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THE CONSTITUTIONALITY OF CONGRESSIONAL LEGISLATION TO OVERRULE *ZURCHER v. STANFORD DAILY*

I. INTRODUCTION

In *Zurcher v. Stanford Daily*[1] the United States Supreme Court upheld the constitutionality of a state police search of a student newspaper office based on traditional procedures for obtaining a search warrant against third parties not implicated in any crime.[2] The Court refused to rule that the first or fourth amendment rights of the newspaper required police, before conducting a search for evidence, to obtain a subpoena and to rely on voluntary compliance by the innocent third party to deliver the evidence. Amid wide and continuing criticism of the decision as insensitive to the first amendment rights of the institutional media,[3] members of Congress responded to the Court's suggestion in *Stanford Daily* that statutory protection against search warrant abuses could be developed.[4]

In 1978 and 1979 numerous bills[5] were introduced in Congress imposing a variety of additional procedures on law enforcement officials seeking to obtain warrants to search places not implicated in crimes. The requirement common to the bills was that the government must show probable cause to believe that the person possessing the material had committed or was committing the criminal offense for which the materials were sought. The bills, however, varied with regard to which persons and places should be protected.[6]

Of special interest, however, were the constitutional bases set forth in the bills for imposing the additional requirements on state, as well as federal, law enforcement officials. There was little doubt that Congress could bind federal officials through the necessary and proper clause.[7] Of less certainty was the proper rationale, if any, for extending such restraints to state police searches of third parties. One theory posited that the work-product of media offices subject to third-party searches could be classified as material "in and affecting" commerce among the states, and thus searches involving such material were subject to Congress' authority to regulate interstate commerce pursuant to the commerce clause.[8] An alternate theory posited that Congress had the power to regulate state searches under section 5 of the fourteenth amendment, which provides that Congress may "enforce, by appropriate legislation, the provisions" of the amendment.[9] Under this rationale, Congress may pass legislation to protect the first and fourth amendment rights of third parties, rights that are applied to the states through the due process clause of the fourteenth amendment.

Virtually identical issues faced Congress several years earlier in the wake of bills introduced following the *Branzburg v. Hayes* decision,[10] in which the court refused to allow reporters to claim a constitutional privilege against revealing confidential news sources to grand juries. These issues were not confronted at that time, however, since a national

[1] 436 U.S. 547 (1978).

[2] Justice White wrote the majority opinion on behalf of five Justices, including Justice Powell, who also wrote a concurring opinion. Justice Stevens wrote a dissenting opinion, as did Justice Stewart, who was joined by Justice Marshall.

[3] *See, e.g., Citizens Privacy Protection Act: Hearings on S. 3162 and S. 3164 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 1–3 (1978) (statement of Sen. Bayh) [hereinafter cited as 1978 *Senate Hearings*]; *Zurcher v. Stanford Daily: Hearings on H.R. 3486 and H.R. 4181 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 3–5 (1979) (statement of William Small, CBS, Inc.) [hereinafter cited as 1979 *House Hearings*]. *See generally The Court and the Press*, NEWSWEEK, June 26, 1978, at 93; *High Court vs. the Press*, N.Y. Times, Nov. 18, 1979, §6 (Magazine), at 76.

[4] 436 U.S. at 567. *See generally* Bayh, *Police Searches of Innocent Third Parties: A Congressional Response to Zurcher v. Stanford Daily*, 6 J. LEGIS. 7 (1979).

[5] At least 14 bills were introduced in the 95th Congress: S. 3162, S. 3164, S. 3222, S. 3225, S. 3258, S. 3261, H.R. 3376, H.R. 12952, H.R. 13017, H.R. 13113, H.R. 13168, H.R. 13227, H.R. 13319, H.R. 13710, 95th Cong., 2d Sess. (1978). At least 13 bills were introduced in the 96th Congress: S. 115, S. 855, S. 1790, H.R. 283, H.R. 322, H.R. 323, H.R. 368, H.R. 380, H.R. 1293, H.R. 1305, H.R. 1373, H.R. 1437, H.R. 3486, 96th Cong., 1st Sess. (1979).

[6] Some bills were limited to protecting the materials of the print and broadcast media, *e.g.*, H.R. 3486, 96th Cong., 1st Sess. (1979), while other bills, *e.g.*, S. 3162, 95th Cong., 2d Sess. (1978), extended protection to all third parties.

[7] U.S. CONST. art. I, §8, cl. 18. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); Logan v. United States, 144 U.S. 263, 283–84 (1892).

[8] U.S. CONST. art. I, §8, cl. 3.

[9] U.S. CONST. amend. XIV, §5.

[10] 408 U.S. 665 (1972).

shield law to protect reporters was never enacted.[11]

This comment will examine alternate rationales for imposing on the states federal standards regulating third-party searches. First, the ability of Congress to regulate such searches under modern commerce clause theory—including the recent revival of the tenth amendment as a barrier to the exercise of such power—will be examined critically. The main focus of analysis under the commerce clause power will be a bill introduced in 1979, supported by the Carter administration. Second, the reach of section 5 of the fourteenth amendment in light of case law and scholarly commentary also will be questioned as a basis for extending the requirements imposed by the bills to the states.[12] This comment will conclude that there are serious doubts as to whether either rationale provides a sufficient basis for extending such requirements to state law enforcement officials.

II. The Commerce Clause Rationale

MODERN COMMERCE CLAUSE THEORY

The commerce clause gives Congress power to "regulate Commerce with foreign Nations, and among the several states."[13] In the bills overruling *Stanford Daily*, Congress is constructing a nonconstitutional framework to protect what it perceives as the first and fourth amendment rights of third parties subject to state searches. Such a framework can be supported by the commerce clause in two ways.[14] First, Congress can define the activities or materials that are in or affect interstate commerce. Examining the constitutionality of a statute grounded on this definitional rationale requires the statute to be considered on its face to determine whether the activity or material can be reached under the commerce power. Second, Congress can enact a general regulation of activity or material in or affecting interstate commerce; courts in each instance must inquire whether the activity or material falls under the statutory language. A statute grounded on the latter rationale poses no constitutional problems on its face since a court in each case will determine the proper jurisdiction of the statute.

In 1979 the Carter administration announced its support for one of the bills introduced to overrule *Stanford Daily*—the First Amendment Privacy Protection Act of 1979.[15] This bill followed the second approach available to Congress under the commerce power and did not define activities or material that are in or affect commerce. The drafters of the Act decided, after expressing concern about Congress' ability to reach state searches under the definitional approach,[16] to allow courts to determine jurisdiction on a case-by-case basis. While the Privacy Protection Act does not rely on the definitional approach, that rationale is worth considering in order to examine the Carter administration's decision to pursue the alternate route. Moreover, this examination will provide a guide for determining the reach of the statutory language under the case-by-case approach adopted by the administration.

Since the 1930's, the Supreme Court has given Congress broad authority to regulate interstate commerce and activities affecting commerce. Modern commerce clause theory provides three general methods whereby Congress can regulate commerce. First, Congress can regulate the shipment of material in interstate commerce or regulate interstate movement itself. Second, Congress can protect the instrumentalities of interstate commerce. Third, Congress can regulate any activity that has a close and substantial relationship to, or affect on, commerce. The latter power extends to intrastate activities that, when taken together, have a cumulative affect on commerce.[17]

[11] *See generally* G. Gunther, Cases and Materials on Constitutional Law 1451 (9th ed. 1975); Dixon, *Newsmen's Privilege by Federal Legislation: Within Congressional Power?*, 1 Hastings Const. L.Q. 39 (1974). However, the efforts to pass national shield legislation were revived following *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978). *See Congress Could Enact Shield if Press Unites Behind It*, 64 A.B.A. J. 1829 (1978).

[12] A third basis on which Congress might reach state searches was not employed by any bill; Congress could attach conditions regarding searches to federal grants to the states. *See* note 75 *infra*.

[13] U.S. Const. art. I, §8, cl. 3.

[14] *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 n.12 (1974); Perez v. United States, 402 U.S. 146, 152 (1971); United States v. Darby, 312 U.S. 100, 120–21 (1941).

[15] H.R. 3486, 96th Cong., 1st Sess. (1979). In March 1980 the Senate Judiciary Committee held hearings on Titles I and IV of S. 1790, 96th Cong., 1st Sess. (1979), which together are identical in text to H.R. 3486.

