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THE UNEASY PARTNERSHIP:

The Balance of Power Between Congress and the Supreme Court in Interpretation of The Civil War Amendments

EMIL LIPPE, JR.*

The basic thesis of this article is that the enforcement clauses of the thirteenth,¹ fourteen,² and fifteenth³ amendments have imposed strong affirmative duties upon the United States Congress and the Supreme Court. These duties, due to their very nature, must be exercised in tandem with each other toward the overall goal of the Civil War Amendments: the guarantee that the civil rights of no American be denied him on the basis of race, color, or previous condition of servitude. In addition, a special type of constitutional stare decisis operates to prevent both branches from contracting the rights guaranteed under these amendments.

It will be made clear, therefore, that Congress has the power to enact legislation, for example, striking down school systems exhibiting so-called “de facto” racial segregation. But the point of this article is that this power is no mere reservoir of authority which may or may not be tapped by Congress according to its whim and caprice. Rather, the language, and the underlying purpose of the amendments, as well as the momentum developed by past litigation and legislation thereunder, all combine to compel Congress to address itself to the problems of “de facto” racial segregation. With this premise in mind, this article is intended to provide a policy-making perspective of the duties of the legislative and judicial branches of the government.

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¹ U.S. Const., amend. xiii, § 2. Congress shall have power to enforce this article by appropriate legislation.
² U.S. Const., amend. xiv, § 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
³ U.S. Const., amend. xv, § 2. The Congress shall have power to enforce this article by appropriate legislation.
The general test for validity of Congressional enactments to “enforce” the thirteenth, fourteenth, and fifteenth amendments.

The test for validity of statutes purportedly “enforcing” the thirteenth, fourteenth, and fifteenth amendments appears to be identical for all three amendments. It is the same as that under the necessary and proper clause,\(^4\) which was classically formulated in *McCulloch v. Maryland* as follows:

Let the end be legitimate, let it be within the scope of the constitution [or the amendment in question], and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.\(^5\)

The enforcement clauses of the three amendments are virtually identical in wording\(^6\) and have a common historical origin and overall purpose.\(^7\) The Supreme Court has indicated for each amendment that the appropriate test is that enunciated in *McCulloch*.\(^8\)

The first element of the test is that the end of the enactment be a legitimate one. There has been no indication by the Supreme Court concerning the precise reach of this element of the test, since, it appears, the legitimacy of Congressional purposes in past enactments has not been challenged. It is also doubtful that this element adds anything of substance to the second (discussed immediately below) and the fourth (requiring that the law in question be consistent with the letter and spirit of the Constitution).

The second element of the test is that the end of the enactment in question lie within the scope of the amendment involved. This is implicit in the use of the word “enforce.” Even without such judicial gloss, it would be immediately apparent that legislation wholly unrelated to the substantive provisions of an amendment would not be authorized by the enforcement clause of that amendment.

One important reason why this second element is significant is that the substantive provisions of the three amendments are different. What

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\(^4\) U.S. CONST., art. I, § 8, cl. 18. [The Congress shall have Power] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.


\(^6\) See notes 1-3 supra.

\(^7\) See text accompanying note 70 infra.

Congress may have power to accomplish under one amendment may not be within its power under another amendment.\(^9\)

Another reason for the significance of this second element of the test is that the "state action" requirement varies from one amendment to the other. The thirteenth clearly reaches purely private acts by individuals.\(^{10}\) It is equally clear that the prohibitions of the fifteenth amendment are limited to state action.\(^{11}\)

The traditional interpretation of the fourteenth amendment is that it only reaches state action.\(^{12}\) This principle has been recently reasserted.\(^{13}\) It appears, however, that the state action requirement under this amendment will be limited to cases in which the Supreme Court is applying the amendment of its own force, without Congressional enforcement legislation. Six members of the Court have expressed the view that a law prohibiting private interference with fourteenth amendment rights is authorized by section five of the amendment.\(^{14}\)

The third element of the general test for validity of Congressional enforcement legislation under the Civil War Amendments is that the means be "appropriate," or "plainly adapted," to the end sought. The significant characteristic of this element is that the Court will not second-guess a choice of means or a policy decision, but will usually defer to the Congressional choice. This was clearly illustrated by the Supreme Court's scrutiny of the Voting Rights Act of 1965 in *South Carolina v. Katzenbach*\(^{15}\) to determine its validity as enforcement of the fifteenth amendment. The test was very simply stated: "Congress may use any rational means."\(^{16}\) The Court merely noted that Congress had acted upon some evidence\(^{17}\) or had some reason for its choices.\(^{18}\)

This third element of the test was similarly expressed in *Katzenbach v. Morgan*,\(^{19}\) which considered the validity of certain other provisions of the Voting Rights Act of 1965 as enforcement of the fourteenth amendment. The Court noted that it was up to Congress to weigh the conflicting values and the Court need only "perceive a basis" for

\(^{9}\) Civil Rights Cases, 109 U.S. 3, 23 (1883).
\(^{10}\) Id. at 33.
\(^{11}\) United States v. Reese, 92 U.S. 214, 218 (1875).
\(^{12}\) Civil Rights Cases, 109 U.S. at 11.
\(^{15}\) 383 U.S. 301 (1966).
\(^{16}\) Id. at 324.
\(^{17}\) Id. at 329-30.
\(^{18}\) Id. at 334.
\(^{19}\) 384 U.S. 641 (1966).
the determination. Again, the test is merely whether the choice was a rational one. This is also the standard under the thirteenth amendment.

