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Courts, Congress, and Equal Protection: What *Brown* Teaches Us About the Section 5 Power

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INTRODUCTION

We live in a time of uncertainty with regard to constitutional rights. The Warren Court's aggressive experimentation with both substantive rights and equality rights is a fading memory. On the other hand, it would be unfair to characterize the Court over the last twenty years as unambiguously hostile to individual rights in light of its increasing skepticism toward gender classifications,[1] its flirtation with heightened rational basis review,[2] and its willingness, on occasion, to use expansive language to describe the substantive rights granted by the Due Process Clause.[3] A more consistent theme of the Court's recent individual rights jurisprudence, however, has been its willingness to rein in federal action aimed at protecting individual rights. Early indications of this judicial suspicion of congressional action can be seen in *Adarand v. Pena*,[4] which subjected federal affirmative action plans to the same level of scrutiny as state plans, despite the argument that federal action merits less scrutiny due to Congress's authority and capacity to discern what equality requires.[5] Judicial skepticism also ap-

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1. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

2. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Plyler v. Doe, 457 U.S. 202 (1982).

3. *Compare, e.g.*, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (reflecting a broader approach to the content of "liberty" interest), *with* Washington v. Glucksberg, 521 U.S. 702 (1997) (reflecting a narrower approach to the content of the "liberty" interest protected by the doctrine of substantive due process).

4. 515 U.S. 200 (1995).

5. *See id.* at 235.

peared in the voting rights cases from the early 1990s, most notably in *Shaw v. Reno*[6] and *Miller v. Johnson*,[7] which subjected to strict scrutiny state redistricting plans that were motivated by attempts to comply with the Voting Rights Act,[8] a federal law aimed at enforcing the guarantees of the Fifteenth Amendment.[9] Obviously, this skepticism of federal action fits within the Court's overall renewed interest in judicially imposed limits on federal power.[10]

In 1997, *City of Boerne v. Flores*[11] ushered in an era of even more explicit federalism-based restrictions on the scope of constitutional individual rights. In *Boerne,* the Court struck down the Religious Freedom Restoration Act (RFRA).[12] With this act, Congress had reinstated a test for state restrictions on religious exercise[13] that a previous Court decision had rejected as inappropriately protective of the Free Exercise right.[14] Congress based RFRA on its power, granted by Section 5 of the Fourteenth Amendment, to "enforce" the provisions of that amendment—in that case, the Due Process Clause, which had long been held to incorporate the Free Exercise Clause of the First Amendment.[15] The *Boerne* Court rejected the Section 5 argument, holding that RFRA constituted an attempt to reach an independent

6. 509 U.S. 630 (1993).

7. 515 U.S. 900 (1995).

8. *See id.* at 905.

9. Note that both the affirmative action and the voting rights cases were structured as claims that the challenged action violated individual rights, respectively, the rights of whites who were disadvantaged by affirmative action set-asides and white voters who were allegedly disadvantaged by race-based districting schemes. In both cases, however, the actions were defended as a means of *vindicating* the rights of others, in particular, the beneficiaries of the set-asides and minority voters that were grouped together in a congressional district. While there were competing notions of rights at stake in these cases, the important point here is that the challenged actions were defended ultimately on the grounds of vindicating the rights of at least one group, with at least some argument made that the federal nature of the action (the set-aside and the Voting Rights Act, respectively) justified some level of deference by the Court.

10. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that the Interstate Commerce Clause does not authorize Congress to subject states to retrospective penalties in federal court); Alden v. Maine, 527 U.S. 706 (1999) (holding the same with regard to suits in state courts); United States v. Lopez, 514 U.S. 549 (1995) (striking down, for the first time in nearly sixty years, a federal law as exceeding the Interstate Commerce power); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not "commandeer" the apparatus of state government).

11. 521 U.S. 507 (1997).

12. *Id.*

13. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

14. Indeed, RFRA did more than reinstate the pre-*Smith* doctrinal test, as the Court in *Boerne* noted. *See Boerne*, 521 U.S. at 535 (comparing RFRA's requirements with those in *Sherbert v. Verner*, 374 U.S. 398 (1963)).

15. *See id.* at 529.

understanding of what that clause actually meant.[16] The Court agreed without relevant dissent[17] that such interpretive exercises exceeded Congress's Section 5 power.[18] In the years since *Boerne*, the Court has continued to subject to stringent review, federal statutes aimed at enforcing the Civil War amendments. It has struck down laws restricting state government discrimination against the elderly and the disabled,[19] extending protection against patent infringement by states,[20] and providing a federal cause of action for victims of gender-based violence.[21] These cases, except for *Boerne*, decided by the same 5-4 majority, reflect a narrowly held but deep suspicion of congressional power to enforce the Civil War amendments.