[16] Officials from the Department of Justice expressed reservations at the hearings for the bills overruling *Stanford Daily* and in official policy statements. *See* 1978 *Senate Hearings*, *supra* note 3, at 44, 334 (statements of Asst. Atty. Gen. Heymann); Office of Legal Counsel, U.S. Dep't of Justice, Memorandum, Re: Constitutionality of Bills Introduced in Response to Zurcher v. Stanford Daily 1–2 (1978) (unpublished memorandum) [hereinafter cited as OLC Memo]. The Department had similar concerns about bills introduced in response to Branzburg v. Hayes, 408 U.S. 665 (1972). *See* Dixon, *supra* note 11, at 46–48.

[17] *See* Perez v. United States, 402 U.S. 146, 150 (1971). *See also* G. Gunther, *supra* note 11, at 171–228; J. Nowak, R. Rotunda & J. Young, Constitutional Law 150–59

To limit the result of the Court's decision in *Stanford Daily*, Congress under the commerce power can either directly prohibit state searches of specified third parties or prohibit state searches of designated material possessed by third parties. The desired result in either case may be essentially the same, but different commerce power rationales must be applied to support each rationale.

Congressional authority to restrict search procedures of state law enforcement officials directly would fall under the third source of commerce power, the "affecting commerce" rationale.[18] To be cognizable under this prong of the commerce power, the activity sought to be regulated—in this case, state police searches of media or other third party materials—must have a substantial relationship to, or an effect on, interstate commerce. To prohibit state searches of all third parties arguably would extend beyond Congress' admittedly broad power to regulate activities that impact on commerce. The Court consistently has reiterated that the regulated activity must have a close and substantial relationship with, or effect on, commerce.[19] If such language is to be given any content, it must suggest that at some point activities that may have a slight effect on commerce will not fall under Congress' use of the commerce power to reach that activity.[20]

However, a single activity which, when taken together with other instances of the same activity, theoretically might affect commerce can fall under the third commerce power. The source of this principle is *Wickard v. Filburn*,[21] where the Court found that a class of intrastate activities (growing grain for local consumption), when taken as a whole, would affect interstate commerce. Similarly, state police searches and the potential for such searches taken as a whole could disrupt media offices and discourage disclosure from confidential sources of information. Such interference could affect adversely the news gathering and news disseminating functions of media operations and thereby impact on commerce.[22] Thus, state police searches of the institutional media—which can be conceptualized as including both national news media organizations and local media outlets—theoretically could have a discernible impact on commerce. The relation to commerce of searches of other third parties, however, is far more tenuous. The Court recently has stated that the *Wickard* principle does not allow Congress to use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[23] State police searches of the homes or offices of any third party, theoretically, would have no discernible effect on commerce and would seem to be a classic case of a relatively trivial impact on commerce.[24]

Even if a statute is limited to state police searches of media offices, the impact on commerce, whether viewed from an empirical or theoretical basis, may be minimal. The Court in *Stanford Daily* was not persuaded that news operations would be disrupted in any substantial manner by the fear of warranted searches.[25] There have been approximately fifteen warranted searches of media offices since 1970.[26] Even assuming that the fifteen searches were disruptive and affected the media offices' ability to engage in commerce, the impact would appear to be minimal. Given the miniscule number of

(1978). An additional power of Congress, the ability to regulate intrastate activities if the regulation is necessary to regulate the interstate shipment of goods, is often cited. *See* G. GUNTHER, *supra* note 11, at 188–203. This power can be regarded as a subspecies of the first power.

[18] The other commerce powers would not be applicable. State police searches are not in the flow of commerce and are not instrumentalities of commerce.

[19] *See* Katzenbach v. McClung, 379 U.S. 294, 302 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Wickard v. Filburn, 317 U.S. 111, 125 (1942); United States v. Darby, 312 U.S. 100, 120 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

[20] *See* G. GUNTHER, *supra* note 11, at 182, 191–203.

[21] 317 U.S. 111 (1942).

[22] *See generally* Communications Law Clinic, New York Law School, Memorandum, Re: Constitutionality of Proposed Federal Legislation Overruling *Zurcher v. Stanford Daily* (1979) (unpublished memorandum), *reprinted in* 1979 *House Hearings*, *supra* note 3, at 338 [hereinafter cited as CLC Memo]. *See also* Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 986–91 (1976).

[23] Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968). While the holding in *Maryland v. Wirtz* was overruled by National League of Cities v. Usery, 426 U.S. 833 (1976), the commerce clause reasoning was not impaired. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 160–61.

[24] In fairness to the drafters of bills overruling *Stanford Daily*, it should be noted that restricting bills to protect only the "media" or "press" presents significant difficulties of definition and classification. *See generally* 1978 *Senate Hearings*, *supra* note 3, at 53 (statements of Asst. Atty. Gen. Heymann and Sen. Mathias); 1979 *House Hearings*, *supra* note 3, at 17 (statement of Asst. Atty. Gen. Heymann). *See also* Branzburg v. Hayes, 408 U.S. 665, 704–05 (1972).

[25] 436 U.S. 547, 566 (1978).

[26] *See* 1978 *Senate Hearings*, *supra* note 3, at 135 (statement of Jack Landau, Reporters Committee for Freedom of the Press) (records indicate 15 searches of recognized news organizations since 1970—2 by federal officials, 13 by state officials).

searches that have been conducted, there is little evidence that the possibility of warranted searches affects media performance in any meaningful way. The hearings on the bills overruling *Stanford Daily* revealed almost a total lack of objective evidence as to the impact of warranted searches on the commercial business of the institutional media.[27]

In more recent commerce clause adjudication, however, the Court has been willing to rely on congressional findings or hearings to determine the actual or theoretical impact of the activity on commerce. For example, in *Heart of Atlanta Motel, Inc. v. United States*,[28] which upheld the constitutionality of title II of the 1964 Civil Rights Act,[29] the Court stated a two-part test to answer the constitutional question: Whether Congress had a rational basis for finding that the object of regulation affected commerce and whether the means of regulation were reasonable and appropriate.[30] While the Act contained no findings relevant to these tests, the Court found the legislative record ample to support an affirmative determination that the local activities that were regulated had a "substantial and harmful effect upon" commerce.[31]

Similarly, in *Perez v. United States*[32] the Court held that there was a rational basis for the congressional findings that intrastate loansharking activities as a whole affected interstate commerce and that such activity could be regulated despite the lack of evidence that the particular loansharking under prosecution affected interstate commerce.[33]

Applying these principles to the present issue, the courts would be willing to defer to congressional findings or a legislative record that rationally concluded that searches by state officials, and the potential for such searches, of media offices and other protected third parties would substantially impact on interstate commerce.[34] Thus, a court should be amenable to accepting the legislative record supporting such bills if, as in *Heart of Atlanta Motel* and *Perez*, it finds that Congress had a rational basis, based on the evidence before it, to link searches of the covered third parties to impairment of commerce. While the arguments advanced above[35] suggest that such a link is not compelling on either a theoretical or empirical basis sufficient to convince a court on its own review of the facts, it is unlikely that Congress has not met the lower standard of rationality delineated in *Heart of Atlanta Motel* and *Perez*. In short, the legislative record currently before Congress is sufficient to support a bill prohibiting searches of media offices.

Congress also can reach state searches by prohibiting all searches of any third-party material in or affecting commerce. The power underlying this approach would be the second source of commerce power, the ability of Congress to protect the instrumentalities of interstate commerce.[36] In a variety of other contexts, such as prohibiting thefts from interstate shipments,[37] Congress has protected the flow of interstate commerce. Similarly, the prohibition of state searches of the papers of third parties may be regarded as protecting the flow of commerce.

However, all written material possessed by any third party could not be protected under this prong of the commerce power. Rather, only the materials used by persons or organizations engaged in interstate commerce would be protected. Unlike the

[27] *See also* OLC Memo, *supra* note 16, at 10 (empirical evidence indicates "the lack" of a general, nationwide problem).

Several authorities also point toward title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (1976), as providing adequate precedent for Congress to impose requirements on state law enforcement activities that have no substantial impact on commerce. *See, e.g.*, CLC Memo, *supra* note 22, at 336; American Civil Liberties Union, Memorandum, Re: Congressional Power to Restrict Third-Party Searches by State and Local Officials (1978) (unpublished memorandum), *reprinted in* 1979 *House Hearings*, *supra* note 3, at 49 [hereinafter cited as ACLU Memo]. Title III prohibits federal and state officials from wiretapping an establishment, "the operation of which affects interstate and foreign commerce." 18 U.S.C. § 2511(1)(b)(iv). This section, proponents argue, is analogous to bills overruling *Stanford Daily*. To the extent that title III reaches activities having no substantial relation to, or effect on, interstate commerce, it may suffer from the same constitutional infirmities that this comment outlines regarding the bills to overrule *Stanford Daily*. *See generally* OLC Memo, *supra* note 16, at 8–10.

[28] 379 U.S. 241 (1964).

