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FOURTEENTH AMENDMENT
SECTION 5. ENFORCEMENT

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ENFORCEMENT

Generally.—In the aftermath of the Civil War, Congress, in addition to proposing to the States the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments.**75** Several of these laws were general civil rights statutes which broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the States, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years.**76** In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently.**77** Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the commerce clause**78** until Supreme Court decisions indicated an expansive concept of congressional power under the Civil War Amendments,**79** which culminated in broad provisions against private interference with civil rights in the 1968 legislation.**80** The story of these years is largely an account of the "state action" doctrine in terms of its limitation on congressional powers;**81** lately, it is the still-unfolding history of the lessening of the doctrine combined with a judicial vesting of discretion in Congress to reinterpret the scope and content of the rights guaranteed in these three constitutional amendments.

State Action.—In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to federal courts,**82** and to provide criminal**83** and civil**84** liability for state officials and agents**85** or persons associated with them**86** who violate protected rights. These statutory measures designed to eliminate discrimination "under color of law"**87** present no problems of constitutional foundation, although there may well be other problems of application.**88** But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875 **89** Congress had proscribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public amusement. The Civil Rights Cases**90** found this enactment to be beyond Congress' power to enforce the Fourteenth Amendment. It was observed that Sec. 1 was prohibitory only upon the States and did not reach private conduct. Therefore, Congress' power under Sec. 5 to enforce Sec. 1 by appropriate legislation was held to be similarly limited. "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."**91** The holding in this case had already been preceded by United States v. Cruikshank**92** and by United States v. Harris**93** in which the Federal Government had prosecuted individuals for killing and injuring African Americans. The Amendment did not increase the power of the Federal Government vis-a-vis individuals, the Court held, only with regard to the States themselves.**94**

Cruikshank did, however, recognize a small category of federal rights which Congress could protect against private deprivation, rights which the Court viewed as deriving particularly from one's status as a citizen of the United States and which Congress had a general police power to protect.**95** These rights included the right to vote in federal elections, general and primary,**96** the right to federal protection while in the custody of federal officers,**97** and the right to inform federal officials of violations of federal law.**98** The right of interstate travel is a basic right derived from the Federal Constitution which Congress may protect.**99** In United States v. Williams,**100** in the context of state action, the Court divided four-to-four over whether the predecessor of **18** U.S.C. Sec. **241** in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights "which Congress can beyond doubt constitutionally secure against interference by private individuals." This issue was again reached in United States v. Price**101** and United States v. Guest,**102** again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the due process and equal protection clauses.

Inasmuch as both Price and Guest concerned conduct which the Court found implicated with sufficient state action, it did not then have to reach the question of Sec. 241's constitutionality when applied to private action interfering with rights not the subject of a general police power. But Justice Brennan, responding to what he apparently intepreted as language in the opinion of the Court construing Congress' power under Sec. 5 of the

Fourteenth Amendment to be limited by the state action requirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress' power was broader.**103** "Although the Fourteenth Amendment itself . . . 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, Sec. 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection."**104** The Justice throughout the opinion refers to "Fourteenth Amendment rights," by which he meant rights which, in the words of **18** U.S.C. Sec. **241** , are "secured . . . by the Constitution," i.e., by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the equal protection clause commands that all "public facilities owned or operated by or on behalf of the State," be available equally to all persons; that ac[illegible]cess is a right granted by the Constitution, and Sec. 5 is viewed "as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." Within this discretion is the "power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals" who would deny such access.**105**

It is not clear, following changes in Court personnel and in the absence of definitive adjudication, whether this expansion of Congress' power still commands a majority of the Court.**106** If the Court adheres to the expansion, it is not clear what the limits and potentialities of the expansion are, whether it is only with regard to "state facilities" that Congress may reach private interfering conduct, and what "rights" are reasonably and properly encompassed within the concept of "Fourteenth Amendment rights."

Supplement: [P. 1933, delete last full paragraph of section, and substitute the following:]

The Court, however, ultimately rejected this expansion of the powers of Congress in United States v. Morrison.**55** In Morrison, the Court invalidated a provision of the Violence Against Women Act **56** that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment,**57** dismissing the dicta in Guest, and reaffirming the precedents of the Civil Rights Cases and United States v.