These developments matter in a symposium marking the fiftieth anniversary of *Brown v. Board of Education* (*Brown I*)[22] because the struggle for school desegregation presents a prism through which to examine Congress's power to ensure that states comply with constitutional limitations. School segregation is both a legal and a social problem. *Brown I*'s holding that school segregation violates the Equal Protection Clause is a classic example of a constitutional right whose implications must be thought to have changed since its drafting. It changed, the Court noted, because of social changes, in particular, the increased importance of education as a component of full participation in American life.[23] Even more notable is the social-reality component of the Court's decision in the second *Brown* decision (*Brown* II),[24] which required desegregation "with all deliberate speed."[25] That determination was made with explicit reference to the "practi-

16. *See id.* at 534.

17. Justice Kennedy wrote the opinion, which was joined by Chief Justice Rehnquist and Justices Stevens, Thomas, and Ginsburg. Justice Scalia joined most of the opinion. *Id.* at 537. Justice O'Connor, who has joined all of the subsequent majorities on Section 5 cases, dissented because she disagreed with the correctness of the underlying decision RFRA was thought to overturn; however, she stated that she otherwise agreed with the majority's Section 5 analysis. *Id.* at 545. Justices Breyer and Souter would not have reached the Section 5 issue. *Id.* at 565-66.

18. *Id.* at 536.

19. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (applying the Age Discrimination in Employment Act to the states); *see also* Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (applying the Americans with Disabilities Act to the states).

20. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 666 (1999).

21. *But see* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (upholding application of the Family and Medical Leave Act's retrospective relief provisions to states as an appropriate exercise of the Section 5 power). *Hibbs* is discussed later in this article. *See infra* Part III.C.

22. 347 U.S. 483 (1954).

23. *See, e.g., id.* at 494.

24. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

25. *Id.* at 301.

cal" difficulties (considered broadly to include political and administrative difficulties) inherent in school desegregation.[26] These difficulties by themselves suggest the appropriateness of significant congressional involvement in desegregating school districts.

Those difficulties—and the attendant argument for a broader congressional role—were magnified by developments that arose as state and local authorities attempted to resist and evade the desegregation mandate. For example, soon after *Brown,* concerns surfaced about the ostensibly private choices that tended to frustrate school integration.[27] Such private choices were linked to governmental sponsorship of segregation by ties that were undeniable, yet subtle in their logical and empirical proof. Decisions to encourage segregated residential neighborhoods, thus preordaining the racially disparate effect of neutral school administration decisions such as neighborhood attendance policies; or to build interstate highways, thus enabling white flight; or to support private education, thus providing an obvious alternative to public schools under a legal obligation to integrate; or to provide city services to areas beyond the border of the school district ordered to integrate, can all be seen as governmental action that may have been undertaken with the intent of maintaining segregation, or at least with the intent of failing the state's affirmative obligation to eliminate all vestiges of segregation.[28] But such claims are difficult to prove in a court, with its institutional inability to draw broad conclusions about complex empirical reality. These claims are also difficult for a court to respond to for a more practical reason: the challenged actions represent basic policy making and structural decisions by the government, which are difficult for a court to second-guess for reasons of political legitimacy, and the reform of which is even more difficult for courts to oversee. Institutionally, Congress seems better placed to discern (1) when such private/public actions really should be attrib-

26. *E.g., id.* at 300-01.

27. *See, e.g.,* Goss v. Bd. of Educ., 373 U.S. 683 (1963). In *Goss,* the Court struck down minority to majority transfer plans, which allowed any student, upon request, to transfer from a school where he was a racial minority to a school where he was part of the racial majority, as unconstitutional because these plans inherently promoted discrimination.

28. *See, e.g.,* Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (discussing state support for private schools); *infra* note 133 (citing authorities discussing relationships between residential segregation and school segregation); Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond,* 11 B.U. PUB. INT. L.J. 35, 40 (2001) (discussing highway construction policies and their relationship to school desegregation); Robert Chang, *Los Angeles as a Single-Celled Organism,* 34 LOY. L.A. L. REV. 843, 851 (2001) (noting the relationship between highway and infrastructure construction and white flight from inner cities).

uted to the government, (2) when they reflect an unconstitutional state motivation to maintain segregation, or at least to renege on its obligations to eliminate segregation "root and branch," and (3) what the proper remedy should be for such unconstitutional conduct.

