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The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment

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At the beginning of Chief Justice Earl Warren's last term, the New York University Law School held a conference to honor the centennial anniversary of the Fourteenth Amendment. Two Justices of the Supreme Court, William Brennan and Earl Warren, gave introductory and concluding presentations in the book that followed. Brennan premised his remarks, titled "Landmarks of Legal Liberty," on the idea that the Supreme Court has an affirmative obligation to enforce the rights' protections found in Section 1 of the Fourteenth Amendment. Brennan endorsed Congress' decision, shortly after Reconstruction, to enact specific civil rights legislation that expanded the Court's jurisdiction over the states and to realize the substantive promise of the Amendment through judicial power. As Brennan rationalized,

> Congress' investiture of the federal judiciary with broad power to enforce the limits imposed by the amendment reflects acceptance of two fundamental propositions. First, it demonstrates a recognition that written guarantees of liberty are mere paper protections without a judiciary to define and enforce them. Second, it reflects acceptance of the lesson taught by the history of man's struggle for freedom that only a truly independent judiciary can properly play the role of definer and enforcer.[1]

As the passage reveals, Brennan's conception of liberty (and history) works in conjunction with his comprehension of what his role is as a member of the federal courts and structures his non-interpretivism in Enforcement Clause cases. For Brennan, Section 5 of the Fourteenth Amendment gave Congress the limited role of enacting laws designed to

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1. William J. Brennan, Jr., *Landmarks of Legal Liberty*, *in* THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 3-4 (Bernard Schwartz ed. 1970).

protect or expand upon rights that are a natural extension of the Amendment, but it restricts Congress' power to take away such judicially-created rights.[2]

Chief Justice Warren's remarks, styled "Fourteenth Amendment: Retrospect and Prospect," made clear that he shared his colleague's conviction that the attainment of the Fourteenth Amendment's promise of equality rested in large part with the Supreme Court's discretion.[3] Whereas Brennan believed that the Court was both the "definer and enforcer" of Fourteenth Amendment freedom, Warren's more sobering historical account of the immediate period following the ratification of the Civil War Amendments revealed that the Supreme Court's interpretation of the Fourteenth Amendment mostly retarded Congress' well-intention efforts up until 1875 (as expressed in five civil rights statutes) to make the Negro more free in a white society.[4] *The Civil Rights Cases*[5] and *United States v. Harris*[6] demonstrated that the Court failed to live up to its responsibility to help the Negro by adhering to a "concept of federalism that was of pre-Civil War vintage"[7] and, concomitantly, by not fully appreciating that it was best to defer to Congress' explicit (and expanded) power to enact anti-discrimination law under Section 5. By assuming for itself the sole power to define the scope of equality under the Fourteenth Amendment, the Court took a document "that seemed, on its face, to expand federal legislative power" and transformed it into a "vehicle for the expansion of federal judicial power."[8] For Chief Justice Warren, this propensity was disturbing in light of the Court's ruling in *Plessy v. Ferguson*[9] and its increasing willingness, in a lassiez-faire economic climate at the turn of the twentieth century, to employ the Due Process Clause as a means to enforce property (instead of human) rights.[10] Consequently, in refusing to give Congress "a meaningful role in Fourteenth Amendment enforcement,"[11] the Court displayed that it was not institutionally

2. *Id.* Justice Brennan's line is drawn in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Critics assert it is inconsistent to allow Congress the power to expand, but not retard, rights. *See* Robert A. Burt**,** *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81 (1969).

3. Earl Warren, *Fourteenth Amendment: Retrospect and Prospect*, *in* THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 212-33 (Bernard Schwartz ed. 1970).

4. *Id.*

5. 109 U.S. 3 (1883).

6. 106 U.S. 629 (1883).

7. Warren, *supra* note 3, at 220.

8. *Id.* at 222.

9. 163 U.S. 537 (1896).

10. Warren, *supra* note 3, at 224.

11. *Id.* at 225.

competent to resolve the social problem of Negro equality that, in turn, destroyed its "essential function . . . to act as the final arbiter of minority rights."[12]

The Brennan and Warren viewpoints illustrate that even the most ideologically compatible jurists can agree on the objective while still expressing different conclusions about whether it is likely to be achieved. While Brennan optimistically saw the Fourteenth Amendment as the means to effectuate positive social change in the benevolent hands of the Supreme Court, Warren was more circumspect and doubtful in light of the Court's historic failure to do so. Hence, unlike Brennan, Warren was more willing to surrender judicial authority to Congress and share enforcement duties if it meant that the nation could move forward and "translat[e] the Fourteenth Amendment's promise of equality into meaningful action."[13] With cases like *United States v. Guest*,[14] *South Carolina v. Katzenbach*,[15] and *Katzenbach v. Morgan*,[16] Warren took some solace (in 1968) that the Court might be moving away from the interpretative constraints that cases like *The Civil Rights Cases*[17] imposed.[18] Yet, he wondered aloud if it was realistic to think that the Court would be able to show the kind of moral leadership that would continue to break down the racial barriers that transformed America into anation that is "moving toward 'two societies, one black, one white – separate and unequal.'"[19]

Perhaps Warren's remarks were tempered by a pragmatic inevitability (if not a little foresight) that the Court's Section 5 jurisprudence would surely change for the worse if more restraint-oriented justices were appointed to the bench. Given its dubious track record in affording Congress the legislative power under Section 5 to enforce the Amendment, he might have also intuited that the Court would be reluctant to loosen the state-action requirement in an effort to broaden the scope of Section 1 guarantees to encompass private conduct in prospective non-racial discrimination cases. In spite of what Warren may have believed, and even though he and Brennan might have differed on whether the Court might be the instrument for salutary change in

12. *Id.* at 228.
13. *Id.* at 227.
14. 383 U.S. 745 (1966).
15. 383 U.S. 301 (1966).
16. 384 U.S. 641 (1966).
17. 109 U.S. 3 (1866).
18. Warren, *supra* note 3, at 226-27.
19. Warren, *supra* note 3, at 228-29; *id.* at 213 (quoting from Report of the National Advisory Commission on Civil Disorders 1 (1968)).

equal protection law, both Justices nonetheless recognized that the substantive contours of the Amendment are shaped by the proper use of judicial power which, in the end, reflected the willingness of the Court to defer to Congress' initiatives in enacting legislation that furthered the value of equality. Stated differently, the constitutional politics of interpreting Section 5 is, in essence, a debate about the scope of judicial supremacy. As a result, all the rights expressed in Section 1 of the Amendment often hang in the precarious balance of those who hold, and aggressively assert, institutional power in the pursuit of ideological goals at a particular time in the Court's history.

In this way the Rehnquist Court's approach to Section 5 jurisprudence is identical to the one utilized by Justices Brennan and Warren in an earlier day when they, instead of conservatives, controlled the ideological outcomes of the Court. While the contemporary Court is continuing to restrict Congress' power through its construction of what the Fourteenth Amendment (and federalism) means, the non-interpretivist judicial philosophy that defined the Warren Court's legacy historically and expanded Congress' authority was justified—and politically legitimized—*by what the Court said* Congress could do in a political system of separated powers and compound federalism. What is different is who is sitting on the bench, and who holds the power to make such declarations in law. Accordingly, the politics of constitutional interpretation are indeed profound, but typically center on a very old debate about state sovereignty that remains remarkably resilient in the face of ever-changing political, legal and social milieus. What may be distinct is the Rehnquist Court's adamant insistence that it has the exclusive obligation to be the final arbiter of federalism, a behavior pattern that transforms it into an illegitimate body of judicial fiat, rather than a defensible court of justice.[20] The Court's self-imposed claim to be authoritative in matters of social policy has manifested itself in other areas of jurisprudence that also serve as an expression in the law of federalism.[21] What is striking about the Court's line-drawing, though,

20. *See* Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison, *and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 148-49 (2000). The authors analyze the Court's work in *United States v. Morrison*, 529 U.S. 598 (2000) and conclude not only that the Court misapplied precedent, but also that they are "unaware of any other instance in which a court has gone to such lengths to derive controlling meaning from the presumed, yet unspoken, premises of century-old precedent." *Id.* at 149.

21. The Rehnquist Court's micro-management of campaign and election law is an example that some have claimed not only illegitimately determined the 2000 presidential election, but also underscores the tendency for the Court to stake its institutional claim to be final arbiter in the political thicket. *See generally* THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R.

is the length it will go to protect its domain while, simultaneously, running blindly into a host of historical, doctrinal, and institutional contradictions that call into question the soundness of its constitutional wisdom in Section 5 cases.

This essay analyzes the Rehnquist Court's Section 5 cases by first, in Section I, establishing how the Supreme Court has historically assumed the task of interpreting Congress' power to act under the Fourteenth Amendment. Two periods, Reconstruction and then the mid-1960s, are examined because they present contrasting views about the scope of what the Fourteenth Amendment and its enforcement section means. Section II then surveys Section 5 cases from the Rehnquist Court in order to illustrate how its jurisprudence mirrors the anti-federalist rhetoric established in the post-reconstruction era while, not surprisingly, departing from the principles set forth in the Warren Court's egalitarian revolution. Section III analyzes the Rehnquist Court's Section 5 jurisprudence while predicting how the Court is likely to approach deciding *Hibbs v. Department of Human Resources*,[22] a Ninth Circuit case the Court agreed to decide in the 2002-03 Term. It also concludes that the Court, in *Hibbs*, is likely to apply an interpretivist construction of Section 5 power that will reaffirm the anti-federalist doctrine established in the Reconstruction period and, as a result, reassert judicial supremacy, while missing another opportunity to align constitutional law doctrine with the framer's more salutary design in creating the Fourteenth Amendment.

I.

Section 5 of the Fourteenth Amendment expressly gives Congress the power to enforce, by appropriate legislation, the Amendment's provisions.[23] Under Section 1, the provisions are directed at prohibiting state action and guaranteeing rights of privileges or immunities, due process, and equal protection. As Section 1 rights are stated in broad terms, Section 5 empowers Congress to make national laws affecting a vast range of state conduct and individual liberty.[24] Accordingly, the

Sunstein & Richard A. Epstein eds., 2001); Christopher P. Banks & John C. Green, *Introduction*, *in* SUPERINTENDING DEMOCRACY: THE COURTS AND THE POLITICAL PROCESS (Christopher P. Banks & John C. Green, eds., 2001); Christopher P. Banks, *A December Storm Over the Supreme Court: Bush v. Gore and Superintending Democracy*, *in* SUPERINTENDING DEMOCRACY: THE COURTS AND THE POLITICAL PROCESS, *supra*, at 237-64.

22. 273 F.3d 844 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2618 (2002).

23. U.S. CONST. amend. XIV, § 5.

24. U.S. CONST. amend. XIV, § 1.

Supreme Court has confronted the challenge of resolving two fundamental Section 5 issues. First, can Congress use Section 5 authority to apply the rights' guarantees of the Fourteenth Amendment to non-state (i.e. private) actors? Second, can Congress employ Section 5 power to alter the Fourteenth Amendment's substantive meaning in Section 1 by passing laws that change (or define initially) what the Supreme Court has said (or not said) about what the rights are? [25] Both questions directly address core separation of powers and federalism values because each fundamentally concern whether the Fourteenth Amendment is a grant of constitutional authority that Congress can employ to displace the states' pre-Civil War role in determining, or safeguarding, individual civil liberties.[26] While the Court has given different responses to each question during its political history, the Rehnquist Court's Section 5 jurisprudence has brought into sharp relief a third question that is a derivative of the answers it has given to the first two: namely, to what extent can the Eleventh Amendment limit Congress' power to fashion a legislative remedy that preserves civil rights and liberties pursuant to its Section 5 power? With this issue the Rehnquist Court has underscored the anti-civil rights' significance of its federalism doctrine. Its approach highlights the difficulties in contemplating that Section 5 is both a source of rights (under Section 1 of the Fourteenth Amendment) and an independent justification to gain access to federal courts whenever the states compromise liberty.[27] Often

25. *See generally* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 917-1021 (David L. Shapiro et al. eds., 13th ed. 1997).

26. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 871-74 (1986); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323-24 (1952).

27. *See, e.g.*, Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000). *See* Symposium, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001). In this sense, Section 5 is different, and perhaps more important to the civil rights struggle, because it provides not only support for congressional action under Section 1 of the Fourteenth Amendment, but also legitimizes the litigation decision to sue a state in federal court in situations where state sovereignty immunity can be abrogated under the Eleventh Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Rehnquist Court's Section 5 decisions premise the outcome of Eleventh Amendment and Section 1 and Section 5 (of the Fourteenth Amendment) cases on anti-federalist legal principles that, more often than not, assume priority over competing pro-nationalist doctrine. As the Court has held, in *Fitzpatrick*, Section 5 is an independent source of national power to abrogate Eleventh Amendment state sovereignty; but, by putting the sovereign interests above all else (most of the time) and making it virtually impossible for the Congress to meet its judicially-imposed burden to tightly fit its legislative ends with its legislative means, the Court is emasculating Congress's power under Section 5 to either protect against state or private abuse of civil rights under the Fourteenth Amendment *and* the Eleventh Amendment. Thus, the Court is nullifying, on federalism grounds, any meaningful attempt to effectuate civil rights through Section 5, and in the process, tilting the

the Rehnquist Court has looked to key precedents decided in the Chase (1864-73), Waite (1874-88) and Fuller (1888-1910) period, a time when anti-federalist sentiment, and racial tension ran high in the wake of the Civil War.[28] After these cases are examined, select rulings from the Warren Court are compared with them to discern the outer limits of a liberal construction of Section 5 powers. It is against this background that the Section 5 cases come full circle in the Rehnquist Court.

