

# Essay

## Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*

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Last Term, the Supreme Court sent ominous signals about the future of federal antidiscrimination law. The Court twice ruled that Congress lacked power under Section 5 of the Fourteenth Amendment to enact laws prohibiting discrimination.<sup>1</sup> In *Kimel v. Florida Board of Regents*,<sup>2</sup> the Court concluded that Section 5 did not give Congress the power to abrogate

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1. The relevant sections of the Fourteenth Amendment provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

U.S. CONST. amend. XIV, §§ 1, 5.

2. 120 S. Ct. 631 (2000).

state Eleventh Amendment immunity for suits under the Age Discrimination in Employment Act of 1967,<sup>3</sup> and in *United States v. Morrison*,<sup>4</sup> the Court held that Congress was without power under either the Commerce Clause or Section 5 to enact a provision of the Violence Against Women Act of 1994 (VAWA)<sup>5</sup> creating a federal civil remedy for victims of gender-motivated violence.<sup>6</sup>

Both *Kimel* and *Morrison* are written in forceful and broad strokes that threaten large stretches of congressional authority under Section 5. Yet the Court's Section 5 holdings were rendered without dissent.<sup>7</sup> Although in *Kimel* there were four Justices prepared to disagree strenuously with the decision's liberal interpretation of Eleventh Amendment immunity,<sup>8</sup> and although in *Morrison* there were four Justices prepared to disagree strenuously with the decision's restrictive interpretation of federal Commerce Clause power,<sup>9</sup> not a single Justice in either case was ready to vote to sustain congressional power under Section 5, even as Justice Breyer identified key deficiencies in *Morrison*'s justification for its Section 5 holding.<sup>10</sup>

3. 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997).

4. 120 S. Ct. 1740 (2000).

5. Pub. L. No. 103-322, 108 Stat. 1902 (1994).

6. The provision that was struck down can be found at 42 U.S.C. § 13981 (1994).

7. For a discussion, see Walter Dellinger & Jonathan Hacker, *14th Amendment Is Real Issue in Federalism Cases*, NAT'L L.J., Aug. 7, 2000, at A28.

8. Indeed, the disagreement was so intense that the four dissenting Justices explicitly refused to be bound by "*stare decisis*" and "to accept" recent decisions "as controlling precedents." *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 653 (2000) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting). Stevens concluded: "The kind of judicial activism manifested in cases like *Seminole Tribe* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises." *Id.* at 653-54 (citations omitted). The exasperation of the majority is also evident: "Justice Stevens disputes that well-established precedent again. . . . [T]he present dissenters' refusal to accept the validity and natural import of decisions . . . makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution." *Id.* at 643 (citations omitted).

9. *Morrison*, 120 S. Ct. at 1759 (Souter, J., dissenting); *id.* at 1774 (Breyer, J., dissenting).

10. In *Kimel*, the four dissenters were willing to address only the question of Eleventh Amendment immunity. 120 S. Ct. at 651 (Stevens, J., dissenting). Indeed, the dissenters stressed that "the *Seminole Tribe* decision unnecessarily forces the Court to resolve vexing questions of constitutional law respecting Congress' § 5 authority." *Id.* at 653. In *Morrison*, Justice Breyer, joined by Justice Stevens, doubted "the Court's reasoning rejecting" congressional Section 5 power, 120 S. Ct. at 1778 (Breyer, J., dissenting), but he found it unnecessary to "answer the § 5 question, which I would leave for more thorough analysis if necessary on another occasion," *id.* at 1780. Justices Souter and Ginsburg did not address the Section 5 issue at all.

This same pattern held true in the Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which was the Court's first major opinion to address Section 5 power in almost twenty years. In *Boerne*, all the Justices except Souter and Breyer concurred in the Court's conclusion that Congress was without Section 5 power to enact the Religious Freedom Restoration Act. Justices Souter and Breyer did not reach the question. Only in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), were four Justices—Stevens, Souter, Ginsburg, and Breyer—willing to confront the Section 5 question directly and to uphold an exercise of Section 5 power. At issue in *Florida Prepaid* was the Patent Remedy Act, 35 U.S.C. §§ 271(h), 296(a) (1994), which authorized suits for patent infringements against states.

This silence is remarkable, yet explicable. Since the New Deal, the Commerce Clause has shaped core understandings of the contours of national power. In the early 1960s, the Supreme Court took the consequential step of upholding the public accommodations provisions of the Civil Rights Act of 1964 on Commerce Clause grounds alone,<sup>11</sup> despite the fact that Congress had asserted authority to enact the legislation under both the Commerce Clause and Section 5 of the Fourteenth Amendment.<sup>12</sup> We have ever since grown habituated to the use of Commerce Clause power to sustain federal antidiscrimination law, never definitively resolving the shape and reach of Section 5 authority.

What might be called the “jurisdictional” compromise of the 1960s was forged at a time when the Commerce Clause seemed to offer boundless support for Congress’s authority to enact antidiscrimination laws. But this no longer appears to be the case. Given the Court’s current determination to impose limits on Congress’s authority to enact antidiscrimination legislation under the Commerce Clause, the time has come to examine thoroughly, at long last, a question that the Court has now rendered inescapable: the extent of Congress’s power to enact antidiscrimination legislation under Section 5 of the Fourteenth Amendment.

A growing number of the Court’s decisions<sup>13</sup> now claim authoritatively to resolve this question within a framework that seeks to protect what the Court regards as “vital principles necessary to maintain separation of powers and the federal balance.”<sup>14</sup> These decisions are enormously consequential. This past Term represents the first time since Reconstruction that the Court has declared that Congress lacked power to enact legislation prohibiting discrimination. Yet the impact of last Term’s decisions is still not clear. The decisions are rife with ambiguity. After *Kimel*, for example, it is uncertain whether and to what extent Congress can exercise its power under Section 5 to redress forms of discrimination that differ from those that courts prohibit in cases arising under Section 1 of the Fourteenth Amendment. It is equally unclear after *Morrison* whether and to what extent antidiscrimination legislation enacted under Section 5 can regulate the conduct of private actors. Depending upon how *Kimel* and *Morrison* are

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527 U.S. at 648 (Stevens, J., dissenting). Federal protection for patent property rights is, of course, at some remove from the antidiscrimination values that historically lay at the heart of the Fourteenth Amendment and its Section 5 enforcement power. See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (“Its aim was against discrimination because of race or color.”).

11. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250-52 (1964) (reserving the question of congressional power to enact the Civil Rights Act of 1964 under Section 5 of the Fourteenth Amendment).

12. *Infra* text accompanying note 22.

13. Other recent Section 5 cases (not involving the Equal Protection Clause) include *Boerne*, 521 U.S. 507, and *Florida Prepaid v. College Savings Bank*, 527 U.S. 627.

14. *Boerne*, 521 U.S. at 536.

interpreted in subsequent decisions, the Court's Section 5 jurisprudence could develop in quite different directions.

Any hope of engaging the Court with regard to the premises of this emerging Section 5 jurisprudence depends upon wrestling with the Court's reasoning now, while this new body of doctrine is still taking shape in ongoing litigation. We thus begin this Essay by analyzing Section 5 legislation within the framework advanced by the Court in its recent decisions. We argue that neither separation-of-powers nor federalism values require the kind of stringent judicial supervision of Section 5 antidiscrimination legislation that some interpretations of the Court's recent decisions might be read to authorize. After analyzing Congress's Section 5 power within the terms of the Court's recent decisions, we conclude the Essay by stepping outside the framework of these decisions. We question the court-centered model of constitutional interpretation that these decisions assume, examining the relationship between Court and Congress that actually shaped the meaning of the Equal Protection Clause in recent decades. We argue that this history justifies a continuing role for democratic vindication of equality values.

The Essay is divided into four parts. In the first, we briefly set the stage by describing the interlocking Supreme Court decisions that have brought Congress's power to enact antidiscrimination legislation under Section 5 to the top of the judicial agenda, while simultaneously rendering doubtful the nature and extent of Congress's authority to enforce the Equal Protection Clause.

In Part II, we examine the separation-of-powers constraints that the Court has imposed on Section 5 power in the *Kimel* decision. Section 5 gives Congress the "power to enforce, by appropriate legislation, the provisions of this article," and the constitutional scope of Section 5 legislation therefore doubles back on the question of how "the provisions of this article" are to be read. The Court apparently regards this peculiar doubled structure as especially threatening to its authority to interpret the Constitution, and it conceptualizes this question as an issue of separation of powers.<sup>15</sup> *Kimel* uses a test of "congruence and proportionality" to ensure that congressional Section 5 legislation does not encroach on the Court's prerogative to declare the meaning of the Fourteenth Amendment. The test

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15. The ultimate question concerns whether Congress has acted within the authority of its enumerated powers. Some have viewed this as essentially a question of federalism. See, e.g., William Cohen, *Congressional Power To Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); David Cole, *The Value of Seeing Things Differently*: *Boerne v. Flores* and *Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 40-44. But query whether the values of federalism entirely exhaust the function "of the Court in keeping Congress within the boundary of its enumerated powers." William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 318 (1996).

is intended to distinguish statutes that attempt to remedy violations of Section 1 of the Amendment from those that attempt to redefine the constitutional protections of that Section. While some lower courts have begun to read *Kimel* as requiring that legislation enforcing the Equal Protection Clause conform to the terms of the Court's cases judicially enforcing the Clause,<sup>16</sup> we argue that, properly read, *Kimel* allows for institutional variance in legislative and judicial enforcement of the Clause. This approach is supported not only by the Court's reasoning in *Kimel*, but also by the Court's reasoning in cases interpreting the equal protection guarantee of Section 1.

If *Kimel* constrains Section 5 power to ensure that Congress's efforts to enforce the Equal Protection Clause do not encroach on the prerogatives of the Court, *Morrison* constrains Section 5 power to ensure that Congress's efforts to enforce the Equal Protection Clause do not encroach on the prerogatives of the states. In Part III we analyze how *Morrison* applies the Court's "resurgent federalism"<sup>17</sup> to antidiscrimination legislation enacted under Section 5. Since the days of Reconstruction, the Court has worried that Section 5 might "authorize Congress to create a code of municipal law for the regulation of private rights" that will displace "the domain of State legislation."<sup>18</sup> *Morrison* provocatively appeals directly to these Reconstruction-era perspectives. We subject *Morrison* to critical scrutiny, examining its arguments and reasoning, and measuring its vision of federalism against the historical development of the federal civil rights tradition in the twentieth century. Although *Morrison* might be interpreted as announcing a per se rule forbidding the use of Section 5 power to regulate private parties, we argue that the decision is better read as requiring a case-by-case determination of whether Section 5 legislation is congruent and proportional to the constitutional violation it seeks to remedy. We conclude Part III by exploring whether federalism values require restrictions on Section 5 antidiscrimination legislation that is properly remedial within the meaning of *Kimel*.

However interpreted, the Court's decisions in *Kimel* and *Morrison* impose new and substantial restrictions on Congress's power to enact antidiscrimination laws under Section 5. This is because both decisions conceive of the legitimacy of Section 5 power as ancillary to judicial authority to enforce Section 1 of the Fourteenth Amendment. In Part IV we suggest that this framework of analysis misconceives how the constitutional

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16. *Infra* note 108 and accompanying text.

17. Thomas W. Beimers, *Searching for the Structural Vision of City of Boerne v. Flores: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 26 HASTINGS CONST. L.Q. 789, 790 n.7 (1999).

18. The Civil Rights Cases, 109 U.S. 3, 11 (1883). For a contemporary statement of this concern, see *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287-88 (1993) (Kennedy, J., concurring).

meaning of the Equal Protection Clause is established. We argue that the framework is not required by either federalism or separation of powers, and that it is inconsistent with the development of equal protection jurisprudence in the decades after *Brown v. Board of Education*.<sup>19</sup> Drawing on the history recounted in Part III, we illustrate how the Court struggled with the distinctive dilemmas of interpreting the Equal Protection Clause during the founding decades of our modern antidiscrimination tradition and responded by forging a relationship with Congress that cannot be conceptualized within a framework that would require Section 5 legislation to be narrowly tailored to judicial enforcement of Section 1.

In the aftermath of *Brown*, the Court invited Congress's participation in vindicating equality norms, both because Congress could secure popular acceptance of the Court's decisions interpreting the Equal Protection Clause and because the representative branches of government were an important resource for the Court as it struggled to learn from and speak to the American people about the meaning of the Fourteenth Amendment's guarantee of "equal protection of the laws." In this era, the Court established a relationship with Congress that was fluid and dynamic, and that could not be adequately comprehended by mechanical criteria like "congruence and proportionality." This institutional relationship enabled the Court to interpret the Equal Protection Clause in a manner that was attentive to evolving and contested social norms. The framework of the Court's recent Section 5 decisions represents a fundamental break with the forms of interaction that the Warren and Burger Courts cultivated with Congress in this formative period of the modern antidiscrimination tradition.

At stake in the framework of analysis advanced by *Kimel* and *Morrison*, therefore, is the survival of the very institutional ecology in which legal and social understandings of equality have provoked, inspired, and shaped each other over the last four decades. Yet at no point in last Term's cases did the Court identify or weigh the potential costs of disrupting this ecology, which its newfound interest in limiting the ways that Congress may enforce the Equal Protection Clause threatens to do. Restricting the participation of the representative branches in enforcing the Equal Protection Clause does not necessarily enhance the authority of the Court or the Constitution and, we argue, may ultimately diminish the authority of both.

This, then, is the largest set of concerns that animates the writing of this Essay and that leads us to engage in a serious and sustained way the Court's decisions in *Kimel* and *Morrison*. In order to evaluate the reach, rationale, and likely consequences of the restrictions these cases impose on Section 5

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19. 347 U.S. 483 (1954).

power, we begin our story at a provisional beginning, in an effort to understand how the question of Congress's Section 5 authority, so long shrouded in mystery, has now become a focal point of Supreme Court attention.

## I. THE CONTEMPORARY SIGNIFICANCE OF SECTION 5

The history of federal antidiscrimination law in the twentieth century features two momentous events. The first is *Brown v. Board of Education*,<sup>20</sup> when the Supreme Court breathed new life into Section 1 of the Fourteenth Amendment. The second is the passage of the Civil Rights Act of 1964,<sup>21</sup> the first major federal antidiscrimination legislation enacted since 1875. In debating and drafting the 1964 Act, Congress invoked its power under both the Commerce Clause and Section 5 of the Fourteenth Amendment.<sup>22</sup> But when the Supreme Court came to determine the Act's constitutionality in *Heart of Atlanta Motel v. United States*, it shied away from a confrontation with its own Section 5 precedents, which dated from the first Reconstruction, and chose instead to build on the case law of the New Deal settlement, which ceded very broad powers to Congress to legislate under the Commerce Clause. It translated the question of congressional authority into the relatively simple issue of whether "Congress had a rational basis for finding that racial discrimination . . . affected commerce."<sup>23</sup>

20. *Id.*

21. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 2000(a) (1994)).

22. Civil Rights Act of 1964 § 201, 78 Stat. at 243. For example, the jurisdictional provisions of Title II of the Act, which prohibits discrimination in places of public accommodation, trace the contours of both Section 5 and the Commerce Clause. The Act applies to a public accommodation "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." 42 U.S.C. § 2000a(b) (1994) (emphasis added). The Senate Report noted that the Supreme Court had in 1883 in the *Civil Rights Cases*, struck down a closely analogous federal statute that was based upon Section 5 power. But the Report explains:

There is a large body of legal thought that believes the Court would either reverse the earlier decision if the question were again presented or that changed circumstances in the intervening 80 years would make it possible for the earlier decision to be distinguished. That question, however, was not before the committee, for the instant measure is based on the commerce clause . . . of the Constitution.

S. REP. NO. 88-872, at 12 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2366. The House Report said simply that "[a] number of provisions of the Constitution of the United States clearly supply the means 'to secure these rights . . .'" H.R. REP. NO. 88-914, at 18 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2393. For a full discussion of the legislative history, see DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 292-330 (1966), which recounts in detail how Congress deliberated about the scope of its powers under the Commerce Clause and the Fourteenth Amendment to enact the public accommodations provisions of the Civil Rights Act, and see also *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 292-93 n.1 (1964) (Goldberg, J., concurring), which discusses the legislative history of the Act.

23. *Heart of Atlanta*, 379 U.S. at 258; see also *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964). In *Heart of Atlanta*, the Court stated:

The decision fixed a fateful pattern. While Congress, in what might be called a second Reconstruction,<sup>24</sup> continued to invoke its powers to enact antidiscrimination legislation under Section 5 of the Fourteenth Amendment,<sup>25</sup> *Heart of Atlanta* set a precedent that invited judicial ratification of this legislation on alternative grounds, most notably on the basis of the Commerce Clause.<sup>26</sup> This pattern persisted during the ensuing years,<sup>27</sup> progressively obscuring the relationship of federal antidiscrimination legislation to Section 5, even as Congress and the Court continued to reason about antidiscrimination legislation as enforcing the equality values of the Fourteenth Amendment.<sup>28</sup> Over time, disparities emerged between the requirements of federal antidiscrimination legislation and the constitutional requirements that courts were willing to enforce under Section 1 of the Fourteenth Amendment.<sup>29</sup> But these differences were not generally understood by the Court or others as constitutionally

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Our study of the legislative record . . . has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.

*Heart of Atlanta*, 379 U.S. at 250. Justice Douglas, writing separately, observed that "the result reached by the Court is for me much more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause. For the former deals with the constitutional status of the individual not with the impact on commerce of local activities or vice versa." *Id.* at 279 (Douglas, J., concurring); see also *id.* at 291-93 (Goldberg, J., concurring).

24. See, e.g., MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990* (2d ed. 1991).

25. See, e.g., Americans with Disabilities Act of 1990, § 2, 42 U.S.C. § 12101(b)(4) (1994); Violence Against Women Act of 1994, 42 U.S.C. § 13981(a) (1994); Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 108 Stat. 694, 694; H.R. REP. NO. 92-238, at 19 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2154 (Equal Employment Opportunity Act of 1972); S. REP. NO. 90-721, at 7 (1967), reprinted in 1968 U.S.C.C.A.N. 1837, 1843 (Civil Rights Act of 1968).

26. For examples of the Court refusing to reach the Section 5 question, see *infra* note 280.

27. There were, however, some notable exceptions. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding that Congress had authority under Section 5 to extend Title VII of the Civil Rights Act of 1964 to state employees).

28. *Infra* text accompanying notes 280-283.

29. There are, for example, discrepancies between the Court's treatment of pregnancy under Title VII and its treatment of pregnancy under the Fourteenth Amendment. Compare *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987) (stating that the first clause of the Pregnancy Discrimination Amendment "add[s] pregnancy to the definition of sex discrimination prohibited by Title VII"), and *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."), with *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."). There are also discrepancies between Title VII's requirements for proving discrimination and those of the Fourteenth Amendment. Compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (allowing claims of discrimination in cases of disparate impact), with *Washington v. Davis*, 426 U.S. 229 (1976) (requiring plaintiffs alleging discrimination to prove that the state acted with discriminatory purpose).



problematic; they could always be accommodated by the broad authority of the Commerce Clause.

Recently, however, three lines of decision have combined to disturb this arrangement. First, the Court has signaled its intention to abrogate the New Deal settlement and reassert judicial control over the scope of Commerce Clause power. In *United States v. Lopez*,<sup>30</sup> the Court struck down the Gun-Free School Zones Act of 1990 as exceeding Congress's authority to regulate interstate commerce. In *Morrison*, the Court expanded the logic of *Lopez* into the domain of federal civil rights law, holding that 42 U.S.C. § 13981, the provision of VAWA creating a federal civil remedy for victims of gender-motivated violence, could not be sustained as an exercise of Commerce Clause power.<sup>31</sup> The Court stressed that the reach of § 13981 was not limited by any "jurisdictional element" connecting federally regulated behavior to interstate commerce<sup>32</sup> and that § 13981 sought to assert federal control over "noneconomic activity"<sup>33</sup> that was peculiarly within an area "of traditional state regulation."<sup>34</sup> Despite extensive congressional findings documenting the adverse effects of gender-motivated violence on interstate commerce<sup>35</sup>—findings far more extensive than those that the Court had found adequate to sustain the Civil Rights Act of 1964 in *Heart of Atlanta*<sup>36</sup>—the Court ruled that upholding this exercise of the commerce power over an activity that is not itself "commercial" or "economic" in character would obliterate the "distinction between what is truly national and what is truly local."<sup>37</sup> If § 13981 were to be upheld as a constitutional exercise of congressional power, therefore, it would have to be under Section 5 of the Fourteenth Amendment.

*Lopez* and *Morrison* impose uncertain restrictions on the use of the commerce power. Although the present Court does not seem inclined to attack *Heart of Atlanta* by holding that federal regulation of discrimination in public accommodations or employment involves matters that are "noneconomic" or "truly local," the Court has now begun to use criteria to restrict Congress's power under the Commerce Clause that are indifferent to the varying forms and settings in which discrimination occurs. The Court's new Commerce Clause cases tend toward equating national power with power to regulate "economic" events, activities, and transactions, a category whose definition is not especially clear, but whose purpose seems

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30. 514 U.S. 549 (1995).

31. *United States v. Morrison*, 120 S. Ct. 1740, 1740-54 (2000).

32. *Id.* at 1751-52.

33. *Id.* at 1751.

34. *Id.* at 1753.

35. *Id.* at 1752.

36. *Id.* at 1763 (Souter, J., dissenting).

37. *Id.* at 1754.

to be to restrict Congress from enacting legislation that intrudes upon "traditional" areas of state regulation, like education, the family, or the criminal regulation of intrastate violence.<sup>38</sup>

*Morrison* dramatically illustrates how the Court's revived limitations on the commerce power now materially constrict the effective scope of federal antidiscrimination legislation. Because exercise of VAWA's civil rights remedy would impose federal constraints on violence in the family, the Court treats the law as interfering with "noneconomic" matters that, from the standpoint of the Court's new Commerce Clause jurisprudence, are "local," beyond the scope of legitimate national concern. From the standpoint of Fourteenth Amendment values, however, there is no reason to assume that sex discrimination in the administration of the criminal law is outside federal regulatory concern, because the state's failure to enforce prohibitions on assault in an evenhanded way leaves women unprotected from attack by family members as well as by others. Discrimination in state regulation of family life has no special immunity from the reach of the Fourteenth Amendment.<sup>39</sup> The Court's recent limitations on Congress's powers under the Commerce Clause thus focus renewed attention on Section 5 as an alternative source of constitutional authority, one adequate to the task of combating discrimination in whatever social forms or settings it happens to manifest itself.

This reinvigorated focus on Section 5 has been intensified by a second line of recent decisions. In its 1996 opinion in *Seminole Tribe v. Florida*,<sup>40</sup> the Court held that congressional legislation enacted pursuant to Article I powers, such as the Commerce Clause, cannot abrogate the Eleventh Amendment immunity of states, which "prevents congressional authorization of suits by private parties against unconsenting States"<sup>41</sup> in federal courts. Two years later, in *Alden v. Maine*,<sup>42</sup> the Court held that this immunity also prohibited the federal government from subjecting "nonconsenting States to private suits for damages in state courts."<sup>43</sup>

The contours of Eleventh Amendment immunity are extremely complex; but suffice it to say that the Amendment bars suits by private parties that seek money or damages "resulting from a past breach of a legal

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38. See *id.* at 1753-54; *United States v. Lopez*, 514 U.S. 549, 564 (1995).

39. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Orr v. Orr*, 440 U.S. 268 (1979); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); see *infra* text accompanying notes 291-293.

40. 517 U.S. 44 (1996).

41. *Id.* at 72. For a good discussion of *Seminole Tribe*, see Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1.

42. 527 U.S. 706 (1999).

43. *Id.* at 712. For a critique, see Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000).

duty.”<sup>44</sup> Since large stretches of federal law are ordinarily enforced by exactly such suits, it is fair to conclude that the “net result” of *Seminole Tribe* and *Alden* will be “that Congress may regulate the states, but in the end will lack the practical tools necessary to do so with maximum effectiveness.”<sup>45</sup> This would certainly be true of most federal antidiscrimination law, which is normally enforced by private suits against the states. In fact, federal antidiscrimination law that cannot be sustained as an exercise of Section 5 power will probably be enforced against the states primarily through the cumbersome and unwieldy interventions of federal agencies.<sup>46</sup>

Eleventh Amendment immunity, however, can be abrogated by legislation enacted “pursuant to Congress’s § 5 power.”<sup>47</sup> The upshot is that the scope of Section 5 power has now become the measure of what federal antidiscrimination legislation may effectively be applied to the states. The Court’s evasion in *Heart of Atlanta* has thus come home to roost. In the past thirty years, Congress has exercised its commerce authority to develop a rich and complex jurisprudence of federal antidiscrimination legislation, which is in many of its particulars in tension with judicial enforcement of Section 1 of the Fourteenth Amendment. The question of whether this law may properly be applied to the states will depend upon how the Court chooses to conceptualize the relationship between Section 5 and Section 1.