This Article considers the institutional capacity of Congress to enforce the Fourteenth Amendment, and in particular, its equal protection guarantee, using as its prism the problem of school segregation posed by *Brown*. Section 5 of the Fourteenth Amendment explicitly grants Congress the power to "enforce" the amendment's provisions.[29] The scope of that power, however, has engendered much judicial and scholarly debate. This Article enters that debate by considering the institutional attributes of Congress that differentiate it from the courts in ways relevant to implementing the Fourteenth Amendment's broad promises. It considers *Brown*, and school desegregation, as a case study revealing how those attributes suggest the appropriate contours of the Section 5 power.

Part I briefly examines the judicial role in desegregation. It then considers several important federal civil rights laws enacted in the 1960s, and considers the extent to which such laws could be justified as enactments designed to enforce *Brown*. Part II considers several institutional attributes of Congress that justify a significant role for it in guaranteeing the rights enshrined in the Equal Protection Clause. Part III synthesizes the empirical examination of courts' and Congress's desegregative actions and the more theoretical examination of Congress's institutional capabilities to suggest what the school desegregation experience teaches about the Section 5 power.

I. *BROWN*, THE COURTS, AND CONGRESS

A. Difficulties in Judicial Implementation of *Brown*

The *Brown* Court knew that its decision would open up a difficult era for the federal courts. The Justices' records reveal that they were aware of the opposition the decision would face, opposition that would be directed at the courts, who would shoulder the primary burden of implementing the decision.[30] As it happened, of course, Justices that considered dissenting in *Brown* decided—perhaps for

29. U.S. CONST. amend. XIV, § 5. Thus, this article will refer to this power as "the Section 5 power."

30. *See* THE SUPREME COURT IN CONFERENCE, 1940-1985, at 644-671 (Del Dickson ed., 2001)[hereinafter SUPREME COURT].

reasons that were themselves pragmatic—to join the Chief Justice's opinion striking down public school segregation.[31]

Concerns about implementation of the decision led the Court to seek reargument on the remedial issues, and eventually to settle on the "all deliberate speed" formula. In *Brown II* the Court was careful to identify the practical difficulties that might arise in the process of desegregating public schools. Those issues were both material,[32] such as the state of school facilities, transportation systems, and teacher assignment methods, and legal,[33] such as the existence of local and state laws that either required, permitted, or assumed the continued existence of segregated systems. More importantly, the Court's caution in *Brown II* reflected an awareness of the real-world difficulty of the task, a difficulty caused not so much by the existence of separate attendance roles or teacher assignment systems, or even by the existence of a legal structure of segregation, as by the likelihood of political and social resistance to integration.[34]

The Court's fears were confirmed by the violent response to the first attempts at desegregation in the late 1950s and early 1960s, although it might fairly be asked whether that violence was exacerbated, if not unwittingly encouraged, by the Court's own timidity in directing how lower courts should implement *Brown*.[35] Indeed, what is striking about the Court's attempt to integrate the schools is how violent and immediate the reaction was to any action by the courts. In the first decade after *Brown*, the initial attempts to desegregate drew a combination of private (and not-so-private) violence and half-hearted integration measures. The best known desegregation-related event at the time was the stand-off in Little Rock in 1958,[36] but violence shrouded integration of educational institutions throughout the South.[37] School districts that purported to comply with *Brown* often did so by adopting attendance plans, especially so-called "freedom of choice" plans,

31. *See* Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954).

32. *See* Brown v. Bd. of Educ., 349 U.S. 294, 300-01 (1955).

33. *See id.* at 298-99.

34. *See* SUPRME COURT, *supra* note 30.

35. *See generally* MORTON HORWTIZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 39 (1998).

36. Cooper v. Aaron, 358 U.S. 1, 10-11 (1958) (describing the series of stand-offs between the Arkansas National Guardsmen, the black school children, and the federal troops that led to this case).