The fourth element of the test is the requirement that the enactment be consistent with the letter and spirit of the Constitution. This means simply that other constitutional guarantees retain their validity; the power to enforce one portion of the Constitution does not authorize the repeal of another.

For example, although a quasi-legislative, quasi-executive determination that certain states were violating the fifteenth amendment was held not to be a violation of the bill of attainder clause or the doctrine of separation of powers, there is every reason to believe that the holding would be different were a person found guilty. The bill of attainder clause was intended to implement the doctrine of separation of powers by preventing legislative punishment of specifically designated individuals or groups. If Congress were to prohibit a member of the Ku Klux Klan from practicing law before the Supreme Court unless he signed an oath declaring he had never violated the civil rights of a black American, the law would probably be struck down.

The most commonly encountered example of conflict with other constitutional provisions has been the clash of Congressional enactments with the reserved powers of the states, particularly in the area of voting qualifications. The general rule remains that the states have power to set voting qualification standards. When this power is exercised "within the domain of state interest," the state power is paramount; when it is used to circumvent a "federally protected right," there is no protection for the enactment. The problem lies in the definition of these two categories. "Federally protected right" includes both the fifteenth and fourteenth amendments. Congress is chiefly responsible for implementing the rights guaranteed by the fifteenth amendment, and may utilize "any rational means" to accomplish that purpose. The enforcement clause of the

20 Id. at 653.
22 U.S. CONSTIT., art. I, § 9, cl. 3.
23 South Carolina v. Katzenbach, 383 U.S. at 324.
28 Id.
29 Id. at 326.
30 Id. at 324.
fourteenth amendment positively grants Congress the power to exercise its discretion to determine whether and what legislation is necessary to implement that amendment's provisions.\textsuperscript{32}

Exactly how far Congress' discretion extends, and the extent of the Supreme Court's willingness to strike down such enactments, is a difficult matter. The Supreme Court found no difficulty in \textit{South Carolina v. Katzenbach} and \textit{Katzenbach v. Morgan} arising from the states' reserved powers. However, when Congress attempted to set a uniform voting age of 18 years in state and local elections, it was held in \textit{Oregon v. Mitchell}\textsuperscript{33} that this exceeded Congressional authority under the enforcement clause of the fourteenth amendment. It is not clear what the basis for this holding was, however, because there was no majority opinion in the case.

In \textit{Oregon v. Mitchell}, Justice Black argued that allowing Congress to set the minimum voting age for all elections would, if carried to its logical end, render the states "impotent figureheads."\textsuperscript{34} His point was well taken. The states' powers to set minimum age requirements for voting had often been recognized in dictum.\textsuperscript{35} If this power to set age requirements could be overridden by a purported Congressional determination of an equal protection violation,\textsuperscript{36} then little indeed would be left of this state power to set voting qualifications.

Probably the key distinction for explaining the different outcome in the two \textit{Katzenbach} cases and \textit{Oregon v. Mitchell} is the nature of the state practices at which the statutes were aimed. The former two cases both involved practices which Congress had determined were being utilized to deny the right to vote and the equal protection of the laws to certain racial minority groups. Nothing could be closer to the central purpose of the Civil War Amendments. Justice Black argued that although the fourteenth amendment does reach discrimination other than racial discrimination, different standards should prevail for racial and non-racial discrimination.\textsuperscript{37} He argued that the fourteenth amendment was not intended to render every distinction between groups of people an equal protection violation, but that it was designed to strike down every distinction, "however trifling," based upon race.\textsuperscript{38}

His argument seems fundamentally sound. Where the Supreme Court is applying the equal protection clause\textsuperscript{39} of its own force, it has fashioned

\begin{footnotes}
\item[32] Katzenbach v. Morgan, 384 U.S. at 651.
\item[34] Id. at 126 (opinion of Black, J.).
\item[36] See text accompanying notes 63-64 infra.
\item[37] Oregon v. Mitchell, 400 U.S. at 126-27 (opinion of Black, J.)
\item[38] Id. at 127.
\item[39] \textit{U.S. CONST.}, amend. xiv, § 1.
\end{footnotes}
exceptionally stringent tests for the validity of enactments which classify on the basis of race. By so doing, the Court can retain the especial solicitude for the elimination of racial discrimination which prompted passage of the Civil War Amendments in the first place, and yet allow extension of the amendments to non-racial matters where their plain wording warrants such extension. And, in this specific case, the Court can yield proper respect to the reserved powers of the states without weakening either the central purpose of the amendments or Congress’ discretionary power to enforce that purpose.