[29] 42 U.S.C. § 2000a(a)–(e)(1976).

[30] 379 U.S. at 258–59.

[31] *Id.* at 258.

[32] 402 U.S. 146 (1971).

[33] *Id.* at 154–57.

[34] The hearings before Congress in 1978 and 1979 regarding the bills here considered were replete with testimony from representatives of the media, as well as from members of Congress, concerning what they saw as the deleterious effects of the holding in *Stanford Daily* on the effective functioning of the nation's media in gathering and disseminating news. For a brief congressional report to the same effect, see H.R. REP. No. 1521, 95th Cong., 2d Sess. (1978).

[35] *See* text accompanying notes 18–27 *supra*.

[36] *See* note 17 & accompanying text *supra*.

[37] *See* 18 U.S.C. § 659 (1976). *See also* 18 U.S.C. § 32 (1976) (destruction of aircraft); 18 U.S.C. § 33 (1976) (theft of motor vehicles).

analysis employed above to determine whether an activity affects commerce, the instrumentality theory should be given a more restrictive meaning. An object is an instrumentality of interstate commerce only to the extent that the use of the object is necessary for the activity in question to continue in interstate commerce.[38] In the context of the present issue, only the materials of media organizations operating on an interstate basis should be considered instrumentalities of commerce. Thus, a bill premised on the "instruments" theory would reach a smaller class of state searches than searches covered by a bill premised on the "affecting commerce" theory.

THE SHERMAN ACT ANALOGY

Cognizant of the constitutional uncertainty surrounding the ability of Congress to reach state searches under the commerce power, the drafters of the Privacy Protection Act did not define any activity or material that is in or affects commerce.[39] The Act prohibits the search or seizure by federal or state officials of any "work-product" or "documentary" materials "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce."[40]

The Privacy Protection Act is thus analogous to section 1 of the Sherman Antitrust Act,[41] which prohibits certain activities that are in or affect commerce. In each Sherman Act case, courts must determine whether the activity sought to be reached by the substantive portion of the Sherman Act is in or affects interstate commerce.[42]

In the Privacy Protection Act the "in or affecting" commerce language refers to the media materials sought to be protected, not to the searches sought to be prohibited.[43] Therefore, in each case arising under the Privacy Protection Act, a court must determine whether the searched materials were in or affecting commerce. The drafters of the Act intended that the statutory language should govern the materials to be protected:[44] those materials held "in connection with a purpose to disseminate . . . [a] form of public communication."[45]

Thus, the materials sought to be protected must satisfy both a statutory and a constitutional inquiry. Under the statutory analysis, a court must determine first, whether the materials are connected "with a purpose to disseminate" communication to the public. The drafters intended this language to reach all materials meant to be published or incorporated in a form of public communication and all materials gathered and prepared in anticipation of publication.[46] The second statutory inquiry is whether the material was part of a "form of public communication." The drafters intended this language to cover any written communication available to the general public.[47] Once these tests are satisfied, the constitutional inquiry would involve a determination of whether the materials were in or affected commerce.

For the constitutional inquiry, the "in commerce" and "affecting commerce" analysis outlined above would be applicable. Under the "in commerce" analysis, the materials would have to be used by persons or organizations engaged in the

[38] There has been no court adjudication of federal statutes protecting instrumentalities of interstate commerce. Thus, there are no judicial interpretations of what constitutes an "instrumentality of commerce." By its plain meaning, however, the term refers to an object that is necessary for an activity to engage in interstate commerce. It should not refer to materials used by any third party whose activities only may affect commerce.

[39] *See* note 16 & accompanying text *supra*. The intent of the drafters of the Privacy Protection Act to follow the Sherman Act analogy is apparent from the hearings and statutory language, *see* notes 43-47 & accompanying text *infra*, although the Sherman Act was never mentioned by officials from the Department of Justice.

[40] H.R. 3486, 96th Cong., 1st Sess. §2(a), (b) (1979). The bill requires federal and state officials to use the subpoena process to obtain the protected materials of third parties. Two exceptions to the search prohibition for work-product materials are provided: if there is probable cause to believe that the person possessing the material has committed or is committing the offense for which the materials are sought, §2(a)(1), and if there is reason to believe that immediate seizure of the materials is necessary to save a life, §2(a)(2). Four exceptions to the search prohibition for documentary materials are provided. The first two exceptions, §2(b)(1), (2), parallel the two exceptions for work-product materials. The last two exceptions are if there is reason to believe that giving notice pursuant to a subpoena would result in the destruction of the material, §2(b)(3), and if the materials have not been produced in compliance with the subpoena, §2(b)(4). Finally, the bill does not apply to any search related to the enforcement of the customs laws. *Id.* §3.

[41] 15 U.S.C. §1 (1976).

[42] *See generally* P. AREEDA, ANTITRUST ANALYSIS 120-22 (2d ed. 1974); L. SULLIVAN, LAW OF ANTITRUST 708-14 (1977).

[43] *See* 1979 *House Hearings*, *supra* note 3, at 18-19 (statement of Asst. Atty. Gen. Heymann).

[44] *Id.* at 11.

[45] H.R. 3486, 96th Cong., §2(a), (b) (1979).

[46] *See* 1979 *House Hearings*, *supra* note 3, at 11 (statement of Asst. Atty. Gen. Heymann).

[47] *Id.*

flow of interstate commerce.[48] Under the "affecting commerce" analysis, the materials would have to affect commerce in a substantial manner.[49] In either case, the Act would appear to reach only materials utilized by national news media organizations. Only in such large, multistate organizations would written materials satisfy the constitutional prerequisites of being in the flow of commerce or of having a likelihood of substantially affecting commerce. Strictly intrastate media operations, such as the student newspaper involved in *Stanford Daily*, probably would not send publications or broadcasts outside the state, thus failing the "in commerce" test; because of their small size, they would be unlikely to affect substantially the dissemination of news on a national basis, thus failing the "affecting commerce" test. By applying the jurisdictional language to materials, not activities, the drafters of the Privacy Protection Act may have restricted[50] the scope of the protection afforded by the Act unnecessarily.

THE TENTH AMENDMENT BARRIER

The most recent addition to commerce clause jurisprudence has been the imposition of the tenth amendment[51] as a barrier to congressional exercise of the commerce power in a way that interferes with the sovereign functions of the states. In 1976 the Court in *National League of Cities v. Usery*[52] held unconstitutional the 1974 amendments to the Fair Labor Standards Act[53] that extended wage-and-hour requirements under the Act to virtually all state and local government employees. Under current tenth amendment analysis, the Privacy Protection Act, assuming it applies to state law enforcement officials through the commerce clause, must be measured against the restrictions found in the *National League of Cities* decision.

In striking down the 1974 amendments, the *National League of Cities* Court outlined the contours of state sovereignty which could not be impaired by Congress through the commerce clause. The Court stated that certain state governmental functions that are "essential to separate and independent existence"[54] are immune to congressional interference. After canvassing the anticipated costs associated with meeting the wage-and-hour requirements and further pointing out that the delivery of government services would be displaced and restructured by the requirements,[55] the Court concluded that the 1974 amendments impermissibly interfered "with the integral government functions"[56] of states and their subdivisions:

> [The amendments will] significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. . . . [I]t is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. . . . We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the commerce clause].[57]

By imposing national requirements on search procedures by state and local law enforcement officials, the Privacy Protection Act would seem to interfere with "integral" and "traditional" government functions and services. The Court in *National League of Cities* found "police protection" to be a traditional government function,[58] and on other occasions the Court has emphasized the right of states to fashion their own law enforcement procedures.[59] The imposition of a national subpoena requirement to replace third-party warrant searches has the potential to "seriously undermine law enforcement efforts."[60] A subpoena requirement would eliminate the element of surprise in searches and thereby facilitate destruction of evidence by third parties.[61] Moreover, those state and

[48] *See* text accompanying notes 36–38 *supra*.

[49] *See* text accompanying notes 18–24 *supra*.

[50] *See* text accompanying notes 28–35 *supra* (suggesting that certain state searches could be reached under "affecting commerce" grounds).

[51] U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."

[52] 426 U.S. 833 (1976).

[53] 29 U.S.C. § 203 (1976) (declared unconstitutional in part, National League of Cities v. Usery, 426 U.S. 833 (1976)).

[54] 426 U.S. at 845–46 (citations omitted).

[55] *Id.* at 851–52.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 851.

[59] *See, e.g.*, Foley v. Connelie, 435 U.S. 291, 297 (1978); Patterson v. New York, 432 U.S. 197, 201–02 (1977); Ker v. California, 374 U.S. 23, 34 (1963). *See generally* OLC Memo, *supra* note 16, at 5–6.