37. *See* NORMAN DORSEN ET AL., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 625-33 (1976) (describing the history of southern intransigence).

that left in place the schools' long-standing and state-sponsored racial identity.[38]

By the late 1960s, the Court had become impatient with the slow pace of change. Most notably, in *Green v. County School Board of New Kent County, Virginia*[39] the Court rejected yet another freedom of choice plan, and highlighted the district's affirmative duty to establish a unitary school system.[40] The Court made its impatience unmistakable by noting that the school district waited eleven years after *Brown* to institute its inadequate freedom of choice plan. Recounting that history, the Court repeated what it had said four years earlier, that "[t]he time for mere 'deliberate speed' [had] run out."[41] Three years after *Green*, in *Swann v. Charlotte-Mecklenburg Board of Education*,[42] the Court took the next logical step, by delineating the tools district courts possessed to implement *Green*'s mandate of desegregation "that promises realistically to work, and promises realistically to work now."[43] In *Swann,* a unanimous Court authorized district courts to supervise a wide variety of school board decisions, including student and teacher assignment, facilities equalization, school siting and student transportation, in pursuit of desegregation.[44]

In retrospect, *Swann* can be seen as the high-water mark of the Court's aggressiveness in enforcing *Brown.* Two years after *Swann*, the Court in *San Antonio Independent School District v. Rodriguez*[45] rejected, by a 5-4 vote, the argument that the property tax financing method for public schools, and the unequal resources thereby provided schools in wealthy and poor districts, violated the Equal Protection Clause.[46] In so doing, the Court made clear its unwillingness to second-guess the practice of unequal school financing, thus contributing, at least indirectly, to the attractiveness of suburban districts for many affluent whites. In *Keyes v. School District Number 1*,[47] when the Court held open for judicial remedy school districts that never

38. *See, e.g.,* Freeman v. Pitts, 503 U.S. 467, 472 (1992) (noting that the DeKalb County School System in Georgia "took no positive action toward desegregation until the 1966-1967 school year, when it did nothing more than adopt a freedom of choice transfer plan").

39. 391 U.S. 430 (1968).

40. *See id.* at 437-38.

41. *Id.* at 438 (quoting Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964)).

42. 402 U.S. 1 (1971).

43. *Green*, 391 U.S. at 439.

44. *See Swann*, 402 U.S. at 18-31.

45. 411 U.S. 1 (1973).

46. *See id.* at 50-51.

47. 413 U.S. 189 (1973).

engaged in *de jure* segregation, political opposition to desegregation increased outside of the South.

At the same time those districts were opened up to judicial scrutiny, federal courts were beginning to conclude that for some urban districts, effective desegregation would sometimes require the involvement of their suburban neighbors. In 1974, in *Milliken v. Bradley*,[48] the Court, in a 5-4 decision, rejected a district court's involvement of suburban Detroit districts in the court's plan to integrate Detroit schools, holding that the suburban districts were innocent of any illegal conduct and thus beyond the reach of the court's remedial powers.[49] Two years later, in *Pasadena City Board of Education v. Spangler*,[50] the Court rejected a district court's continued imposition of requirements regarding the racial mix of a previously segregated school district, on the grounds that the district had complied with the required racial mix for one year, and had thus achieved unitary status, at least with regard to that feature of the district's operation.[51]

Milliken and *Spangler* were watersheds, limiting, respectively, the geographic and temporal reach of desegregation remedies. Given the extraordinary complexity of and political controversy surrounding school desegregation, it was perhaps inevitable that the imposition of these limits would lead to incomplete desegregation.[52] Perhaps just as importantly, courts' inability to complete the job would yield impatience with continued federal judicial oversight of local school districts. Starting in 1991 with *Board of Education of Oklahoma City Public Schools v. Dowell*,[53] and continuing in 1992 with *Freeman v. Pitts*,[54] and in 1995 with *Missouri v. Jenkins*,[55] the Court spoke of desegregation "to the extent practicable."[56] That formula had significant consequences for judicial supervision of school districts. It allowed the dissolution of an injunction where the school board had complied in good faith with a desegregative decree, despite the existence of ves-

48. 418 U.S. 717 (1974).

49. *See id.* at 752.

50. 427 U.S. 424 (1976).

51. *See id.* at 434-36.

52. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 487-89 (1992) (noting the logical flow from the analysis in *Spangler* to the result in *Freeman* that district courts can relinquish, in a piecemeal fashion, control over school districts as particular functions performed by the district achieve unitary status).

53. 498 U.S. 237 (1991).

54. 503 U.S. 467 (1992).

55. 515 U.S. 70 (1995).