Much is at stake in this issue. So, for example, the Court has interpreted Section 1 to require a showing of “discriminatory purpose” as a

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44. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). There are several important exceptions to Eleventh Amendment immunity. The most significant is that it does not extend to the kinds of “actions against state officers for injunctive or declaratory relief” that were approved in *Ex parte Young*, 209 U.S. 123 (1908). *Alden*, 527 U.S. at 757. For a discussion of this distinction, see *Papasan v. Allain*, 478 U.S. 265 (1986); and Carlos Manuel Vázquez, *Night and Day: Coeur d’Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998). Eleventh Amendment immunity does not apply to suits by the United States, nor does it “extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State.” *Alden*, 527 U.S. at 755-56; see also *Conley v. Vill. of Bedford Park*, 215 F.3d 703, 709 n.3 (7th Cir. 2000); *Narin v. Lower Merion Sch. Dist.*, 206 F.3d 323, 331 n.6 (3d Cir. 2000); *Horwitz v. Bd. of Educ.*, No. 98-C-6490, 2000 U.S. Dist. LEXIS 8021, at \*9-10 (N.D. Ill. June 6, 2000). Eleventh Amendment immunity does not prohibit “a suit for money damages . . . prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.” *Alden*, 527 U.S. at 757. Eleventh Amendment immunity also may be waived. In a recent decision, however, the Court suggested that there may be limits to Congress’s authority to condition the receipt of “federal funding” on the express waiver of Eleventh Amendment immunity. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999).

45. Meltzer, *supra* note 43, at 1026.

46. States cannot assert Eleventh Amendment immunity against the federal government. *Supra* note 44.

47. *Alden*, 527 U.S. at 756; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

prerequisite for a judicial finding of constitutional invalidity,<sup>48</sup> yet a violation of Title VII can be established merely upon a showing of “disparate impact.”<sup>49</sup> In order to uphold the application of the disparate impact standard of Title VII to a state, the Eleventh Circuit recently felt itself obliged to reconcile these two standards by concluding that “although the form of the disparate impact inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the core injury targeted by both methods of analysis remains the same: intentional discrimination.”<sup>50</sup>

If the conclusion of the Eleventh Circuit were taken seriously, it would suggest a fundamental reworking of an important area of Title VII jurisprudence.<sup>51</sup> We might then imagine Title VII divided between those standards suitable for application to states, because duplicative of judicial practice under Section 1, and those standards suitable for application to private parties, because developed under the aegis of the Commerce Clause. Or we might imagine an incremental judicial reworking of the body of Title VII law so as to bring it into line with the constricted set of standards constitutionally applicable to states. Neither alternative is attractive. They can be avoided, however, only if we are able to distinguish congressional power under Section 5 from judicially enforceable standards under Section 1.

But it is just this possibility that appears to be threatened by the Court’s newly developing case law on the scope of Congress’s powers under the enforcement clause of the Fourteenth Amendment. We are referring, of course, to a third line of decisions, initiated by the Court’s 1997 decision in *City of Boerne v. Flores*,<sup>52</sup> holding that the Religious Freedom Restoration Act of 1993 (RFRA)<sup>53</sup> was not a constitutional exercise of Section 5 power.<sup>54</sup> *Boerne* was the first significant decision explicitly to address the scope of Section 5 in almost twenty years.

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48. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

49. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Congress codified the disparate impact standard in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074-76, which was meant to reverse the Supreme Court’s interpretation of Title VII in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

50. *In re Employment Discrimination Litig. Against Alabama*, 198 F.3d 1305, 1322 (11th Cir. 1999).

51. We should add that it is not at all clear that the Eleventh Circuit meant for its own conclusion to be taken seriously, for the court goes out of its way to emphasize the view that disparate impact doctrine can be applied to the states without alteration. The question, however, is whether this view is plausible or sustainable if “the core injury targeted” by such doctrine is truly “intentional discrimination.”

52. 521 U.S. 507 (1997).

53. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

54. The Court subsequently applied *Boerne* in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

Congress enacted RFRA “in direct response” to the Court’s decision in *Employment Division v. Smith*,<sup>55</sup> which had sharply constricted the approach of *Sherbert v. Verner*<sup>56</sup> by holding that constitutional rights of free exercise of religion would not, for the most part, be violated by neutral, generally applicable regulations of conduct.<sup>57</sup> Congress disagreed and passed RFRA “to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened.”<sup>58</sup> RFRA was justified as an exercise of Congress’s Section 5 power “to enforce” First Amendment free exercise rights as incorporated in the Due Process Clause of Section 1 of the Fourteenth Amendment.<sup>59</sup>

In *Boerne*, the Court declared that Congress lacked power under Section 5 to enact RFRA. It began its analysis by observing “that § 5 is ‘a positive grant of legislative power’ to Congress”<sup>60</sup> and that its “scope” was therefore to be interpreted in “broad terms.”<sup>61</sup> Reaffirming *Katzenbach v. Morgan*,<sup>62</sup> the Court stated that “[i]t is for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference.”<sup>63</sup> But the Court then distinguished between the power “to enforce” the provisions of the Fourteenth Amendment and “the power to determine what constitutes a constitutional violation.”<sup>64</sup> It held that Section 5 authorized the former, but not the latter:

Congress’s power under § 5 . . . extends only to “enforc[ing]” the provisions of the Fourteenth Amendment. The Court has described this power as “remedial[.]” The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.<sup>65</sup>

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55. *Boerne*, 521 U.S. at 512 (discussing *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

56. 374 U.S. 398 (1963).

57. For a summary of the relevant holding of *Smith*, see *Boerne*, 521 U.S. at 512-14.

58. 42 U.S.C. § 2000bb(b)(1) (1994).

59. RFRA applied “to all Federal and State law, and the implementation of that law, whether statutory or otherwise.” *Id.* § 2000bb-3(a).

60. *Boerne*, 521 U.S. at 517 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

61. *Id.*

62. 384 U.S. 641.

63. *Boerne*, 521 U.S. at 536 (quoting *Morgan*, 384 U.S. at 651).

64. *Id.* at 519.

65. *Id.* (first alteration in original) (citation omitted). This distinction and holding were aimed at the alternate holding of *Morgan*, which seemed to cede to Congress the power independently to interpret the meaning of Section 1. See *Boerne*, 521 U.S. at 527-29; Robert A. Burt, *Miranda and*

The Court initially argued that maintaining the distinction between the power to remedy constitutional violations and the power to determine the nature of constitutional rights was necessary in order to preserve the supremacy of the Constitution. "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'"<sup>66</sup>

But because the Constitution remains "superior, paramount law" whether interpreted by the Court or by Congress, so long as either institution chooses to regard it as such, what really seems to be at stake for the Court in the distinction between remedial and substantive legislation is the preservation of judicial control over the ultimate meaning of the Constitution, at least in the context of cases properly litigated before the Court. In *Boerne*, the Court was plainly provoked by Congress's openly expressed purpose to nullify the Court's own interpretation of the First Amendment in *Smith*.<sup>67</sup> RFRA posed a direct challenge to the Court's interpretation of the Free Exercise Clause, a challenge that the Court was determined to resist:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. . . . When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. . . . [I]t is this Court's precedent, not RFRA, which must control.<sup>68</sup>

*Boerne* thus reasserts the basic precept of *Marbury*: In the last instance, it is for "the Judicial Branch . . . to say what the law is."<sup>69</sup>

*Boerne* frankly concedes that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and [that] Congress must

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*Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 83-84. For a discussion of the literature, see Gary C. Leedes, *State Action Limitations on Courts and Congressional Power*, 60 N.C. L. REV. 747, 778-82 (1982); and Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996).

66. *Boerne*, 521 U.S. at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

67. See *supra* text accompanying note 58 (quoting RFRA's statement of purpose).

68. *Boerne*, 521 U.S. at 536.

69. *Id.*

have wide latitude in determining where it lies.”<sup>70</sup> But in a context in which “common sense” suggested that RFRA was “a congressional effort to overrule the Supreme Court on a point of constitutional interpretation,”<sup>71</sup> the Court insisted that the line “exists and must be observed.”<sup>72</sup>

To ensure that Congress would not exceed its legitimate powers under the Fourteenth Amendment, *Boerne* proposed that the line be discerned by a test of “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”<sup>73</sup> The Court concluded that:

RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.<sup>74</sup>

The Court’s new interest in constraining Section 5 power, when considered in light of the developments in Commerce Clause and Eleventh Amendment jurisprudence we have just discussed, raises disconcerting questions for the future of federal antidiscrimination law. Limitations on Commerce Clause power, imposed in the name of federalism by *Lopez* and *Seminole Tribe*, have reemphasized the importance of congressional Section 5 power, while *Boerne* has simultaneously imposed a new and uncertain restriction on the nature of that power. When the 1999 Term began, the Court had not yet applied either its resurgent federalism or its intensified solicitude for separation of powers to federal antidiscrimination legislation. But this restraint ended in January 2000, when *Kimel* held that Congress was without power under Section 5 to enact the Age Discrimination in Employment Act of 1967 (ADEA).<sup>75</sup> Five months later, *Morrison* held that Congress was without power under either the Commerce Clause or Section 5 to create in VAWA a civil cause of action for victims of gender-motivated violence.

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70. *Id.* at 519-20.

71. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 469 (1994); *id.* at 473 (“That is what RFRA’s supporters wanted, and that is what they got.”); see also Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 153 (1995).

72. *Boerne*, 521 U.S. at 520.

73. *Id.*

74. *Id.* at 532.

75. The ADEA retains its force, of course, as a valid exercise of the commerce power. It is thus fully applicable to private parties and to cities, and it is enforceable against states by the federal government. See *supra* note 44.

In the next Part of this Essay we examine how *Kimel* applies the separation-of-powers concerns of *Boerne* to Congress's power to enact remedial antidiscrimination legislation under Section 5. In the Part that follows, we evaluate *Morrison's* use of federalism to restrict otherwise properly remedial exercises of Section 5 power. To do so, we offer a brief history of the development of our modern antidiscrimination tradition. In Part IV we deploy this history to raise more fundamental questions about whether the model of constitutional interpretation on which *Boerne* rests is appropriate for reasoning about legislative or judicial enforcement of the Equal Protection Clause.

## II. KIMEL AND THE SEPARATION OF POWERS

The question for decision in *Kimel* was whether the ADEA could be enforced against states in private suits for damages and back pay. Congress had extended the protections of the ADEA to state and federal employees in 1974,<sup>76</sup> and the Court thereafter upheld the statute in *EEOC v. Wyoming*<sup>77</sup> as "a valid exercise of Congress' powers under the Commerce Clause."<sup>78</sup> But in 1996 the Court's decision in *Seminole Tribe* interposed Eleventh Amendment immunity as a bar to such suits unless the ADEA could be upheld as a valid exercise of Section 5 power.<sup>79</sup>

The ADEA stringently regulates age-based discrimination. Under accepted equal protection doctrine, by contrast, courts use a lenient "rational basis" standard to scrutinize age-based classifications.<sup>80</sup> The question in *Kimel* was whether Congress could adopt age discrimination legislation under Section 5 whose liability rules differed from those that the Court was willing to apply in its own enforcement of Section 1.

*Kimel* adopts *Boerne's* framing of this issue. Like *Boerne*, it begins with the proposition that the exercise of congressional Section 5 power is "entitled to much deference."<sup>81</sup> Like *Boerne*, *Kimel* distinguishes between remedial and substantive power, and it invokes the "congruence and proportionality" test to separate one from the other.<sup>82</sup> "Our task," *Kimel*

76. Fair Labor Standards Act of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 74.

77. 460 U.S. 226 (1983).

78. *Id.* at 243. The Court added: "We need not decide whether it could also be upheld as an exercise of Congress's powers under § 5 of the Fourteenth Amendment." *Id.*; see also *Gregory v. Ashcroft*, 501 U.S. 452, 468-70 (1991) (discussing *EEOC*, 460 U.S. 226); *EEOC*, 460 U.S. at 234 & n.6 (listing district court opinions that had upheld the extension "as an exercise of Congress' power under either the Commerce Clause or § 5 of the Fourteenth Amendment").

79. Justices Stevens, Souter, Ginsburg, and Breyer dissented in *Kimel* on the grounds that *Seminole Tribe* was wrongly decided. *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 653 (2000) (Stevens, J., dissenting); see also *supra* notes 8, 10.

80. See, e.g., *Gregory*, 501 U.S. at 470-71; *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

81. *Kimel*, 120 S. Ct. at 644 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

82. *Id.*



states, “is to determine whether the ADEA is in fact . . . an appropriate remedy or, instead, merely an attempt to substantively redefine the States’ legal obligations with respect to age discrimination.”<sup>83</sup>

The difficulty, however, is that neither *Boerne* nor *Kimel* ever clearly explains the distinction between remedial and substantive legislation.<sup>84</sup> The Court appears to believe that substantive legislation seeks to define the “unconstitutional behavior” that is prohibited by the Constitution, whereas remedial legislation purports instead to be “instrumentally useful” in preventing or deterring behavior that is otherwise properly defined as unconstitutional.<sup>85</sup> *Boerne* proposes the congruence and proportionality test as a means of identifying the “basic aims” of Section 5 legislation.<sup>86</sup> Legislation “designed to” remedy “unconstitutional behavior” is within the scope of Section 5, whereas laws that “attempt a substantive change in constitutional protections” are not.<sup>87</sup> The function of the *Boerne* test, the Court has explained, is to ensure “that the *object* of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations.”<sup>88</sup>

Insofar as the point of the *Boerne* test is to distinguish substantive from remedial legislation, its basic thrust, in the words of Chief Justice Marshall’s venerable opinion in *McCulloch v. Maryland*,<sup>89</sup> is to ascertain whether “congress, under the pretext of executing its powers,” has passed “laws for the accomplishment of objects not intrusted to the government.”<sup>90</sup> The test ultimately seeks to ascertain congressional intent;<sup>91</sup> it does not purport to restrict congressional power that is exercised for a proper purpose. This clarifies why *Boerne* could propose the congruence and proportionality test while simultaneously asserting that congressional

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83. *Id.* at 648.

84. For a discussion of the difficulties of this distinction, see, for example, Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 767-70 (1998).

85. Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 87-88.

86. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999); see also *Kimel*, 120 S. Ct. at 645 (applying the test).

87. *Boerne*, 521 U.S. at 532.

88. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999) (emphasis added).

89. 17 U.S. (4 Wheat.) 316 (1819).

90. *Id.* at 423.

91. For example, in *Florida Prepaid v. College Savings Bank*, the Court applied *Boerne*’s congruence and proportionality test to determine whether Congress’s abrogation of state sovereign immunity from patent claims was intended to remedy potential due process violations, or instead whether “[t]he statute’s apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime.” 527 U.S. at 647-48. The Court noted that although the latter purposes “are proper Article I concerns,” Article I “does not give Congress the power” to abrogate state sovereign immunity. *Id.* at 648.

“conclusions” about the necessary scope of proper Section 5 legislation “are entitled to much deference.”<sup>92</sup>

On this account, however, the *Boerne* test is ambiguous with respect to two fundamental questions. First, *Boerne* asks courts to determine whether Section 5 legislation is congruent and proportional to the goal of remedying or deterring violations of the Fourteenth Amendment. Yet *Boerne* does not specify what should count as equal protection violations for purposes of applying the test, an ambiguity of immense practical significance in a decision like *Kimel*. In this Part of our Essay, we analyze *Kimel*'s application of the congruence and proportionality test to explore the nature of the equal protection violations that, consistent with *Boerne*'s concern to preserve judicial authority “to say what the law is,” Congress can be empowered to deter or remedy by exercise of its Section 5 power. At stake in this question is whether legislative and judicial enforcement of the Equal Protection Clause may vary.

Second, the *Boerne* test never specifies how much congruence and proportionality is constitutionally necessary. *Boerne*'s requirement that Section 5 legislation have “the object” of enforcing the Fourteenth Amendment implies, of course, that there must be *some* relationship between the legislation and the goal of remedying or deterring violations of the Equal Protection Clause. But *Boerne* gives little or no guidance about how tight a fit a court should require between congressional legislation and the Court's own enforcement of Section 1. Presumably the degree of congruence and proportionality required of Section 5 legislation will depend on the constitutional values potentially compromised by that legislation. *Boerne* and *Kimel* each explain their use of the test by reference to only one such value, which is the need of the Court to retain control over the articulation of “what the law is.” This would suggest that Section 5 legislation need possess only so much congruence and proportionality as to render it plausible that the legislation was enacted for a purpose approved by the Court.<sup>93</sup> The congruence and proportionality requirement might be

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92. *Boerne*, 521 U.S. at 536. As Chief Justice Marshall went on to say in *McCulloch*, “But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.”

17 U.S. (4 Wheat.) at 423.

93. In both *Boerne* and *Kimel*, the Court was prepared to accord Congress a good deal of leeway in order to achieve permissible ends. Thus *Boerne* explicitly reaffirmed the basic principle of Section 5 jurisprudence that properly remedial congressional legislation can prohibit “conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” *Boerne*, 521 U.S. at 518 (citations omitted). *Boerne* went out of its way to approve earlier relevant precedents, like *City of Rome v. United States*, 446 U.S. 156 (1980), *Oregon v. Mitchell*, 400 U.S. 112 (1970), *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and even *Katzenbach v. Morgan*, 384 U.S. 641 (1966), in which the Court had interpreted “the sweep of Congress's enforcement power” under the Reconstruction Amendments to extend considerably

stricter, however, if the *Boerne* test were to be used as a vehicle for the protection of other constitutional values, such as federalism. We discuss these issues in Part IV after we have considered the question of federalism in the context of the *Morrison* case.

#### A. Applying the *Boerne* Test to Federal Antidiscrimination Legislation

To determine whether Section 5 legislation is congruent and proportional to the goal of remedying or deterring violations of the Fourteenth Amendment, one must first identify the class of violations that Congress is empowered to remedy or deter. The *Kimel* opinion itself is highly equivocal in this regard.

*Kimel* begins by focusing on the category of age within the Court's own equal protection jurisprudence. When courts review claims of age discrimination in equal protection cases arising under Section 1, they employ rational basis review. Rational basis scrutiny means "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."<sup>94</sup> The statutory requirements of the ADEA, however, effectively elevate "the standard for analyzing age discrimination to heightened scrutiny."<sup>95</sup> *Kimel* stresses this disparity in the first half of its opinion, noting that the ADEA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."<sup>96</sup> This half of the opinion ends with the conclusion that "the ADEA is 'so out of proportion to a supposed remedial or preventive object

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beyond the bounds of what a court might find to violate these Amendments. *Boerne*, 521 U.S. at 518. *Kimel* agreed that

Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.

*Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 644 (2000) (citations omitted). *Kimel* recognized that the Constitution does not preclude "Congress from enacting reasonably prophylactic legislation." *Id.* at 648. When acting remedially for an objective properly within the scope of Section 5 power, therefore, Congress can regulate otherwise constitutional behavior for the instrumental purpose of protecting constitutional rights. It can act both to "prevent . . . constitutional violations," *Boerne*, 521 U.S. at 535, and to "deter[]" them, *id.* at 518. It follows from these conclusions that Section 5 legislation will frequently be neither tightly congruent nor proportional to whatever baseline definition of a constitutional violation the Court is prepared to require.

94. *Kimel*, 120 S. Ct. at 646.

95. *Id.* at 648.

96. *Id.* at 647.

that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”<sup>97</sup>

Although this would appear to end the matter, *Kimel* promptly launches into a second analysis by flatly asserting that this disproportionality is not actually dispositive. The fact that “the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry.”<sup>98</sup> That answer, apparently, can come only from an independent review of the legislative history of the ADEA. In this half of its analysis, *Kimel* performs something much closer to an ordinary judicial inquiry into legislative intent. It reviews the evidence before Congress to determine whether Congress had intended to enact remedial or substantive legislation. Only after finding that “Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age,”<sup>99</sup> and that Congress therefore “had no reason to believe that broad prophylactic legislation was necessary in this field,” does *Kimel* ultimately conclude that the ADEA is “not a valid exercise of Congress’s power under § 5 of the Fourteenth Amendment.”<sup>100</sup>

The two halves of *Kimel*’s analysis correspond to two distinct understandings of the *Boerne* test. *Kimel* first asks whether the prohibitions of the ADEA are congruent and proportional to the goal of remedying or deterring “state employment decisions and practices [that] would likely be held unconstitutional under the applicable equal protection, rational basis standard.”<sup>101</sup> It interprets the test as assessing the congruence and proportionality of the ADEA to the goal of remedying or deterring *conduct that in litigation a court would hold in violation of the Equal Protection Clause*. In the second half of its analysis, however, *Kimel* seems to probe congressional intent to ask whether Congress believed that the regulations of the ADEA were necessary to combat “unconstitutional discrimination.”<sup>102</sup> Insofar as this inquiry can be translated into the technical terms of the *Boerne* test, it focuses on the question of whether the

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97. *Id.* (quoting *Boerne*, 521 U.S. at 532).

98. *Id.* at 648. The Court continued:

Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States’ legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress’s action.

*Id.*

99. *Id.* at 649.

100. *Id.* at 650.

101. *Id.* at 647.

102. *Id.* at 650.

ADEA is congruent and proportional to the goal of remedying or deterring conduct that would violate the Equal Protection Clause.

The Court in *Boerne* was so plainly provoked by Congress's expressed desire to "make a substantive change in the governing law"<sup>103</sup> that it barely paused to consider the distinction between these two interpretations of its own test.<sup>104</sup> Yet the difference is of great practical and theoretical importance. *Kimel*'s first interpretation of the *Boerne* test is quite harsh. Rational basis review is highly permissive. "[A]bsent some reason to infer antipathy,"<sup>105</sup> it requires those who challenge a legislative classification to "carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."<sup>106</sup> Rational basis review requires plaintiffs to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."<sup>107</sup> Courts using rational basis review therefore only rarely find constitutional violations.

If the exercise of congressional Section 5 power must be congruent and proportional to behavior that a court would hold unconstitutional under rational basis review, virtually all antidiscrimination legislation, except that protecting racial minorities and women, will be rendered beyond Congress's Section 5 power. Some lower courts are in fact already beginning to interpret *Kimel* in this unforgiving way:

On the question whether a statute . . . enforces the Fourteenth Amendment, *Kimel* establishes two principal propositions. First, because the rational-basis test applies to age discrimination, almost all of the ADEA's requirements stand apart from the Constitution's rule. Most age discrimination is rational, and therefore constitutional, yet the Act forbids it. The ADEA therefore does not "enforce" the Fourteenth Amendment. Second, there is no need for prophylactic rules to catch evasions of the rational-basis test by state governments. Congress did not find that such a problem exists, and there is no evidence of one. The ADEA therefore cannot be understood as enforcement legislation.<sup>108</sup>

It is important to bear in mind, therefore, that *Kimel* itself, in the second half of its analysis, offers an alternative interpretation of the *Boerne* test—

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103. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

104. For a careful consideration of this issue, see Cole, *supra* note 15, at 59-71; and Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 189-92 (1997).

105. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

106. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79 (1911).

107. *Vance*, 440 U.S. at 111.

108. *Erickson v. Bd. of Governors*, 207 F.3d 945, 948-49 (7th Cir. 2000) (citation omitted); see also *Kazmier v. United States*, 225 F.3d 519, 524 (5th Cir. 2000); *Cooley v. Miss. Dep't of Transp.*, 96 F. Supp. 2d 565, 566-67 (S.D. Miss. 2000).

one that comports far more comfortably with both the stated purpose of the *Boerne* test and with the Court's own equal protection jurisprudence.

In the second half of its analysis, *Kimel* asks whether the regulations of the ADEA are congruent and proportional to the task of remedying or deterring "unconstitutional discrimination."<sup>109</sup> This version of the *Boerne* test does not ask whether Section 5 legislation remedies or deters conduct that a court in adjudication would find unconstitutional, but instead asks whether Section 5 legislation remedies or deters conduct that is unconstitutional. We are so accustomed to thinking about courts as the sole venue within which constitutionality is determined that it may require imaginative effort to keep these two different accounts of the *Boerne* test analytically distinct. But they are actually quite different from each other, and rational basis review is an excellent context in which to grasp the discrepancy between the two.

Rational basis review establishes a procedural framework to guide courts in adjudicating certain claims of unconstitutional state action.<sup>110</sup> The Court has explicitly recognized that this framework embodies "a paradigm of judicial restraint."<sup>111</sup> As the Court carefully explained in its very first case addressing age-based discrimination, "action by a legislature is presumed to be valid" when courts employ "the rational-basis standard."<sup>112</sup> To *presume* that state action is valid is not to find it so; it is instead to allocate the burden of proof for deciding the ultimate question of constitutionality.

In the context of rational basis review, the ultimate question of constitutionality will frequently turn on the presence vel non of what the Court has termed "invidious discrimination."<sup>113</sup> It is black-letter law that the Equal Protection Clause secures "every person within the State's

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109. *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 650 (2000).

110. Of course, the procedures for judicial decisionmaking embodied in rational basis review also reflect substantive judicial judgments about the kinds of state decisions that are likely to reflect invidious discrimination, as well as about the meaning of invidious discrimination in particular contexts. See, e.g., *infra* text accompanying note 126. These procedures also reflect understandings about the limited competence of courts to enforce Section 1 of the Fourteenth Amendment. See *infra* text accompanying notes 122-123.

111. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993).

112. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976); see also *Beach Communications*, 508 U.S. at 314-15 ("On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, . . . and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"); *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

113. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.").

jurisdiction against intentional and arbitrary discrimination.”<sup>114</sup> Intentional discrimination—whether “invidious,”<sup>115</sup> “hostile or oppressive,”<sup>116</sup> or “a mere excuse for . . . the oppression, or spoliation of a particular class”<sup>117</sup>—is constitutionally prohibited:

Since *Barbier v. Connolly*, the Court’s equal protection cases have recognized a distinction between “invidious discrimination[]”—*i.e.*, classifications drawn “with an evil eye and an unequal hand” or motivated by “a feeling of antipathy” against, a specific group of residents, *Yick Wo v. Hopkins* . . . —and those special rules that “are often necessary for general benefits [such as] supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects.”<sup>118</sup>

Long before equal protection doctrine had developed categories of suspect classifications or oriented itself toward the protection of specific groups, it had settled on the conclusion that state decisions must be justifiable by reference to public reasons, so that government action that flows merely from “antipathy”<sup>119</sup> or “animus”<sup>120</sup> is unconstitutional, whether or not it is subject to rational basis review.<sup>121</sup>

The doctrine of rational basis review specifies the “judicial restraint” that courts should exercise in responding to claims of invidious discrimination. The Court has offered various reasons to explain this judicial restraint. Sometimes the Court has attributed it to a proper deference to legislative factfinding. “Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.”<sup>122</sup> Sometimes the Court has attributed its restraint to judicial reluctance to assume “a legislative role . . . for which the Court lacks both authority and competence.”<sup>123</sup>

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114. *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)).

115. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 770 (1975); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 82 (1911).

116. *Welch v. Henry*, 305 U.S. 134, 146 (1938).

117. *Holden v. Hardy*, 169 U.S. 366, 398 (1898).

118. *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 593 n.40 (1979) (citations omitted).

119. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

120. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

121. *See, e.g., id.* at 620; *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000).

122. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940); *see also Leathers v. Medlock*, 499 U.S. 439, 451-52 (1991) (quoting *Madden*, 309 U.S. at 87-88).

123. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973).

It is noteworthy that these explanations do not in any way purport to define the meaning of the Equal Protection Clause. They instead identify a variety of restraints on the institutional competence of courts to review democratic lawmaking. If courts are too aggressive in searching out invidious discrimination, they might exceed their factfinding capabilities or improperly assume the role of a "super-legislature."<sup>124</sup> These cautions do not apply to Congress, however, which is a perfectly legitimate legislature capable of making broad factual findings. Nothing in the justification of rational basis review constrains Congress from exercising its own institutional prerogatives to undertake legislative factfinding to determine whether there is invidious discrimination in any given area of national life.

The Court has explained that the judiciary itself will assume the responsibility of such aggressive review, marked by a heightened scrutiny that shifts the burden of proof onto the state, only in circumstances where there is a sufficiently great likelihood of "prejudice and antipathy" to warrant the expenditure of judicial resources and the intrusion on democratic decisionmaking:<sup>125</sup>

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of its laws," which is essentially a direction that all persons similarly situated should be treated alike. . . . *Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . .*

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. . . .

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. . . ."

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124. *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting)).

125. *See, e.g., Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) ("Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm.").



We have declined, however, to extend heightened review to differential treatment based on age. . . . [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.<sup>126</sup>

It is clear, therefore, that rational basis review marks the site of a gap between conduct that the Court in principle recognizes might be unconstitutional and conduct that the Court is willing in adjudication to hold unconstitutional.<sup>127</sup> When asked to pronounce on the constitutionality of democratically legitimate state action, courts are subject to a variety of institutional constraints, which are reflected in the severe “judicial restraint” of rational basis review. These institutional constraints, however, do not affect Congress’s competency to fill the gap by using Section 5 power to remedy the invidious discrimination that the Court itself has held violates the guarantees of the Equal Protection Clause.

This analysis supplies a basis on which we can decide which of *Kimel*’s two versions of the *Boerne* test better fulfills what *Kimel* itself describes as the primary function of the congruence and proportionality test, which is to ensure that the “ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning” remain within “the province of the Judicial Branch.”<sup>128</sup> This function is fulfilled so long as Congress seeks to remedy conduct that the Court recognizes as violating the Equal Protection Clause. Although the “judicial restraint” of rational basis review prevents courts from regulating the full extent of such conduct, that is no reason to use the congruence and proportionality test to confine Congress to regulating conduct that a court would likely hold in litigation to violate the Equal Protection Clause. The more plausible reading of the test is *Kimel*’s second version, which asks whether Section 5 legislation is congruent and proportional to the task of remedying “unconstitutional discrimination.”<sup>129</sup> *Kimel* thus quite rightly moves beyond the first half of its analysis by asking whether Congress could have had any “reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.”<sup>130</sup>

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126. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985) (emphasis added).

127. See Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 318-26 (1987).

128. *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 644 (2000). For a discussion of other possible values served by the *Boerne* test, see *infra* Part IV.

129. *Kimel*, 120 S. Ct. at 650.

130. *Id.* at 649.

We might better grasp the fundamental and practical distinction between these two interpretations of the congruence and proportionality test if we consider a hypothetical federal statute that forbids discrimination based upon sexual orientation. To date, the Court has applied only rational basis review to classifications based on sexual orientation. Yet today there is widespread animus against gays and lesbians in the United States,<sup>131</sup> and state action based on animus is unconstitutional.<sup>132</sup>

If a court were to ask whether a federal statute forbidding sexual orientation discrimination was congruent and proportional to state "decisions and practices that would likely be held unconstitutional under the applicable equal protection, rational basis standard,"<sup>133</sup> which is *Kimel's* first interpretation of the *Boerne* test, the statute would probably be held beyond the Section 5 power of Congress. But this conclusion might be different if a court were instead to ask whether the statute was congruent and proportional to "unconstitutional discrimination,"<sup>134</sup> which is the question that *Kimel* poses in its second version of the *Boerne* test. A sufficiently developed legislative record might well reveal enough animus against gays and lesbians to render a federal prohibition of sexual

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131. See, e.g., *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2477-78 (2000) (Stevens, J., dissenting).

132. In *Romer v. Evans*, 517 U.S. 620, 632 (1996), the Court employed rational basis review to analyze the constitutionality of an amendment to the Colorado Constitution, yet invalidated the state law on the grounds that "the amendment seems inexplicable by anything but animus toward" homosexuals. In this respect, *Romer* resembles *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), where the Court, employing rational basis review, invalidated a permit requirement on the grounds that it "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450.

Although in the vast majority of cases, courts applying rational basis review to state action challenged as discriminating on the basis of sexual orientation have upheld the regulatory practice, lower courts since *Romer* have been more inclined to follow the Court's lead and scrutinize challenged practices for unconstitutional animus, even when applying rational basis review. There are a number of recent examples of courts finding that governmental action motivated by animus fails rational basis review. See, e.g., *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997) ("[I]t didn't take *Romer* to tell us that . . . arbitrary state action is contrary to the principle of equal protection of the laws."); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) (granting summary judgment for a plaintiff who was fired as a volleyball coach due to her sexual orientation "[b]ecause a community's animus towards homosexuals can never serve as a legitimate basis for state action"); *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1174 (S.D. Ohio 1998) (finding that a school board violated the Equal Protection Clause when it refused to renew the plaintiff's teaching contract on account of his sexual orientation, because "the Board's decision was motivated by animus toward him as a homosexual"); *Dahl v. Sec'y of the U.S. Navy*, 830 F. Supp. 1319, 1335 (E.D. Cal. 1993) (finding that, "[e]ven under the rational basis standard," the Navy's policies excluding homosexuals violated the Equal Protection Clause).

133. *Kimel*, 120 S. Ct. at 647.

134. *Id.* at 650.

orientation discrimination a “reasonably prophylactic”<sup>135</sup> remedial measure within Congress’s Section 5 power.<sup>136</sup>

### B. *Separation of Powers and the Enforcement Gap*

The ambiguity in the ways that *Kimel* applies *Boerne*’s congruence and proportionality test arises because there is a significant gap between conduct that will be found unconstitutional under standards and procedures that courts have devised for use in adjudicatory proceedings, and conduct that might be found unconstitutional by a factfinder applying judicial standards but not subject to the same institutional constraints as courts. Because the considerations of “judicial restraint” that shape and guide rational basis review are specifically designed to prevent courts from intruding on legislative discretion, they ought not to prevent Congress from applying the prohibition against invidious discrimination in a procedurally different and more comprehensive way than a court.

As our inquiry into the rational basis standard suggests, courts regularly consider the constraints of their institutional position in the course of crafting doctrine to govern adjudication of claims arising under the Constitution. As a consequence, courts often adopt liability rules to govern constitutional litigation that do not reflect the full range of meanings that the Constitution’s text might reasonably be understood to embody. This discrepancy illustrates what Lawrence Sager has termed the “underenforcement of the equal protection clause by the federal courts.”<sup>137</sup>

When doctrines the Court has crafted to guide adjudication under the Equal Protection Clause are defined in light of concerns about the institutional capacities and legitimacy of courts, there exists the possibility of an enforcement gap and therefore of an ambiguity in the application of the *Boerne* test. It is relatively easy to analyze the implications of the

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135. *Id.* at 648.

136. Some lower courts are now beginning to pursue this line of analysis in order to distinguish Congress’s Section 5 power to enact the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994), from Congress’s Section 5 power to enact the ADEA. Although current doctrine applies rational basis review to both age and disability, these courts stress that “[t]he *Kimel* Court found that older persons have not suffered from systematic, historic discrimination and that the group protected by the ADEA . . . is not a discrete and insular minority. . . . By contrast, the ADA’s legislative findings and record make clear the history of purposeful, pervasive discrimination against persons with disabilities.” *Lewis v. N.M. Dep’t of Health*, 94 F. Supp. 2d 1217, 1228 (D.N.M. 2000); see also *Davis v. Utah State Tax Comm’n*, 96 F. Supp. 2d 1271, 1282-84 (D. Utah 2000). The Court has granted a writ of certiorari in *Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir. 1999), cert. granted, 120 S. Ct. 1669 (2000) (No. 99-1240), to decide this question.

137. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978); see also Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 433-34 (1993) [hereinafter Sager, *Justice in Plain Clothes*].

enforcement gap in *Kimel* for the proper application of the *Boerne* test, because so long as Section 5 legislation enforces authoritative judicial interpretations of the Equal Protection Clause, the “ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning” will remain “the province of the Judicial Branch.”<sup>138</sup>

Enforcement gaps can occur in various forms and guises, however, and sometimes the implications for interpreting the *Boerne* test are not as clear as in this case. In the remainder of this Part, we consider a distinct kind of enforcement gap that arises when the Court interprets a constitutional provision in such a way as to suggest that a legislature may apply different constitutional standards than courts.<sup>139</sup> A good example of this kind of enforcement gap may be the line of cases that the Court decided in the late 1970s holding that a showing of disparate impact disadvantaging minorities or women is insufficient to make out a judicially remediable equal protection violation, because “purposeful discrimination is ‘the condition that offends the Constitution.’”<sup>140</sup> It is black-letter doctrine that courts will apply rational basis review to facially neutral rules, unless it can be shown that these rules have a “discriminatory purpose”;<sup>141</sup> that is, unless it can be shown that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>142</sup>

In adopting this interpretation of the Equal Protection Clause, the Court overruled a considerable number of lower court decisions holding “that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.”<sup>143</sup> The Court freely conceded that these decisions “impressively demonstrate that there is another side to the issue,”<sup>144</sup> but it

138. *Kimel*, 120 S. Ct. at 644.

139. The political question doctrine represents a simple form of this kind of underenforcement gap. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . .”).

140. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 274 (1979) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

141. *Washington v. Davis*, 426 U.S. 229, 240 (1976).

142. *Feeney*, 442 U.S. at 279.

143. *Davis*, 426 U.S. at 244. The Court would later concede that the doctrine of discriminatory purpose was contradicted by “some contrary indications . . . from some of our cases.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 & n.10 (1977) (citing *Wright v. Council of Emporia*, 407 U.S. 451, 461-62 (1972); *Palmer v. Thompson*, 403 U.S. 217, 225 (1971); *United States v. O’Brien*, 391 U.S. 367, 381-86 (1968)). For an account that situates the Court’s interpretive choices in larger historical perspective, see Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-48 (1997).

144. *Davis*, 426 U.S. at 245.

nevertheless insisted that a court must find discriminatory purpose before it could hold a facially neutral statute in violation of the Equal Protection Clause. Any other conclusion, the Court said, would involve a “more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution.”<sup>145</sup> Extension of the disparate impact rule “beyond those areas where it is already applicable by reason of statute . . . should await legislative prescription.”<sup>146</sup>

The doctrine of discriminatory purpose appears to set forth a clear liability rule, defining what does and does not violate the Equal Protection Clause. But this clarity dissipates on close inspection. Like rational basis review, the doctrine of discriminatory purpose is not justified by the requirements of the Equal Protection Clause, but by reference to the particular institutional limitations of the Court as a nonrepresentative body within a democracy.<sup>147</sup> “The calculus of effect,” the Court observes in justification of its rule, “is a legislative and not a judicial responsibility.”<sup>148</sup> The Court does not say that discriminatory impact violates the Equal Protection Clause; neither does it say that *only* discriminatory purpose violates the Equal Protection Clause. Instead it announces that courts are disabled because of their countermajoritarian status from invalidating facially neutral state action that causes a racially disparate impact, unless that action reflects a discriminatory purpose. As in the case of rational basis review, none of the reasons given by the Court to justify this judicial restraint would disqualify Congress from enforcing a different standard, if that standard were consistent with the requirements of the Equal Protection Clause. Indeed, the Court seems to go out of its way to affirm legislative competence and to invite “legislative prescription.”

If Congress undertakes to remedy or deter state action that has a discriminatory impact on a protected class, is such legislation an appropriate means of enforcing the Equal Protection Clause, given the manner in which the Court reasons about judicial enforcement of the Clause in *Davis* and *Feeney*? This very problem arose in the VAWA litigation. In striking down § 13981, the Court of Appeals for the Fourth Circuit noted that the statute was in part aimed at ameliorating the discriminatory impact of facially neutral rules that had a discriminatory impact on women, like

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145. *Id.* at 247. For a discussion of the institutionally self-conscious justifications that the Court offered for evaluating equal protection claims brought directly under Section 1 in a discriminatory-purpose framework, see Siegel, *supra* note 143, at 1137-38 & n.130.

146. *Davis*, 426 U.S. at 248.

147. For a discussion of this point, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 898-99 (1999).

148. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979).

recent statutory formulations of the marital rape exception.<sup>149</sup> The court held that because the legislative history does “not demonstrate that Congress [‘was] concern[ed],’ with the type of *purposeful* discrimination against women in the enforcement of facially neutral laws that could give rise to an equal protection violation,”<sup>150</sup> the statute could not be characterized as remedial under *Boerne*.

The Fourth Circuit in fact misconstrued VAWA’s legislative history: Congress heard ample testimony about openly expressed gender bias in the administration of “facially neutral” criminal law that the Fourth Circuit simply failed to discuss.<sup>151</sup> Moreover, *Kimel* is clear that, even in the absence of discriminatory purpose, Congress can enact “reasonably prophylactic”<sup>152</sup> Section 5 legislation designed to prevent or deter constitutional violations, and that this legislation can reach conduct that is not itself unconstitutional.<sup>153</sup> But the deeper question posed by the Fourth Circuit was whether Congress could appropriately seek under Section 5 to remedy constitutional violations arising out of the administration of facially neutral laws and practices, not as a means of reaching the effects of purposeful discrimination,<sup>154</sup> but because Congress believed that the discriminatory effects of such laws and practices rendered them unconstitutional.

This question turns on whether Section 5 legislation must be congruent and proportional to the task of remedying purposeful discrimination, or whether it can instead be congruent and proportional to the task of remedying facially neutral policies that have disparate effects. The

149. When the Court began to apply heightened scrutiny to laws employing gender classifications in the mid-1970s, states modified many laws and doctrines regulating family relations so that they were expressed in gender-neutral terms; these changes often occurred without substantial alteration of the terms on which the relationship was otherwise regulated. For an account of these changes, see Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2188-96 (1996). For a survey of state statutes that illustrates how marital rape doctrine still shapes the criminal law, although often in gender-neutral terms, see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1375, 1484-85 (2000).

150. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 884 (4th Cir. 1999) (en banc) (alteration in original) (citation omitted), *aff’d sub nom. United States v. Morrison*, 120 S. Ct. 1740 (2000).

151. *E.g., Morrison*, 120 S. Ct. at 1760-61 n.7 (Souter, J., dissenting) (listing the gender bias task force reports from twenty-one states that Congress considered); *id.* at 1779 (Breyer, J., dissenting) (citing congressional reports that documented the presence of unconstitutional gender bias in the state court systems).

152. *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 648 (2000).

153. Thus, for example, the Court has held since the days of *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), that Section 2 of the Fifteenth Amendment, which is “coextensive” with Section 5 of the Fourteenth Amendment, *City of Rome v. United States*, 446 U.S. 156, 208 n.1 (1980) (Rehnquist, J., dissenting), authorizes Congress to “outlaw voting practices that are discriminatory in effect” even “if § 1 of the Amendment prohibits only purposeful discrimination.” *id.* at 173.

154. *See, e.g., supra* text accompanying note 50.

resolution of this question poses a substantive question of equal protection law. If we read the Court in *Davis* and its progeny as authorizing Congress to apply disparate impact analysis, the case is theoretically simple. Congress is merely enforcing the Constitution as the Court has authorized it to read the Constitution. There is no threat to ultimate judicial control over the substantive meaning of the Fourteenth Amendment.

The difficulty in the case arises because of uncertainty about whether the Court has actually authorized Congress to apply this interpretation of the Equal Protection Clause. Primarily concerned with its own implementation of the Constitution, the Court has not spoken clearly about the bounds of Congress's independent constitutional authority. But the Court has repeatedly emphasized that its embrace of discriminatory purpose doctrine is rooted in concerns relating to the institutional legitimacy and competence of Article III courts. It has asserted that making judgments about the disparate impact of facially neutral policies is "a legislative and not a judicial responsibility."<sup>155</sup> It has virtually invited "legislative prescription."<sup>156</sup> And it has approved Congress's wholesale extension of Title VII of the Civil Rights Act of 1964 to the states, replete with its disparate impact methodology, as "an appropriate method of enforcing the Fourteenth Amendment" under Section 5.<sup>157</sup>

Application of the *Boerne* test is thus entangled with substantive interpretation of the Equal Protection Clause. The ultimate question is whether the Court is willing to countenance Congress's making a judgment about the existence of a constitutional violation in terms that deviate from those that guide the Court's own enforcement of Section 1, where the Court has explicitly justified its own self-imposed guidelines as significantly shaped by factors that specifically concern or constrain *courts*. If Congress employs a standard for determining the existence of a constitutional violation whose difference from the Court's can fairly be attributed to the fact that Congress, as a legislative body, is not subject to the same resource or legitimacy constraints as is the Court, is Congress "altering the meaning" of the Equal Protection Clause, or is it merely "enforc[ing it], by appropriate legislation," as it is explicitly empowered to do by Section 5 of the Fourteenth Amendment? Separation-of-powers values require a judicial judgment about whether the constitutional interpretation informing Congress's exercise of Section 5 power is appropriate to the role of legislatively enforcing the Fourteenth Amendment.

This suggests that courts cannot apply the *Boerne* test to antidiscrimination laws without first interpreting the Equal Protection

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155. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979).

156. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

157. *City of Rome*, 446 U.S. at 179; see also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). *But see Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 306 n.12 (1977).

Clause.<sup>158</sup> The question is whether and how we understand the conduct constrained by the Equal Protection Clause to vary as the Clause is enforced by Congress or the courts, given their distinct institutional capacities.<sup>159</sup> The Court has itself suggested that there are good reasons why some equal protection standards may be better enforced by a legislature than by the judiciary.<sup>160</sup> What Congress may do in such circumstances is thus not a question that can be decided, as the Fourth Circuit decided it, by the *Boerne* test alone, without also and primarily addressing underlying substantive issues of equal protection doctrine.

Recognizing that the Equal Protection Clause can be enforced differently by Congress than by the Court does not contradict the primary objective of *Boerne*, which is to ensure that “the ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning” remain “the province of the Judicial Branch.”<sup>161</sup> The Court retains the prerogative of striking down Section 5 legislation it deems constitutionally unreasonable or as tending toward a substantive account of the Equal Protection Clause that the Court wishes to suppress. In the last instance, therefore, the Court always retains the authority “to say what the law is.” The essential question is how the Court should exercise this authority. Should it defer to Congress’s judgment about the proper implementation of the Equal Protection Clause, as it defers to virtually all other exercises of congressional power?<sup>162</sup> Or should it use the criteria of “congruence and

158. See Levinson, *supra* note 147, at 917-20.

159. As we discuss later, the Court has explicitly adopted such an institutionally differentiated framework with respect to the enforcement of the Thirteenth Amendment. See *infra* text accompanying notes 257-260.

160. These suggestions have received support in the scholarly literature. E.g., Burt, *supra* note 65, at 111-14; Cole, *supra* note 15, at 61-63; Archibald Cox, *The Supreme Court, 1966 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 121 (1966); Eisgruber & Sager, *supra* note 85, at 91; McConnell, *supra* note 104, at 189-92. Lawrence Sager has stressed Congress’s unique ability to realize Fourteenth Amendment norms in the face of polycentric difficulties, its ability to overcome entrenched resistance to such norms, and its ability to energize citizens to support such norms. Sager, *Justice in Plain Clothes*, *supra* note 137, at 419-28.

161. *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 644 (2000).

162. See *infra* note 187. Such a deferential approach to reviewing Congress’s power to enact antidiscrimination legislation under Section 5 does not imply that the Court should adopt an equally deferential approach when reviewing legislation in order to protect individual liberties and fundamental rights under Section 1 of the Fourteenth Amendment or the equal protection component of the Fifth Amendment. See *Fullilove v. Klutznick*, 448 U.S. 448, 528 n.7 (1980) (Stewart, J., dissenting) (“Neither [Section 2 of the Thirteenth Amendment nor Section 5 of the Fourteenth Amendment] grants to Congress the authority to require the States to flout their obligation under § 1 of the Fourteenth Amendment to afford ‘the equal protection of the laws’ or the power to enact legislation that itself violates the equal protection component of the Fifth Amendment.”); *id.* at 548 (Stevens, J., dissenting) (“Congress has broad power to spend money to provide for the ‘general Welfare of the United States,’ to ‘regulate Commerce . . . among the several States,’ to enforce the Civil War Amendments, and to discriminate between aliens and citizens. . . . But the exercise of these broad powers is subject to the constraints imposed by the Due Process Clause of the Fifth Amendment. That Clause has both substantive and procedural



proportionality” as a form of narrow tailoring closely to bind Congress’s Section 5 power to the terms of the Court’s own enforcement of Section 1?

Analysis of this question requires some knowledge of the historical relationship that the Court established with Congress in the years after *Brown*, when Congress sought to use its Section 5 authority to enact antidiscrimination legislation. It also requires an understanding of the constitutional values at stake in properly characterizing the relationship between Congress and the Court. Since the days of Reconstruction, the Court has repeatedly indicated its fear that close supervision of congressional Section 5 power may be required to preserve the values of federalism. We thus defer analyzing the important question of how the Court should conceptualize its relationship with Congress until Part IV, when we will be able to draw upon our discussion of the historical development of modern antidiscrimination legislation and upon our consideration of *Morrison*’s appeal to federalism, issues we now take up in Part III.

### III. *MORRISON* AND FEDERALISM

*Kimel* radically destabilizes congressional Section 5 power to enact antidiscrimination legislation. But the extent of the damage is uncertain because the *Boerne* test, and the separation-of-powers values it represents, are so highly ambiguous. Read as a coarse claim of judicial supremacy, *Kimel* can eviscerate Section 5 authority to combat discrimination. But interpreted in the more flexible light we suggest, *Kimel*’s implications are far less grim.

Separation of powers, however, was only one of two lines of attack on congressional Section 5 authority launched by the Court in the 1999 Term. The second assault came in the name of federalism. It came in the *Morrison* opinion, in terms more openly hostile to Congress’s Section 5 powers than *Kimel*. *Morrison* held that 42 U.S.C. § 13981, the section of VAWA that created a civil remedy for victims of gender-motivated violence,<sup>163</sup> was beyond congressional power under either the Commerce Clause or the Fourteenth Amendment.

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components; it performs the office of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in requiring that the federal sovereign act impartially.”).

163. Section 13981 authorized victims to sue their attackers “for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.” 42 U.S.C. § 13981(c) (1994).

### A. *The Logic of the Morrison Opinion*

It is in fact quite difficult to ascertain the scope and grounds of *Morrison's* Fourteenth Amendment holding. The Court begins its analysis by acknowledging that Congress had exercised its power to enforce the Fourteenth Amendment on the basis of a "voluminous . . . record" establishing "that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions" that "often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."<sup>164</sup> The Court concedes that such "state-sponsored gender discrimination" might very well violate the Equal Protection Clause, but it notes that there are "certain limitations on the manner in which Congress may attack discriminatory conduct," limitations that "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."<sup>165</sup> The Court mentions the "state action" requirement of Section 1 as "[f]oremost among these limitations."<sup>166</sup>

The Court then cites *United States v. Harris*<sup>167</sup> and the *Civil Rights Cases*,<sup>168</sup> two 1883 decisions striking down Reconstruction-era legislation as beyond Congress's Section 5 power, for the proposition that Section 5 legislation cannot be "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers."<sup>169</sup> Claiming to yield to "[the] force of the doctrine of *stare decisis* behind these decisions," the Court refuses to let "dicta" in either *United States v. Guest*<sup>170</sup> or *District of Columbia v. Carter*<sup>171</sup> interfere

164. *United States v. Morrison*, 120 S. Ct. 1740, 1755 (2000).

