

the abortion rulings, to use § 5 powers to curtail the rights the Court has derived from the Due Process Clause and other provisions of the Constitution.²¹³²

Congress's power under *Morgan* returned to the Court's consideration when several states challenged congressional legislation²¹³³ 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 that many observers had previously seen.²¹³⁴ Four Justices accepted *Morgan* in full,²¹³⁵ while one Justice rejected it totally²¹³⁶ and another would have limited it to racial cases.²¹³⁷

The other three Justices seemingly restricted *Morgan* to an alternate rationale found in that case. In *Morgan*, in addition to the theory that Congress has special competence to adjudge discrimination, Justice Brennan had asserted that Congress may override state law not because the law itself violated the Equal Protection Clause but because being without the vote meant a class of persons were being subjected to discriminatory state and local treatment. Giving these people the ballot would afford a means of correcting that situation, making the statute an appropriate means to enforce the Equal Protection Clause under "necessary and proper" standards.²¹³⁸ This rationale served as the basis for upholding the age reduction provision, while the manner in which these Justices dealt with the residency and absentee voting provision was to afford Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.²¹³⁹

²¹³² See *The Human Life Bill: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 97th Congress, 1st Sess. (1981). An elaborate constitutional analysis of the bill appears in Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed 'Human Life' Legislation*, 68 VA. L. REV. 333 (1982).

²¹³³ Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. §§ 1973aa-1, 1973bb.

²¹³⁴ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

²¹³⁵ 400 U.S. at 229, 278-81 (Justices Brennan, White, and Marshall), id. at 135, 141-44 (Justice Douglas).

²¹³⁶ 400 U.S. at 152, 204-09 (Justice Harlan).

²¹³⁷ 400 U.S. at 119, 126-31 (Justice Black).

²¹³⁸ 384 U.S. at 652-52. A similar "necessary and proper" approach underlay *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), under the Fifteenth Amendment's enforcement clause.

²¹³⁹ The age reduction provision could be sustained "only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substan-