[60] Zurcher v. Stanford Daily, 436 U.S. at 560.

[61] *See* 1978 *Senate Hearings*, *supra* note 3, at 297–98 (statement of Paul Perito, National District Attorneys Association); 1979 *House Hearings*, *supra* note 3, at 165–66 (statement of Richard Williams, National District Attorneys Association); Brief for the United States as Amicus

local jurisdictions that have no legislative basis for the issuance of subpoenas would be required to rely on grand juries to return prosecutor's subpoena requests. The delay associated with obtaining subpoenas through such a method would be protracted by the limited function and availability of grand juries in many states.[62] Thus, in addition to modifying police investigative procedures, the Privacy Protection Act would require state and local jurisdictions to restructure their methods of issuing subpoenas if they wish to be able to obtain them more readily.

If the imposition on state sovereignty principles derived from *National League of Cities* is viewed exclusively as an empirical assessment of financial burden on the states, then the Privacy Protection Act could be held valid more easily, since the direct financial burden resulting from the Act would be somewhat intangible.[63] This reading of the decision, however, is narrow and untenable. The Court only referred to the fiscal burden as one aspect of the imposition on state sovereignty, and the Court's broad reasoning did not emphasize monetary expense as the sole basis for the principle underlying its decision.[64] Rather, the displacement (of which the fiscal burden was the cause) of local government discretion in deciding how to deliver services was the factor that proved decisive for the Court.[65]

The approach taken in Professor Laurence Tribe's interpretation of *National League of Cities* suffers from a similarly narrow reading of the case. Tribe argues that the decision is best viewed as reaffirming state autonomy only to the extent necessary to ensure an individual's constitutional right to receive government services.[66] This view is unconventional and not supported by case law.[67] However, even if it were accepted, it would not aid in determining how *National League of Cities* should be applied to the Privacy Protection Act. It is not clear how the Act shields the individual rights Tribe describes; on the one hand, the Act purports to protect the first and fourth amendment rights of the media and other third parties, but on the other hand, the Act arguably could dilute an individual's right to receive effective police services from the government. Therefore, Tribe's analysis fails to offer any basis for predicting the constitutional validity of the Act under *National League of Cities*.

The adoption of Justice Blackmun's interpretation of *National League of Cities*, however, may result in the Act being upheld. Blackmun, who provided the crucial vote for the five-member majority, explained in his concurring opinion that the decision adopted a balancing test, with federal interests being weighed against state interests.[68] While the majority did not formulate its holding in those terms, such a reading of the decision is suggested by the Court's refusal to overrule *Fry v. United*

Curiae at 25–26, Zurcher v. Stanford Daily, 436 U.S. 547 (1978), *reprinted in Justice Department Policy Concerning News Media Search Warrants: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 144–45 (1978) [hereinafter cited as *Justice Department Policy Hearings*]; Note, *supra* note 22, at 973–74.

[62] *See* note 61 *supra*. However, the exceptions to the prohibition of the use of search warrants in the Privacy Protection Act, note 40 *supra*, may mitigate the Act's disruption of state law enforcement functions.

At least one court has addressed the tenth amendment implications of a national subpoena requirement indirectly. In *In re* Special April 1977 Grand Jury, 581 F.2d 589 (7th Cir.) (per curiam), *cert. denied*, 439 U.S. 1046 (1978), the Illinois attorney general argued that his staff's compliance with a federal grand jury subpoena would violate state sovereignty principles outlined by *National League of Cities*. In rejecting this argument, the court of appeals stated that "the impact of a subpoena on state functions is markedly different from the *Usery* direct system of regulation that requires reallocation of state resources." 581 F.2d at 592. This reasoning can be readily distinguished from a tenth amendment challenge to the Privacy Protection Act. Unlike a single federal grand jury investigation, the Privacy Protection Act would affect state officials nationwide. Moreover, the Act would affect the routine functions of police rather than merely the office of a single state official.

[63] *See* 1979 *House Hearings*, *supra* note 3, at 63–64 (statement of Prof. Mark Tushnet); ACLU Memo, *supra* note 27, at 47. *But see* text accompanying notes 60–62 *supra* (suggesting state and local jurisdictions may experience significant costs in implementing a subpoena-only requirement).

[64] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 162; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 311 (1978); OLC Memo, *supra* note 16, at 5 & n.5.

[65] 426 U.S. at 848.

[66] L. TRIBE, *supra* note 64, at 313–18. At least one authority, in attempting to support the Privacy Protection Act on commerce clause grounds, cites Tribe in an effort to distinguish *National League of Cities*. *See* CLC Memo, *supra* note 22, at 338–39.

[67] Tribe so characterizes his own interpretation. *See* L. TRIBE, *supra* note 64, at 313 n.28, 314.

[68] 426 U.S. at 856 (Blackmun, J., concurring). Blackmun suggested the imposition of federal environmental standards on the states as one area "where the federal interest is demonstrably greater." *Id.* It should be noted, however, that lower federal courts which have considered *National League of Cities* have always relied on the reasoning in the majority opinion, not on Blackmun's balancing test. *See, e.g.*, Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979); Pearce v. City of Wichita Falls, 590 F.2d 128 (5th Cir. 1979); Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978).

States.[69] In *Fry*, the Court upheld the imposition of federal wage controls on state employees, and the *National League of Cities* Court found several factors to distinguish such controls from the 1974 amendments: that the problem of inflation could be dealt with only on a national basis, that the controls were only for a limited time period, and that they displaced no state choices as to how government operations should be structured.[70]

The analysis of *Fry* suggests that Blackmun's balancing approach can be viewed in two ways: as a utilitarian analysis of the net benefits of the federal interest to be weighed against the net losses of invading state sovereignty or as turning on the nature, not the weight, of the federal interest advanced to justify state submission.[71] The latter view is the more plausible one, since, as noted above,[72] *National League of Cities* did not turn on the financial burden imposed on the states. Applying the second view requires the difficult weighing of the federal interest in upholding the first and fourth amendment rights of the media and related third parties[73] against the state interest in retaining traditional police investigative procedures. Under Blackmun's analysis, the lenient rationality test for evaluating congressional judgments as to which activities affect commerce[74] would not be applicable. Rather, Congress would need to show that current state search warrant practices have the present danger or future potential for inhibiting the gathering and dissemination of news on a national basis by the third parties the Privacy Protection Act covers. Given the paucity of evidence concerning the abuse of search warrants against the media and other third parties on a national or local level, it is doubtful that the record currently before Congress is sufficient to generate a federalism interest capable of supporting the Privacy Protection Act.[75]

III. The Fourteenth Amendment Rationale

KATZENBACH V. MORGAN and *OREGON V. MITCHELL*

A second constitutional basis for the application of bills overruling *Stanford Daily* to the states is section 5 of the fourteenth amendment, also referred to as the enforcement clause, which gives Congress the power "to enforce, by appropriate legislation, the provisions" of the amendment.[76] Several of the bills currently before Congress,[77] unlike the Privacy Protection Act, are premised on section 5 of the fourteenth amendment. Since the Court has applied first and fourth amendment guarantees to the states through incorporation into the due process clause of the fourteenth amendment,[78] proponents of this approach argue that the bills are enforcing congressional determinations of the meaning of the fourteenth amendment, notwithstanding the contrary determination reached by the Court in *Stanford Daily*.[79] However,

[69] 421 U.S. 542 (1975).

[70] 426 U.S. at 853.

[71] This interpretation of Blackmun's opinion is suggested by Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1235–37 (1977).

[72] *See* text accompanying notes 64–65 *supra*.

[73] The drafters of the Privacy Protection Act were not intending to enhance the nation's commerce as such through the bill. Therefore, the federalism interest must rest on the much narrower ground of protecting the rights of persons and organizations within each state. This formulation makes the federalism interest under the "nature" analysis even more difficult to justify. *See* Stewart, *supra* note 71, at 1237. However, there might be spillover effects to other states in that an impairment of the ability of the media of one state to disseminate news would affect those out-of-staters who wished to hear the news. This formulation makes the federalism interest easier to justify. *Id.*

[74] *See* text accompanying notes 38–44 *supra*.

[75] *See* text accompanying notes 25–27 *supra*. *See also* OLC Memo, *supra* note 16, at 6 (suggesting that Congress is required to make a "substantial record" of abuse of search warrants by state officials to justify a federalism interest under Blackmun's balancing analysis).