165. *Id.*

166. *Id.* at 1756.

167. 106 U.S. 629 (1883).

168. 109 U.S. 3 (1883).

169. *Morrison*, 120 S. Ct. at 1756 (quoting *Harris*, 106 U.S. at 629). The Court continued: "We reached a similar conclusion in the *Civil Rights Cases*. In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the § 5 enforcement power." *Id.* The Court then proceeded to cite to a series of modern cases holding that state action is required for a violation of the Equal Protection Clause.

170. 383 U.S. 745 (1966). In *Guest*, six Justices, in two independent opinions, opined that congressional Section 5 legislation could regulate the behavior of private persons.

171. 409 U.S. 418 (1973). In *Carter*, the Court in a footnote that was dicta cited *Guest* for the proposition that Congress could "proscribe purely private conduct under § 5 of the Fourteenth Amendment." *Id.* at 424 n.8.

with its view that Congress cannot “under § 5 prohibit actions by private individuals.”<sup>172</sup>

The Court’s reasoning is very difficult to follow. It seems to conflate the state action requirement of Section 1 with some form of limitation on Section 5 power. There may in fact be questions after *Boerne* about what kind of state action is necessary in order to establish a violation of the Equal Protection Clause for purposes of Section 5 legislation,<sup>173</sup> but in *Morrison* the Court explicitly acknowledges that Congress had extensively documented unconstitutional state action in the discriminatory response of state criminal justice systems to gender-motivated violence.<sup>174</sup> *Morrison* therefore goes beyond a separation-of-powers analysis to intimate that even properly “remedial” Section 5 legislation cannot “prohibit actions by private individuals.” It claims to derive this limitation on Section 5 power from *Harris* and the *Civil Rights Cases*.

But these precedents do not support this conclusion. The *Civil Rights Cases* have long been read as standing for the proposition that state action is prerequisite for constitutional violations of the Equal Protection Clause.<sup>175</sup> In both *Harris* and the *Civil Rights Cases*, the Court struck down legislation that prescribed “rules for the conduct of individuals in society toward each other” without being “corrective of any constitutional wrong committed by the States.”<sup>176</sup> The *Civil Rights Cases*, which invalidated the Civil Rights Act of 1875, specifically held that the Act was not “predicated” on “any supposed or apprehended violation of the Fourteenth Amendment on the part of the States.”<sup>177</sup> It explained:

172. *Morrison*, 120 S. Ct. at 1756-58.

173. During the 1960s, the possibility that state action standards might differ for Congress acting pursuant to Section 5 than for a court enforcing Section 1 was suggested by jurists across the philosophical spectrum. See *infra* notes 264-274 and accompanying text.

174. *Morrison*, 120 S. Ct. at 1755, 1758.

175. *E.g.*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 172 (1972) (“In 1883, this Court in *The Civil Rights Cases* set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, ‘however discriminatory or wrongful,’ against which that clause ‘erects no shield.’” (citation omitted)). Justice Rehnquist, who authored both *Jackson* and *Moose Lodge*, was also the author of *Morrison*.

176. *The Civil Rights Cases*, 109 U.S. 3, 14 (1883). *Harris*, which struck down provisions of the Civil Rights Act of 1871, turns on analogous reasoning:

When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.

*United States v. Harris*, 106 U.S. 629, 639 (1883).

177. *Civil Rights Cases*, 109 U.S. at 14. For a discussion of the reasoning of *Harris* and the *Civil Rights Cases*, see Laurent B. Frantz, *Congressional Power To Enforce the Fourteenth*

[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity.<sup>178</sup>

Although both *Harris* and the *Civil Rights Cases* insist that Section 5 legislation must be “corrective of [a] constitutional wrong committed by the States,” neither opinion purports to impose a restriction on Section 5 legislation that is otherwise properly remedial. They are each fully consistent with federal regulation of private parties, so long as that regulation is properly “corrective,” which is to say “adapted to counteract and redress the operation of . . . prohibited State laws or proceedings of State officers.”<sup>179</sup> As the Court made plain: “It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is [corrective in] character.”<sup>180</sup>

Perhaps apprehensive about leaning so heavily on *stare decisis* in the context of largely irrelevant precedents, *Morrison* then proceeds to argue that “even if” its conclusion were not compelled by *Harris* or the *Civil Rights Cases*, VAWA’s civil remedy would be impermissible under Section 5 because it fails the congruence and proportionality test of

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*Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964). Perhaps sensing the marginal relevance of these precedents, the *Morrison* Court notes that there was

abundant evidence . . . to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting § 13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves.

*Morrison*, 120 S. Ct. at 1758. But however accurate this may be as an account of the concerns that led Congress to enact the Civil Rights Acts of 1871 and 1875, it is clear that the Court did not premise its decisions about the constitutionality of the 1871 and 1875 Acts on this understanding of the legislative history. *Harris* explicitly assumes as a ground of its striking down the Civil Rights Act of 1871 that “the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons.” *Harris*, 106 U.S. at 639. Similarly, the opinion in the *Civil Rights Cases* explicitly assumes that the Civil Rights Act of 1875 was not “predicated” on “any supposed or apprehended violation of the Fourteenth Amendment on the part of the States.” *Civil Rights Cases*, 109 U.S. at 14.

178. *Civil Rights Cases*, 109 U.S. at 13.

179. *Id.* at 18.

180. *Id.* at 14; see *Morrison*, 120 S. Ct. at 1779 (Breyer, J., dissenting) (providing a similar reading of the *Civil Rights Cases*); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 307 n.54 (1989) (“Straightforwardly read, Justice Bradley’s opinion for the Court in the *Civil Rights Cases* establishes not that the racially discriminatory practices of nongovernmental innkeepers and carriers are beyond the fourteenth amendment’s concern or the reach of its prohibitions, but rather something more like the opposite. . . . The holding is that federal authorities . . . are not authorized by the fourteenth amendment to provide remedies for privately wrought violations of rights that the state is affirmatively obligated to vindicate, unless and until it appears that the state itself is failing to perform this obligation.” (citation omitted)).

*Boerne*.<sup>181</sup> Section 13981 “is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”<sup>182</sup> Furthermore, § 13981 “applies uniformly throughout the Nation,” whereas “Congress’ findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.”<sup>183</sup>

But this section of the Court’s opinion is also unclear, for *Morrison*’s use of the congruence and proportionality test is conceptually quite different from *Boerne*’s. *Boerne* explicitly employed the congruence and proportionality test to determine whether “the goal” of Section 5 legislation was “to prevent and remedy constitutional violations” or instead to redefine the nature of constitutional obligations.<sup>184</sup> *Kimel* employed the test for the same purpose. The Court in *Morrison*, however, applies the test on the assumption that Congress’s “goal” in enacting § 13981 is to counteract bona fide violations of the Equal Protection Clause, violations inhering in the discriminatory actions of state criminal justice systems. *Morrison* thus employs the congruence and proportionality test to impose limitations on Section 5 legislation that both *Boerne* and *Kimel* would deem properly remedial.

*Boerne* and *Kimel* each begin with the premise “that § 5 is ‘a positive grant of legislative power’ to Congress,”<sup>185</sup> and that it is therefore “for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference.”<sup>186</sup> Yet *Morrison* uses the congruence and proportionality test to fasten tight restrictions on the exercise of otherwise legitimate Section 5 legislation, restrictions that seem analogous to the narrow tailoring required by strict scrutiny. We know of no other positive constitutional grant of power to Congress that is treated with such suspicion and hostility by the Court. The general rule is quite otherwise. Congressional enactments within the domain of positive constitutional grants of power are normally treated with a “deference” that reflects a “presumption of constitutionality.”<sup>187</sup>

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181. *Morrison*, 120 S. Ct. at 1758.

182. *Id.*

183. *Id.* at 1759.

184. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

185. *Id.* at 517 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)); see also *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 644 (2000) (“[Section] 5 is an affirmative grant of power to Congress.”).

186. *Kimel*, 120 S. Ct. at 644; *Boerne*, 521 U.S. at 536 (quoting *Katzenbach*, 384 U.S. at 651).

187. *United States v. Playboy Entm’t Group*, 120 S. Ct. 1878, 1888 (2000) (referring to “the usual presumption of constitutionality afforded congressional enactments”); see also *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (“We begin here . . . by noting the heavy presumption of constitutionality to which a ‘carefully considered decision of a coequal and representative branch of our Government’ is entitled.”); *Town of Lockport v. Citizens for Cmty.*

*Morrison* is quite careless in applying its newly minted version of the congruence and proportionality test. It notes, for example, that § 13981 “is different from . . . previously upheld remedies in that it applies uniformly throughout the Nation”:

Congress’ findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan* . . . was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach* . . . the remedy was directed only to those States in which Congress found that there had been discrimination.<sup>188</sup>

*Morrison*’s reasoning here is simply wrong. The nationwide remedy of § 13981 is not in fact “different . . . from previously upheld remedies.” In *Oregon v. Mitchell*,<sup>189</sup> the Court unanimously upheld a nationwide prohibition on literacy tests.<sup>190</sup> It did so despite the absence of “state-by-state findings concerning . . . the . . . actual impact of literacy requirements on the Negro citizen’s access to the ballot box.”<sup>191</sup> Justice Stewart listed the advantages of such nationwide remedies:

Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country. This in turn increases the likelihood of voluntary compliance with the letter and spirit of federal law. Nationwide application facilitates the free movement of citizens from one State to another, since it eliminates the prospect that a change in residence will mean the loss of a federally

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Action, 430 U.S. 259, 272 (1977) (noting “the presumption of constitutionality to which every duly enacted state and federal law is entitled”). The presumption of constitutionality “is the postulate of constitutional adjudication.” *New York v. O’Neill*, 359 U.S. 1, 6 (1959). It is “strong” because it “is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power.” *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953).

188. *Morrison*, 120 S. Ct. at 1759.

189. 400 U.S. 112 (1970).

190. The prohibition was approved as an exercise of congressional power under Section 2 of the Fifteenth Amendment. See *Mitchell*, 400 U.S. at 216 (opinion of Harlan, J., concurring in part and dissenting in part); *id.* at 235-36 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part); *id.* at 282-83 (Stewart, J., concurring in part and dissenting in part). But the Court has always treated Section 2 as “coextensive” with Section 5 of the Fourteenth Amendment. See *supra* note 153 and accompanying text. *Morrison* itself, in the passage quoted in the text accompanying *supra* note 188, treats the Section 2 remedy of *South Carolina v. Katzenbach* as interchangeable with the Section 5 remedy of *Katzenbach v. Morgan*.

191. *Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part). Justice Stewart continued: “In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records.” *Id.*

protected right. Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not. Such a line may well appear discriminatory to those who think themselves on the wrong side of it. Moreover the application of the line to particular States can entail a substantial burden on administrative and judicial machinery and a diversion of enforcement resources. Finally, nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one and reflects a national commitment to its solution.<sup>192</sup>

Moreover, Congress did not find, as *Morrison* suggests, that “the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.” In fact, the record before Congress was quite different. It included a letter signed by thirty-eight state attorneys general urging passage of VAWA, because “the problem of violence against women is a national one, requiring federal attention.”<sup>193</sup> Congress also “had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so.”<sup>194</sup> Similar evidence was sufficient to sustain a nationwide remedy in *Mitchell*. Why was it insufficient in *Morrison*? If the Court is for the first time going to invalidate otherwise proper Section 5 legislation on the grounds that it does not sufficiently correspond to the violation it is meant to remedy, certainly it is incumbent upon the Court to explain how narrowly tailored it expects congruent and proportional Section 5 legislation to be. *Morrison* does not offer a clue.

Similar conceptual difficulties plague *Morrison*'s holding that § 13981 fails the congruence and proportionality test because “it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”<sup>195</sup> The holding seems deliberately to

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192. *Id.* at 283-84.

193. Letter from Robert Abrams, Attorney General of New York, et al., to Jack Brooks, Chair, House Judiciary Committee (July 22, 1993), reprinted in *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 34-36 (1993). The letter states that “the current system for dealing with violence against women is inadequate.” *Id.* at 35.

194. *United States v. Morrison*, 120 S. Ct. 1740, 1779 (2000) (Breyer, J., dissenting).

195. *Id.* at 1758. The Court continued: “In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the § 5 remedies we have previously upheld.” *Id.*

reiterate the *per se* rule that *Morrison* earlier purported to derive from *Harris* and the *Civil Rights Cases*. But whether a particular remedy is congruent or proportional depends entirely on how it is tailored to the specifics of a particular violation. It depends on whether the remedy reasonably ameliorates the harm of the violation, given the nature of that harm and the intrusion of the remedy. These inquiries, however, require case-by-case examination; they do not lend themselves to *per se* rules. What requires assessment is the relationship of a particular remedy to a particular violation. A congruence and proportionality test would thus seem utterly unsuited as a vehicle for the *per se* rule that *Morrison* might be read to imply.

Nor is it clear that a congruence and proportionality test would be especially hostile to Section 5 remedies directed against private parties. We know from previous precedents, for example, that Section 5 legislation imposing criminal penalties on private parties who conspire with state actors to deprive persons of their Section 1 rights is constitutional.<sup>196</sup> If it is congruent and proportional for Congress to sanction private parties who, with the intent of violating the constitutional rights of a victim, break into jail to lynch a prisoner with the implicit agreement of a sheriff, why is it not also congruent and proportional for Congress to sanction private parties who, with the identical intent, perform the identical acts without the agreement of a sheriff?<sup>197</sup>

Or, to bring the matter closer to home, why was it not congruent and proportional for Congress in § 13981 to create private remedies for victims of gender-motivated violence, if by hypothesis the states were systematically and unconstitutionally failing to protect them from this violence? The Solicitor General argued to the Court in *Morrison* that “Section 13981 . . . prevents and remedies the discrimination that victims of gender-motivated crimes often face in state justice systems by giving them an alternative means of obtaining legal redress.”<sup>198</sup> Surely any serious

196. *United States v. Price*, 383 U.S. 787 (1966); *United States v. Guest*, 383 U.S. 745 (1966).

197. Assuming, of course, the presence of a constitutional violation. Justice Jackson, in an opinion implicitly cited by *Morrison*, *see infra* note 201, specifically reserves this question: “We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws . . . . Indeed, the post-Civil War Ku Klux Klan . . . may have, or may reasonably be thought to have, done so.” *Collins v. Hardyman*, 341 U.S. 651, 662 (1951). Later, in *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971), the Court became much more explicit about this question: “A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State.”

198. Brief for the United States at 44, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5, 99-29), 1999 WL 1037259. The Solicitor General continued: “Congress could decline to make proof of state discrimination an element of Section 13981’s cause of action. Indeed, such



application of a congruence and proportionality test would explain exactly why this argument falls short. But *Morrison* offers no hint. Instead it is content to leave its newly fashioned congruence and proportionality test clothed with all the menace of an essentially arbitrary standard.<sup>199</sup>

The Section 5 analysis of *Morrison* is exceptional in a constitutional jurisprudence that ordinarily accords great respect to congressional enactments, striking them down only after thoughtful consideration. *Morrison* conflates the state action requirement of Section 1 with the entirely distinct question of whether Congress may regulate private parties under Section 5; it miscites and purports to rely upon ancient precedents; it floats a per se rule, which it promptly withdraws by appropriating *Boerne*'s congruence and proportionality test to serve the new and anomalous purpose of narrowly restricting the exercise of otherwise legitimate congressional power; it even fails to offer a careful and clarifying application of its own newly fashioned test.

#### B. *Morrison and the Values of Federalism*

In point of fact, the Court never pauses to explain what it finds so very alarming in Congress's use of Section 5 power to create a civil cause of action for victims of gender-motivated violence. The closest it comes is by referring to the constitutional function of the state action requirement of Section 1, which the Court notes is "necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."<sup>200</sup> This theme of federalism is reinforced by *Morrison*'s unusual tribute to the "force of the doctrine of stare decisis" carried by the Court's 1883 decisions in *Harris* and the *Civil Rights Cases*.<sup>201</sup> In these decisions of the first Reconstruction,

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proof would have made the federal remedy much more costly and cumbersome for plaintiffs and much more intrusive into state functions." *Id.* at 44 n.25.

199. As Justice Breyer notes in dissent:

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial "legislation . . . [that] prohibits conduct which is not itself unconstitutional." . . . The statutory remedy . . . intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy "disproportionate"? And given the relation between remedy and violation—the creation of a federal remedy to substitute for constitutionally inadequate state remedies—where is the lack of "congruence"?

*Morrison*, 120 S. Ct. at 1779 (Breyer, J., dissenting).

200. *Id.* at 1755. The Court then cites *Boerne* for the point that "the Amendment 'does not concentrate power in the general government for any purpose of police government with the States.'" *Id.* at 1755-56.

201. In a startling passage, the Court states:

the Court was centrally concerned with interpreting the Fourteenth Amendment to prevent Congress from adopting "general legislation upon the rights of the citizen," limiting the scope of Section 5 instead to "corrective legislation, that is, such as may be necessary and proper for counteracting . . . such acts and proceedings as the States may commit or take, and which, by the [fourteenth] amendment, they are prohibited from committing or taking."<sup>202</sup> The *Civil Rights Cases* held that Congress could not "establish a code of municipal law regulative of all private rights between man and man in society," for that "would be to make Congress take the place of the State legislatures and to supersede them."<sup>203</sup> Constitutional concern about preserving the "distinction between what is truly national and what is truly local"<sup>204</sup> is of course also a central theme in *Morrison's* account of why § 13981 cannot be justified under Congress's Commerce Clause power.

It is federalism, then, that drives *Morrison's* dismissive treatment of congressional Section 5 power. Having worked so hard in the first section of its opinion to preserve the regulation of violence in domestic relations from the reach of national Commerce Clause power, the Court in *Morrison* was not about to turn around and let federal authority return through the back door of Section 5. This raises the question, however, of whether federalism constraints imposed on Section 5 should be construed *in pari materia* with those imposed on the Commerce Clause. As we have discussed,<sup>205</sup> there is every reason to reject this supposition, because Section 5 has its own particular purposes and priorities that differ from the "commercial concerns that are central to the Commerce Clause."<sup>206</sup>

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The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

*Id.* at 1756. The passage evokes Justice Jackson's earlier more cautious and politically explicit praise of *Harris* and the *Civil Rights Cases* as decisions made "by a Court, every member of which had been appointed by President Lincoln, Grant, Hayes, Garfield or Arthur—all indoctrinated in the cause which produced the Fourteenth Amendment, but convinced that it was not to be used to centralize power so as to upset the federal system." *Collins*, 341 U.S. at 657-58. *Collins* was sharply limited, if not overruled, in *Griffin*, 403 U.S. at 93-96.

202. The *Civil Rights Cases*, 109 U.S. 3, 13-14 (1883).

203. *Id.* at 13.

204. *Morrison*, 120 S. Ct. at 1754.

205. *Supra* text accompanying notes 38-39.

206. *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). One can therefore expect the distinct emphases and functions of Section 5 to intersect with the values of federalism in ways that are different from those of the Commerce Clause. It is not determinative of the federalism question for Section 5 that § 13981 touches upon what, for purposes of the Commerce Clause, the Court may choose to regard as "areas of traditional state regulation" like "family law" or "intrastate violence." *Morrison*, 120 S. Ct. at 1753-54. Even if the Court

*Morrison* in fact does approach questions of federal power differently in its analysis of Congress's authority under the Commerce Clause than in its analysis of Congress's authority under Section 5. *Morrison*'s discussion of the Commerce Clause is very careful and reasons from the premise that federal regulation of economic matters is presumptively legitimate. In striking contrast, *Morrison*'s discussion of Section 5 is impatient and filled with suspicion. Although every exercise of every federal power can be said in some sense to subtract from the reserved "domain of State legislation,"<sup>207</sup> the Court clearly perceives Section 5 power as especially troublesome in this regard, as though it carried some uniquely pernicious capacity to unsettle the "balance of power between the States and the National Government."<sup>208</sup> It is for this reason that *Morrison* refashions the *Boerne* test into a set of strict judicial controls designed tightly to circumscribe congressional Section 5 legislation. The Court does not dare to impose such strict controls on federal commerce power, and indeed such restrictions would be anomalous and unacceptable in the context of any other positive grant of congressional power. But apparently the Court apprehends Section 5 as singularly threatening to the independence of the states.

To circumscribe Section 5 in the name of federalism is implicitly to advance an image of the proper relationship between the federal government and the states.<sup>209</sup> The question, therefore, is what image of this relationship might justify the restriction *Morrison* seeks to draw, which seemingly would prevent Congress from employing Section 5 to regulate the conduct of private parties. Although neither *Harris* nor the *Civil Rights Cases* stands for the proposition that *Morrison* seeks to extract from them, there is nevertheless something telling in *Morrison*'s recourse to these decisions of the first Reconstruction. Both cases express a vision of federalism that is highly sympathetic to *Morrison*'s larger project of restricting federal power. Both present an account of our federal system in which there are large stretches of state municipal law free from federal interference.

This was the understanding of federalism that pervasively shaped the Court's interpretation of the Constitution in the decades after the Civil War. In this era, it should be recalled, the Court was determined to circumscribe federal commerce authority by drawing lines between, for example, "commerce" and "manufacture," on the grounds "that if the national

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concludes that these areas are peripheral to the regulation of commerce, that tells us nothing about their significance in the struggle against discrimination.

207. *Civil Rights Cases*, 109 U.S. at 11.

208. *Morrison*, 120 S. Ct. at 1755.

209. For a good recent discussion of the values at stake in articulating such an image, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.”<sup>210</sup> As late as 1936, the Court was still clinging to the proposition that the regulation of “productive industries” was beyond federal power, because “[t]he relation of employer and employee is a local relation. At common law, it is one of the domestic relations.”<sup>211</sup> But this view of the Commerce Clause was washed away in the constitutional upheavals that brought us *Wickard v. Filburn*,<sup>212</sup> *United States v. Darby*,<sup>213</sup> *NLRB v. Jones & Laughlin Steel Corp.*,<sup>214</sup> and, in more recent times, *Heart of Atlanta*<sup>215</sup> itself.

We realize, of course, that the Court is seeking in *Lopez* and in *Morrison* to stem this tide and to rehabilitate federalism values in Commerce Clause jurisprudence, most especially by reviving the concept of “areas of traditional state regulation.”<sup>216</sup> But the Court has at best offered tiny corrections to a substantially altered landscape. No member of the present Court, with the possible exception of Justice Thomas,<sup>217</sup> would consider reneging on *Heart of Atlanta* and *Katzenbach v. McClung*.<sup>218</sup> The fact is that today there is no discrete, categorically defined realm of social

210. *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895); see also *id.* at 13 (“It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government.”); *Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (“No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce.”). *But cf.* Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism “Born” in the First Place?*, 22 HARV. J.L. & PUB. POL’Y 123, 131-35 (1998) (suggesting that the Court did not begin to enforce federalism limits on Article I powers by invalidating politically consequential legislation until the 1930s); *id.* at 135 (“[A]fter a period of gestation during the late Nineteenth and early Twentieth Centuries, judicially-enforced federalism was ‘born’ only in 1935. A sickly infant from the start, it died a quick death in 1937.”); Larry D. Kramer, *Putting Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 228-33 (2000) [hereinafter Kramer, *Political Safeguards*].

211. *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936); see also *id.* at 309 (“[I]f the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.” (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935))).

212. 317 U.S. 111 (1942).

213. 312 U.S. 100 (1941).

214. 301 U.S. 1 (1937).

215. 379 U.S. 241 (1964).

216. *United States v. Morrison*, 120 S. Ct. 1740, 1753 (2000).

217. *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) (“Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.” (emphasis added)).

218. 379 U.S. 294 (1964).

life that is immune from federal regulation.<sup>219</sup> Even the domains *Lopez* and *Morrison* repeatedly characterize as areas of traditional state regulation—the family, education, and the regulation of intrastate violence—are permeated with federal law enacted pursuant to Congress’s commerce and spending powers.<sup>220</sup> What sense, then, does it make in the year 2000 for the Court to evoke *Harris* and the *Civil Rights Cases* as limits on Section 5 power designed to protect discrete areas of social life from federal interference?

The relationship between national and state governments in our federal system is not static.<sup>221</sup> One cannot simply extract an account of the national government’s powers from cases decided in 1883 and mechanically apply it to a federal civil rights statute enacted more than one hundred years later. As our Commerce Clause jurisprudence so richly illustrates, the practical implications of our federalism commitments change over time, because federalism itself is a dynamic system, expressed in institutional relationships that evolve in history. So, for example, the economic upheavals of the Great Depression fundamentally altered our “practical conception”<sup>222</sup> of the necessity of national economic regulation “in this interdependent world of ours.”<sup>223</sup> Although the Court initially and infamously resisted the implications of these altered understandings, it eventually changed its constitutional conception of the scope and range of Congress’s power to regulate commerce. Today, the employment relationship, which the Court once confidently declared beyond Congress’s power to regulate, now appears to us as quintessentially a sphere of “national” regulatory concern.