A final example of the requirement that Congressional enforcement legislation be consistent with the letter and spirit of the Constitution is that the legislation must not run contrary to what is prohibited by the amendment of its own force.

The extent of Congress’ power to "expand" or "dilute" Supreme Court interpretations of the thirteenth, fourteenth, and fifteenth amendments: a narrow view.

First, Congress can merely enact legislation to abrogate and override state legislation which has been found by the Supreme Court to violate the substantive provisions of these three amendments. This much at least is immediately apparent from the use of the word "enforce."

Second, Congress may inform "the judgment of the judiciary by particularizing the 'majestic generalities'" of the substantive provisions of the amendments. This could be accomplished by holding extensive hearings to determine that the civil rights of a particular minority were being denied, and by conducting intensive examination into the methods being used to accomplish such purposes.

Third, Congress can act to enhance the efficacy or speed the remedy for judicially determined violations by providing alternative procedural machinery. This was one of the aims of the Voting Rights Act of 1965. The background to passage of the Act was a long history of state reliance upon discriminatorily administered literacy tests and other devices in order to circumvent the fifteenth amendment's guarantees. The Court had struck down many such devices on its own, and Congress had sought to facilitate case-by-case litigation against such practices. The result was

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41 See text accompanying note 66 infra.
42 Katzenbach v. Morgan, 384 U.S. at 648-49.
43 Id.
44 South Carolina v. Katzenbach, 383 U.S. at 311-12.
45 Id. at 329.
46 Id. at 313.
only minimal improvement of black voter registration, mainly because of the burdens, expense, and delays inherent in case-by-case litigation and because of evasion or defiance of court orders.\textsuperscript{47} Congress’ response was decisive: upon a finding by the Attorney General that certain specific conditions were met, he could order the automatic suspension of tests or devices which could be used to deprive citizens of their right to vote. The Court upheld these provisions of the Act.\textsuperscript{48}

Fourth, Congress can itself determine that certain devices, although not themselves violative of the amendment’s substantive provisions, are being utilized to effect violations, and legislate against such devices.\textsuperscript{49} An ideal example can be found in the coverage formula used by the Voting Rights Act. Congress found that in many states literacy tests and other qualification devices were fair on their face, but had been framed in such a way as to facilitate discriminatory application by administering officials.\textsuperscript{50} And these devices had actually been used to deny blacks the right to vote.\textsuperscript{51} Accordingly, Congress authorized the Attorney General to suspend the use of such tests and devices where there was a low voting rate for racial minorities, and the Supreme Court upheld use of the formula.\textsuperscript{52}

It is this aspect of Congressional enforcement power which is said to authorize Congressional legislation against private conduct which the substantive provisions of the fourteenth amendment would not reach of their own force.\textsuperscript{53} The rights created by the fourteenth amendment are rights of the individual vis-à-vis the state, but these rights may be just as effectively denied by purely private action, hence it is argued that Congress should be allowed to punish such private interference with fourteenth amendment rights.\textsuperscript{54}

Thus, under this fourth area of Congressional power, it seems clear that Congress may reach activities untouchable by the Supreme Court in applying the particular amendment of its own force.\textsuperscript{55} The question is just how far this power goes. It is rather clear that Congress may not attempt to legislate concerning matters wholly unrelated to the objectives of the particular amendment. Legislation under section two of the fifteenth amendment, for example, has been invalidated only when addressed to

\textsuperscript{47} Id. at 313-14.
\textsuperscript{48} Id. at 308.
\textsuperscript{49} Katzenbach v. Morgan, 384 U.S. at 650-53.
\textsuperscript{50} South Carolina v. Katzenbach, 383 U.S. at 333-34.
\textsuperscript{51} Id. at 329.
\textsuperscript{52} Id. at 330.
\textsuperscript{53} See text accompanying notes 12-14 supra.
\textsuperscript{54} United States v. Guest, 383 U.S. at 782 (Brennan, J., concurring).
\textsuperscript{55} Katzenbach v. Morgan, 384 U.S. at 648-49.
evils "not comprehended" by the amendment—viz., reaching wholly private action or even forbidding infringements of the right to vote which were not racially motivated. But if Congress attacks an evil arguably within the scope of the amendment—the Supreme Court will probably defer to that decision. A good example is the Court's approach in *Jones v. Mayer*. There, the Court noted that Congress' determination that certain practices constituted badges and incidents of slavery, and therefore must be prohibited to promote the ban on slavery, need only be a rational determination.

Fifth, Congress can itself legislatively determine that specific practices violate the amendments and then legislate against them. In a limited sense, Congress is allowed to adjudicate, through the legislative process, the issue of a specific violation. The bill of attainder clause will undoubtedly prevent Congressional legislation aimed at individuals or groups of persons. Thus, this power is limited to the determination of state violations of the amendments.