56. *Dowell*, 498 U.S. at 250.

tiges of the segregated system.[57] It also freed a district from judicial supervision with respect to the parts of its operations that had achieved unitary status, despite the continued existence of dual system attributes in the district's other operations.[58] Finally, it required that judicial remedies be confined to the offending district, even if that would make it impossible to eliminate all vestiges of the prior dual system.[59]

Ultimately, these latter decisions focused as much on the practical capabilities of courts as on formal issues of liability and remedy. Implicit in these opinions is a sense of the practical limitations courts faced when attempting to supervise, for an indefinite period, as massive and important an institution as a public school system. Unquestionably, the Court has conveyed this sense, in part, because of its other priorities, most notably its federalism-based interest in returning schools to local control as soon as possible.[60] In other words, value choices, rather than purely institutional limitations, help explain the tenor of these decisions. Still, there is something to the Court's concern about the workability of indefinite judicial supervision of institutions as traditionally locally operated as schools. The answer to this concern, though, need not have been vertical—that is, a passing back of control to local authorities before the constitutional right has been fully vindicated. Instead, perhaps the answer could have been horizontal—a shouldering by Congress of the burden of enforcing desegregation. In particular, Justice O'Connor, concurring in *Jenkins*, explicitly turned to "the representative branches,"[61] both state and federal, for broader actions. Justice O'Connor was clearly thinking, at least in part, about the Section 5 power. Indeed, while she noted both courts' institutional incapacity "to prescribe palliatives for societal ills"[62] and cited approvingly Justice Thomas's caution that federalism limits federal courts' ability to supervise local institutions such as schools,[63] she also described the Fourteenth Amendment not as an alteration of the power balance between federal and state governments generally, but (emphasizing the point) between federal and

57. *See id.* at 249-50.

58. *See Freeman*, 503 U.S. 467, 490-91.

59. *See Jenkins*, 515 U.S. at 89-90.

60. *See id.* at 88; *Freeman*, 503 U.S. at 489-90; *Dowell*, 498 U.S. at 248.

61. *Jenkins*, 515 U.S. at 112 (O'Connor, J., concurring).

62. *Id.*

63. *See id.* at 113.

state *legislatures*.[64] To make the point even clearer, she contrasted federal courts' "limited judicial role"[65] with Congress's "discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[66]

If one analyzes the practical difficulties inherent in the judicial supervision of school districts in light of Congress's unique institutional competence, it seems clear that many of these difficulties could have been better managed by Congress. The history of what Congress did to enforce *Brown*, what it considered doing, and what it should constitutionally have been able to do had it wished, illuminates the problem not just of school integration, but also of the proper scope of the Section 5 power. Put briefly, the history of school desegregation teaches us lessons about the appropriate scope of Section 5.

B. Section 5 and Congressional Implementation of *Brown*

1. Restricting Interference With Desegregation Orders

Congress's initial response to *Brown* was quite modest. The civil rights bills enacted in 1957 and 1960 focused mainly on voting rights, with very little direct action on school desegregation.[67] One of the few steps Congress took was the prohibition on violent interference with court-issued desegregation orders.[68] The inclusion of this provision in the Civil Rights Act of 1960 was perhaps unsurprising, given the violence in Little Rock two years earlier. Otherwise, however, the statutes were almost silent on the topic.[69]

Article I's Necessary and Proper Clause clearly authorizes Congress to prohibit interference with judicial desegregation orders.[70] Still, even this modest step provides a vehicle for considering the important question: whether Section 5 authorizes Congress to reach private conduct. The analysis might go as follows: The violent obstruction of a court order reduces the order's effectiveness, and

64. *See id.* at 112.
65. *Id.* at 113.
66. *Id.* (internal quotation omitted).
67. *See generally* Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86.
68. *See generally* Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86.
69. Indeed, the only other school desegregation-related provision in these bills provided for the education of military dependents in areas where the local schools had been closed, an issue presumably because of school districts' decisions to close schools rather than integrate them. *Id.* In a sense, this provision accommodates, or at least assumes the existence of, evasions of, *Brown*, rather than combating such evasion.
70. U.S. CONST. art. I, § 8, cl. 18.

thus, the ability of individuals to enjoy the constitutional rights recognized in that order. At least, as a matter of text, the prohibition on interference clearly seems to be a step that "enforces" the rights recognized in that order. While the Section 5 power might not be the only source of power for such prohibitions, logically it would be one source, to the extent that the right interfered with was within the Fourteenth Amendment's guarantees.