The same historically and institutionally attentive approach ought to inform any serious effort to understand the questions of federalism

219. MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 8 (Daniel J. Elazar ed., 1966) (“No important activity of government in the United States is the exclusive province of one of the levels, . . . not even the most local of local functions, such as police and park maintenance.”); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1006 (2000) (“A binary assumption, that an issue is either ‘state’ or ‘federal,’ misses the rich complexity of governance, in which shared and overlapping work is commonplace.”); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 933 (1994). Even the Gun-Free School Zones Act of 1990, which was struck down in *Lopez* as an example of a federal law seeking to regulate the “truly local,” was easily rehabilitated by the simple and effective expedient of inserting a jurisdictional element “that will virtually always be present.” Meltzer, *supra* note 43, at 1049 & n.159.

220. For an account of some of the many ways federal law regulates family life, see Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1373-85 (1998), which discusses court cases applying equal protection and privacy doctrines to the family, as well as federal legislation in the areas of tax, immigration, child support, adoption, social security, and welfare law, along with recent statutes such as the Defense of Marriage Act.

221. See Kramer, *Political Safeguards*, *supra* note 210, at 227.

222. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937) (describing a change funded by “actual experience”).

223. *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

presented by Congress's Section 5 power to enact antidiscrimination legislation. Just as our understanding of federal economic regulatory power has changed dramatically since 1883, so has our understanding of federal civil rights authority. The Court, however, invokes *Harris* and the *Civil Rights Cases* as definitive accounts of how federalism ought to restrict national efforts to protect civil rights, without pausing to inquire whether any intervening historical developments might have qualified the descriptive or prescriptive understandings on which these nineteenth-century decisions are premised. The Court's assumption that national authority to enforce civil rights has remained unaltered since the nineteenth century is all the more remarkable given the dramatic changes in our understanding of the Equal Protection Clause. One would think that a Court that has enshrined Justice Harlan's dissent in *Plessy*<sup>224</sup> might at least pause before invoking the *Civil Rights Cases* as an authoritative account of federal power to regulate discrimination, given that Justice Harlan dissented just as passionately from the Court's judgment in the *Civil Rights Cases* as he did from the notorious ruling of *Plessy*.<sup>225</sup>

### C. *Federalism and Civil Rights*

One cannot reason about the scope of the national government's authority to enforce civil rights without addressing the history of the second Reconstruction, which profoundly altered the federal government's role in combating discrimination. That history is now institutionalized in judicial precedents, congressional enactments, and executive agencies. It has been incorporated into the common sense and experience of the country. It has rendered the account of federalism expressed in the *Civil Rights Cases* as obsolete as would be any account of federalism that relied on the authority of *Carter Coal*.

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224. See, e.g., *Romer v. Evans*, 517 U.S. 620, 623 (1996) ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."); *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (plurality opinion) ("[W]e think *Plessy* was wrong the day it was decided, *Plessy*, *supra*, at 552-562 (Harlan, J., dissenting) . . ."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) ("[O]nly a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens,' *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).").

225. *The Civil Rights Cases*, 109 U.S. 3, 54 (1883) (Harlan, J., dissenting) ("It was perfectly well known that the great danger to the equal employment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by [Section 5], to clothe Congress with power and authority to meet that danger."). For a fuller discussion of Justice Harlan's dissenting opinion in the *Civil Rights Cases*, see *infra* note 237.

We cannot in this Essay recount a full history of the fundamental transformation that 1960s civil rights enforcement has wrought in the texture of our federalism. But we will briefly sketch the highlights of that story by way of suggesting just how radically implausible is *Morrison's* evocation of the *Civil Rights Cases* to restrict Congress in the otherwise legitimate exercise of its Section 5 powers to combat discrimination.

The epochal event was of course the enactment of the Civil Rights Act of 1964. The Act emerged from a complex history of social activism, sparked in part by the Court's own decision in *Brown*,<sup>226</sup> which, together with the per curiams that succeeded it,<sup>227</sup> destabilized the constitutional legitimacy of pervasive and entrenched practices of racial segregation. By the 1960s, protestors were aggressively confronting these practices in a range of market settings, where segregation was backed by hybrid configurations of public and private power. Demonstrations of civil disobedience precipitated arrests, which protestors subsequently challenged on federal constitutional grounds.<sup>228</sup> The executive and judicial branches of

226. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

227. *E.g.*, *Schiro v. Bynum*, 375 U.S. 395 (1964) (per curiam) (city auditorium), *aff'g* 219 F. Supp. 204 (E.D. La. 1963); *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (public facilities); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam) (restaurant); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (per curiam) (sporting events), *aff'g* 168 F. Supp. 149 (E.D. La. 1958); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (public parks), *aff'g* 252 F.2d 122 (5th Cir.); *Pennsylvania v. Bd. of Dirs.*, 353 U.S. 230 (1957) (per curiam) (school); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses), *aff'g* 142 F. Supp. 707 (M.D. Ala.); *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413 (1956) (per curiam) (graduate professional program); *Holmes v. City of Atlanta*, 350 U.S. 879 (per curiam) (public golf course), *rev'g* 223 F.2d 93 (5th Cir. 1955); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public beaches), *aff'g* 220 F.2d 386 (4th Cir.); *Muir v. Louisville Park Theatrical Assoc.*, 347 U.S. 971 (1954) (per curiam) (privately run opera performance), *rev'g* 202 F.2d 275 (6th Cir. 1953).

228. Numerous cases ended up before the Supreme Court. *See, e.g.*, *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964) (5-4 decision) (reversing convictions arising out of sit-ins because the passage of the Civil Rights Act of 1964 while the appeal was pending abated the prosecutions); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (invalidating on vagueness grounds the convictions of sit-in demonstrators for refusing to leave premises after being asked to do so); *Bell v. Maryland*, 378 U.S. 226 (1964) (vacating and remanding sit-in convictions to be reconsidered in the light of the intervening enactment of state and local public accommodations laws); *Robinson v. Florida*, 378 U.S. 153 (1964) (reversing sit-in convictions on the grounds that a state regulation mandating racially separate washroom facilities for restaurant employees and customers constituted state action); *Barr v. City of Columbia*, 378 U.S. 146 (1964) (per curiam) (reversing convictions arising out of a sit-in for lack of evidence); *Griffin v. Maryland*, 378 U.S. 130 (1964) (reversing trespass convictions on the grounds that the arrest by a park employee who had been deputized as sheriff constituted state action); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964) (per curiam) (reversing the convictions arising out of a peaceful assembly on Fourteenth Amendment grounds); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963) (certifying to the Florida Supreme Court a number of state-law questions arising out of convictions in a "Freedom Ride" case); *Fields v. South Carolina*, 375 U.S. 44 (1963) (summarily reversing breach-of-peace convictions); *Wright v. Georgia*, 373 U.S. 284 (1963) (reversing breach-of-peace convictions of blacks for playing basketball in a public park on grounds of inadequate warning under the Due Process Clause); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (per curiam) (reversing convictions arising out of a sit-in because a local ordinance required segregation in restaurants); *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (reversing a contempt conviction for

the federal government were thus forced to decide whether to support protesters confronting racial segregation at lunch counters and other “private” establishments, or instead to back state authorities deploying state criminal law in support of the right of private property owners to discriminate in their choice of customers.<sup>229</sup> Only after the federal courts were clogged with thousands of such cases did the Kennedy Justice Department and a bipartisan congressional coalition decide to draft federal legislation outlawing racial discrimination by business establishments and employers.<sup>230</sup>

The question was whether Congress had the constitutional power to enact such a law. The New Deal revolution in congressional commerce power was barely twenty-five years old. It had established that the federal government could enforce wage and hours regulation in employment relationships. But at the beginning of the 1960s, it was by no means clear that the national government had the authority to enforce norms of racial equality in those same relationships.<sup>231</sup> That issue did not even emerge until

refusing to leave a white-only area of the courtroom on equal protection grounds); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (reversing convictions arising out of a public protest on First Amendment grounds); *Taylor v. Louisiana*, 370 U.S. 154 (1962) (per curiam) (reversing convictions arising out of a sit-in at a bus terminal for lack of evidence); *Garner v. Louisiana*, 368 U.S. 157 (1961) (reversing disturbing-the-peace convictions of sit-in demonstrators on the due process ground of total absence of evidence).

229. See generally JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 306-17 (1994) (describing sit-in cases litigated by the NAACP Legal Defense Fund in the Supreme Court); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 38-48 (1998) (describing the civil disobedience decisions of the Supreme Court between 1964 and 1967); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 227-29 (2000) (describing sit-in cases of 1963 and 1964).

230. Jack Greenberg reports that in 1964 there were several thousand sit-in cases in the federal courts. GREENBERG, *supra* note 229, at 316-17 (discussing the argument of *Hamm*, 379 U.S. 306). For one account of the ways that civil disobedience protests shaped the civil rights agenda of the Kennedy Administration, see HARRIS WOFFORD, *OF KENNEDYS AND KINGS: MAKING SENSE OF THE SIXTIES* 103-77 (1980). See also PHILIP A. KLINKNER WITH ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 264-75 (1999) (describing how the initiative to enact a civil rights bill arose out of symbolic politics of the Cold War and escalating pressures created by civil disobedience protests, culminating in the bombing of a black church in Birmingham); Norbert A. Schlei, *Foreword to BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW*, at vii, viii-ix (1976) (describing how the Birmingham demonstrations and sit-ins in May and June of 1963 prodded the Kennedy Administration into proposing a civil rights bill). Norbert Schlei was an Assistant Attorney General and was in charge of drafting the Administration's bill.

231. Prior to 1960, there were, of course, civil rights and race equality claims sporadically asserted in the labor context. Historians are still uncovering the roots of modern civil rights tradition in the New Deal era. See, e.g., William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 80 (1999) (presenting a vision of a “labor-based civil rights movement” that never realized its potential during or after the New Deal). For a new and provocative account of the federal government's early efforts to protect civil rights in market relationships in the wake of the New Deal, see Risa L. Goluboff, *A Road Not Taken: The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. (forthcoming Apr. 2001), which discusses the legal practice and constitutional interpretations of the Civil Rights Section of the Department of Justice between 1939 and 1954.



the civil rights struggles that succeeded *Brown*. Modern constitutional law casebooks notwithstanding, Congress's power to enact the Civil Rights Act of 1964 did not follow simply from its authority to regulate the production of homegrown wheat.<sup>232</sup> It deeply misconceives the constitutional issues posed by the Act to imagine that it was merely a logical entailment of the 1937 revolution. The Act in fact posed questions about the reach of federal power that were politically and conceptually distinct from the understandings of the New Deal.

Underlying the debates provoked by the sit-ins and protests was the assumption, elaborated and formalized with the spread of Jim Crow, that owners of private property had a "right" or "liberty" to discriminate in the customers they would serve. Although Anglo-American common law had imposed on at least some business owners the duty to serve customers on a nondiscriminatory basis,<sup>233</sup> the linkage of property ownership with the liberty to discriminate found increasingly forceful expression in the decades after the Civil War as white Americans invoked racial notions of associational privacy to justify practices of racial segregation in both public and private spheres.<sup>234</sup>

Both the *Civil Rights Cases* and *Plessy* explicitly drew on this racialized conception of the freedom to associate. These nineteenth-century decisions were premised upon the view that the Constitution conferred upon the emancipated slaves equality in civil, but not social, rights. From this standpoint, law neither could nor should enforce "social equality" among the races.<sup>235</sup> The commitment to provide emancipated slaves equality at law

232. *Wickard v. Filburn*, 317 U.S. 111 (1942).

233. The classic statement of this doctrine is Lord Chief Justice Holt's dissent in *Lane v. Cotton*:

If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him . . . . If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier . . . .

88 Eng. Rep. 1458, 1464-65 (K.B. 1701) (Holt, C.J., dissenting) (citation omitted).

234. Siegel, *supra* note 143, at 1121-28 (illustrating how, over time, the concept of associational privacy was employed to justify state-enforced segregation of marriage, education, transportation, and accommodations); Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (tracing the expansion of the common-law duty to serve in the period before the Civil War and demonstrating how American common-law courts came to celebrate the right of private property owners to discriminate in the use of their property in the decades after the Civil War).

235. For sources discussing the ways that white Americans invoked distinctions among civil, political, and social rights in reasoning about the rights of African Americans during the nineteenth century, see Siegel, *supra* note 143, at 1120 n.28. See also *id.* at 1123-28 (tracing discourse in debates over the Civil Rights Act of 1875, cases applying the Civil Rights Act of 1875, the Supreme Court decision invalidating the Civil Rights Act of 1875, and the decision in *Plessy v. Ferguson* upholding a statute mandating segregation of public accommodations under the Fourteenth Amendment). For an account that analyzes the efforts of African Americans to make emancipatory demands within this discursive framework, see CELESTE MICHELLE CONDIT

was thus bounded by a competing commitment to protect the freedom of "all" Americans to discriminate in the choice of their associates. "It would be running the slavery argument into the ground," the Court reasoned in the *Civil Rights Cases*,

to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.<sup>236</sup>

In essence, the Court used the distinction between civil and social rights to mark a sphere of associational freedom in which law would allow practices of race discrimination to flourish. The logic of federalism that the Court employed in decisions like the *Civil Rights Cases* was thoroughly imbued with this concern about protecting the freedom to discriminate in racial associations.<sup>237</sup> The need to protect this sphere of associational

& JOHN LOUIS LUCAITES, CRAFTING EQUALITY: AMERICA'S ANGLO-AFRICAN WORD 94-110 (1993).

236. The *Civil Rights Cases*, 109 U.S. 3, 24-25 (1883).

237. In the *Civil Rights Cases*, the Court held that Congress lacked power under the Thirteenth and Fourteenth Amendments to enact the Civil Rights Act of 1875, which prohibited discrimination in public accommodations. The role played by race in the Court's judgment about the limits of federal power is most apparent in the Court's interpretation of the Thirteenth Amendment. The Court held that although the Thirteenth Amendment gave Congress direct and plenary authority to enforce the prohibition on slavery, *id.* at 18, 23, the federal government could enact only legislation that protected the civil rights of the freedmen, not their "social rights," *id.* at 22. In the Court's view, the 1875 Act's prohibition of race discrimination in transportation and accommodations had "nothing to do with slavery or involuntary servitude." *Id.* at 24; *see also id.* at 25 ("There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery."). Thus, although the Court conceded that Congress's power under Section 2 of the Thirteenth Amendment was direct and plenary, it used the distinction between civil and social rights to confine federal power under the Thirteenth Amendment in the interests of preserving a sphere of "private" association in which racial discrimination could be freely practiced.

The same dynamic is perceptible in the Court's treatment of the claim that the 1875 Act could be sustained as an exercise of Congress's power under Section 5 of the Fourteenth Amendment. Having held in the *Slaughter-House Cases* that the primary purpose of the Fourteenth Amendment was to redress "the grievances" of "the slave race," 83 U.S. (16 Wall.) 36, 71-72 (1872), the Court in the *Civil Rights Cases* proceeded to hold that Congress lacked direct and plenary power to enforce the Fourteenth Amendment and could only exercise Section 5 power when it was seeking to remedy state action that violated the Amendment. Thus, although Section 5 would appear on its face to cede to Congress expansive power to redress racial discrimination, the Court in the *Civil Rights Cases* restrictively interpreted that power by emphasizing the state action language in Section 1. It is not clear from the Court's opinion in the *Civil Rights Cases* what forms of race-based state action would violate Section 1, *cf.* *Pace v. Alabama*, 106 U.S. 583 (1882) (upholding, under the Fourteenth Amendment, a state law punishing interracial cohabitation, fornication, adultery, or marriage), or how the distinction between civil and social rights would bear on this question, *cf.* Siegel, *supra* note 143, at 1123-27 (demonstrating that "distinctions between civil and social rights were not fixed, but instead were

freedom also drove the Court's conclusion thirteen years later in *Plessy* that state-mandated segregation of public accommodations did not violate Section 1 of either the Thirteenth or the Fourteenth Amendment.<sup>238</sup>

Civil disobedience following in the wake of *Brown* dramatically contested this racialized conception of associational liberty. As protesters

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forged in the struggle over the scope of Reconstruction legislation"). Thirteen years later, of course, the Court in *Plessy* would use the distinction between civil and social rights sharply to limit the reach of Section 1. See *infra* note 238.

To appreciate fully the role that racial assumptions play in shaping the Court's reasoning in the *Civil Rights Cases*, it is helpful to compare Justice Bradley's reasoning with Justice Harlan's dissenting opinion in the case. While Bradley assumes that racial discrimination will remain a normal and largely unobjectionable feature of social life in the United States, Harlan reasons that because the institution of slavery "rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races." *Civil Rights Cases*, 109 U.S. at 36 (Harlan, J., dissenting). Arguing that access to public accommodations is a civil right protected by the common law, Harlan concludes that Congress has the power under the Thirteenth Amendment to enact the provisions of the 1875 Act that prohibit race discrimination in public accommodations. Harlan also defends the 1875 Act as a proper exercise of Congress's power to enforce the Fourteenth Amendment. In Justice Harlan's view, Section 5 vests Congress with direct and primary authority to enforce the provisions of Section 1, including its first sentence, which reverses the *Dred Scott* decision, *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), and makes all persons born or naturalized in the United States citizens of the United States. Cf. *Civil Rights Cases*, 109 U.S. at 46 (Harlan, J., dissenting) (reading the first clause of the Fourteenth Amendment as "introduc[ing] all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the 'People of the United States'"). Citizenship carries the right to be free from racial discrimination in respect to civil rights. "[U]nless the recent amendments be splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the nation[, c]itizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State." *Id.* at 48. It follows for Harlan that Congress can enact legislation enforcing racial equality in civil rights by exercise of its power under Section 5. It is evident, then, that the competing views of federalism advanced by Justice Bradley and Justice Harlan in the *Civil Rights Cases* express contrasting normative assumptions about the permissibility of race discrimination in the aftermath of slavery. Cf. PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 23-60 (1999) (arguing that the racial content of Reconstruction debates about federalism can be discerned by considering the racial understandings informing the proponents' differing approaches to slavery and its abolition).

238. *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* repeatedly invokes the distinction between civil and social rights in the course of explaining why laws mandating segregation are permissible under the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 544 ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."); *id.* at 551-52 ("If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."). In holding that such segregation is constitutional under the Thirteenth Amendment, *Plessy* essentially recapitulates the argument of the *Civil Rights Cases*. *Id.* at 543 ("'It would be running the slavery argument into the ground,' said Mr. Justice Bradley, 'to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will . . . deal with in other matters of intercourse or business.'" (quoting *Civil Rights Cases*, 109 U.S. at 24-25)).

staged sit-ins designed to challenge the freedom of white Americans to segregate black Americans in commonplace social transactions, business owners in turn invoked the power of the state to enforce their right to segregate commercial establishments. The ensuing conflicts posed deep questions about whether national power should intervene to uproot this racialized conception of property and liberty, or whether it should instead turn a blind eye, as it had since the end of Reconstruction. While many states had adopted some form of legislation prohibiting discrimination in public accommodations by the early 1960s,<sup>239</sup> Southern states in particular were determined to resist a federal law that would interfere with customs of segregation in market transactions. The South's filibuster of the civil rights bill in the Senate "was the longest on record, eighty-two days," taking up "63,000 pages of the *Congressional Record*."<sup>240</sup>

This protracted struggle fundamentally altered the ways in which Americans reasoned about national power, changing understandings of both federalism and liberty. Before 1964, it was still commonplace for public figures like Robert Bork and Milton Friedman to decry the prospect of federal interference with the freedom of business owners to discriminate in their choice of customers or employees,<sup>241</sup> and to equate it with McCarthyism,<sup>242</sup> communism,<sup>243</sup> fascism,<sup>244</sup> socialism,<sup>245</sup> involuntary

239. *Bell v. Maryland*, 378 U.S. 226, 284-85 (1964) (Douglas, J., concurring in part) (listing, in an appendix prepared by the United States Commission on Civil Rights, state antidiscrimination laws as of 1964).

240. POWE, *supra* note 229, at 233; *see also id.* at 232 (reporting that "the Civil Rights Act passed the House of Representatives by the overwhelming bipartisan margin of 290-130, 104 of the dissenters being southern Democrats, who fully understood that this bill was aimed directly at the white South").

241. These objections were the mainstay of opposition to the enactment of the Civil Rights Act of 1964 in Congress. *E.g.*, 2 STATUTORY HISTORY OF THE UNITED STATES 1304 (Bernard Schwartz ed., 1970) (excerpting the congressional floor debates over the Civil Rights Act of 1964) (statement of Sen. Tower) ("[W]hat is left of individual liberty if a man or a woman cannot choose associates in work or in play on the basis of either reason or prejudice, which are often indistinguishable?"); *id.* at 1121 (statement of Rep. Willis) ("In the teeth of previous rulings of the courts to the contrary, title II undertakes to order that from here on the 14th amendment shall mean that the private owner of a place of business, such as a restaurant and many others, cannot choose his customers."); *id.* at 1129 (statement of Rep. Abernethy) ("An owner of property should not be compelled to serve or entertain or otherwise accommodate anybody that he, the owner, does not want to accommodate.").

242. *E.g.*, Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21, 24 (arguing that just as with "McCarthyism," "the issue was not whether communism was good or evil but whether men ought to be free to think and talk as they pleased," so too "[i]t is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them"); *see also id.* at 22 ("There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. . . . The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.").

243. *E.g.*, 110 CONG. REC. 9184 (1964) (statement of Sen. Thurmond) (stating that "FBI Director J. Edgar Hoover has confirmed . . . that 'Communist influence does exist in the Negro

servitude,<sup>246</sup> or worse.<sup>247</sup> It is a measure of the fundamental changes wrought by the second Reconstruction that these public and prominent objections to federal enforcement of antidiscrimination norms now sound like voices from another world.<sup>248</sup>

movement,” and demanding that Congress inquire into “these subversive influences which have promoted racial strife and turmoil and which have been responsible in a large measure for promoting and inspiring the pending so-called civil rights legislation”); 2 STATUTORY HISTORY OF THE UNITED STATES, *supra* note 241, at 1421 (statement of Rep. Smith) (“Already the second invasion of carpetbaggers of the Southland has begun. Hordes of beatniks, misfits, and agitators from the North, with the admitted aid of the Communists, are streaming into the Southland on mischief bent, backed and defended by other hordes of Federal marshals, Federal agents, and Federal power.”).

244. *E.g.*, 110 CONG. REC. 9030 (1964) (colloquy between Sens. Talmadge and Tower) (Sen. Talmadge observing that “so long as we have discrimination, we shall have freedom. When we cease to have discrimination, we shall have an ant-hill society, in which the Government will call the shots,” and Sen. Tower responding, “I think we will have about arrived at ‘1984’ when that occurs”); 2 STATUTORY HISTORY OF THE UNITED STATES, *supra* note 241, at 1293 (statement of Sen. Ervin) (“I will agree that if this bill were passed, that the America I have known and loved, the America that believes in liberty rather than Government by regimentation, would be supplanted by a police state.”); *id.* at 1401 (statement of Sen. Goldwater) (“To give genuine effect to the prohibitions of this bill will require the creation of a Federal police force of mammoth proportions. It also bids fair to result in the development of an ‘informer’ psychology in great areas of our national life—neighbors spying on neighbors, workers spying on workers, business spying on businessmen . . . These, the Federal police force and an ‘informer’ psychology, are the hallmarks of the police state and landmarks of the destruction of a free society.”).

245. *E.g.*, 2 STATUTORY HISTORY OF THE UNITED STATES, *supra* note 241, at 1299 (statement of Sen. Tower) (“If Federal Government is to inject itself to this extent into the operation of the nation’s industry, it may well find itself in complete charge under a Socialist state.”).

246. *See* Alfred Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L.Q. 228 (1964) (arguing that state legislation requiring nondiscrimination in public accommodations and various personal service occupations violates the Thirteenth Amendment by forcing one person to serve another), *cited in* 110 CONG. REC. 8633 (1964). Title II of the Civil Rights Act of 1964 was in fact challenged as an “involuntary servitude” in violation of the Thirteenth Amendment, a challenge summarily dismissed by the Court. *Hear of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964). *But see* *Browning v. Slenderella Sys.*, 341 P.2d 859, 869 (Wash. 1959) (Mallery, J., dissenting) (“The right to exclusiveness, like the right to privacy, is essential to freedom. . . . When a white woman is compelled against her will to give a Negress a Swedish massage, that . . . is involuntary servitude.”).

247. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 113 (1982 ed.) (originally published in 1962) (“The Hitler Nuremberg laws . . . [are] similar in principle to [Title VII.]”); 2 STATUTORY HISTORY OF THE UNITED STATES, *supra* note 241, at 1165-66 (colloquy between Sens. Sparkman and Talmadge) (arguing that the Civil Rights Act would empower another Mussolini or Hitler); *id.* at 1302 (colloquy between Sens. Hill and Tower) (same).

248. *E.g.*, 2 STATUTORY HISTORY OF THE UNITED STATES, *supra* note 241, at 1132 (statement of Rep. Abernethy) (“If a department store manager wants to hire blond sales clerks, he can hire all blond sales clerks. His wife might object but the Federal Government cannot. Title VII would change all this . . . . The most remote corner of our social structure and virtually all of our economic structure would be reached, cajoled, and controlled by this incredible proposal.”); *id.* at 1274-75 (statement of Sen. Long) (“[I]t is desirable for the colored, as well as the white, to associate with their own kind, and to have their social relationships among their own kind. [I] believe[] that is the opinion of the overwhelming majority of the white, as well as the colored—reserving the right of anyone who wants to mix to do so.”); *id.* at 1304 (statement of Sen. Tower) (“Where was the Congress ever given the power to declare it to be a wrong for an American to dislike to associate with persons of nations or races which have recently made war on America and treacherously killed or cruelly tortured the sons, brothers, or fathers of living Americans?”).