The Court in *Katzenbach v. Morgan* upheld the challenged Act on two alternative grounds: that the legislation was "plainly adapted" or appropriate to furtherance of the aims of the equal protection clause, and that the legislation was aimed at eliminating an invidious discrimination in establishing voter qualifications. The latter ground was a Congressional determination that the use of the English literacy requirement to deny persons educated in Puerto Rico the right to vote constituted an equal protection violation. The most noteworthy aspect of the Court's discussion is, again, the extreme deference accorded to the Congressional determination. The Court stated that it was sufficient to be able to "perceive a basis upon which Congress might predicate" its judgment.

If Congress has such wide power to extend the scope and enhance the effectiveness of the substantive guarantees of the thirteenth, fourteenth, and fifteenth amendments, sheer logic would lead to the conclusion that Congress could also act to restrict the scope or dilute the effectiveness of the guarantees. Such, indeed, was the essence of an argument posed by

56 South Carolina v. Katzenbach, 383 U.S. at 326.
58 United States v. Reese, 92 U.S. at 218.
60 *Id.* at 440-41.
61 *See* text accompanying notes 22-25 *supra*.
62 384 U.S. at 652-53.
63 *Id.* at 653-56.
64 *Id.* at 656.
Mr. Justice Harlan in his dissent in *Katzenbach v. Morgan.* The majority in that case gave the argument short shrift by responding as follows:

Contrary to the suggestion of the dissent... section 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize 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. Thus, for example, an enactment authorizing the states to establish racially segregated systems of education would not be—as required by section 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

"Of its own force" means the amendment as interpreted by the Supreme Court. Where Congress expands the amendment's scope, the Court will usually defer to such expansion. But where Congress seeks to exercise its power in the opposite direction, the Supreme Court seems to say that its interpretation of the amendment rather than that by Congress conclusively settles the matter. On its face, this seems a strange and quixotic doctrine. It sounds as if the Court were committed, as a matter of policy, to the promotion of legislation accomplishing certain goals and the defeat of legislation opposing those goals. It is no answer to assert simply that Congress cannot—and end the matter there. Adherence to principled adjudication—the rule of laws and not of men—compels a reasoned response.

Precisely because of the ultra-sensitive nature of the subject matter involved, one must take this objection with utmost seriousness. It resurrects the "settled" doctrine of *Marbury v. Madison* all over again. And, perhaps more than any other area of constitutional law under contemporary conditions, it is not unlikely that an institutional power clash, perhaps of the dimension of *Worcester v. Georgia,* could occur.

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65 384 U.S. at 668.
66 384 U.S. at 651 n. 10.
67 *Morgan* dealt only with Congress' power under the enforcement clauses of the fourteenth amendment. It is this writer's position that the principle under discussion is not to be limited solely to the fourteenth amendment, but includes all three of the Civil War Amendments. The enforcement clauses of each are virtually identical in wording, see notes 1-3 *supra,* the amendments have a common historical origin and purpose, see text accompanying note 70 *infra,* the test for validity of "enforcement" legislation is the same for all three amendments, see text accompanying notes 7-8 *supra,* and the Court's discussion in *Morgan* was not explicitly limited to the fourteenth amendment enforcement power.
The balance of power between Congress and the Supreme Court in interpretation of the Civil War Amendments viewed in perspective: The Uneasy Partnership.

The three amendments under discussion are called "the Civil War Amendments" because they had their origin in that bitter and bloody war. Their one overall purpose was to eradicate slavery and all its vestiges. Yet, from the time of their passage to the present day, racial discrimination and hatred have infected the entire nation, North and South. Passions are still inflamed and political battles continue to be won and lost due to matters of race.

The central purpose of this article is to place Congressional and Supreme Court powers concerning these amendments in perspective and to argue that the two branches have been thrust into an uneasy partnership with correlative duties, powers, and restrictions. This thesis can best be developed by first examining alternative explanations of the relative balance of powers between Congress and the Supreme Court.

Professor Engdahl has forcefully argued that Congress' power to define the reach of a particular amendment, as recognized in Katzenbach v. Morgan, cannot be limited to the fourteenth amendment, but "would apply by analogy to every question of federal power." This would allow Congress to determine—so long as it had "some basis"—its own powers as well as those of the other branches of government, and would amount to "nothing less than a complete repudiation of... the doctrine of judicial review and supremacy."

There are several errors in this analysis. First, it is likely that the deference exhibited in the second rationale of Katzenbach v. Morgan will be limited to the three Civil War Amendments. Second, the argument equates strong deference with judicial abdication of responsibility. So

70 Slaughter House Cases, 83 U.S. (16 Wall.) 36, 77 (1873).
71 See text accompanying notes 63-64 supra.
73 Id. at 21.
74 This is simply because the extreme deference in Morgan to Congressional "adjudication" of an equal protection violation clearly seems to flow from the recognition that the Civil War Amendments intended Congressional leadership in their implementation. See text accompanying notes 85-87 infra.