A. Early Interpretations

The Court's first significant opportunity to explore the meaning of the Fourteenth Amendment occurred during the Chase Court with *The Slaughterhouse Cases*.[29] This case set the tone for subsequent interpretations of not only Section 1, but also Section 5. There, the Court refused to recognize that individual butchers have a right to labor under the Privileges and Immunities Clause, a guaranty that the butchers thought was jeopardized by a state law permitting the monopolization of slaughterhouses (purportedly as a public safety measure that controlled animal carcass disposal). In holding that the clause only pertains to United States citizens and not state governments, Justice Samuel F. Miller reasoned that the states were the sole province for protecting state citizens' labor rights.[30] The federal Constitution, therefore, only applied to privileges or immunities of a national character, such as the right to petition the government, the right of assembly or the right of habeas corpus. Only a few defined rights, the Court rationalized, originated from the relationship between the national government and the citizen (and, inferentially, apart from *Slaughterhouse*, inhumane treatment of blacks by whites in the states was not one of them).[31] Recognizing a

balance of power in favor of the states too much. In essence the Court is refusing to acknowledge Congress's special competence to make legislative judgments on policy issues, as well as eliminating, for litigants suffering civil rights abuse, the possibility that national courts can entertain Congress's legislative effort to provide legal remedies. As a result, in not respecting Section 5 as an independent source of legislative discretion (and authority) under either the Fourteenth or Eleventh Amendments, the Court is assuming for itself absolute control over social policy in the anti-discrimination and civil rights context. *See* Estreicher, *supra* note 20, at 156-57.

28. *See generally* ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, THE SUPREME COURT, RACE AND CIVIL RIGHTS 1-56 (1995).

29. 83 U.S. 36 (1873).

30. *Id.* at 71.

31. *Id.* at 79. As Nelson comments, Justice Miller's holding "for narrowing the reach of section one were flatly inconsistent with the history of its framing in Congress and its ratification by the state legislatures." WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLES TO JUDICIAL DOCTRINE 163 (1988); *See also* Gressman, *supra* note 26, at 1323-58, 1338.

different outcome, Miller suggested, wrongly allows Congress to usurp the states' ability to safeguard rights and transforms the Court into a "perpetual censor upon all legislation of the States, on the civil rights of their own citizens."[32] Not only would this error "fetter and degrade the State governments by subjecting them to the control of Congress," it "radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[33]

Although black civil rights were not directly at issue, *Slaughterhouse's* anti-federalist rhetoric reinforced state power at a time when the national legislature was trying, through sundry Civil Rights and Enforcement Acts, to improve the political and legal status of blacks.[34] The formal distinction between national and state citizenship did little to advance their rights, for it effectively read the Privileges and Immunities Clause out of the Constitution.[35] Moreover, while *Slaughterhouse* did not address the scope of Section 5 power (but only the constitutionality of state law), the result signaled that the Court was not going to be receptive to ratifying Congress' enforcement legislation if it expanded the Fourteenth Amendment's meaning. The message was emphatic, but paradoxical: state governments were in charge of safeguarding Negro civil rights, even though they were also responsible for enacting the infamous black codes that took them away. There seems little doubt that by constricting the meaning of the Fourteenth

32. *Slaughterhouse*, 83 U.S. at 78.

33. *Id.*

34. The legislative response to the Civil War Amendments included The Civil Rights Act of 1866, 14 Stat. L. 27, the first Enforcement Act (May 31, 1870), 16 Stat. L. 140, the second Enforcement Act (February 28, 1871), 16 Stat. L. 433, and the third Enforcement Act (or Ku Klux Klan Act) (April 20, 1871), 17 Stat. L. 13. DAVIS, *supra* note 28, at 12-13. The 1866 Civil Rights Act, passed over President Andrew Johnson's veto, was inspired by the Thirteenth Amendment, and it aimed to undo the restrictions imposed by the black codes by granting blacks the same kind of rights (to make contracts, be sued, etc.) that whites had. It also prescribed criminal penalties against anyone acting under "color of law" who denied them. *Id.* The first Enforcement Act's object was to enforce the Fifteenth Amendment; the second Act levied criminal penalties against those interfering with black rights in exercising the franchise; and the third Act was aimed at curbing private conspiracies that often, with the use of violence, curtailed black civil rights. *Id.* Gressman, *supra* note 26, at 1323-26.

35. As Gressman puts it:

> The decision in the Slaughterhouse Cases has never been reversed. The Fourteenth Amendment to this day has never recovered its life blood which the Court there extracted from it. Completely shattered was the privileges and immunities clause upon which rested the intricate pattern of nationally protected civil rights. . . . For all practical purposes the privileges and immunities clause passed into the realm of historical oddities.

Id. at 1338.

Amendment, the Court (unwittingly or not) was aligning itself with the forces of racial bigotry and hatred. Indeed, in several cases after *Slaughterhouse* the Court undercut Congress' attempt to counter racial discrimination and make the Fourteenth Amendment a source of hope, instead of despair, for the emancipated race.[36]

Two cases decided in the Waite Court, *Ex Parte Virginia*[37] and *The Civil Rights Cases*,[38] are illustrative of this tendency, even though they might have otherwise been significant opportunities to make Section 5 congruent with the salutary intent of at least one congressional effort, the 1875 Civil Rights Act. In *Ex Parte Virginia* the Court ruled that a state judge who excluded blacks from jury service could be criminally indicted under the Act.[39] Over the strenuous dissent of Justice Stephen Field, Justice William Strong's opinion for the Court asserted that a "great purpose" of the Thirteenth and Fourteenth Amendments was to achieve a "perfect equality of civil rights" among all persons in the states.[40] The enforcement clause gave the Amendments "much of their force" because it "enlarged" Congress' power to enact appropriate legislation that made "the Amendments fully effective."[41] Furthermore, Strong declared that "[s]uch enforcement is no invasion of State sovereignty," reasoning that Congress was acting pursuant to its delegated authority; thus a state "in exercising her rights . . . cannot disregard the limitations which the Federal Constitution has applied to her power."[42] His dissenting brethren, Justice Field, thought otherwise,

36. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875) (refusing to recognize the legal validity of criminal indictments against three whites who conspired, with about 100 other whites, to deny blacks their voting rights at a political gathering pursuant to Section 6 of the 1870 Enforcement Act); United States v. Harris, 106 U.S. 629 (1883) (invalidating the 1871 Ku Klux Klan Act which sought to protect against private conspiracies to deny blacks civil rights); The Civil Rights Cases, 109 U.S. 3 (1883) (holding that Congress is without power under the Thirteenth or Fourteenth Amendment to enact the 1875 Civil Rights Act, which guaranteed equal public accommodations and provided, in the case of violations, criminal sanctions). *See* Gressman, *supra* note 26, at 1336-43; DAVIS, *supra* note 28, at 1-56.

37. 100 U.S. 339 (1879).

38. 109 U.S. 3 (1883).

39. *Ex parte Virginia*, 100 U.S. at 349.

40. *Id.* at 344-45. *See also* Strauder v. West Virginia, 100 U.S. 303 (1880) (finding the Fourteenth Amendment secures civil rights to all persons).

41. *Ex parte Virginia*, 100 U.S. at 345. Justice Strong explained what is "appropriate" legislation by remarking that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Id.* at 345-46.

42. *Id*. at 346. As Justice Strong explained, "[i]ndeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is

contending that the national law controlled a state judge's discretion to select, in accordance with state law, qualified veniremen.[43] For Field, such meddling curtailed a state's "absolute freedom from all external interference in the exercise of its legislative, judicial and executive authority."[44]

Whereas Justice Strong's opinion in *Virginia* had the potential to offer some comfort for those endorsing a liberal construction of Section 5 powers, its holding, on the surface,[45] was more of the exception than the rule.[46] The Supreme Court, in fact, more typically drew a line that is consistent with Justice Field's view in *The Civil Rights Cases*,[47] an outcome invalidating the 1875 Act's public accommodations provisions. In nullifying Congress' power to create an anti-discrimination law based on either Section 1 or 5 of the Fourteenth Amendment, Justice Joseph P. Bradley's majority opinion observed that the 1875 Act directly, and generally, regulated individual conduct, without reference to any state law on the subject. The Fourteenth Amendment, Bradley declared, applies only to "State action of a particular character . . . [and] individual invasion of individual rights is not the subject matter of the amendment."[48] Section 5, he continued, only authorizes Congress "[t]o adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts."[49] While Congress may, on occasion, enact a law that "in advance . . . meet[s] the exigency when it arises," the law nonetheless "should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or

carved out of them." *Id.*

43. *Id.* at 354 (Field, J., dissenting) (asserting the Constitution does not give Congress the power to regulate officers of the state who discharge state laws).

44. *Id.* at 362.

45. Instead of interpreting *Ex Parte Virginia* as a case that expanded the Fourteenth Amendment's meaning, Nelson states that the Court construed the state judge's acts during jury selection as being ministerial (instead of judicial), thereby helping to create a doctrine of judicial immunity and "hence . . . a weakening of the Fourteenth Amendment" because, inferentially, a flagrantly racial, and state-sanctioned, "judicial" act would not fall under the protection of the Amendment. NELSON, *supra* note 31, at 184.

46. In addition to *Ex Parte Virginia*, the Waite Court made at least two other rulings vindicating Congress's anti-discriminatory power and black civil rights in *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that denying blacks jury service was an unconstitutional denial of equal protection), and *Neal v. Delaware*, 103 U.S. 370 (1880) (reaffirming *Strauder*). DAVIS, *supra* note 28, at 18-19. But, with *Virginia v. Rives*, 100 U.S. 313 (1880), which held that juries did not have to be racially integrated in accordance with equal protection, the Court diminished the legal force of the principles outlined in *Ex Parte Virginia*, *Strauder*, and *Neal*. *Id.*

47. 109 U.S. 3 (1883).

48. *Id.* at 11.

49. *Id.*

State action of some kind, adverse to the rights of the citizen secured by the amendment."[50] Bradley's analysis, which is roughly the application of a means/end test, prefers to ratify what the national government does only as a direct response to a pre-existing pattern of state conduct that necessitates application of the rights-protection clause of the Fourteenth Amendment.[51]

These principles are the basis for the state action concept and remain at the cornerstone of subsequent Fourteenth Amendment jurisprudence that inhibits it from pertaining to private behavior.[52] Yet Bradley's opinion was significant for Section 5 cases in other ways. For example, it illustrated that the Court would take the analytical step of determining the scope of Congress' Section 5 power by inspecting the national legislation carefully to see if makes reference to, and is designed to prevent or fix, constitutional violations by the state. By placing the onus on Congress to write a law that responds to specific state law violations, the Court is engaging in a rudimentary form of "plain statement" analysis, a principle that has long been a characteristic of restrictive Section 5 cases.[53] Also, in rejecting the notion that the 1875 Act might be considered corrective legislation, Bradley identified "corrective" laws as what "may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the [Fourteenth] amendment, they are prohibited from making or enforcing."[54] Notably, although Bradley limited national authority, his choice to use the words "necessary and proper" are susceptible to a contrary interpretation, and one that is more consistent with the way they were used by subsequent Courts to increase legislative power, even in the Section 5 context.[55] Finally, it discloses that Congress' decision to enact "general" legislation (i.e. legislation that does not remedy specific state law deprivations) will run afoul of the Tenth Amendment because it displaces a state's right to legislate on the same subject (i.e. say, passing an anti-discrimination law).[56] Perceiving the Tenth Amendment

50. *Id.* at 13.

51. *See generally* Symposium, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999).

52. *See, e.g.*, City of Boerne v. Flores, *infra* note 181; United States v. Morrison, *infra* note 215. See also GUNTHER, *supra* note 25, at 925-26.

53. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991). *See generally* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 665-73 (5th ed. 2003).

54. *The Civil Rights Cases*, 109 U.S. at 13-14.

55. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966); McCulloch v. Maryland, 17 U.S. 316 (1819).

56. *See The Civil Rights Cases*, 109 U.S. at 14-15.

as an affirmative limitation on what the national government can do, of course, is also a precursor to the argument Associate Justice Rehnquist made several generations later in *National League of Cities v. Usery*.[57]

The majority position in *Slaughterhouse* was contested by Justice John Marshall Harlan I, who registered a lengthy dissent that mirrors many of the objections that would persist, over time, about the limited scope of congressional power. While Justice Harlan had not yet penned his famous *Plessy v. Ferguson*[58] dissent, he struck an identical chord in *Civil Rights*. The majority erred, he began, because "the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."[59] Harlan continued:

> "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, *if need be*, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.[60]

For Harlan, the Court ought to recognize that the law's intent is to prevent racial discrimination, and to say that Congress had no power to prevent it is incompatible with prior cases, like *Prigg v. Pennsylvania*,[61] which upheld the Fugitive Slave Law of 1793 as a constitutional exercise of Congress' implied power to permit the re-capture of fugitive slaves and preserve the master's property rights under Article IV, Section 2 of the U.S. Constitution.[62] How can it be, Harlan asked, that Congress has the implied right to recapture fugitive slaves but not the

57. 426 U.S. 833 (1976), *rev'd by*, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

58. 163 U.S. 537 (1896).

59. *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

60. *Id.* (emphasis added).