This transformation in American expectations about the purposes and reach of federal regulatory power did not grow out of the constitutional upheavals of the New Deal. Nor was it asserted, or legitimated, as a simple corollary of Congress's power to regulate interstate commerce. It emerged instead from a set of historically distinct struggles and debates about the enforcement of antidiscrimination norms in discrete areas of social life. The burning normative question was whether Congress could or should intervene to reform this deeply engrained, racialized understanding of property and liberty. The substance of the controversy inhered in disputes about the norms and commitments that inhabit the Equal Protection Clause.

On the level of formal constitutional discourse, however, the constitutional debates surrounding the enactment of the Civil Rights Act of 1964 revolved around the question of whether the statute should be enacted as an exercise of Congress's power to regulate interstate commerce or instead of its Section 5 power to enforce the Fourteenth Amendment.<sup>249</sup> Eventually Congress split the difference and drafted the statute to rely upon both the Commerce Clause and upon Section 5.<sup>250</sup> When the Court considered the validity of the Act in *Heart of Atlanta*, it chose to affirm its constitutionality as an exercise of the commerce power, reserving judgment on the question of whether it might also be a legitimate exercise of Congress's authority to enforce the Fourteenth Amendment.<sup>251</sup> But although the Court was cautious about attributing Congress's power to prohibit discrimination by private actors to Congress's power to enforce the Fourteenth Amendment, and would remain so throughout the decade, it was not in the least ambivalent about the larger point, which was that Congress

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Today such objections to federal enforcement of antidiscrimination norms in market transactions are rarely voiced by officials in public settings. But discourses of the racial private sphere once used to oppose laws enforcing antidiscrimination norms in business transactions have now taken on new life in debates over affirmative action. See Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29, 52-61 (Robert Post & Michael Rogin eds., 1998) (tracing the evolution of racial privacy discourse in the period after the enactment of the Civil Rights Act of 1964 from the claim that civil rights law should respect associational freedom to a claim that civil rights law should respect the market allocations individuals and groups secure through meritocratic competition, and illustrating how courts and commentators invoked this new discourse of the racial private sphere as a basis for restricting affirmative action).

249. There were, in fact, congressional proponents of each view, and extended debates about the kinds of transactions Congress might reach by exercise of each source of power. For a good summary of the debates, see MORGAN, *supra* note 22, at 292-330; see also *Heart of Atlanta*, 379 U.S. at 286-91 (Douglas, J., concurring) (discussing, in an appendix, the Fourteenth Amendment basis of the enacted public accommodations title).

250. The Act applies to a public accommodation "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." 42 U.S.C. § 2000a(b) (1994); see also *supra* note 22.

251. *Heart of Atlanta*, 379 U.S. at 250 ("[W]e have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which [Congress] acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone."); see also *supra* note 23.

had authority to enact legislation applying antidiscrimination norms to transactions between private parties.

This can be seen clearly in the Thirteenth Amendment jurisprudence that the Court developed at that time. The *Civil Rights Cases* had held that Congress could not enact the 1875 Civil Rights Act under the Thirteenth Amendment because racial discrimination in “matters of intercourse or business”<sup>252</sup> was not a badge or incident of slavery that Congress could regulate under Section 2 of the Thirteenth Amendment.<sup>253</sup> But in the 1960s the Court effectively overruled this aspect of the *Civil Rights Cases* and held in *Jones v. Alfred H. Mayer Co.*<sup>254</sup> that Congress could prohibit discrimination by private individuals in a variety of social transactions under Section 2 of the Thirteenth Amendment.<sup>255</sup> “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>256</sup>

The Court was so determined to ensure that Congress had sufficient authority to regulate discriminatory conduct by private parties that it expanded Congress’s power to enforce the Thirteenth Amendment without according a similarly capacious interpretation to the self-enforcing provisions of Section 1 of the Thirteenth Amendment.<sup>257</sup> The issue came to

252. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

253. Underlying the holding was a concept of federalism designed to uphold the freedom to discriminate in “social” matters. For a full discussion of this point, see *supra* note 237. The Court continued for many decades to invoke this same understanding of federalism to read the Thirteenth Amendment very narrowly. *E.g.*, *Hodges v. United States*, 203 U.S. 1, 18 (1906); *cf.* *Corrigan v. Buckley*, 271 U.S. 323, 330-31 (1926).

254. 392 U.S. 409 (1968).

255. *Id.* at 440-41. In *Jones*, the Court construed section 1 of the Civil Rights Act of 1866, now codified at 42 U.S.C. § 1982 (1994), to reach discrimination in real property transactions by private actors, holding also that Congress had the power under Section 2 of the Thirteenth Amendment to enact § 1982. The Court observed:

[T]he fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals.

*Jones*, 392 U.S. at 438-39. For a discussion, see Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019 (1969). The Court later construed another Reconstruction statute derived from section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1994), to prohibit private schools from discriminating on the basis of race. *Runyon v. McCrary*, 427 U.S. 160 (1976). In the ensuing years, federal courts developed a body of doctrine that integrated cases decided under these revived nineteenth-century statutes with cases arising under the Civil Rights Act of 1964 and the Civil Rights Act of 1968. Note, *Federal Power To Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 466-505 (1974).

256. *Jones*, 392 U.S. at 440.

257. The Thirteenth Amendment provides:

a head in *Palmer v. Thompson*,<sup>258</sup> when the Court rejected constitutional challenges to a decision by Jackson, Mississippi, to close a municipal swimming pool rather than to desegregate it. In response to the argument that the city's decision constituted a "badge or incident" of slavery condemned by the Thirteenth Amendment, *Palmer* stated:

The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident" of slavery. Consequently, the argument seems to run, this Court should declare that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. . . . Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors. Finally, *although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in Jones v. Alfred H. Mayer Co. could empower Congress to outlaw "badges of slavery."* The last sentence of the Amendment reads: "Congress shall have power to enforce this article by appropriate legislation." *But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.*<sup>259</sup>

The Court was thus willing to read Section 2 as authorizing Congress to regulate discriminatory conduct that the Court was itself unprepared to declare violated Section 1 in litigation seeking judicial enforcement of the Thirteenth Amendment.<sup>260</sup> Because issues of equal protection in the 1960s revolved almost entirely around questions of racial discrimination, this broad interpretation of the Thirteenth Amendment's enforcement clause, when coupled with Congress's Commerce Clause power, essentially ceded to Congress sufficient constitutional authority to regulate the full range of discriminatory conduct by private actors it sought to reach.

By the end of the 1960s, in short, the landscape of federalism had been fundamentally altered. Social activism had forced the question of

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Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

258. 403 U.S. 217 (1971).

259. *Id.* at 226-27 (emphasis added).

260. See Laycock, *supra* note 84, at 755; Sager, *Justice in Plain Clothes*, *supra* note 137, at 433; cf. *City of Memphis v. Greene*, 451 U.S. 100, 125 (1981).



discrimination by private actors to the top of the national agenda, and Congress had responded with major legislation to address the problem. This legislation was ratified by the Court, whether based upon the Commerce Clause, the Thirteenth Amendment, or the spending power. One way or the other, what would have been unimaginable in prior decades had come to pass: The struggle against discrimination by private actors had become a legitimate end of the federal government.

It is true that throughout this period the Court never squarely addressed the scope of Congress's power to prohibit discrimination by private actors under Section 5 of the Fourteenth Amendment. In *Guest*, concurring opinions joined by six Justices suggested that under Section 5, Congress could enact laws punishing conspiracies by private actors to interfere with Fourteenth Amendment rights.<sup>261</sup> But the Court's opinion in *Guest*, as elsewhere, explicitly reserved the question.<sup>262</sup>

Why did the Court avoid the question of Section 5 power in cases such as *Heart of Atlanta* and *Guest*? The question cannot be definitively answered, but several considerations seem to have played an important part. It certainly weighed heavily with the Court that the interpretation of Section 5 was tied in significant and contested ways to the construction of Section 1. In 1963, most observers interpreted the *Civil Rights Cases* as requiring that Section 5 legislation remedy discrimination involving state action of the kind required for equal protection claims arising under the judicially enforceable provisions of Section 1; the debates over the 1964 Act were conducted on this assumption.<sup>263</sup> Judicial pronouncements concerning the scope of Congress's powers under Section 5 thus might affect the kinds of state action claims plaintiffs could ask courts to adjudicate under Section 1. Throughout the 1960s the Court was under intense pressure to relax the state action requirement for judicial

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261. *United States v. Guest*, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part) ("A majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy."); *see also* *District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973) (dictum).

262. *Guest*, 383 U.S. at 755; *see also* *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971) ("[T]he allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.").

263. *See, e.g.*, sources cited in note 266 *infra*. Even in *Heart of Atlanta*, the concurring opinions of Justices Douglas and Goldberg, which argued that the 1964 Act ought to be upheld as an exercise of Section 5 power, both assumed that a judicially enforceable violation of Section 1 was a necessary predicate to the exercise of Section 5 power. *See* *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 280 (1964) (Douglas, J., concurring); *id.* at 376-77 (Goldberg, J., concurring). Both Justices Douglas and Goldberg were willing to extend the state action requirement of Section 1 to reach "discriminatory treatment (based on race) in places of public accommodation" by private parties. *Id.* at 280 (Douglas, J., concurring).

enforcement of Section 1.<sup>264</sup> Particularly after *Burton v. Wilmington Parking Authority*,<sup>265</sup> the nature of this requirement was uncertain,<sup>266</sup> reflecting an instability that was intensified by the constant and unremitting strain of the sit-in cases.<sup>267</sup>

It was not until the Court's protracted deliberations in *Bell v. Maryland*<sup>268</sup>—conducted while debate raged in the Senate over the 1964

264. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 276 (1991) ("[A] brief survey of the period's constitutional commentary . . . reveals that the dominant trend in legal academic thought espoused abolition of the state action requirement."). The pressure to liberalize the state action requirement in equal protection cases is a central theme of the *Harvard Law Review's Supreme Court Forewords* authored by Archibald Cox in 1966 and Charles Black in 1967. See Cox, *supra* note 160; Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967); see also John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

265. 365 U.S. 715 (1961).

266. At this time Supreme Court case law could be read as supporting a claim of state action in many racially discriminatory situations not involving formal action or authorization by the state. See MORGAN, *supra* note 22, at 297 (noting that in the early 1960s, "one might plausibly construe the amendment as encompassing state enforcement of discrimination based solely on custom or usage and lacking any prior state authorization"). The uncertainty surrounding the state action requirement was so great that Republican congressmen advocating a Fourteenth Amendment basis for the Civil Rights Act of 1964 repeatedly pointed to state action precedents suggesting that discrimination in public accommodations licensed by the state was actionable under the Fourteenth Amendment. *E.g.*, *Civil Rights: Hearings Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong. 1388 (1963) (questioning of Rep. McCulloch); *id.* at 1395 (statement of Rep. Lindsay) ("The 14th amendment approach in effect would cover a public facility which is privately owned and which is authorized to do business by the State."); *id.* at 1601 (statement of Rep. Lindsay) (stating, in response to the question "[D]o you take the position then that if there is a license or permit issued by the State or a subdivision of the State that any action that might be taken will come under the prohibition of the 14th amendment?" that "I would like to argue that case in the Supreme Court, and I think I would win it today").

267. Observers of the Court well appreciated that the sit-in cases put increasing pressure on state action limitations restricting judicial enforcement of Section 1. *E.g.*, Thomas P. Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101, 101 ("In the *Sit-in Cases* decided last Term the Supreme Court inched closer to a confrontation with perhaps the most interesting, most discussed—perhaps the most crucial—issue since the decision of the *School Segregation Cases*. In some respects the resolution of this issue, whether the Fourteenth Amendment provides the Negro with a self-executing federal right to equal treatment by the proprietors of private establishments catering to all the public except Negroes, may have more far-reaching implications and greater consequences than even the *School Segregation Cases*." (footnotes omitted)).

The Court's deliberations in *Bell v. Maryland*, 378 U.S. 226 (1964), which occurred during congressional debates over the 1964 Act, show four—and possibly five—Justices ready to reverse the restaurant sit-in convictions on Fourteenth Amendment grounds. Compare POWE, *supra* note 229, at 227-29 (reporting that Chief Justice Warren, and Justices Brennan, Douglas, and Goldberg were ready to reverse the convictions on Fourteenth Amendment grounds), with Klarman, *supra* note 264, at 273-77 (reporting that after a long delay in the Court's internal deliberations in the case, Justice Clark circulated a draft opinion that would have found state action, but subsequent state law developments enabled Justice Brennan to build a majority for reversing the convictions on retroactive abatement grounds). Apparently concerned that an adverse decision in the case might be viewed by some to undercut chances for the Act's passage, the Court delayed deciding the case, and then finally reversed the sit-in convictions on state-law grounds just three days after the Senate passed the Act, and ten days before it became law. HORWITZ, *supra* note 229, at 39-41; POWE, *supra* note 229, at 229.

268. 378 U.S. 226.

Civil Rights Act—that Justice Black seems first to have suggested the possibility that Congress could use as a predicate for Section 5 legislation discrimination that did not necessarily meet the state action requirement of Section 1.<sup>269</sup> Two years later in *Guest*, the Court itself explicitly reserved the question of whether Section 5 legislation needed to be predicated on the same state action requirement as Section 1,<sup>270</sup> and in that same year in *Katzenbach v. Morgan*, the Court held in the alternative that Section 5

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269. In his dissent in *Bell*, Justice Black intimated that although the majority could and should have sustained the sit-in convictions, Congress might have power under the Fourteenth Amendment to enact legislation prohibiting discriminatory conduct that the Court enforcing the Fourteenth Amendment “alone” could not reach. Justice Black criticized the Court for siding with the protesters when, as far as he understood it, Section 1 of the Fourteenth Amendment protected, through the state action requirement itself, the liberty of property owners to discriminate:

[T]he Fourteenth Amendment of itself does not compel either a black man or a white man running his own private business to trade with anyone else against his will. We do not believe that Section 1 of the Fourteenth Amendment was written or designed to interfere with a storekeeper’s right to choose his customers or with a property owner’s right to choose his social or business associates, so long as he does not run counter to valid state or federal regulation. *The case before us does not involve the power of the Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race and to trade with all if they trade with any. We express no views as to the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses, nor upon any particular form of legislation to that end.* Our sole conclusion is that Section 1 of the Fourteenth Amendment, *standing alone*, does not prohibit privately owned restaurants from choosing their own customers. It does not destroy what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him to do otherwise.

*Id.* at 342-43 (Black, J., dissenting) (emphasis added) (citations omitted). Black carefully reserved the question of whether Congress, pursuant to Section 5, must draw the public/private distinction in the same way as the Court in its own application of Section 1. *See also id.* at 338 (observing that there is no cited evidence “to support the proposition that the Fourteenth Amendment, without congressional legislation, prohibits owners of restaurants and other places to refuse service to Negroes”); *id.* at 339 (“It should be obvious that what may have been proposed in connection with passage of one statute or another is altogether irrelevant to the question of what the Fourteenth Amendment does in the absence of legislation.”); *cf.* *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 278-79 (1964) (Black, J., concurring).

270. The Court stated:

Since we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.

*United States v. Guest*, 383 U.S. 745, 755 (1966). Justice Brennan, in his separate opinion in *Guest*, explicitly embraced the position that Section 5 legislation was not constitutionally required to correct equal protection violations that were defined by the same standards as those used by courts to define Section 1 violations. *Id.* at 782 (Brennan, J., concurring in part and dissenting in part) (“A majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy.” (emphasis in original)); *id.* at 783 n.7 (“Congress, not the judiciary, was viewed as the more likely agency to implement fully the guarantees of equality, and thus it could be presumed the primary purpose of the Amendment was to augment the power of Congress, not the judiciary.”); *see also* *District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973) (dictum).

legislation could remedy violations that differed from those courts were empowered to redress pursuant to Section 1.<sup>271</sup> Upon receiving the draft of the *Morgan* opinion, Black wrote a personal note to Brennan, congratulating him on a “historic opinion which for the first time gives § 5 of the Fourteenth Amendment the full scope I think it was intended to have.”<sup>272</sup>

The Court thus advanced an institutionally differentiated approach to Section 5 analogous to that which it would later develop in its Thirteenth Amendment jurisprudence.<sup>273</sup> Contemporary commentators read the Court’s Section 5 decisions as implicitly embracing such an approach.<sup>274</sup> But, in the end, the Court never definitively resolved the question of whether or how a state action requirement restrained Congress’s power to enact antidiscrimination legislation under Section 5, perhaps because the Fourteenth Amendment, unlike the Thirteenth Amendment, concerns such a wide range of disparate rights that relate in such conceptually distinct ways

271. 384 U.S. 641, 648-49 (1966) (holding that under Section 5 of the Fourteenth Amendment, Congress can enact legislation prohibiting enforcement of a state law, even if courts have not determined that the state law violates the provisions of the Amendment) (“A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It 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 § 1 of the Amendment.”) (citations to historical accounts of the Fourteenth Amendment invoked in support of the Court’s interpretation of Congress’s Section 5 powers omitted).

272. Communication from Hugo Black, Justice, U.S. Supreme Court, to William Brennan, Justice, U.S. Supreme Court (May 23, 1966).

273. *Supra* text accompanying notes 257-260.

274. Certainly Archibald Cox, who as Solicitor General had previously believed that it was impractical to defend the constitutionality of the Civil Rights Act of 1964 on Fourteenth Amendment, as distinct from Commerce Clause, grounds, read the *Morgan* and *Guest* cases in his *Supreme Court Foreword* of 1966 as attributing to Congress a special institutional competence and authority to address the state action requirement of the Fourteenth Amendment. He interpreted the cases as signaling that the Court had begun to exercise judicial review of Section 5 power in deferential terms resembling its approach to federalism questions under the Commerce Clause:

Here then, as under the commerce clause, in place of the question, what will the Court permit, the principal issue becomes, how widely should Congress choose to extend federal regulation. Political opinions upon the wisdom of that transfer of responsibility [to determine federalism limits under the Commerce Clause] differ widely. In my view it gave the federal system as a whole the flexibility to satisfy the material needs of its citizens, without significantly lessening the power of the states to respond. The recent decisions express a parallel view of congressional responsibility in the area of human rights.

Cox, *supra* note 160, at 119. For Cox’s view of the 1964 Act, see Seth M. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1311-13 (2000). For another contemporary interpretation of *Morgan*, see Burt, *supra* note 65, at 104, which reads *Morgan* as “assert[ing] a new constitutional theory of Court-Congress relationships under the Fourteenth Amendment.”

to the issue of state action.<sup>275</sup> Or the Court may simply have been reluctant to venture into this complex territory when it was uncertain about the state action requirement of Section 1 and about the exact relationship between Section 5 and Section 1, and when it could achieve its goal of encouraging congressional regulation of discrimination by private actors through other means.

Although we cannot understand the full range of concerns that led the Court to rely on the Commerce Clause and Section 2 of the Thirteenth Amendment to vindicate Congress's power to enact antidiscrimination legislation during the 1960s—while reserving decision about the scope of Congress's powers under Section 5 of the Fourteenth Amendment—this lingering question should not obscure what is perfectly clear about the Court's commitment during the 1960s. Through a combination of interpretive stratagems, the Court decisively freed federal antidiscrimination legislation from the state action requirement it preserved for its own Section 1 cases. It encouraged Congress to decide when and how the federal government would enforce antidiscrimination norms against private actors—authority Congress exercised in enacting the violence and housing provisions of the 1968 Civil Rights Act.<sup>276</sup> The Court's deference to Congress helped to consolidate a new consensus about the federal government's role in enforcing civil rights. By the end of the decade, Congress, the Court, and the American people all expected the federal government to lead the fight against discrimination in the public and private sectors. This is the momentous fact that *Morrison* ignores by citing

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275. The Court may have been concerned about its capacity to confine any decision to relax or waive state action requirements in exercises of Section 5 power to congressional efforts to enforce the Equal Protection Clause. For a discussion of the difficulties that may attend relaxing the state action requirement in the context of other Section 1 rights, see Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537 (1998).

276. Cf. Cox, *supra* note 160, at 117-18 (reading *Morgan* and *Guest* as encouraging Congress to exercise its authority under Section 5 to regulate racial violence and housing discrimination). Congress invoked its powers under the Fourteenth Amendment as well as the Commerce Clause in enacting the Civil Rights Act of 1968. See S. REP. NO. 90-721, at 5 (1967) ("[A] majority of the Justices made it clear that Congress could, under section 5 of the 14th amendment, enact a statute reaching private conduct denying such rights. H.R. 2516 is such a statute and would—as six Justices said was constitutionally possible—cover racially motivated acts of violence which do not involve participation on [sic] connivance of public officials."); H.R. REP. NO. 90-473, at 6 ("While the 14th and 15th amendments, of their own force, do not forbid private discrimination in which no trace of 'State action' is involved, they do expressly authorize Congress to enact appropriate legislation to 'enforce' their substantive guarantees. The scope of this congressional power is broad. (*South Carolina v. Katzenbach*, 383 U.S. 301, 326-327). It surely comprehends legislation punishing private persons, who, for racial reasons, engage in acts or threats of violence that obstruct access on equal terms to the facilities and benefits which a State provides its citizens, and thereby thwart the attainment of the promise of the 14th and 15th amendments. Any doubt on this score was laid to rest by the opinions of Mr. Justice Clark and Mr. Justice Brennan (speaking together for six of the nine Justices), in the *Guest* case. . . .").

the *Civil Rights Cases* as an authoritative account of the meaning of federalism in the context of federal antidiscrimination legislation.

#### D. Morrison, *Civil Rights, and Federalism*

No doubt the Court has the raw power to deny this historical transformation by seeking to revive older notions of federalism. Federalism is, as we have said, a dynamic system, and since the days of the second Reconstruction there has certainly been a renewed interest in restricting the power of the federal government. But the decisive question raised by *Morrison's* appeal to federalism is whether the nation has retreated from the view that a central mission of the federal government is to protect individuals against discrimination by public and private actors.

The 1960s produced a consensus on this question that was the result of full and passionate debate. The Civil Rights Act of 1964 provoked sustained public deliberation about the role of the federal government that fundamentally transformed American traditions of federalism.<sup>277</sup> Americans now believe that a core function of the federal government is to prohibit discrimination in the public and private sectors. *Morrison* simply does not acknowledge or critically engage this shared public understanding. The Court's discussion of Section 5 power, in contrast to its treatment of Commerce Clause power, offers no positive account of the appropriate relationship between federal and state governments in matters of civil rights enforcement. *Morrison* instead invokes rules and tests to cabin Section 5 power in the interests of federalism, assiduously avoiding any discussion of what role the federal government *ought* to play in enforcing civil rights. The Court reaches back to the nineteenth century to invoke the *Civil Rights Cases* for the view that it would threaten the "balance of power between the States and the National Government"<sup>278</sup> for Congress to regulate the conduct of private actors under the Fourteenth Amendment.

But *Morrison* never evaluates this nineteenth-century understanding, descriptively or prescriptively, in terms of the constitutional arrangements of the twentieth century. *Morrison* never explains why, if it is compatible with the proper balance of power between the states and the national government for Congress pervasively to regulate discrimination by private actors by exercising its powers under the Commerce Clause or the

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277. Cf. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 137 (1991) (arguing that it was the "escalating political struggle against institutional racism"—in part precipitated by *Brown*—that "enabl[ed] the Presidency and Congress of the mid-1960's finally to transform the embattled judicial pronouncements of the mid-1950's into the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965," and so retroactively to imbue *Brown* with the significance of documents "that express the considered judgments of We the People").

278. *United States v. Morrison*, 120 S. Ct. 1740, 1755 (2000).

Thirteenth Amendment, it is not also compatible with this balance of power for Congress to regulate such discrimination by private actors as is deemed necessary and proper to remedy violations of the Equal Protection Clause of the Fourteenth Amendment.

Of course the nature of any such explanation would depend on what *Morrison* actually holds. *Morrison* is notably ambiguous about whether it imposes a per se rule categorically forbidding Section 5 legislation from regulating private parties, or whether it instead requires a case-by-case inquiry into the “congruence and proportionality” of Section 5 legislation with respect to an underlying Section 1 violation.

Interpreted as imposing a per se rule forbidding Section 5 legislation from regulating private parties, *Morrison* is a hugely consequential decision. Read in this way, *Morrison* would erect a sharp and arbitrary barrier against federal efforts to remedy the effects of Section 1 violations, a barrier lacking warrant in precedent, either in the *Civil Rights Cases* or in *Boerne* itself.<sup>279</sup> To justify imposing this new per se restriction on Congress’s use of its Section 5 power to enforce antidiscrimination norms against private actors, the Court would have to offer a normative account of the proper purposes of the federal government, the persuasive force of which would depend on shared understandings about the legitimate role of the national government. Yet, as we have seen, the struggles that led to the enactment of the Civil Rights Act of 1964 produced a consensus, which lasts to this day, about the propriety of the federal government enforcing antidiscrimination norms against private actors. *Morrison* neither addresses nor contests this consensus, as any opinion seeking to alter the national government’s role in enforcing civil rights would have to do.