Consider an extreme example. If a sniper stationed himself on a rooftop near the entrance to a school and threatened to shoot any African American child that sought to enter, in the exercise of her court-decreed right to an integrated education, then surely, we would say that the sniper was interfering with the exercise of a right under the Equal Protection Clause. Such a situation echoes *United States v. Waddell*,[71] where the Court sustained the application of the Enforcement Act[72] to a defendant who attempted to terrorize an African American homesteader into abandoning his federally granted homestead. In both cases, a private party is interfering with the exercise of a federally granted right. In *Waddell,* the Court had no difficulty sustaining the constitutionality of the Enforcement Act that punished conspiracies to prevent the enjoyment of federally granted rights.[73] The Court's language in *Waddell*, quoting from an earlier case dealing with private party infringement of voting rights, is quite explicit:

> The power [to enact such a statute] arises out of the circumstance that . . . the right which [the victim] is about to exercise, is dependent on the laws of the United States. . . . [I]t is the duty of that government to . . . protect him from violence while so doing . . . .[74]

It might be wondered whether a right to equal protection of the state's laws is the same type of right as a federal right to a homestead. In *Waddell*, the Court spoke of the latter right as a relationship between the federal government and the individual, which, according to the Court, the federal government had ample constitutional authority to protect,[75] and contrasted rights "dependent on a law or laws of the State."[76] The proper characterization of the equal protection right may raise a difficult issue here, on the theory that equal protection is a right to the equal protection of *state* laws. Of course, the right to the

71. 112 U.S. 76 (1884).
72. 18 U.S.C. § 241 (1948).
73. *See Waddell*, 112 U.S. at 77.
74. *Id.* at 80 (quoting *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884)).
75. *See Waddell*, 112 U.S. at 80.
76. *Id.* at 79.

equal protection of those laws is based in the Federal Constitution. In early cases, the Court seems to have believed that the equal protection guarantee was sufficiently different from other federal constitutional rights as to justify a different rule with regard to the scope of federal authority to vindicate it.[77]

Of course, it might be objected that the right at issue is not a right to equal protection in the abstract, but a right against a state denial of equal protection. This distinction would in fact explain the result in *Waddell*, as the right to the homestead would be construed as a set of entitlements—for example, to occupy the land and be recognized as holding a fee simple interest in it—that would have been infringed by the terrorist, thus triggering federal remedial power. By contrast, it might be argued that since the only equal protection right granted in Section 1 is the right against a state's denial, federal enforcement power would have to be confined to the party doing the denying, that is, the state.

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77. For example, in *Ex parte Yarbrough*, 110 U.S. 651 (1884), the Court upheld the constitutionality of federal prosecution of individuals who conspired to harm a person based on the victim's exercise of his right to vote in a federal election. The Court found the requisite federal authority not in Congress's power to enforce the Fifteenth Amendment, but based more generally on the federal government's implicit authority to protect the integrity of the process by which its government is chosen. *Id.* at 662; *see also* Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (upholding the constitutionality of the Ku Klux Klan Act, 42 U.S.C. § 1985 (1980), by identifying as the relevant federal rights infringed by the defendants, the federal right to travel and the Thirteenth Amendment's right to be free of the badges and incidents of slavery). By contrast, in *United States v. Cruikshank*, 92 U.S. 542 (1875), the Court struck down, as unconstitutional, an indictment alleging a conspiracy to violate a person's right to equal protection of the laws. *Id.* at 555, 559.

Why the different results between *Cruikshank* and *Yarbrough*? Five slots on the Court changed occupants in the intervening years. Yet a more principled explanation, even if one difficult to understand from a modern perspective, offers itself. In *Cruikshank*, the Court stated the following in striking down the relevant part of the indictment:

> The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. . . . The power of the national government is limited to the enforcement of this guaranty.

Id. at 555.

It seems that the *Cruikshank* Court thought that equal protection rights somehow remained rights guaranteed to citizens by states, with the federal government playing only a superintending role, which stopped short of authorizing federal regulation of private conduct.

Justice Harlan's dissent in the *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting), seems to adopt the basic assumption of this approach, with the crucial difference that he viewed the Fourteenth Amendment's grant of state citizenship to all residents of a state as carrying with it all the affirmative rights that flowed from state citizenship, including the rights to equal treatment. *See id.* at 46-47. In turn, the affirmative nature of that grant authorized Congress to go beyond enacting enforcement legislation that merely counteracted state government misconduct. *See id.*

But equal protection cannot be cabined so neatly. "Denials" of equal protection, unlike perhaps "deprivations" of life, liberty, or property interests without due process, or "abridgements" of privileges or immunities, can take the form of state inaction, as well as state action. Equal protection of the laws can be denied by a state withholding protection, for example, by refusing to investigate crimes against African Americans. The fact that equal protection can be "denied" by state inaction raises questions of enforcement. How, one might ask, can a state be compelled to take affirmative actions of a given sort? Certainly, courts can enjoin state actors, as they have done quite extensively in the school desegregation context.[78] But making something happen (the equal protection of equal laws) by forcing an intermediary (a state) to do it is clumsy and potentially ineffective. The affirmative nature of a state's equal protection obligation, when combined with the myriad ways in which denials of equal protection may occur, suggests the appropriateness of broad congressional discretion in determining what enforcement method is most appropriate, that is, providing the equal protection the state has denied, or requiring the state to do it. For example, if the state has denied a lesbian a library card because of her sexual orientation, presumably the best approach is to require states not to discriminate on that ground in the provision of library services, rather than building an equivalent federal library that did not discriminate. But if the problem is a sniper that a state is unwilling to stop from terrorizing children attempting to integrate a school, perhaps a federal marshal policing the grounds is the best approach.