61. Prigg v. Pennsylvania, 41 U.S. 539 (1842).

62. *The Civil Rights Cases*, 109 U.S. at 27-30. Justice Harlan added that the Court found that Congress had "the implied power . . . to enforce the master's rights" under the Fugitive Slave Act of 1850 as well. *Id.* at 30.

express authority, under the Thirteenth Amendment (and its enforcement clause, in Section 2), to safeguard "freedom and the rights necessarily inhering in a state of freedom[?]"[63]

Harlan's answer was unequivocal. It is absurd, he wrote, to eliminate the institution of slavery and then enslave the blacks again by leaving them in the care of the states, the source of their initial bondage. The Thirteenth Amendment prohibited such an anomaly, and its commitment to end slavery and all of "its badges and incidents" is at "the foundation of the Civil Rights Act of 1866."[64] Because the Act does not prescribe the method by which individuals or businesses operate railroads, inns, or places of public amusement, the legislation also did not impermissibly tread on state power or sovereignty. [65] Nor was it conceivable that Congress could not use its constitutional authority under the Fourteenth Amendment to prevent, through proactive legislation, "hostile State laws or hostile State proceedings."[66] If anything, Harlan suggested, Section 5 enlarged Congress' power by denying to states the right to engage in racial discrimination; but it did not (as the majority maintained) concomitantly increase judicial authority since the Court can always nullify unconstitutional state action, regardless of whether Section 5 existed or not.[67] As Harlan put it:

> It is . . . a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action. If any right was created by that amendment, the grant of power, through appropriate legislation, to enforce its provisions, authorizes Congress, by means of legislation, operation throughout the entire Union, to guard, secure and protect that right.[68]

For Harlan, then, the Court must use restraint in upsetting Congress' legislative judgment, for "it is for Congress, [and] not the judiciary, to say that legislation is appropriate—that is—best adapted to the end to be attained."[69] Acting contrary to this (properly applied)

63. *Id.* at 34.

64. *Id.* at 35.

65. *Id.* at 41-43. Harlan also observed that, in *Prigg*, the Court specifically "turned a deaf ear" to the Pennsylvania Attorney General's argument that validating national power would be a "dangerous encroachment on state sovereignty." *The Civil Rights Cases*, 109 U.S. at 30.

66. *Id.* at 44-45.

67. *Id.* at 45-46.

68. *Id.* at 46-47.

69. *Id.* at 51. As he explained:

> The judiciary may not, with safety to our institutions, enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a co-ordinate

means/ends test, Harlan suggested, violates extant principles established in *McCulloch v. Maryland*,[70] and it wrongfully denies to Congress the power to give blacks privileges or immunities (under Section 1 of the Fourteenth Amendment) that the states are trying to take away.[71]

The judicial conflict in the *Slaughterhouse* and *Civil Rights* cases cannot mask the general trend of the Court's anti-civil rights' jurisprudence in the post-Reconstruction period. Although the Court vindicated the rights of blacks in isolated instances, by and large the judicial branch, either through decision, indifference, or inconsistency, was far from being a champion of minority interests.[72] Indeed, it was the champion of state interests, a fact that eerily presaged Justice John Paul Stevens's evaluation of the Rehnquist Court nearly 125 years later.[73] Consequently, in the formative years after the Civil War, and lasting until (roughly) 1938, the Fourteenth Amendment was more akin to being an empty promise for those wishing that it would be an instrument for ending racial discrimination.[74] Congress' capability to use Section 5 was even less, as the Supreme Court indicated that it was not going to use its judicial power to ratify a liberal view of the Amendment, which in turn minimizes what the legislative branch could do in equalizing racial relations. The Court was not receptive to applying Section 1 rights' guarantees to private conduct. Nor, would it generally expand the Amendment's substantive content. In light of this track record, it is unremarkable that Chief Justice Warren, in 1969, had a dim view of the Court's Fourteenth Amendment cases after the Civil War.[75]

B. The Outer Limits of Section 5 Authority

In the *Slaughterhouse* cases to the *Civil Rights Cases*,[76] and with

> department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government.

Id.

70. McCulloch v. Maryland, 17 U.S. 316 (1819).

71. *The Civil Rights Cases*, 109 U.S. at 51-52.

72. *See generally* Gressman, *supra* note 26.

73. Fla. Prepaid Postsecondary Educ. Expense Bd. v. C. Savings Bank, 527 U.S. 627, 664 (1999) (Stevens, J., dissenting) (referring to the Court as "the champion of States' rights").

74. Abraham L. Davis and Barbara Luck Graham aver that the Court's opinions during this period "proved to be [the] blacks' worst enemy." DAVIS, *supra* note 28, at 60. They also assert that the Court, incrementally, expanded the reach of the Fourteenth Amendment, particularly after 1935, and in light of the Court's famous "Footnote Four" ruling in *United States v. Carolene Products*, 304 U.S. 144 (1938), which signaled a more activist approach in crafting equality principles. *Id.* at 75-79.

75. Warren, *supra* note 3, at 212-33.

76. The Slaughterhouse Cases, 83 U.S. 36 (1873); The Civil Rights Cases, 109 U.S. 3 (1883).

the 1877 Tilden/Hayes Compromise[77] and, later, *Plessy v. Ferguson*,[78] the Supreme Court endorsed a pre-Civil War, or anti-federalist conception of federalism.[79] That understanding envisioned the national government and states as co-equal sovereigns. As such, the former could only act properly pursuant to its carefully prescribed delegated authority, so unsubstantiated forays into the sacrosanct sphere of the states was not going to be legitimated by the Supreme Court. The states were the true and traditional defenders of civil liberty and the Fourteenth Amendment was a source for rights' protection only if either state action was implicated, or a fundamental right derived from national citizenship was compromised. The Court's role was passive, as it would not align itself with congressional efforts to equalize relations between the races, at least through expansive interpretations of either Section 1 or 5 of the Fourteenth Amendment. Rather, it would only actively protect the states in those instances when the national government threatened the states' co-equal status in a balanced political system of shared power. In the spirit of the times, unless private property or business interests were compromised, it would not exercise its discretion to be a proactive champion of individual civil rights, in spite of the broad potential of the Fourteenth Amendment and the intent of its framers.[80]

A number of historical and political developments, including most notably the centralization of the national government brought on by the New Deal, facilitated a doctrinal shift in Fourteenth Amendment jurisprudence, culminating in the "switch in time that saved nine" rulings,[81] and shortly thereafter the decision in *United States v. Carolene*

77. Scholars observe that the Court's participation in the Compromise (especially with Justice Bradley casting the deciding vote in favor of candidate Rutherford B. Hayes) brought an abrupt end to Reconstruction (with a pledge to withdraw national troops and a promise not to use force in the attainment of civil rights) and "reaffirm[ed]" white supremacy, states' rights, and southern racism. Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259, 365-67 (2001). *See also* DAVIS, *supra* note 28, at 13.

78. Plessy v. Ferguson, 163 U.S. 537 (1896) (holding "separate but equal" facilities are constitutional under the Fourteenth Amendment).

79. *See* Warren, *supra* note 3, at 220.

80. Law professor (and now Dean) Richard Aynes' account of John Bingham's role in drafting the Fourteenth Amendment discloses that Bingham harbored a complex constitutional theory that supported an expansive view of national power to protect civil rights. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 66-74 (1993); *see also* HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM & THE COURT: CIVIL RIGHTS & LIBERTIES IN THE UNITED STATES 9-10 (6th ed. 1994) (observing that the Court, from 1836 to 1930, was inclined to protect state authority and, increasingly, "the sanctity of property").

81. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding a state minimum wage protection law); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National

Products and its famous Footnote Four.[82] In time, the rise of the administrative state, when combined with the judiciary's increased enforcement of civil rights and liberties under the so-called "double standard"[83] of the Fourteenth Amendment, restructured the relationship between the national and state governments and, for the second time in history,[84] tilted the balance of power towards the former instead of the latter. The states, which were now subject to a judicially-created doctrine of selective incorporation that inexorably nationalized most of the Bill of Rights, increasingly were faced with the political reality that the federal Constitution generally, and the Fourteenth Amendment specifically, was a substantial source of civil liberty.[85] These transformations greatly helped politically disadvantaged and minority interests because the Supreme Court began to use the Fourteenth Amendment as more of a sword instead of a shield against recalcitrant states that denied civil rights and liberties, particularly in the area of voting rights, criminal justice, public accommodations and higher education.[86]

The second era of national expansion coincided, in part, with the Warren Court (1953-69) and its respective due process and egalitarian revolutions.[87] In arguably its most important civil rights ruling, *Brown v. Board of Education*[88] the Court not only rejected the doctrinal premise of *Plessy's* "separate but equal doctrine," but also sought to go "where no court had ever gone before [and] dismantle an entrenched social

Labor Relations Act of 1935). These rulings signaled that the Court would uphold, instead of reject, legislative power (and, on a national level, the New Deal) and a posture that only a few years earlier looked quite improbable. ABRAHAM, *supra* note 80, at 10-11.

82. 304 U.S. 144, 152 n.4 (1938). The three paragraphs of Footnote 4 signal, inter alia, that a law conflicting with the Bill of Rights is presumptively unconstitutional, as well as, greater judicial scrutiny in evaluating legislation that undermines civil rights and the interests of "discrete and insular" minorities. *Id*. *See also* ABRAHAM, *supra* note 80, at 17-22; DAVIS, *supra* note 28, at 77.

83. ABRAHAM, *supra* note 80, at 9-29.

84. The first time was during the Marshall Court, where the Supreme Court was interested in expanding Congress's legislative power over commerce. *See id.* at 9.

85. Justice Benjamin Cardozo's Opinion for the Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), is often credited with constitutionalizing the "preferred freedoms" doctrine, or "concept of ordered liberty," that reflected the Court's commitment to incorporate, selectively, specific provisions of the national Bill of Rights under due process clause for the purpose of applying them against the action of state governments. Prior to *Palko*, the Court, in *Barron v. Baltimore*, 32 U.S. 243 (1833), refused to do so, leaving wharf owner Barron without a federal remedy under the takings clause of the Fifth Amendment in his lawsuit for damages against the City of Baltimore for dredging Baltimore's harbor and ruining access to Barron's wharf.

86. DAVIS, *supra* note 28, at 60, 75-77. *See generally id.* at 57-114.

87. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

88. 347 U.S. 483 (1954).

order."[89] Ironically, the cultural attitude under more rigorous judicial scrutiny was the byproduct of the anti-federalist mindset that the Court itself helped to ratify, in spite of the Union victory in the Civil War: that racial segregation was a local issue that was (perhaps) morally justified but, in any event, must be handled by the states without national interference.[90] Until *Brown*, the Supreme Court, by and large, showed little inclination to rebut the cultural presumption of white supremacy. But, with *Brown* and its second "all deliberate speed" enforcement decision[91] along with *Cooper v. Aaron*,[92] the Court was now poised to wield its own moral authority, and judicial power, to implement *Brown's* racial integration mandate.[93]

Although some in the legal academy downplay the Court's role in the civil rights struggle in the 1950s and 1960s,[94] it is not happenstance that the political branches stepped up their fight against racial discrimination and Southern resistance to *Brown* with a bevy of statutes and executive action geared toward enfranchising blacks and breaking down the barriers of state-sanctioned legal segregation.[95] Undoubtedly the country became more sympathetic to the victims of racial bigotry after witnessing the violent reaction of government officials in Birmingham, Alabama and, later, Selma, Mississippi, that forcibly resisted integration in the early 1960s.[96] Still, the Civil Rights Act of

89. POWE, *supra* note 87, at 27.

90. *Id.* at 34.

91. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (holding that implementation of Brown I should proceed "with all deliberate speed").

92. 358 U.S. 1 (1958).

93. The Court, however, occasionally took the lead in attacking racial segregation. *See, e.g.*, Guinn v. United States, 238 U.S. 347 (1915) (invalidating grandfather clauses that restrict black voting rights). The Roosevelt Administration created a Civil Liberties Unit in the Department of Justice in 1939, and then later helped launch a Committee on Fair Employment Practices to superintend business practices with the national government. President Harry Truman also took executive action against racism ordering, inter alia, that the military must be integrated. O'BRIEN, *supra* note 53, at 1322-23.

94. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE? 336-43 (Benjamin I. Page ed., 1991).

95. See the policy decisions by the Kennedy, and subsequently the Johnson, Administrations to make civil rights enforcement a priority in the aftermath of *Brown*. O'BRIEN, *supra* note 53, at 1324-25.

96. POWE, *supra* note 87, at 223-25 (recounting Martin Luther King's successful, but controversial, decision to enlist children in the civil rights' protests in Birmingham, one that allowed public opinion to change in favor of the protesters after children were seen being pelted with high pressure fire hoses); *id*. at 225-26 (describing the assassination of Medgar Evers, an NAACP organizer, in Jackson, Mississippi, at the end of a ten-week period of civil rights protests in 186 cities, with nearly 15,000 arrests); *id.* at 232-33 (describing the outrage, and rioting, following a bombing of a Baptist Church in Birmingham that killed and injured several children, which served as a partial impetus for the 1964 Civil Rights Act). In speaking about *Brown's* effect and the Civil

1964 (at first, reluctantly) proposed by the Kennedy Administration languished in Congress until John F. Kennedy's assassination in Dallas in November, 1963.[97] Shortly thereafter, his successor, President Lyndon Baines Johnson, and ultimately Congress, ushered it into law in February, 1964, and the landmark legislation was soon to be followed by the path-breaking Voting Rights Act of 1965.[98]

Although the Civil Rights Act of 1964 and the Voting Rights Act of 1965 had the combined effect of equalizing public accommodations and enfranchising, each law was immediately challenged. The Warren Court responded in kind with landmark cases that reinterpreted the scope of Congress' power to enforce civil and voting rights legislation under the Civil War Amendments. The first, an eight-to-one ruling in *South Carolina v. Katzenbach* penned by the Chief Justice,[99] reinvigorated the enforcement clause (Section 2) of the Fifteenth Amendment and rebuffed South Carolina's claim that the Voting Rights Act improperly barred the state from using certain voting qualifications (e.g. literacy tests) as prerequisites for exercising the franchise. After surveying the prior, but invariably futile, legislative and executive efforts to stop the "widespread 'pattern or practice'"[100] of voting discrimination in select southern states, Warren reiterated the legal rule that Congress is empowered to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[101] Congress, which is "chiefly responsible for implementing the prohibitions by appropriate legislation," had plenary power under Section 2 and *McCulloch v. Maryland* to devise specific remedies for achieving its legislative ends.[102] The legislature, moreover, extensively studied the problem and

Rights Act's passage, Powe states that "[t]he entire weight of the federal government was available to make equal opportunities a reality." *Id*. at 234.