There is another possible basis of supporting congressional imposition of media-search standards upon the states. Congress, acting pursuant to the federal spending power, could require states accepting federal grants to comply with proposed search standards. *See* U.S. Const. art. I, cl. 1. No bill has taken this approach, partially because of the inflexibility of relying on uncertain yearly appropriations. *See* 1979 *House Hearings*, *supra* note 3, at 117 (statement of Rep. Kastenmeier). One example of such a condition is a requirement that all states receiving Law Enforcement Assistance Administration grants adhere to the restrictions found in the Privacy Protection Act. The constitutional limitations on such conditions are that they be related to the purpose of the spending (a limitation arguably not breached in the above example) and, possibly, that they not invade state autonomy interests. Such state interests would relate to the tenth amendment analysis outlined above. *See generally* G. Gunther, *supra* note 11, at 250–59; Comment, *Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery*, 26 Am. U.L. Rev. 726 (1977). The Court in *National League of Cities*, however, expressly reserved the question of the effect of its decision on other sections of the Constitution, such as the spending power. 426 U.S. at 852 n.17.

[76] U.S. Const. amend. XIV, §5.

[77] *See, e.g.*, S. 3162, 95th Cong., 2d Sess. (1978); H.R. 4181, 96th Cong., 1st Sess. (1979).

[78] *See* Wolf v. Colorado, 338 U.S. 25 (1949) (incorporation of the fourth amendment); Gitlow v. New York, 268 U.S. 652 (1925) (incorporation of the first amendment).

[79] 436 U.S. 547, 567–68 (1978).

this rationale must be considered in light of the Court's interpretation of the enforcement clause in *Katzenbach v. Morgan*[80] and *Oregon v. Mitchell*,[81] which casts doubt on Congress' power to determine the substantive content of the fourteenth amendment.

In *Katzenbach v. Morgan*, the Court upheld section 4(e) of the Voting Rights Act of 1965[82] as a proper exercise of the enforcement clause power. Section 4(e) provided that the right to vote could not be denied by a state for illiteracy in English to any person who completed the sixth grade in a Puerto Rican school in which the language of instruction was other than English. A New York state law provided otherwise, and the Supreme Court in 1959 had upheld a similar state literacy requirement against an equal protection challenge.[83]

The majority opinion by Justice Brennan upheld section 4(e) of the Act on two grounds. First, Congress had the power to grant Puerto Ricans the right to vote as a means to aid them in securing equality in the state's distribution of public services—education, housing, and law enforcement.[84] The Court's standard for testing the exercise of this remedial power was a lenient one of simply "perceiving a basis" on which Congress could have resolved the conflicting federal and state interests involved in passing section 4(e) of the Act.[85] As a second ground for its decision, the majority indicated that Congress could have concluded that the literacy test violated the equal protection clause of the fourteenth amendment.[86] Again, the Court stated that it was Congress' prerogative to weigh the competing considerations, and it was enough that the Court "perceive a basis" upon which Congress might predicate such a judgment.[87] The first rationale granted Congress power to enforce the fourteenth amendment as a basis for remedying past violations of the amendment. The second rationale gave Congress power to determine the meaning of provisions of the fourteenth amendment for itself and pass legislation directed at enforcing that determination, notwithstanding the Court's prior determination to the contrary.

A strong dissent by Justice Harlan, joined by Justice Stewart, challenged the majority on both grounds. Harlan rejected the application of the remedy rationale since there were no legislative facts to support a finding that Puerto Ricans in New York state had been discriminated against in the delivery of government services.[88] More important, in rejecting the second rationale, Harlan argued that whether there was a violation of the equal protection clause was a judicial question which Congress could not answer; section 5 did not give Congress power to define the substantive scope of the fourteenth amendment.[89] If Congress had such power, he suggested, it could dilute as well as expand equal protection and due process decisions of the Court.[90] In response to this contention, the majority stated in a footnote that section 5 of the fourteenth amendment grants Congress no such discretion: "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[91]

The broad enforcement clause power the *Morgan* Court gave to Congress must be weighed against the much more restrictive reasoning found in *Oregon v. Mitchell*.[92] Such a balancing is extremely difficult, however, since the lengthy and complicated decision in *Oregon v. Mitchell* produced no majority opinion; three Justices authored their own opinions, and two other opinions were each joined by three Justices. So far as is pertinent here, the Court considered the 1970 Voting Rights Act amendments that lowered the voting age to eighteen for

[80] 384 U.S. 641 (1966).

[81] 400 U.S. 112 (1970).

[82] Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 438 (codified at 42 U.S.C. § 1973b(e) (1976)).

[83] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[84] 384 U.S. at 652-53.

[85] *Id.* at 653.

[86] *Id.* at 656.

[87] *Id.* Justice Brennan apparently derived the "perceive a basis" test from his discussion, earlier in the opinion, of the relatively lenient rationality test for congressional legislation found in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). *See* 384 U.S. at 650-51. It should be noted that while little of the vast historical scholarship regarding the fourteenth amendment concerns § 5, what can be discerned of the intent of the framers of § 5 supports arguments for deference to congressional interpretations of the amendment. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 221-29 (1977). *But see* Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 97; Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 101 (both authors suggest, based on historical evidence, that § 5 grants Congress power to legislate only when the judiciary determines that a state law constitutes a denial of a fourteenth amendment right).

[88] 384 U.S. at 669 (Harlan, J., joined by Stewart, J., dissenting).

[89] *Id.* at 667-68.

[90] *Id.* at 668.

[91] *Id.* at 651 n.10.

[92] 400 U.S. 112 (1970).

all federal and state elections[93] and suspended for five years the use of literacy tests in any federal or state election.[94] By shifting five-four majorities, the Court upheld the age limitation provision as it applied to federal elections, but invalidated the provision as it applied to state elections. The suspension of literacy tests was upheld unanimously.

Justice Brennan's opinion, joined by Justices Marshall and White, adhered most closely to the broad language of *Morgan*. Brennan, who would have upheld the application of the eighteen-year-old provision to state elections, expressed doubts as to whether a statute granting the franchise to persons older than twenty-one while denying it to eighteen year olds would survive equal protection scrutiny.[95] Regardless of the Court's view, however, Brennan argued that Congress' factfinding capabilities were superior to those of the Court and justified a congressional determination, based on the enforcement clause, that a state law denying the vote to persons between the ages of eighteen and twenty-one was unnecessary to promote any legitimate state interest and thus discriminated against that class in violation of the equal protection clause.[96]

In a footnote to his opinion, apparently meant to indicate that limitations still existed on the second *Morgan* rationale, Brennan elaborated on his *Morgan* footnote, which limited congressional exercise of the enforcement clause to only 'enforcing' the guarantees of the fourteenth amendment. When the Court strikes down a state law on constitutional grounds, Brennan argued, it indicates, among other things, that the legislative findings supporting the law were "so far wrong as to be unreasonable."[97] If Congress were to make "identical findings on the identical issue," then its judgment would also fail to pass the Court's reasonableness standard of review.[98] Apparently, Brennan was suggesting a hypothetical case illustrating the limitation: If Congress were to enact a law grounded on section 5 that was identical to a state law struck down by the Court as violative of the fourteenth amendment, the federal law could not be upheld unless Congress based the law on findings and evidence different from those advanced by the state legislature.

[93] 42 U.S.C. §1973bb-1 (1970).

[94] *Id.* § 1973 aa.

[95] 400 U.S. at 240 (Brennan, J., with White & Marshall, JJ., concurring and dissenting).

[96] *Id.* at 246–49.

[97] *Id.* at 249 n.31.

[98] *Id.*

The other pivotal opinion was that of Justice Stewart, joined by Chief Justice Burger and Justice Blackmun. In his construction of *Morgan*, Stewart, who would have struck down the eighteen-year-old provision as it applied to either state or federal elections, upheld the first, remedial prong but placed severe restrictions on the second, interpretative prong. On the interpretative power, Stewart argued 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 a lawsuit might not reach the same factual conclusion.[99] Stewart concluded that his invidious discrimination limitation prevented Congress from determining "as a matter of substantive constitutional law what situations"[100] violate the equal protection clause, unless the state law discriminated "against any discrete and insular minority."[101] Since Stewart limited congressional interpretative power under section 5 to overriding those state laws discriminating against traditionally "suspect" classifications, apparently only as determined by the Court itself, Congress could not overturn the state voting laws classifying persons on the basis of age, which was not a suspect category.[102]

Based on the convoluted voting pattern in *Oregon v. Mitchell*, it is difficult to abstract any principles from that decision which modify the precedential value of *Morgan*. Moreover, the Court since 1970 has had little more to say on the two decisions beyond perfunctory citations.[103] In *Mitchell*, all the Justices expressed their willingness to support the remedial rationale of *Morgan*. It is important to note, however, that had the second *Morgan* rationale remained in full force, the *Oregon v. Mitchell* majority undoubtedly would have sustained the eighteen-year-old provision, just as a Court majority had sustained the Voting Rights Act provision in *Morgan*. However, five Justices were unwilling to do so; the Stewart group of three limited this aspect of *Morgan* to situations involving suspect classifica-

[99] *Id.* at 296 (Stewart, J., with Burger, C.J., and Blackmun, J., concurring and dissenting). Unlike Justice Brennan, Justice Stewart found it "inconceivable" that the Court would find the denial of the franchise to persons between 18 and 21 years of age a denial of equal protection. *Id.* at 295 n.14.