Harris. The Court also rejected the assertion that the legislation was "corrective" of bias in the courts, as the suits are not directed at the State or any state actor, but rather at the individuals committing the criminal acts.**58**

Congressional Definition of Fourteenth Amendment Rights.—In the Civil Rights Cases,**107** the Court observed that "the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation," that is, laws to counteract and overrule those state laws which Sec. 1 forbade the States to adopt. And the Court was quite clear that under its responsibilities of judicial review, it was the body which would determine that a state law was impermissible and that a federal law passed pursuant to Sec. 5 was necessary and proper to enforce Sec. 1.**108** But in United States v. Guest,**109** Justice Brennan protested that this view "attributes a far too limited objective to the Amendment's sponsors, that in fact "the primary purpose of the Amendment was to augment the power of Congress, not the judiciary."

In Katzenbach v. Morgan,**110** Justice Brennan, this time speaking for the Court, in effect overrode the limiting view and posited a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to Sec. 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965 **111** barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument "that an exercise of congressional power under Sec. 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce."**112** Inasmuch as the Court had previously upheld an English literacy requirement under equal protection challenge,**113** acceptance of the argument would have doomed the federal law. But, said Justice Brennan, Congress itself might have questioned the justifications put forward by the State in defense of its law and might have concluded that instead of being supported by acceptable reasons the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations which might have led Congress to its conclusion; since Congress "brought a specially informed legislative competence" to an appraisal of voting requirements, "it was Congress' prerogative to weigh" the considerations and the Court would sustain the conclusion if "we perceive a basis upon which Congress might predicate a judgment" that the requirements constituted invidious discrimination.**114**

In dissent, Justice Harlan protested that "[i]n effect the Court reads Sec. 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of Sec. 5, then I do not see why Congress

should not be able as well to exercise its Sec. 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court."**115** Justice Brennan rejected this reasoning. "We emphasize that Congress' power under Sec. 5 is limited to adopting measures to enforce the guarantees of the Amendment; Sec. 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."**116** Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on Morgan in expanding federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimination;**117** on the other hand, it enacted provisions of law purporting to overrule the Court's expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking Morgan.**118**

Congress' power under Morgan returned to the Court's consideration when several States challenged congressional legislation**119** lowering the voting age in all elections to 18 and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that Morgan's vitality was in some considerable doubt, at least with regard to the reach which many observers had previously seen.**120** Four Justices accepted Morgan in full,**121** while one Justice rejected it totally**122** and another would have limited it to racial cases.**123** The other three Justices seemingly restricted Morgan to its alternate rationale in passing on the age reduction provision but the manner in which they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.**124**

More recent decisions read broadly Congress' power to make determinations that appear to be substantive decisions with respect to constitutional violations.**125** Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that "result" in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments.**126** Moreover, movements have been initiated in Congress by opponents of certain of the Court's decisions, notably the abortion rulings, to utilize Sec. 5 powers to curtail the rights the Court has derived from the due process clause and other provisions of the Constitution.**127**

Supplement: [P. 1936, add to text following n.127:]

The case of City of Boerne v. Flores,**59** however, illustrates that the Court will not always defer to Congress' determination as to what legislation is appropriate to "enforce" the provisions of the Fourteenth Amendment. In Flores, the Court held that the Religious Freedom Restoration Act,**60** which expressly overturned the Court's narrowing of religious protections under Employment Division v. Smith,**61** exceeded congressional power under section 5 of the Fourteenth Amendment. Although the Court allowed that Congress' power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be "a congruence and proportionality" between the means adopted and the injury to be remedied.**62** Unlike the pervasive suppression of the African-American vote in the South which led to the passage of the Voting Rights Act, there was no similar history of religious persecution constituting an "egregious predicate" for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates.**63**

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in Boerne, as litigants precluded from arguing that a State's sovereign immunity has been abrogated under Article I congressional powers **64** seek alternative legislative authority in section 5. For instance, in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,**65** a bank which had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the State's sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the States was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the States, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.**66**

A similar result was reached regarding the application of the Age Discrimination in Employment Act to state agencies in Kimel v. Florida Board of Regents.**67** In determining that the Act did not meet the "congruence and proportionality" test, the Court focused not just on whether state agencies had engaged in age discrimination, but on whether States had engaged in unconstitutional age discrimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination by States, finding that there is a rational basis for States to use age as a proxy for other qualities, abilities and characteristics.**68** Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found

that the ADEA, as applied to the States, was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior." **69**