97. The 1964 Civil Rights Act is based on Congress' commerce authority instead of Section 5 of the Fourteenth Amendment. Its main provisions (Title II) outlawed discrimination in public accommodations supported by State action, but it also loosened or ended some state restrictions (like literacy tests) on voting. The voting rights component was a forerunner of the Voting Rights Act of 1965. DAVIS, *supra* note 28, at 132-33, 149-51. The Civil Rights Act also barred employment discrimination in Title VII. O'BRIEN, *supra* note 53, at 1325.

98. The Voting Rights Act of 1965, which is based on Congress's power in Section 2 of the Thirteenth Amendment to end racial inequality, is a comprehensive, remedial statute aimed at eliminating voting qualifications based on race, and it gives the U.S. Attorney General a preemptive role in monitoring voting discrimination practices through "preclearance" of state changes to election laws. O'BRIEN, *supra* note 53, at 773-74; DAVIS, *supra* note 28, at 132-33.

99. 383 U.S. 301 (1966).

100. *Id.* at 312.

101. *Id.* at 324.

102. *Id.* at 326. There, Warren stated that Chief Justice John Marshall wrote, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which

engaged in lengthy deliberations in considering what the best solution was to what Warren called an "insidious and pervasive evil" that was "perpetuated in certain parts of [the] country through unremitting and ingenious defiance of the Constitution."[103] Nothing Congress did in the Voting Rights Act, Warren thus observed, encroached on the states' reserved powers, nor insulated them from federal judicial review, because state power cannot be "used as an instrument for circumventing a federally protected right."[104]

While the Supreme Court acknowledged Congress had reacted to correcting a pre-existing discrimination problem in the states, *South Carolina's* significance rests with the inference that the judiciary would sanction Congress' use of Section 2 enforcement power in future, undefined areas of social policy.[105] Clearly, with its references to *McCulloch* and its invocation of rational basis as the guiding principles of the outcome, Warren's opinion indicated that the Court would be more of a rubber stamp instead of an axe in cases where the exercise of national power was challenged by the states. What remained to be seen was how far the Court was willing to go in deferring to congressional will and, concomitantly, whether the evolving expansion of congressional enforcement power could withstand the test of time and political change.

Together, with other Warren Court rulings demonstrating the breadth of Congress' commerce and law enforcement authority to hold that state and private individuals are civilly and criminally accountable

are plainly adapted to that end, which are not prohibited, but [consistent] with the letter and spirit of the constitution, are constitutional." *Id.* (citing McCulloch v. Maryland, 17 U.S. 316, 421 (1819)). Warren used this principle to equate it to Section 2 power by saying that "[t]he basic test to be applied in a case involving [Section] 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." *Id.* Significantly, in the next sentence, he said that the Court has "subsequently echoed [Marshall's language in *McCulloch*] in describing *each* of the Civil War Amendments." South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) (emphasis added). Presumably, then, Congress' authority in Section 2 of the Fourteenth Amendment is the same as when it exercises power in Section 5 of the Fourteenth Amendment, as well as in Section 2 of the Thirteenth Amendment. At one time, apparently this was the case. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

103. *Katzenbach*, 383 U.S. at 309. Warren noted that the House and Senate Judiciary Committees held hearings over nine days; and floor discussion in both chambers spanned nearly one full month. *Id.*

104. *Id.* at 325 (citing Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

105. Theodore Eisenberg observes, for example, that South Carolina "established Congress's power to proscribe a class of suspect practices without finding that in every instance the practices would be held by the judiciary to be unconstitutional." Theodore Eisenberg, *South Carolina v. Katzenbach*, *in* THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS 291 (Kermit L. Hall ed., 1999).

for racially motivated behavior,[106] *Katzenbach v. Morgan*[107] represents the outer limits of enforcement power doctrine. *Morgan* held, seven-to-two, that a national law (Section 4(e) of the Voting Rights Act of 1965) removing literacy barriers for voting is a valid exercise of legislative power under Section 5 of the Fourteenth Amendment, in spite of a contrary law from New York making the ability to read and write English a prerequisite for casting a ballot. In reversing the district court's ruling that held Section 4(e) impinged upon states' power under the Tenth Amendment, Justice William Brennan's majority opinion asserted that Section 5 permitted Congress to pass the Voting Rights legislation and that Article VI, the Supremacy Clause, nullified a contrary state election law.[108] It also dismissed, with a number of historical references, the contention that Congress' Section 5 power is limited to enforcing laws that come within the ambit of what courts have already determined to be unconstitutional.[109] Such an interpretation, he wrote, would "depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."[110] It would also be contrary to the framer's intent, which was to make Section 5 a powerful grant of delegated power that was in line with the *McCulloch* principle and, of course, the spirit of the Constitution.[111] Hence the Court could "perceive a basis" that Congress could have passed Section 4(e) to combat the inequality that illiterate Puerto Ricans faced in trying to vote in New York, facilitating the conclusion to uphold

106. *See* Heart of Atlanta v. U.S., 379 U.S. 241 (1964) (applying the 1964 Civil Rights Act against a hotel operator who refused to rent rooms to blacks under Article I, Section 8 commerce clause); Katzenbach v. McClung, 379 U.S. 294 (1964) (finding the 1964 Civil Rights Act applied against a restaurant owner who refused to serve blacks under Article I, Section 8 Commerce Clause). *See also* United States v. Guest, 383 U.S. 745 (1966) (holding, with a six Justice majority, that Section 5 of the Fourteenth Amendment authorizes Congress to prescribe criminal penalties under 18 U.S.C. Section 241 to punish private conspiracies depriving blacks use of state facilities); United States v. Price, 383 U.S. 787 (1966) (finding Congress has the power to punish criminal and racially motivated conduct by private individuals and state officials acting in concert to deprive blacks civil rights under the "color of law" provision of 18 U.S.C. § 242).

107. 384 U.S. 641 (1966).

108. *Id.* at 643.

109. *Id.* at 648-49, 659 n.7.

110. *Id.* at 648. Justice Brennan expanded on this point by saying "[i]t would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of [Section] 1 of the Amendment." *Id.* at 648-49 (quoting Fay v. New York, 332 U.S. 261, 282-84).

111. Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (citing McCulloch v. Maryland, 17 U.S. 316, 421 (1819)). Justice Brennan also cited *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879), for the same proposition. *Id.*

the legislative choice.[112]

By requiring that Congress only "perceive" that it had a reasonable premise for enacting the legislation, *Morgan* solidified rational basis review as a deferential standard by which the Court would judge prospective laws purportedly within the scope of any of the rights protected in Section 1 of the Fourteenth Amendment. As a result, but with one exception, Brennan's view of the Court's role in Section 5 cases is contrary to the one espoused by Justice Bradley in *The Civil Rights Cases*. Unlike Brennan, Bradley was wary of national interference and would quickly use the Court's authority to nullify legislation that encroached on the power of the states to make laws protecting, or removing, individual liberty. Bradley's version of judicial deference in construing the parameters of the Fourteenth Amendment is ostensibly an allegiance to the sovereign states; and, in theory, it was of little consequence that state legislatures' could (and did) eliminate personal freedom. Brennan's loyalty, on the other hand, remained superficially, with Congress. But it mattered greatly to him if *any* legislature, national or state, compromised individual liberty because he feared that "the written guarantees of liberty" would ossify into "mere paper protections"[113] without the judiciary's help. In this fashion his actual support lay with his commitment to the Fourteenth Amendment because Brennan, in *Morgan*, was willing to cede judicial power to Congress *only if* the national legislature enacted appropriate laws that enhanced, but did not restrict, Fourteenth Amendment guarantees.[114] By understanding Section 5 power as an affirmative, but in essence one directional grant of power, Brennan was distinct from Bradley: both differed on the core issues of federalism and rights' protection, at least regarding whether the judiciary should use its power to upset state rights when the national legislature acted to preserve Section 1 liberty. Yet, by being one directional, Brennan was identical to Bradley since both were prepared to invoke judicial power when the situation, or the constitutional politics of the moment, called for it.[115] Stated differently,

112. *Id.* at 653, 656.

113. *See* Brennan, *supra* note 1, at 3-4.

114. *Katzenbach*, 384 U.S. at 651 n.10. In this famous, and sometimes sharply criticized footnote, Justice Brennan said that "Congress' power under [Section] 5 is limited to adopting measures to enforce the guarantees of the Amendment; [Section] 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Id.*

115. The "situation," for Bradley, might be to protect state sovereignty and preserve, in the process, Southern white supremacy. For Brennan, the "situation" might be to protect national power and expand minority rights, if Congress acted consistently with a broad conception of the Fourteenth Amendment; or conversely, it might be to reject national *or* state power if *either*

while Brennan might have been able to mask the federalism implications of his position by rationalizing that Congress *usually* enjoys plenary express authority over the states in making choices about how to best preserve liberty, Bradley might too have been able to minimize the consequences of his anti-civil rights beliefs by saying that the Court's role was to protect the states, an outcome that would, in his view, best safeguard the balance of federalism.

In dissent, Justice John Marshall Harlan II, the grandson of the jurist who wrote the stirring dissents in *The Civil Rights Cases* and *Plessy v. Ferguson*, exposed the arbitrariness of Justice Brennan's interpretation by accusing the Court of reading Section 5 as a congressional license to "define the *substantive* scope of the [Fourteenth] Amendment."[116] For Harlan II, the majority violated the equal protection principle that New York was not under a greater burden to prove that it reasonably, and rationally, treated voters who were literate differently than those who were not.[117] As a matter of federalism, Harlan also argued that it was a "necessary prerequisite [for] bringing the [Section] 5 power into play at all" to have the Court, instead of Congress, determine if having literacy qualifications violates the Constitution.[118] In advocating judicial restraint, Justice Harlan II wanted "empirical" proof to show that Congress was acting to remedy a state law that the judiciary has said, or is willing to say, violates basic constitutional rights.[119] In contrast to Brennan's position, Harlan II's theory of Congress' Section 5 power was not one directional, for his federalism rhetoric allowed the legislature very little flexibility to determine, in theory, what the best solution was to the race problem in remedial Fourteenth Amendment terms.[120]

Harlan II's restraint-oriented interpretation of the scope of Section 5 authority would prevail as the country, and the Court, became more

legislature compromised personal freedoms under the Fourteenth Amendment. The point is that either Justice would employ judicial power to achieve what they strongly believed in.

116. *Katzenbach*, 384 U.S. at 668 (Harlan, J., dissenting).

117. *Id.* at 660-61 (Harlan, J., dissenting).

118. *Id.* at 666.

119. Harlan makes this point by comparing *Morgan* to *Heart of Atlanta*. *Id.* at 669. In *Heart of Atlanta*, the Court based its judgment on a voluminous legislative record of discrimination in the states, whereas in *Morgan*, there were no legislative findings of discrimination that support Section 4(e)'s enactment and the argument that the Act would correct the constitutional violation. *Id.* at 669-70 (Harlan, J., dissenting).

120. *Katzenbach*, 384 U.S. at 649. See also U.S. v. Guest, 383 U.S. 745, 784 (1965), where Justice Brennan said "[v]iewed in its proper perspective, [Section 5] of the Fourteenth Amendment appears 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." *Id.*

politically conservative over the next generation. In light of the ensuing conservative retrenchment, the Court's holding in *Jones v. Alfred H. Mayer Co.*[121] remains a bold reaffirmation of Congress' enforcement power under Section 2 of the Thirteenth Amendment. But the Warren Court was about to recede into history, so *Jones* perhaps is best judged as a constitutional relic about the scope, and promise, of what congressional power can be under Section 5 in the hands of a benevolent bench. As the Court's composition changed, *Morgan's* rational basis standard would be replaced by a rigorous form of strict scrutiny that characterized the Court's approach in *The Civil Rights Cases*. Instead of framing constitutional issues in terms of testing Congress' competency to make rational choices about the means it used to effectuate the ends of legislation it enacted under the Fourteenth Amendment, the Court increasingly evaluated the scope of enforcement power by asking if an independent judiciary can relinquish its supremacy to the legislature when it acts through its lawmaking to define the Amendment's substantive meaning.[122] Because the questions are distinct, so too are the answers that the Supreme Court gave about the scope of the legislature's ability to protect civil rights and liberties.

Beginning in the Burger Court (1969-85), the Court thus more actively sought to constrain congressional discretion by reasserting, and sometimes resurrecting, the concept of state sovereignty in federalism cases implicating the Fourteenth Amendment.[123] Perhaps the best example is *National League of Cities v. Usery*,[124] a five-to-four ruling that was later overruled when Justice Harry Blackmun changed his *Usery*, pro-states' vote in *Garcia v. San Antonio Metropolitan Transit Authority*.[125] *Usery* decided whether Congress had Commerce Clause authority to extend Federal Fair Labor Standards Act (FLSA) minimum

121. 392 U.S. 409 (1968) (holding Congress has enforcement power under the Thirteenth Amendment to fight private racial discrimination).

122. *Compare Katzenbach*, 384 U.S. 641 (Brennan, J., Opinion for the Court), *with* Oregon v. Mitchell, 400 U.S. 112, 209 (1970) (Harlan, J., dissenting) ("The role of final arbiter belongs to this Court.").

123. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112; Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

124. 426 U.S. 833 (1976).

