rights while Oregon involved only federalism concerns, Congress is eminently better able to resolve the constitutional values at stake in Oregon than in Welsh. See supra text accompanying note 113. Viewed from this perspective, Trafficante raised a question of separation of powers between the national political branches on one side and the judiciary on the other, a factor that may have influenced Justice Powell. Compare his concurring opinion in United States v. Richardson, 418 U.S. 166, 194-96 (1974), with his opinions for the Court in Warth v. Seldin, 422 U.S. 290, 501 (1975) and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 35, 41-42 (1976). But see J. CHOPER, supra note 113, at ch. 6.


Rights Act of 1866, 208 enacted pursuant to the thirteenth amendment, barred discrimination against whites as well as blacks. At no time had the Court either held or in any way implied that such discrimination violated section 1 of the thirteenth amendment. Nonetheless, Justice Marshall, writing for a majority of seven—with only Justices White and Rehnquist disagreeing at all (and then only as to statutory interpretation)—found that the Act did extend protection to whites, and, in a one sentence footnote that contained the totality of the Court's discussion of the constitutional aspect of the issue, stated that "the Court has previously ratified the view that Congress is authorized under the Enforcement Clause of the Thirteenth Amendment to legislate in regard to 'every race and individual.' Hodges v. United States, 203 U.S. 1, 16-17 (1906); see Jones v. Alfred H. Mayer Co. . . . ." 209

To the extent that McDonald authorized Congress to break from the historical roots of the thirteenth amendment and extend the meaning of "badges and incidents of slavery" to cover persons other than descendants of slaves, the case may be cited to support congressional possession of significant definitional power under the Civil War amendments. But, as suggested above, 210 McDonald may only represent judicial approval of Congress's remedial power under the thirteenth amendment—the theory being that "there is a basis in experience for a congressional conclusion that discrimination against one racial group affects attitudes towards race generally, and promotes discrimination against other races." 211 In any event, McDonald's quite perfunctory treatment of this profound question in general greatly weakens its precedential force.

The most recent addition to the thirteenth amendment decisions, City of Memphis v. Greene, 212 involved the city's closing of a street, heavily traveled by blacks, that ran through a white residential neighborhood. The Court's opinion by Justice Stevens—joined by Chief Justice Burger and Justices Stewart, Powell, and Rehnquist—denied the claim that the street closing was a "badge or incident of slavery" on the ground that plaintiffs had failed to prove discriminatory intent. But, quoting lan-

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209. 427 U.S. at 288 n.18.
210. See supra text accompanying notes 83-88.
211. Karst, Thirteenth Amendment: Judicial Interpretation, to be published in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (L. Levy & K. Karst eds.) (article currently on file at University of Minnesota Law School).
guage from Jones, Justice Stevens went on to say that Congress may "do much more" under the thirteenth amendment's enabling clause than section 1 of the amendment does "by its own unaided force and effect."\(^2\)

Read most generously, this dicta from City of Memphis indicates that four current members of the Court—including those least favorably disposed toward definitional theories of congressional power under the Civil War amendments—would grant Congress extensive authority to define the scope of the thirteenth amendment. But the predictive validity of this computation may be seriously questioned—first, because those joining Justice Stevens were probably far more attentive to the opinion's holding than to its dicta, and second, because (as this Article has observed)\(^2\) the Jones rationale may probably be more accurately construed as confirming Congress's remedial, rather than its definitional power.

VII. CONCLUSION

The above survey of the case law demonstrates that Congress's power to define (or "interpret") the substance of the Civil War amendments is significantly in doubt. Three current members of the Court—Justices Brennan, White, and Marshall—have unequivocally declared their support for Morgan's definitional branch, but careful examination of Justice Brennan's opinion for the Court in Morgan and his separate opinion in Oregon discloses that the scope of the definitional power granted, although by no means insignificant, may nonetheless be quite limited. Chief Justice Burger and Justice Blackmun, while declaring vigorous opposition to Morgan's definitional branch in Oregon, have cast votes in other cases (Trafficante and Welsh), that create some doubt about the strength and nature of their antipathy to congressional interpretation of the Constitution. Indeed, along with that of Justice White—the author of the relevant opinions in Trafficante and Welsh—the positions of Chief Justice Burger and Justice Blackmun could be read as implying even greater deference to Congress on this question than the positions of Justices Brennan and Marshall. Justice Rehnquist, echoing former Justices Harlan and Stewart in his dissent in City of Rome, forcefully expressed his conviction that Morgan's definitional branch offends the constitutional separation of powers embodied in Marbury v.

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213. *Id.* at 125.
214. See supra text accompanying notes 83-88, 210-11.
Justice Powell has not yet really addressed himself directly to the matter of Morgan's definitional branch, but his views on apposite issues (his separate opinion in *City of Rome* and his vote with Justice White in *Trafficante*) emit seemingly conflicting signals. As for Justices Stevens and O'Connor, there is no solid information at present concerning their position on Morgan's definitional branch.

The Burger Court's efforts to readjust the balance between state and national power in favor of the former, as dramatically illustrated by *National League of Cities v. Usery*, imply hostility by a majority of incumbent Justices to doctrines that enhance congressional authority over state and local affairs. By the same token, *Fitzpatrick v. Bitzer*, which stands as an explicit exception to *Usery*, may yet prove to be a very broad incursion indeed. This author's personal view is that the Court should treat the constitutional issue of whether federal action is beyond the authority of the central government and thus violates "states' rights" as nonjusticiable and leave its final resolution to the national political branches. Indeed, although it is beyond the scope of discussion in this paper, several recent opinions—that for the Court in *City of Rome* and those of Chief Justice Burger and Justice Powell in *Fullilove v. Klutznick*—on Congress's "remedial" power under the Civil War amendments suggest authentic steps in this direction. But since a present head count on the existence and reach of Morgan's "definitional" branch produces substantial uncertainty, any confident conclusion concerning its vitality must await the future.

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215. 5 U.S. (1 Cranch) 137 (1803).
218. See *City of Rome*, 446 U.S. at 179.