It is also noteworthy that even though Congress purported to have determined that denial of the right to vote to those between the ages of 18 and 21 constituted an invidious discrimination, the Supreme Court refused to accept the determination. Oregon v. Mitchell, 400 U.S. 112, 118 (1970). The reason for this refusal was probably that the legislation in Oregon v. Mitchell was not limited to elimination of racial discrimination. See text accompanying notes 85-87 and 90 infra. In areas outside of racial discrimination, the reason underlying the need for deference to Congressional "adjudication" of violations of the amendments disappears.
long as the Court requires that there be "a basis" for Congressional determinations, arbitrary and irrational enactments will still fall as invalid. This amount of deference is apparently no more or less than that for Congressional enactments challenged under the due process clause. Such retention of final authority is all that is required to maintain the viability of judicial review. Indeed, excessive second-guessing by the Court probably would pose the greatest threat to the viability of judicial review.

Finally, the deference enunciated in Katzenbach v. Morgan will operate only when Congress acts to expand substantive rights. 75

Professor Cox has expressed a view which is somewhat more impressionistic. He asserts that the Supreme Court decisions may "imply reluctance to take the initiative without legislative action" 76 and foreshadow greater judicial restraint in the future. 77 The crux of his argument is that "[e]ven within familiar areas of judicial action, the Court's leadership in establishing new goals for the states to achieve in the promotion of human rights may command less public acceptance than legislative enactments stamped with the judicial imprimatur of legality." 78

This view focuses upon two extremely significant factors: the necessity for obtaining public acceptance of laws to promote civil rights, and the practical limitations upon the Supreme Court when acting alone to promote civil rights. To the extent that there is any tendency for citizens to resist expansion of civil rights, that tendency will be weakened by firm indications of legitimacy and strengthened by any indication that the expansion lacks legitimacy. 79

One scholar, Professor Buchanan, has proposed a radical alteration of the balance of power between the judiciary and the other two branches of government in all areas of constitutional judicial review. In place of the present judicial supremacy model he proposes that of "viable tension":

the viable tension model accords no binding force to a Supreme Court decision; standing alone, a Court decision obligates no one. The decision may command respect. It may even be followed by the rest of the nation. But until supported by another branch of the federal system, the decision has no legal effect. It remains a weighty, but nonobligatory, pronouncement by one branch of the federal government. 80

75 See text accompanying note 66 supra.
77 Id. at 121.
78 Id. at 94 (emphasis added).
79 See text accompanying notes 108-111 infra.
The central fallacy of Professor Buchanan's argument is that it blithely assumes that the President and the Congress will exercise their viable tension right of constitutional determination without giving in to political pressures. That Presidents may choose to defy Supreme Court decisions for political reasons is alluded to in *Marbury v. Madison*. And that current opposition to court-ordered student busing to end racial segregation has encouraged the President to propose, and the Congress to lend a favorable ear to, legislation to prohibit such busing shows that the other branches of government have not yet acquired the detachment essential to retention of any semblance of the rule of law under a system of "viable tension"—especially in the realm of rights for racial minorities. In the final analysis, Professor Buchanan does concede that "the Supreme Court is in a better position than Congress and the federal executive to deliberate calmly and impartially the enduring implications of a particular constitutional construction." 

At the other extreme, of course, lies unqualified support of judicial supremacy: "the federal judiciary is supreme in the exposition of the law of the Constitution." Admirable as this may be as an abstract proposition, the fact remains that public acceptance of laws advancing civil rights is crucial, and that the Supreme Court acting alone faces limitations on the popular acceptability of its pronouncements. This raises a dilemma: Congressional support is essential to optimal advancement of civil rights, but unlimited Congressional power poses the threat of retraction of civil rights. The answer to this dilemma lies in the unique character and purpose of the Civil War Amendments, and in the Uneasy Partnership which they have imposed upon the Supreme Court and Congress.

The very purpose of judicial constitutional review is to interpose a countermajoritarian decision-making body into the legislative process. This body—the Supreme Court—is to examine laws enacted by the legislature and actions of the executive to determine their consistency with constitutional commands and restrictions. When political pressures lead to enactments contrary to the Constitution, it is the Court's duty to strike them down. This is good in the general case because it assures optimal adherence to fundamental legal principles as opposed to the mood of the moment. It is particularly critical in the especially volatile area of civil rights.