125. 469 U.S. 528 (1985). The membership at the time *Usery* and *Garcia* was identical with the exception of the addition in 1981 of Justice Sandra Day O'Connor, who replaced Potter Stewart and his pro-states' right vote in *Usery* and then, in effect, in his place in *Garcia*. Hence, the dissenters in *Usery*, Justices Brennan, Thurgood Marshall, Bryon White and John Paul Stevens, became the majority when Blackmun switched his vote, thereby relegating the *Usery* majority (Chief Justice Warren Burger and Justices Rehnquist, Stewart, Lewis Powell) to the dissenting bloc in *Garcia*.

wage and maximum hour requirements to state employees. Although conceding Congress had plenary commerce power under Article I, Section 8, Associate Justice William H. Rehnquist's opinion for the Court said there are limits in applying it to private activity since "the means chosen by Congress must be reasonably adapted to the end permitted by the Constitution."[126] Thus, he observed that "[t]his Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."[127] Consequently, Rehnquist looked to the Tenth Amendment, which he suggested is not a truism but rather an affirmative limitation on national power, as the method to prevent national commercial regulation of the "States as States."[128]

Notably, Rehnquist looked to a trio of past precedents (penned by Chief Justice Salmon Chase) to emphasize that the "Court recogniz[ed] the essential role of the States in our federal system of government."[129] In *Texas v. White*,[130] for example, the Court established the principle that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[131] In *Lane County v. Oregon*,[132] moreover, the Court stated that the Constitution "distinctly recogniz[es]" not only the "necessary existence of the States, and, within their proper spheres, the independent authority of the States. . . ."[133] And, with *Metcalf & Eddy v. Mitchell*,[134] the Court asserted that "neither [federal or state] government may destroy the other nor curtail in any substantial manner the exercise of its powers."[135] As applied, these precedents demonstrated that the FLSA wage and hour provisions unconstitutionally interfered with "integral" state functions by regulating "attributes of sovereignty attaching to every state government"; and Congress had no power to control these "traditional aspects of state sovereignty" under the Commerce Clause, in accordance with the Tenth

126. *Usery*, 426 U.S. 840 (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964)).

127. *Id.* at 842 (citing Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (where it said the Court had "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity. . . .'").

128. *Usery*, 426 U.S. at 842-43.

129. *Id.* at 844.

130. 74 U.S. 700 (1869).

131. *Usery*, 426 U.S. at 844 (citing Texas v. White, 7 U.S. 700, 725 (1869)).

132. 74 U.S. 71 (1869).

133. *Usery*, 426 U.S. at 844 (quoting Lane County v. Oregon, 74 U.S. 71, 76 (1869)).

134. 269 U.S. 514 (1926).

135. *Usery*, 426 U.S. at 844 (quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926)).

Amendment.[136]

Although, in a footnote, *Usery* declined to proffer if the outcome would have been different if Congress based its regulation on either Section 5 of the Fourteenth Amendment or Congress' spending power under Article I, Section 8.[137] Dissenting Justice Brennan immediately understood the significance of the Court's holding for subsequent federalism cases. He relied on *United States v. California*[138] to maintain that the states are subordinate to the national government when the latter acts within the scope of its delegated authority.[139] He chided his colleagues for "manufactur[ing] an abstraction without substance, founded neither in the words of the Constitution nor on precedent" the idea that Congress was disabled by the Tenth Amendment from regulating, through the commerce power, the "States qua States."[140] Not only was this position a repudiation of "a long line" of precedents holding otherwise (including *McCulloch v. Maryland*[141]), it was a result that "patent[ly] usurp[ed]" the role that the political process plays in imposing restraints on Congress' commerce authority.[142] Brennan thundered:

> My Brethren do more than turn aside longstanding constitutional jurisprudence that emphatically rejects today's conclusion. More alarming is the startling restructuring of our federal system, *and the role they create therein for the federal judiciary*. *This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure*. If the 1974 amendments have any "vice," my Brother Stevens [in a separate dissent] is surely right that it represents "merely . . . a policy issue which has been firmly resolved by the branches of government having power to decide such questions." It bears repeating "that effective restraints on . . . exercise of the commerce power must proceed from political rather than from judicial processes."[143]

For Brennan, *Usery* was a repudiation of judicial restraint and,

136. *Id.* at 845-52.

137. *Id.* at 852 n.17.

138. 297 U.S. 175 (1936).

139. *Usery*, 426 U.S. at 859 (Brennan, J., dissenting) (citing United States v. California, 297 U.S. 175, 184 (1936)). In *California*, Chief Justice Harlan Stone repudiated the view that a state had sovereign powers by stating that "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." *Id.*

140. *Usery*, 426 U.S. at 860.

141. *Id.* at 860-61; *See* McCulloch v. Maryland, 17 U.S. 316 (1819).

142. *Usery*, 426 U.S. at 857-58.

143. *Id.* at 875-76 (citations omitted) (emphasis added).

instead, an activist result that improperly altered the balance of the federal structure by rejecting the notion that "political safeguards" of federalism would adequately protect the states from national overreaching.[144]

In time, Brennan's objections were vindicated in *Garcia v. SAMTA*,[145] a 1985 ruling that features Justice Harry Blackmun's decision to bolt from the *Usery* majority and write law professor Herbert Wechsler's political safeguards' argument into constitutional law.[146] But, as the sharp disagreement about the proper scope of judicial power illustrates, in 1985 the Court was not of one mind about what federalism, or what state sovereignty in a system of federalism meant. Although *Usery* and *Garcia* centered on the Tenth Amendment's place as an affirmative constraint on otherwise plenary commerce power, the federalism conflict concerned whether the states surrendered their sovereignty or, in later parlance, their "dignity",[147] at the time of the Constitution's ratification *by the states*. For, if they did, as Justice Brennan maintained, the states could not be co-equal sovereigns whenever Congress reasonably used its delegated discretion to achieve a legitimate legislative objective in regulating the national economy. In Brennan's view, showing judicial deference to Congress was an affirmation of the careful balance the Framers struck between that national government and the states at the founding.

The *Garcia* dissenters countered by stating that it was wrong to presume the national political system, either structurally or through the principle of representation, can actually protect the states. Political safeguards are superfluous, because they do nothing to preserve state interests in light of an increasing commerce power, burgeoning federal regulation, the popular election of senators (rather than from the state legislatures as originally conceived) via the Seventeenth Amendment, and the nearly omnipotence impact of interest groups in the national political process.[148] More fundamentally, the dissenting position

144. *Id.* at 876-77. Notably, Brennan cited Herbert Wechsler's famous article for the same proposition. *See id.* at 877, *citing* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

145. 469 U.S. 528 (1985).

146. *Id.* at 549-55 (Blackmun, J., Opinion for the Court); *But see* New York v. United States, 505 U.S. 144 (1992) (O'Connor, J., Opinion for the Court).

147. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997); Alden v. Maine, 527 U.S. 706, 714 (1999); Federal Maritime Commission v. South Carolina State Ports Authority, 122 S. Ct. 1864 (2002). *See also* Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 97 (2002).

148. *See Garcia*, 469 U.S. 557 (Powell, J., dissenting); *id.* at 579 (Rehnquist, J., dissenting); *id.*

objected to the claim that the states somehow relinquished some or all of their sovereignty at the time of the founding. Accordingly, the argument about the Tenth Amendment's effect on national power is only a corollary to the basic insistence that the states are co-equal entities in a dual sovereignty system of federalism.

As fate would have it, Rehnquist's prediction that the dissenting view in *Garcia* would "in time again command the support of a majority of th[e] Court" accurately captured what happened when he assumed the Chief Justice position a little more than one year later. Further, the Court's composition continued its lurch to the right with the strict constructionist appointments of Presidents Ronald Reagan and George H. Bush.[149] Rehnquist was already the colleague of Sandra Day O'Connor (1981) when he was elevated to Chief Justice in 1986 by President Reagan. The confirmations of Antonin Scalia (1986), Anthony Kennedy (1988) and Clarence Thomas (1991) positioned the Court to implement the kind of judicial restraint that often characterizes Rehnquist's federalism jurisprudence.[150] As the five conservative justices coalesced into a majority, the Rehnquist Court (1986 - present) has made significant inroads in curtailing, to an unprecedented level, Congress' power under the Commerce Clause and the Tenth Amendment.[151] It also has revitalized the Eleventh Amendment as a means to limit federal judicial power by using the state sovereignty argument that was temporarily defeated in *Garcia* in a string of subsequent, far-reaching Section 5 cases.[152] At the core of the Rehnquist Court's Section 5 cases is the anti-federalist conviction that close judicial oversight is necessary to protect local interests from federal domination since the U.S. Constitution, is structurally ineffectual in affording the states meaningful representation. Accordingly, as it is

at 580 (O'Connor, J., dissenting). See also David M. O'Brien, "*Federalism as a Metaphor in the Constitutional Politics of Public Administration*," 49 PUB. ADM. REV. 411, 412 (1989), where the author observes that the *Garcia* dissenters could have also grounded their claims on other aspects of increasing national power, including plenary taxing and spending authority and, of course, the Supreme Court's nationalization of the Bill of Rights through its selective incorporation theory.

149. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *see generally* Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48 (1986).

150. Thomas' 1991 confirmation was especially significant since Thomas replaced Justice Thurgood Marshall, and Justice William Brennan had left the Court a year earlier (replaced by David Souter in 1990). THE OXFORD GUIDE TO THE UNITED STATES SUPREME COURT 394 (Kermit L. Hall ed., 1999).

151. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

152. *See, e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 1125 (1996); City of Boerne v. Flores, 521 U.S. 507 (1997).

discussed in Section II, the Court's decision-making features the creation of a new "means and ends" test that makes it virtually impossible for Congress to argue that its legislative choices can satisfy constitutional muster.

II. THE REHNQUIST COURT'S ANTI-FEDERALIST REVIVAL

The boldness of Rehnquist's approach in *Usery* would be repeated, and come to fruition, in *U.S. v. Lopez*,[153] the first Supreme Court ruling since 1936 to invalidate a congressional statute passed under the commerce clause.[154] *Lopez's* significance is underscored by three earlier federalism decisions reflecting the movement toward a firm, and intensified, judicial commitment to protecting states' interests.[155] *Gregory v. Ashcroft*[156] is particularly instructive, as Justice Sandra Day O'Connor's opinion for the Court upheld Missouri's choice to impose a mandatory retirement age of seventy on state judges through its Constitution. O'Connor rebuffed the argument that it violated the Equal Protection Clause and was contrary to the Federal Age Discrimination in Employment Act (ADEA), reasoning that the "system of dual sovereignty" created by the Constitution's structure gave the State, a co-sovereign, the discretion to set the qualifications of those who govern it.[157] While she conceded that the structural political safeguards might protect the states against Congress' exercise of its plenary commerce authority, O'Connor nonetheless decided the case by determining if Congress clearly established its intent to have the ADEA's apply to appointed state judges.[158] "This plain statement rule," O'Connor explained, "is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[159] As applied, Congress did not express its intent clearly, so the ADEA was inapplicable and the people's choice to make state judges retire at 70 was upheld.[160]

153. 514 U.S. 547 (1995) (Rehnquist, C.J., Opinion for the Court) (striking down Congress' Gun-Free Zones Act of 1990 as an invalid exercise of commerce power).

154. *See id.* at 605 (Souter, J., dissenting).

155. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (finding the Federal Age Discrimination in Employment Act inapplicable to appointed state judges); Coleman v. Thompson, 501 U.S. 722 (1991); New York v. United States, 505 U.S. 144 (1992).

156. 501 U.S. 452 (1991).

157. *Id.* at 457-63.

158. *Id.* at 467.

159. *Id.* at 460, 464.

160. *Id.* at 473.

Dissenting Justice Byron White objected that the plain statement requirement substantially undercut Congress' use of the commerce power while avoiding the "constitutional problem" of respecting legislative supremacy and the operation of the political safeguards principle.[161] He also chided the Court for dismissing the possibility that Section 5 of the Fourteenth Amendment could have been used as alternative grounds to validly apply the ADEA to the states. O'Connor conceded this as a possibility by admitting that the Court, in past cases, held that the Civil War Amendments can be an enforcement mechanism under Section 5 that outweighs federalism principles favoring recognition of state sovereignty.[162] Justice White questioned its source as well, claiming that the Court improperly manufactured it from *Atascadero State Hospital v. Scanlon*,[163] an inapposite Eleventh Amendment case.[164]

White's lament in *Gregory* was refined into extant constitutional doctrine in the Court's subsequent federalism and Section 5 jurisprudence, particularly in the aftermath of Thomas' November 1991 confirmation and White's retirement in July 1993.[165] Like Brennan before him, White surely perceived that the Court was in the formative stages of a new federalism revolution. National legislation would be tested against a re-invigorated concept of state sovereignty that increasingly became the judicial mantra for affirmatively limiting not only Congress' otherwise sacrosanct commerce power, but also as the means to wipe the dust off the Tenth, and now, the Eleventh

161. *Gregory*, 501 U.S. at 479 (White, J., dissenting). He also argued it conflicts with the Court's pre-emption rules. *Id.* at 475. This argument would be repeated later by Justice John Paul Stevens in *Florida Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 658 (1999) (Stevens, J., dissenting).

162. *Gregory*, 501 U.S. at 479; *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that the Eleventh Amendment's principle of state sovereignty is limited by Section 5 of the Fourteenth Amendment). In *Gregory*, Justice O'Connor observed that the Court, in *EEOC v. Wyoming*, 460 U.S. 226 (1983), left open the question of whether the national legislature could have used Section 5 as the source for extending the ADEA to the states. *Gregory*, 501 U.S. at 468. Justice O'Connor's majority opinion answered it by stating that "[i]n the face of such ambiguity [about Congress's intent for the ADEA to cover state appointed judges], we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause or [Section] 5 of the Fourteenth Amendment." *Id.* at 470.

163. 473 U.S. 234, 243 (1985) (barring private action in federal court since Congress did not, in unmistakable language, express its intent to abrogate Eleventh Amendment sovereign immunity through the Rehabilitation Act).

164. *Gregory*, 501 U.S. at 476 (White, J., dissenting).

165. Justice Thomas replaced Thurgood Marshall in 1991, and Ruth B. Ginsburg replaced Justice White in August 1993. OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS 394 (Kermit L. Hall ed., 1999).