[100] *Id.* at 296.

[101] *Id.*

[102] *Id.*

[103] *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., with Powell and Blackmun, JJ., concurring) (discussed congressional statute granting standing, citing *Morgan* and *Oregon v. Mitchell*).

tions, while Justices Black and Harlan found limits on the section 5 power in the history of the enactment of the fourteenth amendment. These limits, in their view, granted discretion to the states to govern the voting procedures of their own citizens.[104] The following discussion will examine the extent to which the two rationales of *Morgan* remain in force and the implications of those rationales for the bills overruling *Stanford Daily*.

CONGRESSIONAL REMEDY PRONG OF *MORGAN*

The ability of Congress to fashion remedies through section 5 to cure discrimination or other state action contrary to the fourteenth amendment is the most accepted and least controversial aspect of *Morgan*. This prong of *Morgan* apparently emerged unscathed from *Oregon v. Mitchell* since the five opinions in that case unanimously upheld the provision suspending literacy tests for voting as a remedial measure.[105] Moreover, the Court has recently reaffirmed this prong of *Morgan* in dicta.[106]

Several commentators have suggested that the bills overruling *Stanford Daily* as applied to the states can be justified under section 5 as a remedial measure.[107] Under this theory, Congress could create a prophylactic remedy to deter the number of potential unconstitutional searches resulting from improperly obtained or executed warrants, notwithstanding the Court's determination in *Stanford Daily* that the Constitution did not mandate such a remedy.[108] The requirement of an adversary hearing in which the third party could contest the existence of probable cause necessary for a subpoena likely would reduce the number of future unconstitutional searches. Such a remedy, these proponents argue, falls under the power granted Congress in the first rationale in *Morgan* that was affirmed in *Oregon v. Mitchell*.[109]

However, there are several difficulties with this approach. On a theoretical level, the distinction between remedy and interpretation advanced in *Morgan* may not be a sharp one. It is not clear how a statute providing a remedy to a fourteenth amendment violation can be distinguished from a statute decreeing that such a violation exists. Such a distinction may turn largely on the asserted basis for the statute rather than on the substantive scope of the law.[110] For example, in the present case a bill overruling *Stanford Daily* based on the remedial power would differ in its language little, if at all, from the same bill purporting to rely on the interpretative power of Congress under the enforcement clause.

Even accepting the distinction as valid, however, Congress would still be required to develop an adequate record indicating that an appropriate remedy is necessary. Despite the relative leniency of the "perceive a basis" test for remedial measures stated in *Morgan*, the dissenters in that case failed to perceive any basis in the congressional factual records or findings.[111] However, Justices Harlan and Stewart, the *Morgan* dissenters, did find an adequate record in *Oregon v. Mitchell* to sustain the ban on literacy tests as a remedial measure since there was ample evidence that such tests had long been used throughout the nation as a device to

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[104] 400 U.S. at 117–35 (Black, J.); *id.* at 152–229 (Harlan, J., concurring and dissenting).

[105] More specifically, it generally is agreed that the Justices were analyzing the second rationale of *Morgan* when considering the 18-year-old provision. Professor Gunther suggests that both *Morgan* rationales were at issue. G. GUNTHER, *supra* note 11, at 1033. However, the government defended the Voting Rights Act amendments solely on the basis of the second *Morgan* rationale, *see* D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE IN A NUTSHELL 249–50 (1974), and other commentators see the second rationale as the one in issue. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 692–93; L. TRIBE, *supra* note 64, at 267.

[106] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 302 n.41 (1978) (opinion of Powell, J.) ("We have previously recognized [citing *Katzenbach v. Morgan*] the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.").

[107] *See* 1978 *Senate Hearings*, *supra* note 3, at 370–79 (statements of Profs. Paul Bender and William Cohen).

[108] Nearly all the bills to overrule *Stanford Daily* also provide that aggrieved citizens may sue government officials who violate the procedures established by the bill. *See, e.g.*, H.R. 4181, 96th Cong., 1st Sess. § 4(a)–(d) (1979).

[109] *See* 1978 *Senate Hearings*, *supra* note 3, at 371–75 (statement of Prof. Paul Bender); *id.* at 376–77 (statement of Prof. William Cohen). Eight of the Justices in *Oregon v. Mitchell* upheld the ban on literacy tests as a proper remedial measure under the enforcement clause of the fifteenth amendment. *See* U.S. CONST. amend. XV, § 2. Given the similarity between the enforcement clauses of the fourteenth and fifteenth amendments, commentators have viewed the first *Morgan* rationale as consistent with *Oregon v. Mitchell*. *See, e.g.*, 1978 *Senate Hearings*, *supra* note 3, at 376 (statement of Prof. William Cohen). *See also* Oregon v. Mitchell, 400 U.S. at 144–47 (Douglas, J., concurring and dissenting) (relying on the enforcement clause of the fourteenth amendment to uphold the literacy test ban).

[110] *See* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 608 (1975).

[111] *See* text accompanying note 88 *supra*.

deny the franchise to potential voters.[112] Thus, as was discussed above in a similar context in relation to the commerce clause, Congress must set out findings which indicate a need for remedial measures to deter the possibility of the abuse of constitutional rights through the use of search warrants against third parties.[113]

On its face, the "perceive a basis" test resembles the lenient "mere rationality" test found in cases reviewing congressional determinations that certain activities impact on commerce.[114] Arguably, however, to impose a nationwide remedy even under the "perceive a basis" test would require a showing that current search warrant activities against the media and related third parties are a national problem. A more substantial record to that effect than the one currently before Congress would be required to create such a showing.[115]

CONGRESSIONAL INTERPRETATION PRONG OF *MORGAN*

The most controversial rationale of *Morgan* was the apparent power it gave Congress to interpret for itself, through section 5, the meaning of the fourteenth amendment. This power not only allowed Congress to usurp a traditional judicial function—interpreting the Constitution—but on its face allowed Congress to modify contrary Supreme Court interpretations. This aspect of *Morgan* was not only heavily criticized on its own account, but it is not clear to what extent it survived *Oregon v. Mitchell*.

Most commentators focused their scrutiny on Justice Brennan's effort to limit the extent of this rationale. In his footnote in *Morgan*, Justice Brennan stated that Congress could not "restrict" or "dilute" the guarantees of the fourteenth amendment.[116] As various critics pointed out,[117] *Morgan* did not explain the distinction between "expanding" and "restricting": If the congressional interpretive power was grounded on a special legislative competence to make findings and weigh conflicting considerations, why could not Congress simply interpret as it saw fit? Nor did Brennan's elaboration of his "ratchet" theory in *Oregon v. Mitchell* prove helpful,[118] since he discussed only the narrow ground of the ability of Congress to make findings that will override the findings made by state legislatures on the same issue.[119] This reasoning did not address the more general issue of Congress' power to "dilute" a fourteenth amendment "guarantee," nor did he address the problem of which branch of government was to determine the definition and scope of those guarantees in the first instance.

Finally, even accepting Brennan's theory, there remains the difficulty of determining whether a law dilutes or expands a right.[120] In the context of the present issue, bills overruling *Stanford Daily* might be viewed as "expanding" first and fourth amendment rights for the media and related third parties while "diluting" the equal protection rights of other citizens by not granting this privilege to all persons. Such a bill might even be seen as "diluting" the fourteenth amendment due process guarantee of a fair trial by restricting the amount of information available to a factfinder at trial.[121]

An additional major difficulty in relying on *Morgan's* second rationale is determining the extent to which it was modified by *Oregon v. Mitchell*. While several commentators flatly state that the second rationale was overruled in the latter decision, relying principally on Stewart's opinion,[122]

[112] 400 U.S. at 216–17 (Harlan, J., concurring and dissenting); *id.* at 282–84 (Stewart, J., with Burger, C.J., and Blackmun, J., concurring and dissenting).

[113] *See* 1978 *Senate Hearings*, *supra* note 3, at 371–72 (statement of Prof. Paul Bender).

[114] *See* notes 28–35 & accompanying text *supra*.