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81 5 U.S. (1 Cranch) at 165-166. A President is constitutionally invested with "certain important political powers," in which he must use his discretion and is accountable only to the country, not Congress or the Court.
82 Buchanan, supra note 80, at 1301.
83 *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).
But the Civil War Amendments envisage Congressional leadership in the promotion of civil rights. The amendments were designed to free the Negro race, firmly establish its freedom, and protect it from all forms of oppression.85 And while the terms of the three amendments are susceptible of liberal construction to achieve these ends, it is nevertheless essential that their terms be converted into specifics, and that penalties be imposed for their violation. This must be a dynamic and ongoing process in order to meet every new and increasingly more subtle manifestation of racial prejudice. The Court recognized this soon after passage of the amendments:

All of the [Civil War] amendments derive much of their force from [their enforcement clauses]... It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.86

More recently, with specific reference to the fifteenth amendment, the Court noted that the enforcement clause “indicated that Congress was to be chiefly responsible for implementing the rights” created by the amendment.87

Correctly viewed, however, those decisions do much more than call attention to untapped potential for Congressional legislation. They indicate the presence of a significant affirmative duty to promote the central purpose of the Civil War Amendments. Senator Howard, in introducing the proposed fourteenth amendment to the Senate, described the enforcement clause as follows:

It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes upon the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty.88

Thus Congress was intended to take the lead in enforcing the amendments, and has a duty to do so. Furthermore, this is pragmatically the best way to advance their purposes because it will assure greater popular acceptance.

But of course Congress is not to be alone in enforcing the Civil War Amendments. The principle of Marbury v. Madison requires that the Court continue to obey its duty as ultimate interpreter of the Constitution. The extreme deference to congressional determinations made pursuant to the amendments’ central purpose is therefore warranted, as the analysis

85 Slaughter House Cases, 83 U.S. at 71.
86 Ex Parte Virginia, 100 U.S. 339, 345 (1879) (emphasis added).
87 South Carolina v. Katzenbach, 383 U.S. at 325-26 (emphasis added).
immediately above demonstrates, but not absolute. It does not signal abdication of judicial responsibility. Where Congress seeks to reach conduct not contemplated by the amendments, the Court will intervene. And perhaps Oregon v. Mitchell signifies that this deference does not extend to matters within the scope of the amendments' possible construction but is limited to matters within the scope of their central purpose—elimination of racial discrimination.

But there is more to this partnership. Each partner brings unique skills and abilities with him. The Court has the ability to engage in detached interpretation of the Constitution. The Court has experience in difficult problems of statutory interpretation and application. The lower courts are well adapted to hearing evidence designed to determine the facts relevant to a particular dispute. Congress, by comparison, can command greater public support for its action. Congress can initiate nationwide investigations of certain practices and obtain an overall perspective of a problem area, and then legislate against the specific types of evils uncovered. Finally, Congress is better able to balance competing policy values and render an acceptable compromise.

The partnership is an "uneasy" one because of inherent differences between the two branches. Congress has a popular constituency, to which each member must be at least somewhat responsive. The Supreme Court is relatively removed from such pressures. And, overall, the members of these institutions will have different views on close constitutional issues because of their different backgrounds and because of the different institutional framework within which each is daily involved. Generally, this conflict among branches of government is viewed as beneficial, because it generates checks and balances. But this inherent conflict must perforce give way to a higher command in this area—obedience to the imperatives of the Civil War Amendments.

Both Congress and the Supreme Court are bound by the unique duties imposed by the Civil War Amendments to exercise their unique powers in such a way as to maximize promotion of the civil rights guaranteed by the amendments. When one branch acts to expand these rights, conflict must usually be avoided. When one branch effectively dilutes these rights, the Court is bound by the Marbury principle and the Congress is bound by the enforcement clauses to intervene. This is, in the final analysis, no more than a requirement that each branch exercise

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89 See text accompanying notes 56-58 supra.
90 See text accompanying notes 37-40 supra.
92 Id. at 260.
its powers with the utmost good faith. But it is a strong good faith requirement. The history of bloodshed, hatred and division, and the legacy of continuing black oppression and racial tension teach this. And the problem of equal civil rights is no mere academic issue for scholars to argue about incessantly. As the Supreme Court has noted, the principles involved "are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth." 94

But there is more than a duty to exercise the acquired powers with good faith. Both branches of government are also bound by a unique rule of constitutional stare decisis. This rule's existence has been recently postulated by former Justice Goldberg. 95 He argues that the impact of stare decisis on constitutional safeguards of personal freedoms results in a "ratchet-like effect":

[When the Supreme Court seeks to overrule in order to cut back the individual's fundamental constitutional protections against governmental interference, the commands of stare decisis are all but absolute; yet when a court overrules to expand personal liberties, the doctrine interposes markedly less restrictive caution. 96

Five reasons were advanced in support of this theory.