Amendment. As *Gregory* (and later, *Lopez*) signaled, the Court was going use its judicial authority to be a champion of state sovereignty. It demonstrated that it was prepared to discover innovative principles, like the plain statement rule, to defend states' rights.

In the next two terms after *Lopez* the Court decided *Seminole Tribe of Florida v. Florida*[166] and *City of Boerne v. Flores*.[167] These two landmark rulings greatly limited federal judicial power under the Eleventh Amendment (*Seminole*) and federal legislative power (*Boerne*) under Section 5 of the Fourteenth. While *Lopez* settled whether the Tenth Amendment could nullify congressional legislation under Article 1, Section 8, in overturning *Pennsylvania v. Union Gas Company*[168] *Seminole Tribe* held that the Indian Commerce Clause could not authorize private lawsuits by Indian Tribes against states in federal court under the Eleventh Amendment.[169] Then, after recognizing that the Eleventh Amendment affords the states' immunity as an "attribute" of their sovereignty, in a five-to-four decision Chief Justice Rehnquist dismissed the proposition that the federal Indian Gaming Regulatory Act (enacted under Article I, Section 8, clause 3) gave the tribes a federal forum for compelling Florida to negotiate in good faith and enter into a compact for the purpose of legally engaging in gaming activities.[170] Florida, the Chief Justice noted, did not consent to be sued; thus Congress lacked the power to abrogate the immunity granted the state by the Eleventh Amendment, in spite of Congress' clear intention to do so, as expressed in the legislation.[171]

Gregory's plain statement rule emasculated the national legislature's ability to upset the sovereign choices of a state because the federal ADEA did not clearly express an intent to apply it to state

166. 517 U.S. 44 (1996).

167. 521 U.S. 507 (1997).

168. 491 U.S. 1 (1989).

169. *Seminole*, 517 U.S. 44. The deciding pro-national fifth vote was cast by Justice White. *Id.* (Rehnquist, C.J., Opinion for the Court).

170. *Id.* at 54; *see also* Hans v. Louisiana, 134 U.S. 1 (1890) (Eleventh Amendment bars lawsuits in federal court by citizens against their own State if State has not consented to being sued). Prior to *Seminole*, *Hans* is generally considered the outer limits of Eleventh Amendment sovereign immunity doctrine. Christopher E. Sherer, *The Resurgence of Federalism: State Employees and the Eleventh Amendment*, 23 HAMLINE J. PUB. L. & POL'Y 1, 4 (2001).

171. *Seminole*, 517 U.S. at 72. "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* The Court's analysis was guided by two questions: 1) Did Congress unequivocally express its intent to abrogate immunity?; and 2) Does Congress have the constitutional power under Section 5 of the Fourteenth Amendment to do so? *Id.* at 55.

citizens purportedly covered under the statute. The plain statement rule's cousin, the "clear statement rule,"[172] was applied in *Seminole* to deny Congress the power to let Indian Tribes sue a state and disrupt its sovereignty, even though it unequivocally indicated an intent to do so.[173] *Seminole* is also significant for leaving intact only one of the two remaining basises for Congress to ground its authority to abrogate state sovereignty immunity, namely the Fourteenth Amendment enforcement power in Section 5.[174] Thus, by eliminating *Union Gas*, *Seminole* told Congress it no longer enjoyed power to circumvent state immunity by relying on the Commerce or Supremacy Clause.[175]

Shortly after *Seminole* the Court used the Eleventh Amendment to immunize unconsenting states from federal claims in state courts.[176] Yet, it also used *Seminole* to voice respect for Congress' Section 5 authority to constrain, in theory, state sovereignty in Eleventh Amendment cases.[177] The Court also started to utilize the principles crafted in *Boerne* to insure that the judiciary would be able to superintend closely the choices the national legislature made when it passed laws affecting the states in all federalism cases with civil rights and liberties implications. In *Boerne*, Congress relied on Section 5 to enact the Religious Freedom Restoration Act of 1993 (RFRA), legislation having the effect of reversing the Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[178] The RFRA represented Congress' repudiation of *Smith*, which jettisoned the balancing test approach that had long characterized judicial review of free exercise cases involving state laws (e.g. unemployment compensation statutes) that failed to exempt certain religious practices from their coverage at the expense of religious liberty.[179] The new law hence replaced *Smith's* more restrictive "general

172. *Id.* at 77 (Stevens, J., dissenting) (citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238-39 (1985)).

173. *Id.* at 56.

174. *Id.* at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)). Hence, *Fitzpatrick* is important because it adheres to the principle that the Eleventh Amendment immunity can be abrogated by a federal law enacted under Section 5 authority.

175. *See Seminole*, 517 U.S. at 93-95 (Stevens, J., dissenting). Notably, a State can also consent to be sued by waiving its rights not to be subject to litigation. Florida Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 670 (1999) (Scalia, J., Opinion for the Court). *See also* Sherer, *supra* note 171, at 7.

176. Alden v. Maine, 527 U.S. 706 (1999).

177. *See, e.g.*, *College Savings*, 527 U.S. 672 (citing *Fitzpatrick*, 427 U.S. 445).

178. 494 U.S. 872 (1990).

179. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (nullifying state unemployment compensation denying benefits to Seven Day Adventist who refused to work on day of Sabbath).

applicability" standard with the more familiar and lenient balancing test,[180] a policy judgment that was negated by the Supreme Court in *Boerne*.

Justice Anthony Kennedy's opinion for the Court described Section 5 as a broad grant of authority that is limited in its operation. Kennedy first cast doubt on whether Congress' purpose in passing the RFRA was legitimate, as there was little in the legislative record to indicate that there was a "widespread pattern of religious discrimination in this country."[181] This was significant, Kennedy continued, for only federal law that "*deters or remedies* constitutional violations" is a legitimate exercise of legislative discretion, "even if in the process [the enforcement power] prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy' previously reserved to the States."[182] But where Congress alters the constitutional meaning of a right, as it does here, congressional action will not be sustained because it is not "enforcing" the liberties outlined in Section 1 of the Fourteenth Amendment.[183] Accordingly, only laws exhibiting "congruence and a proportionality between the injury to be prevented or remedied and the means adopted to that end" are constitutionally valid, since those without it are deficient because they may be too "substantive in operation and effect."[184] As a result, the standard empowers the judiciary to determine if Congress has not overstepped its bounds by creating inappropriate legislation under Section 5 that impermissibly puts too much substantive meaning on the rights outlined in Section 1 of the Fourteenth Amendment.

In the Court's view, the Constitution's text, structure and history supported the creation of the congruence and proportionality test.[185] Of particular relevance was the framers' decision to reject Ohio representative John Bingham's first draft of Section 1 of the Fourteenth Amendment, a proposal exacerbating the fear that Congress would interfere with "traditional areas of state responsibility" by permitting it to enact "all laws" that are "necessary and proper" to secure Section 1

180. *See Smith*, 494 U.S. 872 (upholding criminal prosecution against native Americans claiming exemption from state law based on religious use of peyote). Scalia fashioned the "general applicability" principle to evaluate the constitutionality of state laws allegedly burdening free exercise. It stated that laws having an "incidental effect of a generally applicable and otherwise valid provision" do not violate the First Amendment. *Id.* at 878.

181. City of Boerne v. Flores, 521 U.S. 507, 531 (1997).

182. *Id.* at 518 (emphasis provided) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

183. *Id.* at 519.

184. *Id.* at 520.

185. *Id.* at 515-29.

liberties.[186] The new draft (and the final enactment) that replaced Bingham's initial version signified that Congress' power is limited to correcting unjust state legislation that violated Section 1 guarantees.[187] This interpretation is accurate, said Kennedy, for it respects "traditional separation of powers between Congress and the Judiciary" by investing in the Court the power to construe the meaning of self-executing provisions of the Bill of Rights.[188] If it were otherwise, and Congress instead of the Court was able to determine what the Constitution meant substantively, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[189]

The Court's interpretativism in *Boerne* is demonstrated by its reading of precedent, namely its re-affirmation of *The Civil Rights Cases*[190] and its corresponding denigration of that case's antithesis, *Katzenbach v. Morgan*.[191] Whereas the former opinion epitomized the tenet that enforcement legislation must be corrective against (largely) state action,[192] the expansive character of the latter (presumably because of *Morgan's* footnote ten) was "not a necessary interpretation . . . or even the best one."[193] Indeed, Justice Kennedy strained to put the best light he could on *Morgan*, observing that one of the alternative rationales supported its result because the Court at that time "perceived a *factual* basis on which Congress could have concluded that New York's literacy requirement" was discriminatory and an equal protection violation.[194] What *Morgan* actually said, though, is that the Court could have "perceive[d] a basis," not necessarily a "factual" one, as Kennedy wrote.[195] The judicial gloss put on the phrase is subtle, but nonetheless significant. It allowed Kennedy to align *Morgan* with his reading of

186. *Id.* at 520-22.

187. *Boerne*, 521 U.S. at 522-23.

188. *Id.* at 523-24.

189. *Id.* at 529.

190. 109 U.S. 3 (1883).

191. 384 U.S. 641 (1966).

192. *Boerne*, 521 U.S. at 524-25.

193. *Id.* at 528. Kennedy obliquely refers to *Morgan* as having language that "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in Section 1 of the Fourteenth Amendment." *Id*. at 527-28. However, he does not cite footnote 10 in *Morgan*. *See Morgan*, 384 U.S. at 641, n.10.

194. *Boerne*, 521 U.S. at 529 (emphasis added). The other rationale was that Section 4(e) of the 1965 Voting Rights Act is remedial because it corrects "discrimination in governmental services." *Id.* at 528.

195. *See Morgan*, 384 U.S. at 641, 653 & 656. *Compare Morgan*, 384 U.S. at 641, *with Boerne*, 521 U.S. at 529.

South Carolina v. Katzenbach[196] and *Oregon v. Mitchell*, two cases that, in *Boerne*, suggested that the Court must limit the enforcement power by stringently reviewing whether Congress compiled an extensive legislative record to document the pervasive nature of the constitutional problem that the legislation is supposed to correct.[197]

While Justice Kennedy discovered a way to reconcile the Court's past anti-federalist interpretation of Section 5 cases with more progressive opinions coming from the Warren Court, he failed to explain the constitutional origin or justification for the language he utilized to construct the congruence and proportionality standard.[198] Nevertheless, as a legal standard it remains a reformulated, but more stringent, version of the "means/ends" inquiry that has characterized the judiciary's past assessment of "appropriate" legislation.[199] In theory, evaluating congruence and proportionality asks if the federal law is not only remedial but also a deterrent to the commission of future constitutional violations.[200] As applied, it imposes a number of doctrinal and pragmatic constraints on Congress' ability to fix or prevent perceived unconstitutional behavior by the states or private parties. In other words, it is a constitutional trump card that the Court can play at any time to nullify national legislation that, from the Marble Temple's vantage point on Front Street, deems "inappropriate." It is not surprising, then, that the Rehnquist Court has used it along with more generalized anti-federalist legal principles to negate congressional action in several post-*Boerne* federalism cases, particularly in those testing the limits of Eleventh

196. 383 U.S. 301 (1966).

197. *Boerne*, 521 U.S. at 525-28.

198. Justice Kennedy does not specifically explain where the terms "congruence" or "proportionality" come from, although he indirectly refers to "means/ends" by examining past precedent. In certain areas of jurisprudence, like affirmative action, cases like *Fullilove v. Klutznick*, 448 U.S. 448 (1980), have applied a means/ends test to uphold the constitutionality of a ten percent set aside (of federal monies) for public works projects for minority-owned businesses; but there, only three Justices (Burger, Powell, and White) of a six-Justice plurality (Marshall, Brennan, and Blackmun) agreed that Congress tailored the law narrowly enough under the legislative objectives pursuant to either Section 5 or the Article 1 spending clause. Perhaps that is why *Fullilove* is not cited by Kennedy in *Boerne*, but it does not explain why he did not attempt to trace the Court's usage of the means/ends test in past precedent (other than to refer generally to *The Civil Rights Cases*, 109 U.S. 3 (1883) in support of the means/ends rationale). *See Boerne*, 521 U.S. 507. For an analysis of the Court's usage of means/ends and *Fullilove's* significance, see Marci A. Hamilton & David Schoenbrod, Symposium, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999) (arguing *Boerne's* proportionality standard is clearly traceable to past Supreme Court cases).

199. *See* Evan H. Caminker, Symposium, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001).

200. Christopher E. Sherer, *The Resurgence of Federalism: State Employees and the Eleventh Amendment*, 23 HAMLINE J. PUB. L. & Pol'y 1, 8 (2001).

Amendment sovereign immunity.[201]

Hence, in five-to-four rulings, with *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*[202] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[203] the Supreme Court held that neither the 1992 Trademark Remedy Clarification Act (*College Savings*) or the 1992 Patent and Plant Variety Protection Remedy Clarification Act (*Florida Prepaid*) validly abrogated, under Section 5, state sovereign immunity.[204] In *College Savings*, the Court dismissed a private action for damages that was based on the contention that a state's alleged use of false descriptions or representations concerning a patent qualified as a constitutionally protected property right under the Due Process Clause, notably without even applying the congruence and proportionality test.[205] Whereas the Court could not find a right to enforce in *College Savings*, it reached the question of appropriateness in its companion case, *Florida Prepaid*. There, Chief Justice Rehnquist's plurality opinion reasoned that the Patent Remedy Act was not remedial because there was little evidence in the legislative record to prove that Congress was responding to an identifiable pattern of patent infringement (or constitutional violations) by the states or, in fact, a national problem.[206] Thus, the Act was an unconstitutional enforcement mechanism, since disproportionate means were used to achieve a perceived, but unsubstantiated, end.[207]

Having shown it was reluctant to extend Section 5 power to cure due process violations in *Kimel v. Florida Board of Regents*,[208] the Court, in the next term addressed whether Congress can use Section 5 to prevent alleged violations of equal protection originating from age discrimination. Although Congress exhibited a clear intent in the Age

201. *See, e.g.*, Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (1999); Fla. Prepaid PostSecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (1999); Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

202. 527 U.S. 666 (1999).