Interpreting *Morrison* as imposing a per se restriction on Congress’s powers to enforce antidiscrimination norms against private actors would not only constitute a major challenge to popular conceptions of the federal government’s role, but would also represent a significant break with the Court’s own approach to reviewing exercises of Section 5 power. During the 1960s, Congress claimed authority to enact antidiscrimination statutes by invoking its power under the Fourteenth Amendment. The Court did not reject this claim. Instead it encouraged Congress to enact antidiscrimination legislation, while systematically refusing to decide whether various statutes applying antidiscrimination norms to private actors could be justified by Section 5.<sup>280</sup> The Court’s reticence was too persistent to be anything but

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279. For an argument against any such per se rule, see Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351 (2000).

280. On congressional assertions of power, see *supra* notes 22, 25, 276. The Court has repeatedly refused to decide the question. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 306 n.12 (1977) (“Their petition for certiorari and brief on the merits did raise a second question: ‘Whether Congress has authority under Section 5 of the Fourteenth Amendment to prohibit by Title VII of the Civil Rights Act of 1964 employment practices of an agency of a state

deliberate. Its repeated refusal to clarify the relationship between these antidiscrimination statutes and the Fourteenth Amendment preserved a certain useful ambiguity about the status of these statutes as well as about the state action requirement of the Equal Protection Clause. Were the Court in *Morrison* now to hold that Section 5 power can never reach private actors, it would both radically expand the reach of the *Civil Rights Cases* and cut off the Civil Rights Act of 1964 from the Fourteenth Amendment, categorizing the statute for the first time as “merely” a market regulation, constitutionally rooted only in the economic concerns of the Commerce Clause.

Plainly this is not how the statute was understood, either by the Court or by Congress, at the time of its enactment or in the ensuing decades. No one at the time had the slightest doubt but that the antidiscrimination statutes enacted by Congress during the 1960s were implementing the equality norms of Section 1 of the Fourteenth Amendment.<sup>281</sup> That is why the Court could interpret Title VII in terms that readily and unself-consciously evoked the constitutional standards of the Equal Protection Clause.<sup>282</sup> This view of the statute enabled the Court in 1976 easily to

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government in the absence of proof that the agency purposefully discriminated against applicants on the basis of race.’ That issue, however, is not presented by the facts of this case.”); *Curtis v. Loether*, 415 U.S. 189, 198 n.15 (1974) (deciding whether jury trials are required under the fair housing title of the Civil Rights Act of 1968, and stating that “[w]e therefore have no occasion to consider in this case any question of the scope of congressional power to enforce § 2 of the Thirteenth Amendment or § 5 of the Fourteenth Amendment”); *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971) (discussing the constitutionality of 42 U.S.C. § 1985(3) (1994), which prohibits conspiracies to interfere with civil rights and stating that “the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment”); *United States v. Guest*, 383 U.S. 745, 755 (1966) (reviewing an indictment under 18 U.S.C. § 241 (1964), which criminalizes conspiracies against “the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States” and stating that “[s]ince we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment”); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (deciding the constitutionality of Title II of the Civil Rights Act of 1964 and stating that “we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which [Congress] acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone”). *Contra Guest*, 383 U.S. at 782 (Brennan, J., concurring in part and dissenting in part) (“A majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy.”).

281. It is surely relevant for this point that Congress itself persisted in justifying these statutes by reference to its power under Section 5. For a discussion of the Civil Rights Act of 1964, see *supra* note 22. Congress also asserted Section 5 power in enacting the Civil Rights Act of 1968. *Supra* note 276.

282. For example, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court held that discrimination on the basis of pregnancy is not discrimination on the basis of sex under Title VII by applying to Title VII the reasoning of a case interpreting the Equal Protection Clause



approve Congress's wholesale extension of Title VII of the Civil Rights Act of 1964 to the states as "an appropriate method of enforcing the Fourteenth Amendment" under Section 5.<sup>283</sup> Indeed, it was not until 1976 that the Court first sought explicitly to differentiate judicial interpretations of Section 1 from the standards used to interpret Title VII.<sup>284</sup>

If one takes seriously the Fourteenth Amendment concerns that prompted the enactment and interpretation of the Civil Rights Act of 1964, as well as the Fourteenth Amendment concerns that seem to have animated the Court's reluctance to hold that the statute was an exercise of Congress's Section 5 power, then proper constitutional characterization of the statute (and of other antidiscrimination legislation of the second Reconstruction) remains fraught with difficulties. The Court's repeated reservation of the Section 5 question in cases involving legislative application of equality norms to private actors can be interpreted as expressing a deep appreciation of the complex Fourteenth Amendment issues that statutes like the Civil Rights Act of 1964 embody. For this very reason, it would be a dramatic step, of both expressive and practical consequence, for the Court now unequivocally to cut a statute like the Civil Rights Act of 1964 adrift from the Fourteenth Amendment antidiscrimination tradition initiated by *Brown*, whose equality norms played so central a role in its enactment and interpretation, and to insist that the Act is a mere market regulation enacted under the Commerce Clause.<sup>285</sup>

Taken together, these are momentous consequences to attribute to an opinion as terse, as casual, as undeveloped as *Morrison*. Surely we are entitled to a more explicit and considered explication of these weighty issues from an opinion that would alter more than a century of Section 5 jurisprudence by holding for the first time that Section 5 legislation can have no application to private actors, and that would closely confine almost fifty years of federal antidiscrimination law by holding for the first time that its norms can have no constitutional relevance for private actors. There is

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of the Fourteenth Amendment. See *id.* at 132-40 (applying to Title VII the reasoning of *Geduldig v. Aiello*, 417 U.S. 484 (1974)). As Justice Rehnquist explained:

The concept of "discrimination," of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to "discriminate . . . because of . . . sex . . .," without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.

*Id.* at 145.

283. *City of Rome v. United States*, 446 U.S. 156, 179 (1980); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

284. *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also *In re Employment Discrimination Litig. Against Alabama*, 198 F.3d 1305, 1319 n.17 (11th Cir. 1999).

285. GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 201-02 (13th ed. 1997) (quoting a letter from Gerald Gunther to the United States Department of Justice).

thus good reason for interpreting *Morrison* as mandating an inquiry into the congruence and proportionality of Section 5 laws that regulate private actors, rather than as imposing a per se rule categorically barring use of Section 5 power to regulate private parties.

A test of congruence and proportionality would mandate case-by-case inquiry into the question of whether Section 5 power may be used to regulate the conduct of private actors. Rather than defining a distinct sphere of private action that must remain free from federal regulation, the test would focus judicial attention on whether federal regulation is an appropriate means of redressing particular Section 1 violations that Congress is otherwise authorized to remedy. This use of the congruence and proportionality test would be distinct from *Kimel*'s deployment of the test, because its purpose would not be to ensure that Section 5 legislation is remedial. Its purpose would instead be to protect the values of federalism by restricting undue federal interference with states and private actors. The question of what federal interference should be regarded as "undue" would depend upon two questions: the precise values of federalism the test is designed to safeguard, and the Court's apprehension of the proper role of the federal government in remedying unconstitutional discrimination. *Morrison*, however, does not discuss either question.

We can offer a preliminary analysis of the federalism question by observing that Section 5 legislation characteristically raises two distinct kinds of federalism concerns. The first focuses on protecting the states as sovereigns from intrusive federal regulation. Section 5 legislation typically regulates the states themselves, and protecting state legislatures and administrative agencies from direct federal "commandeering"<sup>286</sup> has been a central theme of the Court's contemporary revival of federalism. But however pressing this concern may be for the current Court, it is not one that can explain the Court's use of the congruence and proportionality test to strike down VAWA's civil rights remedy in *Morrison*. Title III of the Violence Against Women Act was specifically crafted to remedy the effects of discriminatory state criminal justice systems without directly regulating states. It thus posed no threat whatever to state sovereignty.<sup>287</sup>

Section 5 legislation is frequently thought to raise a second kind of federalism concern, however, which is that the federal government might exercise a general police power and prescribe "uniform national laws with

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286. *Printz v. United States*, 521 U.S. 898, 925 (1997).

287. Indeed, *Morrison*'s insistence that Congress use its Section 5 power to regulate state actors would seem to imply that Congress would have been on stronger constitutional footing if it had undertaken directly to regulate states whose criminal justice systems failed to protect women from assault to the same extent that they protected men. This is a highly counterintuitive outcome from the perspective of safeguarding states from federal regulation.

respect to life, liberty, and property.”<sup>288</sup> Section 1 of the Fourteenth Amendment contains a vast array of rights which, when taken together, permeate virtually every aspect of American life. *Morrison*’s use of the congruence and proportionality test may be designed to allay the fear, explicitly articulated by the Court since the days of the *Slaughter-House Cases*, that the states might be overwhelmed and engulfed in the maw of congressional Section 5 legislation that would appropriate to the federal government “the entire domain of civil rights heretofore belonging exclusively to the States.”<sup>289</sup> The grip of this fear is diffuse and pervasive, provoking suspicion of the very existence of Section 5 power.

We submit, however, that this view of Section 5 power is an untenable basis on which to premise judicial review of the national government’s legislative power in a constitutional democracy. A more discriminating approach is required, one capable of discerning the elementary point that all forms of Section 5 legislation are not the same. The values of federalism are context-specific.

The precise question raised by *Morrison* is how this concern about the potentially overbroad scope of federal power should be evaluated in the particular context of antidiscrimination legislation. This question comes to us freighted with a history of struggle and contest. The Congress that passed the Fourteenth Amendment knew that it could not establish equality for the newly freed slaves without reaching deep into Southern society and reforming its fundamental principles. That is why it drafted Section 5. But the Supreme Court, fearing a disruption of the balance of the federal system, refused to allow this exercise of federal power,<sup>290</sup> and instead

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288. *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997). For a good statement of the problem, see Jesse H. Choper, *Congressional Power To Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 303-07 (1982).

289. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872).

290. In the words of Justice Brennan:

Stirred to action by the wholesale breakdown of protection of civil rights in the South, Congress carried to completion the creation of a comprehensive scheme of remedies—civil, criminal, and military—for the protection of constitutional rights from all major interference.

. . . . .  
The history of this scheme of remedies for the protection of civil rights was, until very recently, one of virtual nullification by this Court. Key provisions were declared unconstitutional or given an unduly narrow construction wholly out of keeping with their purposes.

*Adickes v. S.H. Kress Co.*, 398 U.S. 144, 205-06 (1970) (Brennan, J., concurring in part and dissenting in part) (footnotes omitted). Legal historians are divided in their assessment of this tumultuous period of constitutional development and the Court’s performance in it. For one recent overview of the literature, see Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J. 201, 2028-35 (1999); and compare BRANDWEIN, *supra* note 237, which traces the connections between historiography and jurisprudence in debates over the Fourteenth Amendment.

created doctrines that shielded the right of state legal systems to segregate and the freedom of private property owners to discriminate.

Even after the gates of federal power were thrown open during the New Deal, it was still not clear whether the national government had the power to overcome these deeply inbred practices and principles of discrimination. It was not until *Brown* changed the standards of Section 1 that this objective became imaginable. And even then, it was not until thousands of protests forced the federal hand that Congress was finally willing to enact the Civil Rights Act of 1964 to accomplish what the Framers of the Fourteenth Amendment thought they had achieved.

When we speak of using the values of federalism to restrict the scope of federal power in the context of national antidiscrimination statutes, therefore, we are speaking of a trust put into federal hands by the Framers of the Fourteenth Amendment, taken away by the Court for almost a century, but, after struggle, returned to national authority in the 1960s. This assumption of federal authority was vindicated by all three branches of the federal government. The question of federalism thus merges with the question of the federal government's proper role in combating discrimination. For whatever might be said about Section 5 power generally, the use of Section 5 power to combat unconstitutional discrimination cannot be conceived as a potential threat to the legitimate balance of the federal system so long as this history retains its normative force.

*Morrison* was apparently unwilling explicitly to challenge this consensus understanding. It refused to acknowledge, much less to criticize, the role the federal government has played in remedying discrimination during the last half of the twentieth century. The opinion offered no plausible alternative account of the proper role of the federal government in enforcing civil rights. It did not argue, for example, that the consensus of the 1960s concerned only the role of the federal government in redressing racial discrimination, rather than protecting broader norms of equality. It did not even claim that this consensus extended only to the specific forms of discrimination prohibited by the Civil Rights Act of 1964. Any such view of our national commitments would be highly controversial, of course, but at least it would articulate the actual set of national equality values that the Court was prepared to permit Congress to implement pursuant to Section 5. Without such an explanation, *Morrison's* deployment of the congruence and proportionality test can only be arbitrary.

If the test is meant to prevent the federal government from assuming the unwarranted prerogatives of a general police power, then the test must distinguish federal antidiscrimination legislation that is compatible with the proper role of the federal government from that which is not. The *Boerne* test performs this function by postulating that the proper role of the federal

government is to “remedy” infringements of Section 1; it invalidates antidiscrimination legislation that is inconsistent with this role. But because *Morrison* is decided on the assumption that § 13981 is properly remedial within the meaning of *Boerne*, we may infer that *Morrison*’s redeployment of the congruence and proportionality test is designed to express some other view about the appropriate role of Congress in using Section 5 power. Until this view is made explicit, however, *Morrison*’s congruence and proportionality test will remain capricious.

The only hint that *Morrison* provides about possible limitations of the federal government’s role in enforcing antidiscrimination law lies in its discussion of the Commerce Clause, where the Court emphatically distinguishes between the “truly national” sphere of commercial relations and “truly local” spheres like education, family, or criminal law.<sup>291</sup> But whatever relevance this distinction might have for Commerce Clause purposes, it has none for purposes of the struggle against discrimination.<sup>292</sup> Although marriage and intrastate crime are archetypal examples of what *Morrison*’s Commerce Clause discussion regards as truly local, we do not read *Morrison* as calling into question the Court’s decision in *Loving v. Virginia*,<sup>293</sup> which struck down a state law criminalizing interracial marriage.

*Loving* did not threaten to endow the federal judiciary with general regulatory authority over marriage or criminal law; it instead corrected a violation of the Equal Protection Clause. Section 5 legislation should be regarded in the same way. If the judiciary is not prevented by federalism from enforcing the Equal Protection Clause in areas of traditional state regulation, why should Congress be differently constrained? If marriage or violence is the site of discrimination that violates the Fourteenth Amendment, we are hard-pressed to imagine a normatively cogent account of federalism or of the national government’s proper role in enforcing civil rights that would restrict the federal government from remedying or deterring such discrimination. That Section 5 legislation may regulate areas in which states retain primary or concurrent regulatory authority is simply immaterial.

#### IV. SEPARATION OF POWERS AND THE MODERN CIVIL RIGHTS TRADITION

In Part III, we discussed federalism constraints on Section 5 legislation that remedies unconstitutional discrimination. In this Part of our Essay, we take up once again the prior and more fundamental question of how a court

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291. *United States v. Morrison*, 120 S. Ct. 1740, 1754 (2000).

292. *Supra* text accompanying notes 38-39, 204-208.

293. 388 U.S. 1 (1967).

should exercise its discretion to determine what ought to *count* as unconstitutional discrimination that Congress is authorized to prevent or remedy under Section 5. We can now pursue this inquiry in a manner that takes account of both federalism and separation-of-powers concerns, and that is informed by the actual historical development of our civil rights tradition.

We argued in Part II that Congress can enforce the Equal Protection Clause in ways that are different from courts without endangering *Boerne*'s concern that the Court retain the authority in the last instance to say "what the law is." But we also noted that neither *Boerne* nor *Kimel* specifies the degree of congruence and proportionality that will be demanded of Section 5 legislation. In part this is a question of how prophylactic the Court will permit such legislation to become,<sup>294</sup> how tightly it will require congressional means to be tied to legitimate congressional ends. But if the Court can authorize Congress to apply standards that the Court itself will not enforce under Section 1, the question of congruence and proportionality must also be understood to raise the larger issue of how closely the Court should tie Section 5 legislation to the Court's own implementation of the Equal Protection Clause. Should the Court narrowly tailor such legislation to the terms of the Court's own decisions enforcing the Clause, or should it instead generously interpret the criteria of congruence and proportionality in order to allow Congress space to remedy violations of the Clause that the Court is itself unwilling to enforce? In this Part of our Essay, we first consider whether courts should vindicate federalism values in applying the congruence and proportionality test to determine the kinds of constitutional violations Congress may remedy under Section 5. We then analyze how the institutional history of the modern civil rights tradition discussed in Part III illuminates the separation-of-powers values at stake in the application of the *Boerne* test.

A. *Identifying Constitutional Violations That Justify Section 5 Authority: Federalism*

In *Boerne* and *Kimel*, the Court justifies the congruence and proportionality test as a doctrinal tool for distinguishing between remedial and substantive exercises of Section 5 power. But there is something strange about this justification. The criteria of congruence and proportionality seem an odd and awkward way to distinguish legislation enacted for the purpose of remedying violations of the Equal Protection Clause from legislation enacted for the purpose of defining the substantive meaning of the Equal Protection Clause. As the second half of the *Kimel*

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294. See *supra* note 93.

opinion illustrates, a court that wishes to discover congressional purpose is perfectly capable of asking the question directly and simply.<sup>295</sup> It is true that the Court has sometimes used the technique of narrow tailoring to “flush out” improper motivation,<sup>296</sup> but it has done so only when there is antecedent reason to suspect that legislation may be animated by unconstitutional purposes, and where there is reason to suspect that a lawmaker will conceal its true motivations. Neither assumption seems justifiable in the context of ordinary Section 5 antidiscrimination legislation.<sup>297</sup>

*Boerne*'s congruence and proportionality test thus appears to impose greater restrictions on Section 5 legislation than can be justified by a strict focus on legislative intent. Both *Morrison* and *Kimel* have displayed the tendency to allow the *Boerne* test to slide into a kind of narrow tailoring, as if even Section 5 legislation enacted for a proper purpose must nevertheless be shown to be a “carefully delimited” remediation of an appropriate constitutional violation.<sup>298</sup> This tendency is certainly manifest in lower court cases applying *Boerne*.<sup>299</sup> It is fair to infer, therefore, that the test is performing some function in addition to that of determining whether Congress's goal is to remedy violations of the Fourteenth Amendment.

There is some evidence that in both *Boerne* and *Kimel* the Court imagines the congruence and proportionality test as imposing a form of narrow tailoring that is singularly applicable to Section 5 power. This may represent the Court's worry that Section 5, unique among positive grants of congressional legislative power, carries the potential to enable Congress to prescribe “uniform national laws with respect to life, liberty, and property.”<sup>300</sup> This is essentially the same concern that we have already analyzed with respect to *Morrison*; it rests on the fear that Section 5 may spawn a general federal police power. But this concern is no more cogent in the context of *Boerne* and *Kimel* than it is in the context of *Morrison*. Section 5 antidiscrimination legislation that is remedial, that seeks to correct infringements of the Equal Protection Clause, does not threaten to generate unchecked federal power. It merely fulfills the federal

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295. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

296. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 145-48 (1980).

297. The ADEA, for example, seems to have been a perfectly run-of-the-mill antidiscrimination statute whose application to the states had even been approved by the Court. See *EEOC v. Wyoming*, 460 U.S. 226 (1983). There was no reason to suspect either that Congress was concealing its purposes or that these purposes, at the time of the statute's enactment, were unconstitutional.

298. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); see, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 959 (3d ed. 2000) (“Laws enacted by Congress pursuant to § 5 [have] suddenly been saddled with something between intermediate and strict scrutiny . . .”).

299. See, e.g., *Kazmier v. Widman*, 225 F.3d 519, 523-24, 529-30 (5th Cir. 2000).

300. *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997).

government's legitimate role in combating unconstitutional discrimination. The question of whether Section 5 legislation is in fact properly remedial is not itself an issue of federalism. Instead it is a substantive question of Fourteenth Amendment law, as refracted through the lens of separation of powers that focuses on the correct relationship between Congress and the Court in enforcing the Fourteenth Amendment.

*Boerne* and *Kimel* do, however, raise a federalism concern that is not present in *Morrison*. RFRA, like the ADEA, regulated the states in their sovereign capacities. RFRA imposed far-reaching burdens on state legislation,<sup>301</sup> while the ADEA dictated conditions of state employment. Because Section 5 power, like the enforcement provisions of the other Reconstruction amendments, is directed against the states themselves, it might be thought to create serious potential for overreaching federal regulation of states. This theme, of course, carries special resonance for the contemporary Court; indeed, one might even say that, having worked so hard in *Seminole Tribe* to establish state Eleventh Amendment immunity from suits predicated upon federal commerce power, the Court was not about to cede to Congress free rein to override that immunity under Section 5. The congruence and proportionality test might thus be interpreted to require narrow tailoring so that the Court can strictly scrutinize congressional legislation directly burdening states.<sup>302</sup>

The difficulty with this use of the *Boerne* test, however, is that the Fourteenth Amendment has been recognized from the day of its adoption as sanctioning a great "shift in the federal-state balance" by authorizing "intrusions by Congress . . . into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."<sup>303</sup>

The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.<sup>304</sup>

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301. Thus *Boerne* observed that RFRA "is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534.

302. *Boerne* noted that "[t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.* at 534.

303. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

304. *Ex parte Virginia*, 100 U.S. 339, 346 (1880).



It is no wonder, then, that neither *Boerne* nor *Kimel* explicitly defends the position that the function of the congruence and proportionality test is to protect states from undue regulation by Congress. It would be anomalous, to say the least, for the Court to use the *Boerne* test to restrict as “undue” otherwise legitimate exercises of congressional power in order to protect precisely the values of state sovereignty that a constitutional grant of congressional power is expressly designed to override. That is why in the end both *Boerne* and *Kimel* are driven to justify their holdings on the grounds that congressional legislation is outside the “sphere of power and responsibilities” assigned to Congress by Section 5.<sup>305</sup>

B. *Identifying Constitutional Violations That Justify Section 5 Authority: Separation of Powers*

If the narrow tailoring of the *Boerne* test is to be justified, therefore, it must be because separation of powers requires that Congress’s proper “sphere of power and responsibilities” be strictly confined to enforcing the Court’s own Section 1 doctrine, so as to preserve judicial authority over “the ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning.”<sup>306</sup> The history of the second Reconstruction that we discussed in Part III offers a useful framework for evaluating this view of separation of powers. It suggests that the Court’s effort to tie closely Section 5 antidiscrimination legislation to the ways that courts enforce Section 1 is fundamentally misguided.

To understand why this might be so, consider how the meaning of the Equal Protection Clause has historically been established. Contemporary equal protection jurisprudence does not flow from the abstract and delphic words of the Clause; nor does it derive from the original intent of the Framers of the Fourteenth Amendment. Instead, the meaning of the Equal Protection Clause, perhaps more than most constitutional guarantees, is tied in complex ways to evolving and contested social norms. As social understandings of equality have developed, so, too, have the constitutional requirements of the Clause, which might thus be understood as articulating general principles whose particular application to specific contexts must be determined “on the ground of history and of common knowledge about the facts of life.”<sup>307</sup> *Brown*, for example, “burst asunder the shackles of original intent”<sup>308</sup> in order to express its own appreciation of the “present” nature of

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305. *Boerne*, 521 U.S. at 535.

306. *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 644 (2000).

307. *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.) (quoting Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960)).

308. Klarman, *supra* note 264, at 253.

“American life throughout the Nation.”<sup>309</sup> The explosive growth of equal protection jurisprudence in the years after *Brown*, a growth that has produced doctrine that would have been unimaginable to the Framers of the Fourteenth Amendment, illustrates how thoroughly the Clause has absorbed altered understandings of equality.

The Court explicitly ties equal protection jurisprudence to changing social norms when it asks whether sex-based classifications are “reflective of ‘archaic and overbroad’ generalizations about gender . . . or based on ‘outdated misconceptions concerning the role of females.’”<sup>310</sup> Cases interpreting the Equal Protection Clause incorporate evolving social understandings when they scrutinize sex-based classifications to determine if they “create or perpetuate the . . . social . . . inferiority of women,”<sup>311</sup> or when they review racial classifications to determine if they demean “the dignity and worth of a person,”<sup>312</sup> or if they reflect “racial prejudice” as distinct from “legitimate public concerns.”<sup>313</sup> These inquiries require contextual judgments that are necessarily steeped in particular normative understandings and controversies.<sup>314</sup> At each moment in history, the Court must select from a field of evolving and contested social understandings an account of what the Constitution requires.

This practice of interpretation is both responsive and directive. In a complex and heterogeneous society like the United States, the values of equality that might be brought to bear on the resolution of any difficult constitutional question are too diverse and contested for the Court merely and passively to “reflect” the social understandings of the nation whose Constitution it is interpreting. Yet the limited character of the Court’s own institutional authority also precludes the possibility that the Court can unilaterally construct social meanings for the nation whose charter of governance it expounds.

When the Court articulates its constitutional vision of what equality demands, therefore, it gives institutionally mediated expression to social norms in a manner that neither fully reflects nor fully remakes the ambient

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309. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954).

310. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (citations omitted); see also *Heckler v. Mathews*, 465 U.S. 728, 745 (1984); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

311. *United States v. Virginia*, 518 U.S. 515, 534 (1996).

312. *Rice v. Cayetano*, 120 S. Ct. 1044, 1057 (2000). On the essential dependence of “dignity” upon changing social norms, see ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 180-84 (1995).

313. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

314. For a discussion of the relationship between antidiscrimination law and ambient social norms of equality, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000); Robert Post, *Response to Commentators*, 88 CAL. L. REV. 119 (2000); and Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000).

culture. In interpreting the Equal Protection Clause, the Court represents the nation's social understandings to the nation for adoption into the fabric of the nation's collective self-accountings.<sup>315</sup> This practice of representation can sometimes help to form the very tradition, the very complex of social norms and values, that in the end will validate the Court's vision as a living and vibrant interpretation of the Constitution. Or it may fail, exposing the Court as an institution that is morally adrift, blind to the vision and deaf to the voice of the people whose Constitution it would interpret.<sup>316</sup>

The Court's authority to interpret the Equal Protection Clause thus depends on more than a mastery of complex precedents or an insularity from political passions. It rests on a special kind of socially situated judgment, a capacity to discern shifts in the ways Americans understand the practices and institutions that organize American life, and an ability to speak from and to those evolving and contested understandings. Considered from this vantage point, the Court's authority to interpret the Equal Protection Clause is always contingent.

Nothing better illustrates this than *Brown* itself. *Brown* forced the nation to confront a new and compelling vision of equal citizenship under the Fourteenth Amendment. But the Court, acting by itself, was unable to bring the nation to embrace the commitments it had expressed in *Brown*. As Judge Wisdom famously observed, "[t]he courts acting alone have failed."<sup>317</sup> It was only with the intervention of Congress and the Executive Branch in 1964 that the vision announced in *Brown* began to become a living constitutional reality.<sup>318</sup>

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315. Of course, as the Court undertakes to speak to and for the nation, the Court can reproduce and rationalize various forms of inequality amongst the social groups that compose the nation. Cf. Siegel, *supra* note 314, at 114-16; Siegel, *supra* note 149, at 2179-84. For an analysis of this dynamic in constitutional interpretation within a collective memory framework, see Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* (Austin Sarat & Thomas R. Kearns eds., 1999).

316. For a discussion, see Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 23-30 (1990).

317. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967); cf. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52 (1991) ("The numbers show that the Supreme Court contributed virtually *nothing* to ending segregation of the public schools in the Southern states in the decade following *Brown*."). For a comprehensive discussion, see ROSENBERG, *supra*, at 39-157.

318. Judge Wisdom's discussion in *Jefferson County* is exemplary. Judge Wisdom welcomed the Guidelines of the U.S. Office of Education, Department of Health, Education, and Welfare, designed to implement Title VI of the Civil Rights Act of 1964, as an immense and necessary assistance in finally achieving the school desegregation constitutionally mandated by *Brown*. "Title VI of the Civil Rights Act of 1964 . . . was not only appropriate and proper legislation under the Thirteenth and Fourteenth Amendments; it was necessary to rescue school desegregation from the bog in which it had been trapped for ten years." *Jefferson County*, 372 F.2d at 856. ROSENBERG, *supra* note 317, argues that the Court's ineffectiveness extended not only to school desegregation, but also to transportation, housing, and public facilities and accommodations.

This was not merely because Congress and the President possessed enforcement powers that the Court lacked. More deeply it was because “[i]nstitutions and social structures throughout America reflected a history of, if not a present commitment to, racial discrimination. Cultural barriers to civil rights had to be overcome before change could occur.”<sup>319</sup> The Court, acting alone, could not overcome these deeply entrenched social norms. It could inspire and illuminate, and perhaps spark forms of political mobilization that would pressure the democratically representative branches of government to act. But it required the involvement of the representative branches of the federal government to entrench *Brown* in ways that would allow the values of the case to survive and prevail.

The image of a courageous Court standing tall in support of *Brown*, exemplified perhaps by the Court’s decision in *Cooper v. Aaron*<sup>320</sup>—an image that no doubt underwrites the interpretive authority asserted by the Court in *Boerne*—does not begin to capture the full complexity of the process by which the equality norms of *Brown* were integrated into the constitutional sensibility of the nation. However crucial may have been the Court’s readiness to assert its authority in the face of popular resistance, the principles articulated in *Brown* were not vindicated, and could not have been vindicated, merely by confrontations like the one at Little Rock. What was required instead was affirmative popular comprehension and commitment.

In the early 1960s, with resistance to *Brown* unchecked and a docket full of appeals from sit-in convictions, the Court understood that it was in a precarious position. The decisions of the Warren Court plainly were guided by the view that the effective implementation of *Brown*, much less the extension of its norms beyond the school segregation context as protesters were urging, required the participation of the representative branches. As Archibald Cox observed in 1966:

A Supreme Court decision reversing the conviction of the sit-in demonstrators upon the ground that the fourteenth amendment required the keepers of places of public accommodation to serve Negroes without discrimination or segregation could never have commanded the same degree of assent as the equal public accommodations title of the Civil Rights Act of 1964 . . . . In this sense, the principle of *Brown v. Board of Education* became more

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319. ROSENBERG, *supra* note 317, at 82; *see, e.g.*, *Bush v. Orleans Parish Sch. Bd.*, 138 F. Supp. 337, 342 (E.D. La. 1956) (“The problem of changing a people’s mores, particularly those with an emotional overlay, is not to be taken lightly.” (Wright, J.)), *aff’d*, 242 F.2d 156 (5th Cir. 1957).

320. 358 U.S. 1 (1958).

firmly law after its incorporation into title VI of the Civil Rights Act of 1964.<sup>321</sup>

It is not surprising, therefore, that the Court looked to Congress as an indispensable partner in the project of making its vision of the Fourteenth Amendment “more firmly law” during the 1960s. Not only was Congress better able than the Court to mobilize and solidify public support for disestablishing public and private practices of apartheid in the market, but in so doing, Congress could actually relieve the pressure on the Court’s own enforcement of the Equal Protection Clause. Even as prominent commentators like Charles Black called the Court to task, urging that “[s]eparate but equal’ and ‘no state action’ [are] fraternal twins . . . the Medusan caryatids upholding racial injustice,”<sup>322</sup> the Court was able to proceed cautiously during the 1960s precisely *because* it could rely on Congress to determine how to apply antidiscrimination norms to the practices of private actors.

Archibald Cox was prescient about the potential consequences of this institutionally differentiated strategy for interpreting and enforcing the Fourteenth Amendment:

It will be interesting to see whether last Term’s emphasis upon congressional power to promote Equality foreshadows greater judicial restraint in pushing forward the frontiers of the fourteenth amendment. . . . [T]he very recognition of a sort of “buffer zone” in which Congress has discretion to define equal protection or due process, even though the Court itself might not judge the particular state policies unconstitutional, may make the arguments for judicial restraint in applying those provisions a good deal more persuasive than when the Court was seemingly forced to render the only decision upon whether the state’s action either was or was not unconstitutional.<sup>323</sup>

In retrospect, it is clear that the enactment of the Civil Rights Acts of 1964 and 1968, and the revival of the civil rights acts of the first Reconstruction, did reduce the insistent demand on the Court to liberalize its Section 1 state action doctrine. This legislation provided an alternative source of law for plaintiffs who sought to challenge racial segregation in accommodations, employment, and housing, as well as the practices of violence sometimes

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321. Cox, *supra* note 160, at 94; cf. ACKERMAN, *supra* note 277, at 137 (arguing that it was because “*Brown* became a symbol energizing a multiracial coalition of blacks and whites into an escalating political struggle against institutionalized racism” that “*Brown* came to possess the kind of numinous legal authority that is . . . uniquely associated with legal documents that express the considered judgments of We the People”).

322. Black, *supra* note 264, at 70.

323. Cox, *supra* note 160, at 121.

used to enforce this segregation. Over time, the availability of federal antidiscrimination statutes allowed the Court to restrict judicial enforcement of Section 1, secure in the belief that congressional legislation would provide relatively full implementation of antidiscrimination norms.

As such legislation became an accepted and normal feature of the American landscape, the Court could start self-consciously to differentiate between constitutional and statutory antidiscrimination standards. But, even as the Court in 1976 in *Washington v. Davis*<sup>324</sup> began for the first time to distinguish explicitly between the standards of the Civil Rights Act of 1964 and those of Section 1 of the Fourteenth Amendment, it never lost this sense of inner connection between the Act and the constitutional enterprise inaugurated by *Brown*. The Court in *Davis* never thought to say that the reason why the 1964 Act could reach disparate impact, whereas Section 1 required findings of discriminatory purpose, was because the Act was merely an exercise of the commerce power. Instead it said that courts, as unrepresentative institutions within a democracy, were ill-equipped to assess the complex polycentric questions raised by efforts to equalize discriminatory effects. It is in fact not until this last Term in *Kimel* that the Court has been prepared to say explicitly that a federal antidiscrimination statute is “merely” an exercise of Commerce Clause power, as though the statute were not connected in any way to the project of making the principles of *Brown* “more firmly law.”

Looking back at the ways in which the Court and Congress interacted at the inception of the modern civil rights tradition, we see forms of institutional cooperation and interdependency that are unaccounted for in *Boerne*'s static and simple account of their constitutionally mandated relationship. The equal protection norms of *Brown* became “more firmly law” only when ratified by a popular support and commitment that the Court by itself was unable to summon. The Court required the assistance of the representative branches of government to establish constitutional values of equality. The project of entrenching *Brown* demanded that the Court recognize Congress as indispensable for the elaboration and institutionalization of constitutional norms.

As Congress began to participate in the enforcement of equality values, it brought to the task its own distinctive institutional energies and capacities. As an elected legislature, for example, Congress was more open to popular conceptions of equality. That is why it was able to perceive the gravity of sex discrimination before the Court was prepared to recognize its harms.<sup>325</sup> Because Congress possessed forms of governance authority the Court did not, Congress was willing and able to reach deeply into the lives

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324. 426 U.S. 229 (1976).

325. See *infra* notes 327-333.

of American citizens, in ways that the Court had traditionally used the state action requirement to avoid. Because Congress possessed the authority to create comprehensive and detailed legislative frameworks, as the Court did not, Congress could tackle polycentric problems of redistribution, like those entailed by a disparate impact standard, even as the Court shied away from implementing such a standard in its own Section 1 jurisprudence.<sup>326</sup>

These disparities were the readily foreseeable consequence of enlisting the support of Congress in making the equality values of *Brown* “more firmly law.” They arose because Congress apprehended and applied the constitutional values of the Fourteenth Amendment antidiscrimination tradition in a manner that was shaped by its distinctive characteristics as a legislative body enforcing constitutional norms. From the perspective of the framework announced in *Boerne*, these disparities register only as potential threats to the Court’s “ultimate” control over the meaning of the Constitution. In Part II, we suggested that these disparities need not constitute threats, because the Court can conceptualize them as forms of constitutional rights appropriate to congressional, rather than judicial enforcement. But the history of the 1960s suggests a deeper and more fundamental understanding.

*Boerne* assumes that the creation of constitutional meaning is divorced from political and social life. It imagines a world in which the Court pronounces constitutional values and the country merely obeys. But our review of the second Reconstruction suggests that this is a historically incomplete picture. Once we view the articulation and institutionalization of equal protection doctrine as an ongoing process that depends on the interaction between constitutional values and social norms, two propositions follow.

First, the Court will sometimes *require* the assistance of Congress to succeed in the very task of constitutional interpretation that *Boerne* seeks to safeguard. This assistance was necessary in order to sustain the interpretive authority of *Brown*.<sup>327</sup> Implicit in such assistance are institutional disparities of perspective and approach. If these disparities are spurned and discarded in the name of maintaining ultimate judicial control over the meaning of the Constitution, the Court risks failing to make its own constitutional vision “more firmly law.” In such circumstances, to read the *Boerne* test to require a strict form of narrow tailoring would be actually to endanger the Court’s own interpretive authority.

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326. Sager, *Justice in Plain Clothes*, *supra* note 137, at 420-22. *But cf.* Siegel, *supra* note 143, at 1132-48 (exploring alternative interpretive pathways available to the Court).

327. *See* ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 303 (1992) (“The condemnation of race segregation in the 1964 Civil Rights Act . . . bestowed legitimacy on the Supreme Court’s ruling in *Brown v. Board of Education* in a way that the Court could never have accomplished on the basis of its authority alone.”).

Second, because Congress, as a popular legislative body, is well situated to perceive and express evolving cultural norms, Congress's understanding of equality is a vital *resource* for the Court to consider as it interprets the Equal Protection Clause. This point is perhaps most clearly illustrated in the development of the law of sex discrimination. The Court did not find that facial classifications based upon sex required intermediate scrutiny until the 1970s, after the rise of the second-wave feminist movement and congressional enactment of legislation prohibiting sex discrimination in the workplace. In the pivotal case of *Frontiero v. Richardson*,<sup>328</sup> the plurality opinion of the Court was frank to acknowledge how congressional action had affected its own evolving attitude toward sex discrimination:

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin." Similarly, the Equal Pay Act of 1963 provides that no employer . . . "shall discriminate . . . between employees on the basis of sex." And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.<sup>329</sup>

When Congress in the Equal Employment Opportunity Act of 1972 used its power under Section 5 to extend to the states Title VII's prohibition of discrimination in employment,<sup>330</sup> the Court had not yet held that sex-based classifications should receive anything other than rational basis review.<sup>331</sup> Congressional reports explaining the 1972 Act, however, emphasized the gravity of sex discrimination and its similarity to race discrimination.<sup>332</sup> By the time the Court had ratified Congress's use of Section 5 in 1976, in an opinion by then-Justice Rehnquist in a case dealing

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328. 411 U.S. 677 (1973).

329. *Id.* at 687-88 (Brennan, J.) (footnotes omitted).

330. Pub. L. No. 92-261, § 2, 86 Stat. 103, 103.

331. *E.g.*, *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Goesaert v. Cleary*, 335 U.S. 464 (1948).

332. H.R. REP. NO. 92-238, at 5 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141 (Equal Opportunity Act of 1972) ("Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."); *see also* S. REP. NO. 92-415, at 7-8 (1971).



with sex discrimination,<sup>333</sup> the Court's Section 1 jurisprudence had begun to catch up with Congress's earlier vision of the Fourteenth Amendment.<sup>334</sup> We suggest that this sequence of events is exemplary.

The Court's equal protection jurisprudence has emerged from a partnership between the Court and the nation, with Congress as one representative of the nation. Sometimes, as in *Brown*, the Court has forged ahead and brought the nation with it; and sometimes, as with sex discrimination, the Court has caught up to the vision of Congress and the nation. When Congress exercised Section 5 power in 1972, it was participating in the very dialogue that has helped to form the Court's own contemporary equal protection doctrine.

We fear, however, that the Equal Employment Opportunity Act of 1972 would not have survived a stringent interpretation of the *Boerne* test. Because the Court's equal protection jurisprudence of the time held that states could discriminate against women subject only to rational basis review for invidiousness, it could be said of Title VII's prohibition of sex discrimination, as *Kimel* said about the ADEA, that it was "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'"<sup>335</sup> If the Court in the 1970s had prohibited exercises of Section 5 power that were not narrowly tailored to the Court's settled understandings of unconstitutional behavior, it would have shut down the very dialogue between Congress and the Court that has in part been responsible for the development of equal protection jurisprudence as we now know it. Such narrow tailoring implicitly assumes that the Court's own equal protection doctrine is complete, settled, and immune from modification in light of congressional action.

The Court can act on this assumption only at its peril. The Court's interpretive authority was enhanced by its ability to learn from Congress in *Frontiero*. Had the Court applied a narrowly tailored version of the *Boerne* test to prevent Congress from applying Title VII's prohibition of sex discrimination to the states, the Court would have risked producing a Constitution estranged from the normative understandings of the political community for which the Constitution purports to speak. Whether judicial defiance of popular reason sustains judicial interpretive authority, as in *Cooper v. Aaron*, or erodes it, as in *Carter Coal*, depends entirely on the particular circumstances involved. It cannot be determined by general principles of separation of powers. It certainly cannot be determined by a strict, mechanical, and acontextual test of congruence and proportionality.

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333. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

334. *Craig v. Boren*, 429 U.S. 190 (1976).

335. *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 647 (2000) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

Considered from the perspective of history, then, it is clear that concerns about preserving the Court's interpretive authority do not require the Court to impose narrow tailoring on antidiscrimination legislation to ensure that it closely conforms to the terms of the Court's own Section 1 jurisprudence. In fact, history suggests that there are circumstances in which imposing such restrictions might well diminish, rather than enhance, the Court's authority in interpreting the Constitution.

If the Court can assure itself that Section 5 legislation is enacted for the purpose of "enforcing" the provisions of the Equal Protection Clause without imposing the additional constraint of narrow tailoring, and if the generic and uniform imposition of this constraint serves neither the values of federalism nor those of separation of powers, how, then, are we to account for the tendency of the *Boerne* test to slide into narrow tailoring? We suggest that the *Boerne* test is actually a tool for restraining Congress whenever the Court is indifferent or hostile to the constitutional values at stake in particular instances of Section 5 legislation. It is a vehicle for the Court to express substantive disagreement with Congress's understanding of the Fourteenth Amendment, without the Court having itself to articulate, explain, or defend a competing view of what the Equal Protection Clause might require in the context of congressional enforcement.

What is at stake in such disagreements, however, is not merely the constitutionality of particular statutes, like the ADEA. Instead, judicial applications of the *Boerne* test alter the terms in which Congress can participate in the antidiscrimination tradition inaugurated by the Civil Rights Act of 1964. As the Court begins to subject Section 5 legislation to harsh and unsympathetic review of a kind that the Court has avoided since the first Reconstruction, it inaugurates a shift in the institutional ecology that supported the elaboration and entrenching of equality norms during the second Reconstruction.

The Court can invalidate particular exercises of Section 5 power without harming the institutional relationships that have played so large a role in vitalizing antidiscrimination law in the modern era. But this is not the tendency and tone of the Court's decisions last Term, which seem at root uninterested in Congress's reasons for enacting the antidiscrimination statutes the Court invalidated. Neither *Kimel* nor *Morrison* endeavors sympathetically to reconstruct and address the equality-based concerns that led Congress to enact the invalidated provisions of the ADEA and VAWA. Instead the Court seems to reason from the premise that its own authority in enforcing the Equal Protection Clause renders Congress's role in enforcing the Clause incidental and a ready target of judicial discipline. From this standpoint, it would appear that the Court is now embarking on a project that it has not pursued since the first Reconstruction: the task of cabining and inhibiting democratic vindication of equality values.

## V. CONCLUSION

The dangers of the Court's new juricentric approach to Section 5 are abundantly illustrated by the *Morrison* opinion. *Morrison* concludes its account of why VAWA's civil rights remedy is unconstitutional with an ominously ambiguous observation. Summarizing its case for invalidating the statute, the Court remarks that if the facts concerning the "brutal assault" alleged in the case "are true, no civilized system of justice could fail to provide [the petitioner, Christy Brzonkala,] a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."<sup>336</sup>

Is the Court saying that Virginia *will* provide Christy Brzonkala a remedy if the facts she alleges are true, or merely that it *should*? It is telling that we cannot discern the answer to this question from the opinion the Court writes striking down the statute Congress enacted in an effort to ensure that Christy Brzonkala *would* have a remedy if she proved the brutal assault she alleged.

That this question remains unanswerable at the end of the *Morrison* opinion, even after several readings, reveals something very important about the way the Court decided the case. *Morrison* declares unconstitutional Congress's efforts to remedy gender bias in the criminal justice system without demonstrating that the Court understood the constitutional concerns that moved Congress to enact the statute in the first instance.

The *Morrison* opinion recounts, with citations to the record, Congress's rationale for enacting the civil rights remedy. It reports that the "§ 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence."<sup>337</sup> It accepts that "[t]his assertion is supported by a voluminous congressional record," noting that "Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions."<sup>338</sup> The Court acknowledges that Congress "concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."<sup>339</sup>

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336. 120 S. Ct. 1740, 1759 (2000).

337. *Id.* at 1755.

338. *Id.*

339. *Id.*

But if the Court recites Congress's rationale for enacting § 13981, it evinces no interest in remedying the constitutional wrong that Congress identified. Instead, the Court announces that "the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct"<sup>340</sup> even if "there has been gender-based disparate treatment by state authorities."<sup>341</sup> What, then, do we make of the Court's capacity (1) to recount Congress's findings of gender bias in state administration of the criminal law,<sup>342</sup> (2) to invalidate VAWA's civil rights remedy; and then, in the face of these findings, (3) to send Christy Brzonkala back to Virginia for the remedy that "no civilized system of justice could fail to provide her" if the facts of the "brutal assault" she alleges are true? Does the Court not credit the evidence of pervasive gender bias in state criminal justice systems that Congress gathered? Or does the Court simply not judge this gender bias to be of constitutional moment?

The Court sees questions of constitutional significance in Congress's decision to supply Brzonkala a federal forum so that her claim will be heard even if state fora are infected by gender bias. But it appears not to see a question of constitutional importance in the possibility that gender bias in state fora might leave a victim of a "brutal assault" without a remedy. At root, the Court seems to be denying that such gender bias is a problem in the United States, which, we are to presume, the Court considers to have a "civilized system of justice."

This refusal to entertain the possibility of systemic constitutional wrong informs and organizes the whole of the *Morrison* opinion, from its insistence on treating VAWA's civil rights remedy as a species of domestic relations or criminal law in its discussion of congressional commerce power, to its elevation of federalism over gender equality values in its treatment of congressional Section 5 power. The Court undertakes to pronounce on the constitutionality of VAWA's civil rights remedy without truly grappling with the systemic nature and breadth of the constitutional violation that Congress was undertaking to remedy.

To have faced this question openly would have been to acknowledge the civil rights remedy, not as a species of family or criminal law, but as an antidiscrimination statute with deep roots in the Court's own Section 1 jurisprudence. This *Morrison* never does. Section 13981 grows directly out

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340. *Id.*

341. *Id.* at 1758.

342. In its enthusiasm to demonstrate that the civil rights remedy is not a congruent and proportional response to the gender biases in the criminal justice system that prompted Congress to enact § 13981, the Court takes liberties in characterizing Congress's factual findings and asserts, without any supporting citation, that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most states." *Id.* at 1759; see *supra* text accompanying note 164.

of the Court's own sex discrimination jurisprudence, taking its normative ends from the strengths of that jurisprudence and its practical urgency from its weaknesses.<sup>343</sup> Yet throughout *Morrison* the Court never acknowledges the relationship of this Section 5 statute to the Court's own Section 1 case law.

What then explains the Court's cavalier treatment of the constitutional concerns that moved Congress to enact the civil rights remedy? *Morrison* betrays the Court's conviction that, at least where matters of equal protection are concerned, the Court has little to learn from Congress. The Court brusquely denies Congress's Section 5 power to enact the civil rights remedy, without cultivating even the appearance of a respectful working relationship with the institution that is equally responsible under the Fourteenth Amendment for enforcing the "provisions of this article." In explaining its decision, the Court mentions, but does not discuss, the voluminous record compiled during years of hearings and debates in which Congress gathered evidence of gender bias in the criminal justice system and discussed how it should be remedied. The Court does not treat the innovative features of VAWA's civil rights remedy as meriting careful consideration, but instead as *prima facie* reasons for the statute's invalidation.

At root, the Court seems to view the enforcement of the Equal Protection Clause as primarily a matter for the judiciary, treating Congress's efforts to implement the Clause as superfluous or even suspect. This juricentric approach to enforcing the Equal Protection Clause carries with it the risk of institutional insularity, and *Morrison* well exemplifies this danger. The gender conventionalism of the Court's reasoning about federalism is striking,<sup>344</sup> as is the Court's failure to evince any appreciation of why Congress had concluded that the criminal justice system's traditional methods of handling violence against women presented grave problems of sex discrimination. In the hearings and debates leading up to the enactment of VAWA, citizens and their congressional representatives repeatedly asserted that the failures of the criminal justice system to protect women from assault betrayed the nation's commitment to equal citizenship for women. *Morrison* simply ignores these claims. The contrast with the

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343. See Siegel, *supra* note 149, at 2188-96 (identifying doctrinal reasons why Section 1 cases only weakly constrain gender bias in the administration of the criminal law and suggesting that the civil rights remedy might supplement adjudication under Section 1 as a means of redressing the states' failure to protect women from assault).

344. The Court's analysis of the Commerce Clause invokes separate spheres discourse to identify markets with matters of "national concern" and families with matters of "local concern"; its analysis of the Fourteenth Amendment discusses violence against women as occurring in a "private" realm beyond the proper reach of federal law; and the opinion as a whole concludes by sounding the familiar protectionist theme that any civilized society protects its women against sexual assault.

manner in which the Court in the 1970s attended to and learned from congressional understandings of the harm of sex discrimination, understandings that differed from the Court's own decisions, could not be sharper.

The abstract criteria of the *Boerne* test invite courts to dismiss Section 5 antidiscrimination legislation with the same spirit of unsympathetic insularity that characterizes *Morrison*. The test of congruence and proportionality flattens and effaces the myriad subtle and complex ways that Congress has participated in the development of our modern equal protection tradition. The mechanical application of the test to Section 5 legislation promises to stunt the ability of Congress to participate in the future development of that tradition. Applied without an appreciation of the actual evolution of modern equal protection jurisprudence, the *Boerne* test could easily invalidate large stretches of federal antidiscrimination law and suppress the lively relationship between Congress and the courts that has in the past animated our vision of what equal protection demands.

And that, for reasons we have tried to explain, threatens forms of institutional dialogue within which Americans have attempted to work out the meanings of national citizenship during the past half century.