First, constitutional safeguards of personal liberties are "instilled with an innate capacity for growth to enable them to meet new evils." 97 Constitutional safeguards are often framed with very specific evils in mind, but are generally intended to apply to more than the specific form or manifestation of an evil extant at a given point in history. Accordingly, the language of a provision is usually framed so as to be susceptible to wide construction. Indeed, even a narrowly worded clause such as the bill of attainder clause is interpreted as a general safeguard and not narrowly and technically and therefore soon to be outmoded. 98 This concern is certainly applicable to the Civil War Amendments—aimed at elimination of the most pervasive and persistent social evil in American history. Racial discrimination continually retreats to ever more subtle and concealed methods, and if the purpose of those amendments is to be fulfilled, they must continually be adapted to meet these challenges.

Second, constitutional stare decisis applies unevenly because this promotes the Supreme Court's duty to safeguard against the tyranny of

94 Cooper v. Aaron, 358 U.S. at 20.
95 Goldberg, supra note 84, at 65-97.
96 Id. at 74-75.
97 Id. at 82.
98 United States v. Brown, 381 U.S. at 442.
the majority.99 Most of the safeguards of personal liberties are aimed at protection of "politically impotent minorities."100 This is one of the justifications for judicial review itself. But it also warns against exclusive reliance upon the unfettered discretion of the Supreme Court for protecting minorities, because "the Court has not always been insensitive to political pressure or contemporary fears."101 Thus, a stiff resistance by stare decisis to the contraction by the Supreme Court itself of personal rights is the best safeguard against Court submission to contemporary, transitory pressures.102 Again, this concern is directly relevant to the Civil War Amendments. Their wording indicates that they were necessary in order to assure, inter alia, citizenship, due process of law, and the right to vote for racial minority citizens. And the past examples of Dred Scott v. Sanford,103 Plessy v. Ferguson,104 and Korematsu v. United States,105 read in light of the continued extreme political sensitivity of the race issue, indisputably counsel agreement with this second reason.

Justice Goldberg's third argument is that the balance of reliance interests counsel's protection of the individual.106 If the Court overrules to contract personal liberties, an ex post facto conviction may be the result; if it overrules to expand, the prosecutor loses a case.107 The notion of unfair surprise central to this argument suggests that interpretation of rights under the Civil War Amendments should not be allowed to operate restrictively.

The fourth argument emphasizes the symbolic importance of Supreme Court decisions. The lack of precedent for significant contraction of rights has shaped public expectations so as to expect continual expansions.108 This public expectation means that although there may be initial grumbling over an expansion of rights, it will soon die down and the decision will be accepted—thus aiding expansion.109 It introduces

99 Goldberg at 86-87.
100 Id. at 87.
101 Id.
102 Id. at 88.
103 Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 450 (1857). In this case, the Supreme Court refused to recognize Negro slaves as "persons" worthy of due process protection of liberty, and considered them to be no more than "property."
104 Plessy v. Ferguson, 163 U.S. 537 (1896). In this case, the Supreme Court created the "separate but equal" doctrine, holding that the state could require racial segregation in public transportation provided that the separate facilities were of equal quality.
105 Korematsu v. United States, 323 U.S. 214 (1944). In this case, the Supreme Court upheld the "exclusion" of citizens of Japanese ancestry from the west coast and their imprisonment in detention camps. No showing of specific disloyalty was required.
106 Goldberg at 88.
107 Id.
108 Id. at 90-91.
109 Id. at 91-92.
greater impersonality to the decision, contributing to the respect for "the rule of law." Conversely, even a slowdown in the rate of expansion or a slight contraction will have a "multiplier effect" in symbolic importance. These concerns are especially relevant to elimination of racial discrimination. The most powerful weapon for eradicating racial discrimination is a continued expectation of inexorable expansion of protection for racial minorities. And, conversely, even the slightest contraction would destroy years of progress, through the multiplier effect of its symbolic message.

Fifth, there is the consideration of state powers. Past resistance to expansion of rights was due to concern for protection of the states' role in the federal system. But once these powers are overridden "common sense" dictates that the states not be given back any of their previous powers to restrict fundamental liberties. Again, this argument is most significant concerning the Civil War Amendments, considering that their major thrust is directed against certain exercises of state power.

Justice Goldberg ends his argument by noting "the interesting parallel" between judicial and legislative power to interpret the Constitution, thereby referring to the Supreme Court assertion that Congress can expand but not abrogate or dilute rights under the Civil War Amendments. The similarity is much more than a mere parallel. Mr. Justice Goldberg's argument seems valid, especially so with regard to the Civil War Amendments. What he has formulated is a rule for principled constitutional adjudication. This, of course, should be respected as binding the Supreme Court. But when Congress undertakes to determine the scope of the Civil War Amendments, it, too, is exercising a power of constitutional adjudication. Hence, Congress, too, should be equally bound by this rule of constitutional stare decisis. Responsibility follows power.