[115] Recently, a federal court of appeals in sustaining the constitutionality of § 103(f)(2) of the Public Works Employment Act of 1977 (setting aside 10% of all funds for minority contractors) had occasion to rely on the remedial prong of *Morgan* and reiterated the "perceive a basis" test. *See* Fullilove v. Kreps, 584 F.2d 600, 604–05 (2d Cir. 1978), *cert. granted*, 441 U.S. 960 (1979) (No. 78-1007, 1979 Term). Interestingly, the court found "troublesome" the sparse record before Congress, but nevertheless found the evidence sufficient to meet the "perceive a basis" test. 584 F.2d at 605–06. This concern with the legislative record parallels similar concerns this comment has expressed concerning the record to support the *Stanford Daily* bills. The Supreme Court's forthcoming decision in *Fullilove* may clarify the scope of the remedial prong of *Morgan*.

[116] 384 U.S. at 651 n.10. *See* text accompanying note 91 *supra*.

[117] *See, e.g.*, D. ENGDAHL, *supra* note 105, at 246; Cohen, *supra* note 110, at 606–07.

[118] *See* 400 U.S. at 249 n.31. *See* text accompanying notes 97–98 *supra*. The "ratchet" description is borrowed from Professor Cohen. *See* Cohen, *supra* note 110, at 606.

[119] *See* D. ENGDAHL, *supra* note 105, § 10.08; Cohen, *supra* note 110, at 612–13.

[120] *See* Cohen, *supra* note 110, at 607.

[121] The first "dilution" is not present in those bills extending protection to all third parties. The second "dilution" is suggested by at least one authority. CLC Memo, *supra* note 22, at 341. However, the latter argument is weakened by the fact that an accused raising the right of a fair trial would rarely desire information that is also sought by law enforcement officials.

[122] *See* D. ENGDAHL, *supra* note 105, at 244; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 693; Cohen, *supra* note 110, at 612.

some writers still view the issue as an open one.[123] If the Justices remaining from the *Mitchell* Court were to retain their positions in that case, Brennan would apply his factfinding gloss to the second prong, while Stewart would limit the second prong to combating instances of discrimination against suspect groups, and presumably instances of state action interfering with fundamental rights, as determined by the Court itself. Brennan's theory arguably supplies a basis for the bills here considered,[124] but the restrictive Stewart theory probably would not supply a basis since the bills are not protecting suspect groups or fundamental rights as determined by the Court.

Given the split of opinion in *Oregon v. Mitchell*, relying on that decision alone to discern the viability of the second *Morgan* rationale is a nearly impossible task. The value of the second *Morgan* prong, however, must be considered reduced to some extent merely on the basis of the bare holding in *Oregon v. Mitchell* striking down the voting-age provision as it applied to the states. At least one writer suggests that the major modification that the ruling in *Oregon v. Mitchell* made in the second *Morgan* rationale was to require a higher standard of review for the reasonableness of congressional action than the lenient "perceive a basis" test adopted in *Morgan*.[125]

In response to the uncertainty generated by *Oregon v. Mitchell*, several commentators have advanced theories that suggest modifications of the second *Morgan* rationale that would still permit Congress to retain a role in constitutional interpretation. The extent to which these theories impact on the section 5 bases of the bills overruling *Stanford Daily* is outlined below. However, since none of these theories have been adopted by the Court, it is impossible to determine which test the bills may have to meet.

Federalism-Liberty Distinction. One approach advanced by Professor William Cohen draws a distinction between congressional decisions as to the division of responsibility between state legislatures and Congress and those decisions second-guessing the courts as to the minimal content of the due process and equal protection clauses of the fourteenth amendment.[126] The latter congressional judgment, Cohen argues, is entitled to no more deference than the same decision by a state legislature. However, the former judgment, "resolving at the national level an issue that could—without constitutional objection—be decided in the same way at the state level, ought normally to be binding on the courts"[127] since Congress is institutionally competent to resolve such federal/state conflicts. As an example of the usefulness of such a distinction, Cohen suggests that section 5 would provide support for bills overruling *Branzburg v. Hayes* to be binding on the states since the *Branzburg* Court felt Congress and state legislatures should be free "to fashion their own standards"[128] on shield laws for reporters. This is arguably a federalism judgment, since it constitutes a decision where a congressional determination may be in conflict with a state legislative determination.[129] Similarly, *Stanford Daily* might be said to have partially relied on the willingness of the Court to allow state legislatures, as well as Congress, to develop statutory and administrative protections against abuse of warranted searches of media offices and related third parties.[130] Under Cohen's theory, congressional legislation overruling *Stanford Daily* would preempt both state legislation to the same effect and a state determination that such legislation was unnecessary.

There are several problems with this approach. Apart from the difficulty of determining whether a Supreme Court decision, or a congressional judgment, turns on federalism rather than liberty concerns, it is doubtful in light of *National League of Cities* that the Court would be willing to give free reign to a congressional judgment on federalism that is in conflict with state law and has the potential for invading state sovereignty.[131] While it

[123] *See* L. TRIBE, *supra* note 64, at 267; 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, 668 (1977).

In contrast, various proponents of the *Stanford Daily* bills, in attempting to justify an enforcement clause basis for extending the bills to cover state officials, regard *Morgan* as completely unimpaired by *Oregon v. Mitchell*. *See* ACLU Memo, *supra* note 27, at 48; CLC Memo, *supra* note 22, at 341. *But see* OLC Memo, *supra* note 16, at 13 (doubting that the second *Morgan* rationale "is so firmly established in our constitutional jurisprudence that it can be relied on with any certainty," citing *Oregon v. Mitchell*).

[124] *See* text accompanying notes 134–47 *infra*.

[125] *See* Gordon, *supra* note 123, at 668.

[126] *See* Cohen, *supra* note 110, at 613–16.

[127] *Id.* at 614.

[128] 408 U.S. 665, 706 (1972).

[129] Cohen, *supra* note 110, at 619.

[130] 436 U.S. at 567. One authority cites Cohen's discussion of *Branzburg* to provide a § 5 basis for the bills overturning *Stanford Daily*. *See* CLC Memo, *supra* note 22, at 341. Professor Cohen in his testimony before Congress, however, did not advance this analogy. 1978 *Senate Hearings*, *supra* note 3, at 375–79 (statement of Prof. Cohen).

[131] *See* L. TRIBE, *supra* note 64, at 271. It should be noted that the *National League of Cities* Court left open the

is true that the Court in *Fitzpatrick v. Bitzer*[132] ruled that the fourteenth amendment provision for congressional enforcement supersedes the eleventh amendment restrictions on suits against states, that decision did not deal with the state sovereignty implications of the tenth amendment. It is not clear to what extent *Fitzpatrick* creates an exception to *National League of Cities*.[133] Thus, Cohen's theory is unlikely to be a persuasive guide to delineating Congress' section 5 power.

Fact-Principle Distinction. Another theory, refined by Professor Irving Gordon,[134] draws on Congress' institutional superiority over the courts as a factfinder. Gordon notes that every constitutional decision by the Supreme Court rests on a normative as well as an empirical component. To the extent that a decision rests on empirical considerations, Congress may modify the Court's ruling by making appropriate findings or developing a legislative record to the contrary. As an example of such a decision, Gordon, like Cohen, relies on *Branzburg v. Hayes*, which he characterizes as "shaped by empirical considerations"[135] in that the Court majority felt the flow of news would not be diminished if the reporter's privilege not to reveal confidential sources was denied.

Similarly, the bills to overrule *Stanford Daily* may be justified as resting on congressional factfinding considerations.[136] This justification, however, turns on the determination of to what extent *Stanford Daily* relied on empirical considerations. While the majority opinion relied for the most part on a discussion of fourth amendment principles,[137] it did weigh factual considerations in the latter portion of the opinion discussing the first amendment arguments advanced by the newspaper: that the requirement of a subpoena would undermine law enforcement efforts,[138] that the preconditions for issuing warrants would protect against their abuse,[139] and that there was no history of an abuse of warrants for searches of newspaper offices.[140]

Under the factfinding theory, if Congress made determinations on an appropriate record that were contrary to the Court's first amendment factual determinations, then the holding in *Stanford Daily* could be modified and the modification would apply to the states. While Gordon's theory has been adopted by many of the supporters of the bills to overrule *Stanford Daily*, the difficulty inherent in the theory lies in distinguishing normative "law" from empirical "fact," if such a distinction is possible.[141] Nevertheless, the fact/principle distinction is supported by language in the *Morgan* majority opinion that Congress could weigh and resolve competing considerations[142] and in Brennan's opinion in *Oregon v. Mitchell* explicitly grounding Congress' section 5 power in its superior factfinding capabilities.[143] This theory appears to be the most defensible one for the use of the enforcement clause as a basis to apply the *Stanford Daily* bills to the states.