If this analysis is sound, then the holding in *United States v. Morrison*,[79] that Section 5 can never authorize regulation of private conduct, seems, at the very least, severely overstated.[80] In particular, enforcement of the equal protection guarantee might legitimately take the form of regulation of private conduct when that conduct results from a state's failure to satisfy its constitutional obligations. In a world in which a state's constitutional obligations are purely negative, that is, where those obligations require states simply to refrain from acting in certain ways, then the federal equal protection right could be

78. *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237 (1991) (recounting the history of the district court's control over the local school district).

79. 529 U.S. 598, 621 (2000).

80. It also seems at least arguably inconsistent with the intention of those who drafted the Fourteenth Amendment. For a summary of the evidence on that issue, see generally FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION 78-93 (2000).

largely vindicated by federal prohibitions on states. If, by contrast, those obligations require the states to take some affirmative action, then a state's failure to act would not only constitute a violation, but might also be effectively remediable only by federal regulation of private conduct. To put it in terms of the sniper hypothetical, if a state's equal protection-based obligations include the protection of school children from violence aimed at thwarting desegregation, then a state's failure to search for the sniper might constitute a failure to provide equal protection, at least if that failure was motivated by an inappropriate motive, such as hostility to desegregation.

This theory requires a court to determine what in fact are a state's constitutional obligations. In the context of school desegregation, this question is resolved by the Court's statements about states' affirmative duty to eliminate all the vestiges of a segregated education system.[81] According to this theory, the affirmative nature of that duty suggests a corresponding larger scope for congressional enforcement authority, including the authority to regulate at least some private conduct. But how much private conduct, and how to determine how much? In the school desegregation context, these questions require courts and Congress to consider the links between public and private discrimination. If states' affirmative duties to desegregate schools require, or would be furthered by the uprooting of the entire social system of segregation, then states' failure to engage in that uprooting could conceivably justify federal intervention. For the reasons examined in Part II, that intervention might more appropriately originate in Congress rather than the courts. But before determining which federal branch is better suited to require states to perform those affirmative acts, the links between those affirmative actions and the underlying constitutional obligation must be uncovered. Congress, the Executive Branch, and the courts all began to consider those links in the 1960s.

2. Public Accommodations Discrimination and the Empirical Links Between Private and Public Action

The 1964 Civil Rights Act was a turning point in federal antidiscrimination law. Among other things, it prohibited race discrimina-

81. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 438 (1968) (requiring school districts to take steps to convert to a system "in which racial discrimination would be eliminated root and branch").

tion in employment[82] and public accommodations,[83] authorized the withholding of federal funds to programs that engaged in discriminatory practices and procedures,[84] and empowered the Attorney General to sue for school desegregation.[85] Four years later, Congress enacted the Fair Housing Act, which prohibited much, though not all, racial discrimination in housing.[86] Very shortly after the enactment of the 1964 Act, the Supreme Court, in a recently reaffirmed decision,[87] upheld the public accommodations provision as a constitutional use of the federal commerce power.[88] Similarly, congressional power to regulate employment and housing markets is not open to serious doubt.[89]

The more interesting question is the Section 5 authority for these provisions.[90] Soon after the Fourteenth Amendment's enactment, the *Civil Rights Cases*[91] rejected the Section 5 basis for a Reconstruction-era public accommodations law analogous to Title II of the 1964 Act. The legislative history of the 1964 Act speculated that by the mid-

82. Civil Rights Act of 1964, 42 U.S.C. § 2000f (1964).

83. Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964).

84. Civil Rights Act of 1964, 42 U.S.C. § 2000d-5 (1966).

85. Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 (1964).

86. Fair Housing Act of 1968, Pub. L. No. 90- 284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601).

87. *See* United States v. Lopez, 514 U.S. 549, 559 (1995).