Thus, footnote 10 of Katzenbach v. Morgan can be seen in proper perspective. The Supreme Court was not fostering its own policy of promoting civil rights legislation. The Court was not merely seeking to preserve its own power. Rather, the Court was responding to the affirmative duty which, concurrently with Congress, it is bound to follow: promotion of the central purposes of the Civil War Amendments. And by stating that Congress could not restrict the amendments' scope, the Court was merely recognizing that the special rule of constitutional

110 Id. at 75-76.
111 Id. at 93.
112 Id. at 94-95.
113 Id. at 95.
114 Id. at 96-97.
115 See text accompanying note 66 supra.
116 384 U.S. at 651 n. 10.
stare decisis which restricts the Court in constitutional adjudication is likewise applicable to Congress when engaged in determining the scope of the amendments.

The Uneasy Partnership and the problem of de facto racial segregation.

It has been stated that the key difference between de facto and de jure racial segregation is purpose to segregate. The state conduct "motivated by purposeful desire to perpetuate and maintain a racially segregated school" will be found unconstitutional, but "impartially maintained and administered" neighborhood school plans will not be, despite the fact that their objective results may be identical. What is the proper response for the Partnership to this situation?

The judicial branch has, in the past, evidenced a reluctance to strike down segregated school systems in the absence of a showing of discriminatory intent in their establishment. But there is an indication of abandonment of this restrictive interpretation.

Wright v. Council of the City of Emporia considered the legality of the school district reorganization which had the effect of impeding progress toward dismantling a dual system as ordered by a district court. It had been found that there was no segregative purpose behind the reorganization. The Supreme Court unequivocally rejected such a test. It was noted that the existence of a discriminatory purpose "may add to the discriminatory effect by intensifying the stigma of implied racial inferiority," and that it could serve as a factor in weighing various alternative desegregation proposals. But the Court stated that it is "the effect—not the purpose or motivation" which determines whether an action is a permissible method of dismantling a dual school system. The Court concluded: "The existence of a permissible purpose cannot sustain an action that has an impermissible effect."

On its facts, Wright is clearly limited to school systems in which unconstitutional segregation had already been ascertained and which was being eliminated under Court order. The Fifth Circuit, however, has chosen not to take so narrow a view. In Cisneros v. Corpus Christi...

118 445 F.2d at 1000.
121 Id. at 461.
122 Id.
123 Id. at 462.
124 Id.
Independent School District, the Court, sitting en banc, found the segregation in the Corpus Christi, Texas, school system constitutionally impermissible. The segregation had occurred as a result of the superimposition and maintenance of a neighborhood school system upon segregated residential patterns. The Court emphasized that the underpinning of its past decisions had been the unlawful effect of state actions. Accordingly, it reasoned as follows:

Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education.

That there was an absence of state action involved in creating the city's residential pattern is of no significance. The Board imposed a neighborhood school plan, ab initio, upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result.

It has been argued by Professor Cox that the extreme deference to Congressional enforcement legislation "clears the way for a vast expansion of congressional legislation promoting human rights." At the same time, it was asserted that the Katzenbach decisions indicated judicial reluctance to take the initiative, primarily due to recognition of the judiciary's lesser ability to command public acceptance of its pronouncements. This view appears to be in accord with political reality. Furthermore, it also maintains the primacy of congressional responsibility for implementation of equal civil rights for all regardless of race.

Professor Cox found it clear that Congress possessed the power under the enforcement clauses to eliminate de facto racial segregation in schools

125 Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972), appeal pending.
126 Id. at 150.
128 Cox, supra note 76, at 107.
129 See text accompanying notes 76-79 supra.
130 See text accompanying notes 85-89 supra.
by legislation "enforcing" the equal protection clause. Yet Congress has not chosen to follow his suggestion.

It is on this issue that theUneasy Partnership bears the greatest potential for future dynamic development. It is possible that the judiciary will become increasingly dissatisfied with congressional inaction on the issue of de facto segregation, and finally take the initiative itself. This is clearly the approach which the Fifth Circuit would choose. And it is arguable that Wright indicates that the Supreme Court is moving toward that position.

It is also possible that the Court perceives a genuine limitation of its own power in applying the amendments of their own force. If this is the case, social desirability of ending de facto segregation will not give the judiciary authority which it lacks otherwise. Perhaps Congress is violating its duty to promote actively and conscientiously the purposes of the Civil War Amendments. But it is most unclear what the judiciary can do to require obedience to this strong affirmative duty.

Conclusion

The issue of what shall be done to eliminate de facto racial segregation in public schools is most difficult and perplexing. The Uneasy Partnership must rise to the occasion by acting positively to actualize the American ideal of equal educational opportunity.

Actualization of the purposes of the Civil War Amendments remains the highest challenge to American jurisprudence and, if ever accomplished, would represent its greatest victory. To meet this challenge, the nation has created a unique institution—The Uneasy Partnership—in which Congress and the Supreme Court are simultaneously pressured, guided, and restricted in fulfillment of their task. The institution has far-reaching powers, and will be equal to the task if Congress and the Supreme Court strive in a dedicated manner to obey their duties.

131 Cox, supra note 76, at 107-108.
132 Cf. text accompanying notes 12-14, 53-54, and 85-88 supra.