However, if this theory is accepted, the bills may be required to pass the hurdle of a more adequate legislative record and perhaps be required to meet a stricter standard of review than *Morgan's* "perceive a basis" test.[144] Such a higher standard of review would be analogous to the standards required for Congress to justify a federalism interest[145] or to impose a nationwide remedial measure.[146] In either case, the legislative record currently before Congress may not be adequate to meet a higher standard of review.[147]

Implicit Limits Theory. A third theory has been

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issue of the impact of its decision on the § 5 enforcement power. *See* 426 U.S. at 852 n.17.

[132] 427 U.S. 445 (1976).

[133] *See id.* at 456. Some writers feel the decision removes any federalism concerns in the exercise of § 5 power. *See* L. TRIBE, *supra* note 64, at 272 n.61; Gordon, *supra* note 123, at 683–84; OLC Memo, *supra* note 16, at 11. However, the Court's brief opinion did not address the principles of state sovereignty implicit in the tenth amendment and included only a *cf.* citation to *National League of Cities* in a footnote. *See* 427 U.S. at 453 n.9. *See also* 1979 *House Hearings*, *supra* note 3, at 63 (statement of Prof. Mark Tushnet) (the *Fitzpatrick* "opinion leaves open the possibility that a statute might surmount an absolute eleventh amendment hurdle but fail in the face of a more general federalism objection").

[134] *See* Gordon, *supra* note 123. *See also* Cox, *The Role of Congress in Constitutional Adjudication*, 40 U. CIN. L. REV. 199 (1971); Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

[135] Gordon, *supra* note 123, at 672.

[136] The Department of Justice adopted this theory to provide a basis for the exercise of the § 5 power. *See* OLC Memo, *supra* note 16, at 11–14. *See also* 1978 *Senate Hearings*, *supra* note 3, at 368–69 (statement of Prof. Paul Bender); CLC Memo, *supra* note 22, at 340.

[137] 436 U.S. at 547–60.

[138] *Id.* at 560.

[139] *Id.* at 565.

[140] *Id.* at 566.

[141] *See* L. TRIBE, *supra* note 64, at 271. Professor Gordon recognizes this difficulty. Gordon, *supra* note 123, at 674.

[142] *See* text accompanying notes 85–87 *supra*.

[143] *See* text accompanying note 96 *supra*.

[144] *See* Gordon, *supra* note 123, at 668. *See also* text accompanying note 123 *supra*.

[145] *See* text accompanying notes 71–75 *supra*.

[146] *See* text accompanying notes 111–15 *supra*.

[147] *See* text accompanying notes 18–27 *supra*.

advanced by Professor Laurence Tribe. Tribe argues that the efforts to justify or supplement the "ratchet" limitation on the second *Morgan* rationale are misplaced, since congressional legislation, whether grounded in section 5 or other grants of congressional power, must be consistent with the Bill of Rights and other limits on federal authority.[148] Tribe suggests a two-step process, which he argues was followed by the Court in *Morgan*: "an inquiry first into whether congressional legislation rationally relates to the purposes and objectives of the fourteenth amendment, and second into whether such legislation is consistent with the Bill of Rights and other external restraints."[149]

The bills at issue here arguably would survive the Tribe analysis. If protection of first and fourth amendment rights is a "purpose" of the fourteenth amendment, then the *Stanford Daily* bills satisfy the first inquiry. The bills apparently satisfy the second inquiry since they expand guarantees in the Bill of Rights. However, the bills also must avoid inconsistency with other external restraints on congressional power. Federalism, as interpreted in *National League of Cities*, would be among the external restraints the bills must confront, and the same analysis as outlined in the discussion of the commerce clause then would be applicable. The bills still would have to be measured against the tenth amendment barrier prohibiting invasion of state sovereign functions.[150]

Underenforcement Theory. A fourth theory of the "ratchet" limitation has been developed by Professor Lawrence Sager.[151] Sager argues that Congress can exercise its section 5 power to enforce and expand constitutional claims when the federal judiciary has declined to uphold the claim based on "institutional" concerns of the judiciary. These institutional barriers, such as the mere rationality standard of review in equal protection adjudication, which the Court justifies on the basis of a judicial incompetence to make complex policy determinations, should not prevent the exercise of the section 5 power to expand rights since the legal scope of a constitutional norm is not coterminous with the scope of federal judicial enforcement.[152] However, when a court decision "is firmly rooted in analytical rather than institutional perceptions,"[153] Congress may not expand the constitutional norm limited by the decision. The *Stanford Daily* Court's refusal to expand the first and fourth amendment rights of the student newspaper clearly rests on analytical, not institutional, grounds. As noted above,[154] the Court relied on principles of the fourth amendment and did not decline to address factual considerations, as the Court essentially does when it declines to overturn a federal or state law by evaluating the law under the mere rationality test of equal protection analysis. Thus, Sager's theory does not provide a basis to support the *Stanford Daily* bills.

IV. Conclusion

A legitimate concern for protecting the first and fourth amendment rights of the institutional media, as well as other related third parties, has motivated Congress to consider legislation that will mandate procedures to modify the Court's holding in *Stanford Daily*. However, members of Congress must be cognizant of the constitutional limits inherent in the commerce clause and section 5 of the fourteenth amendment when applying procedures to state officials.

The lack of an adequate factual record demonstrating the need for the bills to reach the states may prove to be the critical element in any judicial determination of the constitutionality of the proposed legislation. Under commerce clause reasoning, there is virtually no data to suggest that the small number of warranted searches of media offices and related third parties has had any effect on the media's ability to gather and disseminate news and thereby have a sufficient impact on commerce to trigger Congress' commerce power. Likewise, there is admittedly little systematic data available to predict the impact of the Privacy Protection Act on the functioning of state and local law enforcement efficiency. The deterrent effect of the potential for warranted searches immeasurably may affect the media's ability to engage in commerce so as to be reached, if only at the extreme margin, by the commerce power. Likewise, the invasion of state sovereignty prohibited by the tenth amendment turns on the nature, not weight, of the state function impaired by the federal law.

[148] L. Tribe, *supra* note 64, at 271–72.

[149] *Id.* at 271 n.61.

[150] Professor Tribe, in his discussion of *Stanford Daily* in the supplement to his constitutional law treatise, stated that under § 5 Congress "certainly has authority to control searches by state officials in order to extend fuller protection to what the Congress reasonably determines to be constitutional guarantees." *Id.* at 75 n.97 (Supp. 1979).

[151] Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

[152] *Id.* at 1217–18.

[153] *Id.* at 1241.

[154] *See* text accompanying notes 136–40 *supra*.

Search warrants serve crime-detection and evidence-gathering functions of state and local officials, crucial parts of the law enforcement apparatus.

Under the reasoning of section 5 of the fourteenth amendment, however, the lack of an adequate factual record may prove crucial. The ability of Congress to fashion remedies under section 5 must be a response to evidence that a remedy is necessary. The ability of Congress to interpret the fourteenth amendment under section 5 has been justified in at least four ways. The fact/principle distinction relies on Congress developing an adequate record to refute the factual determinations made by the Court. The underenforcement theory by its own terms is not applicable to the bills concerned here. Both the implicit limits theory and the federalism/liberty distinction run into the roadblock of tenth amendment federalism. Thus, the enforcement clause basis for applying the bills overruling *Stanford Daily* to the states is as dubious a rationale as is the commerce clause basis.

Federalism concerns, however, point toward the most satisfactory resolution of the issue: both federal and state governments may respond separately to *Stanford Daily* as they see fit. The Department of Justice has already developed procedures for federal officials concerning third-party searches,[155] and several states have followed suit, or are expected to, with statutes governing their own officials.[156] The ability of the federal and state systems to separately respond to *Stanford Daily* represents the best accommodation of first amendment and federalism values.[157]

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[155] *See generally Justice Department Policy Hearings*, note 61 *supra*.

[156] *See* [1979] 5 MEDIA L. REP. (BNA) (News Notes, July 10, 1979) (17 states considering legislation to limit impact of *Stanford Daily*).

[157] The American Bar Association has reached the same conclusion. At the 1979 Annual A.B.A. Meeting, the House of Delegates refused to endorse a resolution submitted by the A.B.A. Section of Criminal Justice that conditionally endorsed the Carter administration's First Amendment Privacy Protection Act of 1979. *See House Rejects Move to Overturn Zurcher*, 65 A.B.A. J. 1289 (1979). The resolution recommended support for the Privacy Protection Act only if it were limited to federal authorities and extended protection to all third parties. *See* Section of Criminal Justice, A.B.A. House of Delegates Report with Recommendations 6 (August 1979) (unpublished report). The report argued that in light of *National League of Cities v. Usery* it was "most appropriate" for the federal and state systems to fashion their own standards. *Id.* at 8.