203. 527 U.S. 627 (1999).

204. *College Savings* held that the state did not constructively waive its sovereign immunity under the Eleventh Amendment, and that the Act did not validly abrogate it. 527 U.S. 666. In so holding, the Court overturned *Parden v. Terminal Ry. Co. of Ala. State Docks Dept.*, 377 U.S. 184 (1964). *Id.* at 680. *Florida Prepaid* held that Congress intended to abrogate immunity, but could not validly do so because Congress lacked Section 5 authority. 527 U.S. 627.

205. 527 U.S. at 672.

206. *Florida Prepaid*, 527 U.S. at 641.

207. *Id.* at 640.

208. 528 U.S. 62 (2000).

Discrimination in Employment Act (ADEA) to abrogate state sovereign immunity, the Court held (as per Justice Sandra Day O'Connor) that it lacked the power under Section 5 to subject non-consenting States to private lawsuits in federal court alleging age discrimination. After acknowledging that Section 5 gives Congress the authority to remedy and deter rights' violations under the Fourteenth Amendment, O'Connor reiterated the *Boerne* principle that the Congress had little say in fashioning the content of what those rights are.[209] Rather, she declared, "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."[210]

From this premise the Court applied *Boerne's* congruence and proportionality test for appropriateness. In doing so O'Connor observed that Congress, in providing "indiscriminate" substantive and prophylactic remedies under the ADEA, failed to establish in "widespread and unconstitutional age discrimination by the States."[211] Notably, the implications of having a scant record were more profound, if not conclusive, in deciding the case. As O'Connor explained, the Court's past equal protection jurisprudence has, in effect, given the states more latitude to engage in age discrimination without running afoul of the Fourteenth Amendment, provided the offending state can demonstrate that its age classification is rationally connected to a legitimate state interest. Because of rational basis review, in other words, the Court cannot use heightened scrutiny and require "a tighter fit between the discriminatory means and the legitimate ends they serve," as would be the case in lawsuits testing race or gender classifications.[212] As a result, in *Kimel* the Court sent at least three anti-federalist messages: 1) that the Court is the final arbiter of what the Fourteenth Amendment substantively means; 2) that states can sometimes reasonably discriminate on the basis of age classifications in spite of the Equal Protection Clause; and, 3) that Congress has limited Section 5 power to combat age discrimination in the states only if it can prove, in the legislative record or otherwise, that it enacted remedial or prophylactic legislation in response to a national problem of age discrimination occurring in the states.[213]

209. *Id.* at 81.

210. *Id.*

211. *Id.* at 91.

212. *Id.* at 83-84.

213. In ruling that Congress lacked power under Section 5, *Kimel* also answered the open "Section 5" question raised in light of the holding in *EEOC v. Wyoming*, 460 U.S. 226 (1983)

In a dissent joined by Justices Souter, Ginsburg and Breyer, Justice Stevens in *Kimel* expressed dismay at the Court's hubris in extolling state immunity while dismissing the structural political safeguards argument that once held sway in adjudicating federalism cases.[214] Even so, *United States v. Morrison* and *Board of Trustees of the University of Alabama v. Garrett*, indicate that the Court-centered anti-federalist philosophy is firmly entrenched in the five-Justice plurality that often controls the outcome of federalism cases. In *Morrison*, the Court held that Congress did not have commerce or Section 5 authority to supply victims of gender-motivated violence with civil remedies in federal court through the Violence Against Women Act of 1994 (VAWA).[215] Relative to the Section 5 issue, the Chief Justice, in a five-to-four ruling, acknowledged that a "voluminous congressional record" was compiled to document the abuses suffered by victims of gender discrimination in state courts.[216] Yet in light of the language and purpose of the Fourteenth Amendment and, in accordance with past precedent,[217] Congress had limited power to devise remedies against non-state (i.e. private) actors.[218] Thus, the Court ruled the *Boerne* test of proportionality was not satisfied because the VAWA was not corrective enough in terms of combating discriminatory violence from the operation of state laws or officers.[219] Moreover, in dicta, Chief Justice Rehnquist expressed *Kimel's* conviction that it is the duty of the Court, and not Congress, to discern the Constitution's final meaning.[220]

Board of Trustees of the University of Alabama v. Garrett reaffirmed that "it is the responsibility of *this* Court"[221] to limit the substantive reach of the Fourteenth Amendment. There, the Chief Justice for a five-to-four Court held that two state employees (one was diagnosed with breast cancer and, after treatment, demoted in her nurse's job at a state hospital) could not sue under the Americans With Disabilities Act (ADA) for money damages in federal court because

(holding that the ADEA was a valid exercise of national commerce power on the states in spite of the Tenth Amendment). *See Kimel*, 528 U.S. at 78.

214. *Id.* at 92-99 (Stevens, J., dissenting).

215. U.S. v. Morrison, 529 U.S. 598, 613 and 626 (2000) (Rehnquist, C.J., Opinion for the Court).

216. *Id.* at 620, 625.

217. *Id.* at 621-26 (citing principally The Civil Rights Cases, 109 U.S. 3 (1883), and United States v. Harris, 106 U.S. 629 (1883), as supportive of the state action doctrine).

218. *Id.* at 620-21.

219. *Id.* at 625.

220. *Id.* at 616 n.7.

221. 531 U.S. 356, 365 (2001) (emphasis provided).

Congress did not have Section 5 power to abrogate state immunity.[222] After noting that the Court's equal protection analysis concerning the disabled required rationality review, Rehnquist concluded that the "States are not required . . . to make special accommodations for the disabled, so long as their actions towards such individuals are rational."[223] After identifying the scope of the constitutional right, Rehnquist next applied *Boerne's* congruence standard to hold that Congress exceeded its power by creating an anti-discrimination remedy on the states because there was insufficient proof that the states were irrationally engaged in a consistent and recurring past pattern of discrimination.[224] In contrast to legislation that enforced the Fifteenth Amendment's proscription against racial discrimination in voting, the record did not disclose that Congress "explored with great care" the problem of how those with disabilities are treated in the states.[225] Accordingly, as the *Boerne* progeny illustrates, the Court in *Garrett* ruled that the remedy (i.e. the ADA) was disproportionate to the aim of eliminating discrimination against the disabled.[226]

III. NEVADA DEPARTMENT OF HUMAN RESOURCES V. HIBBS AND THE POLITICS OF CONSTITUTIONAL INTERPRETATION

As *Kimel v. Florida Board of Regents* and *Board of Trustees of the University of Alabama v. Garrett* reveal, state-sponsored age (*Kimmel*) and disability (*Garrett*) classifications are presumptively constitutional under the Equal Protection Clause because the Court evaluates them under rational basis review. Thus, when Congress devises a statutory remedy to combat state-sponsored discrimination involving presumptively constitutional conduct, it is harder under the congruence and proportionality test for Congress to claim that it is an appropriate exercise of Section 5 power. Congress has to compile an extensive record to justify that its remedy is a proportionate response to the perceived discriminatory evil it is trying to eradicate. Part of that justification, also, requires the legislature to establish that it is acting in

222. *Id.*

223. *Id.* at 367 (interpreting City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)). Rehnquist continued by saying that the States "could be quite hard headedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 367-68.

224. *Id.* at 368-74.

225. *Id.* at 373.

226. *Id.* at 374.

an area of law that the Court has recognized as a legitimate province of rights' protection, as in race-based voting rights cases. To be sure, as *City of Boerne v. Flores* indicates, Congress' burden is even greater when it enacts prophalytic legislation in a social policy area that arguably goes beyond the substantive limits the Court has imposed on the meaning of rights contained in Section 1 of the Fourteenth Amendment.

In *United States v. Morrison* the Court ruled that a victim of gender-based violence could not sue under the Equal Protection Clause because the Violence Against Women's Act was not directed at State action; hence, it was an invalid exercise of Section 5 power.[227] Because the Court did not find that there was a protected right to be enforced in *Morrison*, it is an open question whether Congress can provide a remedy under Section 5 in a sex-based discrimination case involving Eleventh Amendment immunity. One would intuit that Congress would have an easier time proving to the Court that it is appropriately enforcing a statutory remedy that is directed against state conduct that is presumptively unconstitutional because of heightened scrutiny.[228] Indeed, in *Kimel* the Court reiterated that states have less leeway to demonstrate that race or gender-based classifications are validly serving legitimate legislative objectives.[229] Moreover, even though the Court has said that what the record reveals is not necessarily determinative in evaluating whether the law is appropriately proportionate to the perceived harm,[230] Congress probably has a better chance of convincing the Court that the legislative means fit the ends if it can establish that it is reacting to a pervasive, nationwide problem of gender discrimination.

These propositions will be tested in *Nevada Department of Human Resources v. Hibbs*,[231] where the Supreme Court will decide in the 2002-2003 Term if the Ninth Circuit was correct in holding that Congress intended, and had the constitutional power, to abrogate Nevada's Eleventh Amendment immunity from a private lawsuit claming damages

227. U.S. v. Morrison, 529 U.S. 598, 626 (2000).

228. *See* Sherer, *supra* note 159, at 20-21.

229. *See* Kimmel v. Fla. Bd. of Regents, 528 U.S. 62, 84. "[W]hen a State discriminates on the basis of race or gender, we required a tighter fit between the discriminatory means and the legitimate ends they serve." *Id.*

230. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 646 (1999).

231. Hibbs v. Nev. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2618 (2002). The U.S. Supreme Court entertained oral arguments in the case on January 15, 2002. *See Transcript of Oral Argument* in Nevada Dep't of Human Res. v. Hibbs (No. 01-1368) (Jan. 15, 2003), *available at*, http://www.supremecourtus.gov (last visited Jan. 29, 2003).

under the Family and Medical Leave Act of 1993 (FMLA).[232] Specifically, the Court will review if the Ninth Circuit was correct in limiting states' rights and ruling in favor of William Hibbs, who used the FMLA in conjunction with the Fourteenth Amendment's Equal Protection Clause to claim he was entitled to money damages when the state fired him because he used too much leave to care for his ailing wife. After finding that Congress intended to displace immunity, the circuit court next held that Congress had Section 5 power to abrogate Nevada's immunity because it was the state's burden (and not Congress') to prove that the state had not engaged in past acts of unconstitutional gender discrimination in the workplace. That reallocation of proof, the court reasoned, was justified because heightened scrutiny, instead of rational basis review, controlled the outcome of gender-based discrimination cases. In other words, laws like the FMLA are presumptively constitutional in that they prevent gender discrimination and, therefore, "the burden is on the challenger of the legislation to prove that the states have *not* engaged in a pattern of unconstitutional conduct."[233] Accordingly, because Nevada could not prove if a pattern of past gender discrimination did not exist, the Ninth Circuit ruled that Hibbs, a private individual, could sue in federal court using the FMLA as an appropriate remedial statute.[234]

Assuming that Congress can establish it intended to abrogate immunity,[235] the outcome in *Hibbs* might turn on whether the Supreme Court accepts the lower court's conclusion that the FMLA, like Section 5 legislation that is aimed at remedying gender discrimination, is presumptively constitutional because of heightened judicial review. If the Court agrees, then Nevada, instead of Congress, will have to prove that there is no state-sponsored discrimination. If the burden is shifted, then the law might be held to be appropriate since Congress need not establish that it has created a law that corrects a widespread pattern of sexually discriminatory conduct in the workplace. Notably, however, the Court has another way to avoid making the choice about who sustains the burden of proving unconstitutional behavior by ruling that Congress went too far in defining the scope of the right at issue by

232. Plaintiff Hibbs alleged, inter alia, that his employer, the Nevada Department of Human Resources, wrongfully terminated his position in contravention to the provisions of the Family and Medical Leave Act. *Hibbs*, 273 F.3d 844.

233. *Id.* at 864 n.27.

234. *Id.* at 873.

235. This does not seem to be an obstacle since the FMLA "intent" mirrors the one in the Fair Labor Standards Act.

requiring states give at least twelve weeks of family leave. As the *Hibbs* court observed (but concluded it was not a fatal defect in the Section 5 analysis), the operative provision of the FMLA, Section 2612(a)(1)(C), "sweeps more broadly than the Equal Protection Clause itself" because states providing less than twelve weeks of leave would be acting constitutionally if they did so in a gender-neutral fashion.[236] If that is the case then the Supreme Court could rule against Hibbs on the basis that Congress is improperly trying to change the substantive nature of a right under equal protection law, something that can only be done by the judiciary (as established in *The City of Flores v. Boerne*).[237] In other words, the reluctance of the Rehnquist Court to cede its authority to determine what the meaning of the Constitution is, will in all likelihood, strongly influence what the result will be in *Hibbs*.

A. Judicial Supremacy and the Role of History in Federalism (and Section 5) Cases

As *Hibbs* will undoubtedly underscore, the debate surrounding the scope of congressional power to enforce the Fourteenth Amendment's substantive content is an ongoing constitutional enterprise. It is a historical and contemporary fact of judicial life as the meaning of Section 1 is timelessly indeterminate. Consequently, the Fourteenth Amendment's history suggests that the various compromises the framers made to strike an agreement on the Amendment's equality language is an essential part of it "ultimate emptiness."[238] As law professor William Nelson puts it,

> Americans of 1866, like Americans of today, could all agree upon the rightfulness of equality only because they did not agree on its meaning, and their political leaders, unlike the managers of the modern bureaucratic state, were content to enact the general principle rather than its specific applications into law.[239]

If Nelson is correct, determining what equality specifically means assumes less importance in the Section 5 debate, as long as the general principle of equality remains true. Furthermore, the key question to answer in contemplating Congress' institutional role in protecting liberty is whether the Court can justly reject legislation aiming to enforce the

236. 273 F.3d 844, 856.

237. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

238. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLES TO JUDICIAL DOCTRINE 80 (1988).

239. *Id.*

equality principle, however defined, in palpable situations where social inequality reigns. While it is useful to observe that the Amendment's historical origin is rooted in an attempt to aid blacks in securing their political and legal rights in the aftermath of the Civil War, looking at history is only the beginning, and not the end, of discovering the scope of congressional power to enforce the Section 1 rights. What matters, and what should drive any argument on the issue to its logical conclusion, is that the Amendment must be given the benefit of its most favorable equality construction whenever feasible, and contrary justifications must not trump any attempt by government to provide for the common good. It is hard to aver, at least plausibly, that giving all persons, no matter what race, sex, creed or color, a lawful, and equal opportunity to succeed in a free society is not a worthy goal that is part of achieving the common good.[240]

Consequently, it can only be a distortion of history, and judicial power, to permit a court to twist the salutary language (albeit couched in generalities) of the Fourteenth Amendment into a judicial doctrine that hinders, or destroys, basic civil rights. If Nelson is accurate in saying that "[all could] agree on the rightfulness of equality,"[241] then how can it be correct, historically or otherwise, to argue that a judge or court can use the highest law of the land to say that that Congress lacks the power to make things equal? If anything, as Justice William Brennan suggested in *Katzenbach v. Morgan*,[242] congressional power to further the substantive guarantees of the Fourteenth Amendment should only be nullified if the legislature enacts laws that take away the liberty of individuals. If Congress is acting with an altruistic purpose, arguments saying that it is giving too much liberty at the expense of the states are specious and, perhaps, beside the point. After all, as Justice Stephen Breyer reminds us, formalistic notions of sovereignty should not stand in the way of the real object of the American system of federalism, which is to protect citizen liberty.[243] This idea was not lost on the Supreme Court in *U.S. Term Limits v. Thornton*,[244] a ruling that validated national authority on the basis that the people's sovereignty, and not the

240. As one framer of the Amendment, Thadeus Stevens, said: "The substance of section one . . . required only that 'the same laws must and shall apply to every mortal, American, Irishman, African, German or Turk.'" *Id.* at 116.

241. *Id.* at 80.

242. 384 U.S. 641, 651 n.10 (1966).

243. Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 702 (1999) (Breyer, J., dissenting).

244. 514 U.S. 779 (1995) (Stevens, J., Opinion for the Court, joined by JJ. Souter, Ginsburg, Breyer, and Kennedy).

sovereignty of the states, is what matters most.[245]

Does it change anything to concede that the national, or state, government has more sovereign power than the other if both are committed, in theory, to promoting social equality? What does history tell us in trying to answer that question? First, the history aimed at trying to discover the framing intent of the Fourteenth Amendment is inconclusive, because there are compelling arguments on both sides of the debate concerning the scope of national power to define Section 1 rights.[246] While of course relevant, the history of trying to determine what the founding generation meant in constructing a political system featuring separation of powers and federalism principles is nonetheless likewise indeterminate and subject to conflicting interpretations.[247] One place where history might instruct us is to look at is the objective facts of America's political and social evolution. It is virtually incontestable to argue that James Madison, the principal architect of the Constitution, went to Philadelphia with a plan in hand to replace the Articles of Confederation and strengthen considerably the power of the national government.[248] It is clear that is precisely what the Constitutional Convention did.[249] There is no doubt that the Civil War was fought, and that bloody affair, at least temporarily, resolved any issues about the supremacy of the national government over the states. It is verifiable that the Civil War Amendments were a direct response to the Union victory and the perceived problem on how to deal with the freedmen after emancipation; and that the Fourteenth Amendment was enacted to protect, at least, the black race against punitive legislation that took

245. *But see id.* at 845 (Thomas, J., dissenting). In *U.S. Term Limits*, the Court invalidated an Amendment to the Arkansas state constitution that put term limits on the length of time national representatives can serve. *Id.* at 783.

246. For one view of the scholarship and a response to it, see Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

247. *See, e.g.*, the conflicting opinions between Justices Stevens, Kennedy, and Thomas in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

248. Indeed, his writings before and after the Convention argued that the national government ought to enjoy a veto over state laws, a proposal that was defeated by his fellow statesmen in Philadelphia. Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215 (1979). Madison's reading of history told him that small republics are destined to fail if the mutability of legislation and factional rule was not contained by a republican structure. *See id.*; James Madison, *Vices of the Political System of the United States*, *reprinted in* 2 WRITINGS OF JAMES MADISON 361 (1901); James Madison, *Of Ancient and Modern Confederacies*, *reprinted in* 2 WRITINGS OF JAMES MADISON 369 (1901); Letter from James Madison to Thomas Jefferson (October 24, 1787), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 17 (1904).

249. *See* Christopher Wolfe, *Understanding the 1787 Convention*, 39 J. POLITICS 97 (1977).

away their rights as free persons.[250] History also is informative in conveying that the national government centralized its authority more after the post-1937 New Deal period. And finally, that America remained burdened by a "separate but equal" doctrine until the Supreme Court cast it off in several landmark rulings that declared an equal protection mandate for integrated schools and, significantly, the institutional capacity of the high court to enforce it.[251]

Another historical fact is that the terms of Section 5 are quite explicit, and it is counter-intuitive to find an interpretation in history to claim that it is vague. As written, Section 5 is a clear grant of legislative authority to enforce the provisions of the Fourteenth Amendment by appropriate legislation. In contrast, there is absolutely nothing in the founding document that establishes the judiciary's power to implement its principles, let alone stake a claim that it is the only branch of government to do so.[252] One could even point out, as some have,[253] that meekly accepting the Court's self-imposed claim to be the final arbiter of constitutional interpretation is to cheapen the founding document and what it represents. In other words, by "reconceiv[ing] the Constitution to buttress [a] claim to interpretive supremacy [and] treating the Constitution mainly as a set of legal restraints rather than an instrument enabling self-government," writes professor Christopher Eisgruber, "the Court has made more plausible the idea that constitutional interpretation is exclusively the province of lawyers—a professional elite who may have no special insight into justice or politics but who are expert at the manipulation of fine-grained rules."[254] In short, given the equality principle and the Amendment that epitomizes it, a judicial (and perhaps elitist) interpretation that saps the Amendment's "lifeblood"[255] and drains its language of any equality meaning is simply not persuasive in law, morality or politics. That kind of construction unduly complicates a very simple idea: that all men are created equal.

250. *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

251. Brown v. Bd. of Educ. I, 347 U.S. 483 (1954); Brown v. Bd. of Educ. II, 349 U.S. 294 (1955); Cooper v. Aaron, 358 U.S. 1 (1958).

252. CHRISTOPHER L. EISGRUBER, *Judicial Supremacy and Constitutional Distortion*, *in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE, 72-73 (2001).

253. *Id.* at 71-74.

254. *Id.* at 71. Or, as Greve puts it, "[The Court] has . . . brought us to the brink of being unable to preempt the trial bar." Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 96 (2002).

255. Gressman, *supra* note 251.

B. Institutional Competence

The Supreme Court should assume a more deferential role because it more consistent with a history that respects the basic nationalism of the founding design, along with a history that has reaffirmed (in the Civil War, Depression, New Deal, desegregation and the attainment of voting rights) the proper use of national authority as the country matured culturally and socially.[256] An integral component of that deference is to acknowledge that the states are represented in the political process and do not need extra judicial protection.[257] And more significantly, that the legislature has the institutional competence to study complex problems of policy through the open deliberative process of many (instead of the opinion writing proclivities of the few in closed chambers). The Court must recognize that insisting on a time-bound version of federalism inhibits what Justice Breyer calls a "necessary legislative flexibility,"[258] which is the ability of the citizenry to have a meaningful voice in government. As Breyer suggested in *College Savings*, the Court's tendency to treat Congress like an administrative agency in federalism cases only discourages active participation in representative government and, in the end, becomes a deprivation of freedom in an increasingly sophisticated world.[259] This frustration manifests itself further in litigation where Congress' good-faith efforts to remedy a social problem are thwarted by a hostile judiciary that is never satisfied with the kind of evidence that is compiled in the legislative record.[260] As Justice Stevens lamented in his dissent in *College Savings*, "the Court must shoulder the burden of demonstrating why the judgment of the Congress of the United States should not command our respect."[261]

C. Doctrinal Incoherence

A judiciary committed to preserving its own power at the expense

256. *See* Paul C. Light, *Government's Greatest Achievements of the Past Half Century* (Reform Watch Brief # 2, November 2000), *available at* http://www.brook.edu/ (last visited Feb. 3, 2003) (Brookings Institute policy brief suggesting federal government often had great impact on changing America and the globe). *See also* Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 702 (1999).

257. *See* U.S. v. Morrison, 529 U.S. 598, 647 (2000) (Souter, J., dissenting). *See also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

258. *College Savings*, 527 U.S. at 701 (Breyer, J., dissenting).

259. *Id.* at 702-04.

260. *See, e.g.*, *Morrison*, 529 U.S. at 630-31 (Souter, J., dissenting).

261. 527 U.S. at 693 (Stevens, J., dissenting).

of all others in a political system emphasizing a dual government of shared powers[262] wreaks havoc with the rule of law. Understanding the limits of Congress' Section 5 power is notoriously difficult because the doctrinal position a Justice stakes out is fact-sensitive and always affected by a variety of legal and political factors.[263] Thus, the Court's decision to wield its power and directly tip the balance of federalism towards the states is significant, for it pragmatically influences how citizens, and litigants, order their legal expectations in their dealings with the legal process. Court watchers and Supreme Court Justices have expressed concern that the Rehnquist Court's firm commitment of respecting, say, a state's "dignity"[264] threatens long-standing doctrinal interpretations of pre-emption, Commerce Clause jurisprudence and administrative law.[265] As Justice Stevens argued in *Florida Prepaid*, the Court's new federalism has great potential to disrupt the national uniformity of patent laws; and significantly, puts too much faith in state judiciaries to understand technical legal rules they have little familiarity with, while ironically, removing the federal bench who has the requisite expertise from their adjudication.[266] The creation and ambiguity of the Court's innovative legal standards, like the plain statement rule and the reformulated congruence and proportionality test in *Boerne* will only exacerbate the confusion in the lower courts, who are trying to make sense of them, especially in light of past precedent that the Court is systematically overturning in its frenzy to uphold state sovereignty.[267] In short, the threat of having "shifting legislative majorities"[268] disrupt the

262. "In this relation, then, the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." James Madison, *Federalist No. 39*, *in* THE FEDERALIST PAPERS 245 (Rossiter ed., 1961).

263. For an argument claiming judicial decisonmaking is affected primarily by political variable, see JEFFREY A. SEGAL ET AL., THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

264. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999).

265. *See, e.g.*, Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL'Y 93, 110-17. *See also* Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 658 (1999) (Stevens, J., dissenting); Fed. Maritime Comm. v. S. Car. State Ports Authority, 535 U.S. 743, 1881-89 (2002) (Breyer, J., dissenting); U.S. v. Lopez, 514 U.S. 549 (1995) (Souter, J., dissenting).

266. *Florida Prepaid*, 527 U.S. at 651 (Stevens, J., dissenting). Stevens also notes that usurping patent authority contradicts the reason why the Federal Circuit was created. *Id.*

267. *See, e.g.*, Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996), *overturning*, Pennsylvania Union Gas Co., 491 U.S. 1 (1989); Coll. Savings Bank v. Fla. Prepaid v. Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999), *overturning*, Parden v. Terminal Ry. Co. of Ala. State Docks Dep't, 377 U.S. 184 (1964).

268. See City of Boerne v. Flores, 521 U.S. 507, 529 (1997), where Justice Kennedy rationalized that if Congress instead of the Court was able to determine what the Constitution meant

balance of federalism has been inexplicably and illegitimately been replaced by the shifting coalitions of a divided (often five-to-four) Rehnquist Court.

IV. CONCLUSION

The significance of *Bush v. Gore*[269] is manifested in the Rehnquist Court's federalism jurisprudence. Although seven Justices in *Bush* perceived that there was an equal protection problem with the challenged Florida recount in the 2000 presidential election,[270] three Justices comprising the core group of the five that often control federalism outcomes[271] suggested that the Supreme Court needed to step into the political thicket and decide the outcome because this was not an "ordinary election, but [one dealing with] an election for the President of the United States."[272] In discharging that perceived duty Chief Justice Rehnquist observed that the usual judicial deference that federal courts give state court rulings in election cases cannot obtain.[273] As a result, the Justices selected the President of the United States and established, once again, that it is the *Supreme* Court.

The pattern of Section 5 cases decided by the Supreme Court epitomizes the same sort of judicial arrogance that characterizes the Court's ill-conceived involvement in *Bush v. Gore*.[274] By refusing to abdicate any of its judicial authority, the Court is truly the final arbiter of social policy, and it is likely to remain so until the five-to-four voting bloc in federalism cases is dissipates. Therein lies the significance of *Bush* as well, because the Court's selection of a Republican candidate insures that the controlling coalition will remain intact for years to come. When it does disappear, as it surely will in time in the interest of republican liberty, the Court will confront the messy task of trying to restore its own legitimacy and the proper, historic relationship that existed between the national government and states before the Rehnquist Court asserted its judicial will on the nation.

substantively, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."

269. 531 U.S. 98 (2000).

270. *Id.* at 100 (per curiam).

271. *Id.* at 112 (Rehnquist, J., concurring, joined by JJ. Scalia and Thomas). Justices O'Connor and Kennedy complete the frequently decisive voting coalition.

272. *Id.*

273. *Id*. at 112-13.

274. *See* Banks, *supra* note 21, at 237-64.