88. *See* Heart of Atlanta Hotel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). The other crucial civil rights provision enacted during this period was the Voting Rights Act of 1965 (VRA), which attempted to safeguard the voting rights of African Americans and other ethnic minorities. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971). Because the VRA explicitly aims at state conduct, it does not raise the same enforcement power issues as do the 1964 Civil Rights Act and the Fair Housing Act. Thus, this article will not discuss the VRA. However, this Article's lack of emphasis on the VRA does not suggest its unimportance to school desegregation. Clearly, safeguarding the right to choose local government officials, such as school board officers, helps to ensure the effectiveness of school desegregation. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (identifying the right to vote as a process right that helps ensure that undesirable legislation is corrected through the political process).

89. *See, e.g.*, Russell v. United States, 471 U.S. 858, 862 (1985) (upholding use of the Interstate Commerce power to regulate arson of real estate used for rental purposes, given the existence of a national market for rental real estate); United States v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding federal regulation of employment markets).

90. This Article does not address the final major statutory civil rights provision enacted after *Brown*, the VRA. Clearly, that statute has impacted school integration by increasing African Americans' political influence over the local governmental institutions that ultimately determine the success or failure of a desegregation effort. Because a right to be free of discrimination in voting is so clearly established by the Fifteenth Amendment, however, this Article does not consider the degree to which Congress's power to enforce the Fourteenth Amendment, and in particular, to enforce *Brown*, provides support for the VRA. Of course, the Fifteenth Amendment's own congressional enforcement provision, Section 2, is not free of controversy, and since the Court has consistently viewed those two enforcement provisions as having equal scope, the analysis in this Article is indirectly relevant to the question of how far Congress can go in enforcing the Fifteenth Amendment.

91. 109 U.S. 3 (1883).

1960s the *Civil Rights Cases*' precedent had become shaky and might well be overruled.[92] Because the Interstate Commerce Clause foundation for those provisions was so strong,[93] however, backers of the public accommodations provision in the Johnson Administration and in Congress did not attempt to justify it under the Section 5 power.[94]

The drafters' reticence about justifying such legislation on Section 5 grounds does not mean that they and other observers saw no link between private and government discrimination. Indeed, political, administrative, and judicial actors at the time clearly understood the connection between private discrimination and the denial of equal protection, in particular, segregated educational systems. For example, in 1963, a federal judge found that residential segregation in Oklahoma produced school segregation.[95] The year before, an Executive Order prohibiting racial discrimination in federally financed real estate transactions recited a finding that housing discrimination produced other forms of discrimination and segregation, a reference that at the time must have been understood to include school segregation.[96] Later that decade, a school superintendent in Louisiana concluded that the racially integrated character of a town's dominant employer assisted the community's acceptance of school desegregation.[97] A commentator has concluded that the more rapid pace of school desegregation in the second half of the 1960s resulted in part from desegregation in other areas of community life.[98]

The existence of these links raises important questions about the scope of Congress's authority under Section 5. If private conduct such as employment and housing discrimination so clearly influences the effectiveness of desegregation remedies, it should be asked whether Congress's Section 5 authority should extend to regulating such con-

92. *See* Act of February 10, 1964, Pub. L. No. 88-352, 1964 U.S.C.C.A.N (78 Stat. 241) 2355, 2366.

93. *See id.* at 2367.

94. For a discussion of the debate in the Johnson Administration, see Douglas Martin, *Burke Marshall, A Key Strategist of Civil Rights Policy, Dies at 80*, N.Y. TIMES, June 3, 2003, at A1. For the legislative history of the Civil Rights Act, and in particular, the focus on the Interstate Commerce Clause as the authority for the public accommodations provision, see Act of February 10, 1964, Pub. L. No. 88-352, 1964 U.S.C.C.A.N (78 Stat. 241) 2355, 2366.

95. *See infra* note 133; *see also* Gary Orfield, Plessy *Parallels, in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 41 (Gary Orfield & Susan Eaton eds., 1996) (discussing similar findings by the court considering Atlanta's school system).

96. *See* Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), *reprinted as amended in* 42 U.S.C. § 1982 (1978).

97. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 97 (1991).

98. *See id.*

duct. Such an inquiry is not merely academic. In an era where other sources of federal power, most notably the Interstate Commerce Power, are subject to at least some restrictions at the margins,[99] the Section 5 power might become not just useful, but necessary to reach private conduct that would otherwise be immune from federal regulation. The Violence Against Women Act,[100] struck down in *Morrison*, stands as an example of such a situation, where a statute was held to go beyond the Interstate Commerce Power,[101] and thus necessitated its defenders to argue, unsuccessfully, that Section 5 authorized it.[102] More conventional forms of federal hate crime laws may be another example.[103] Even legislation that clearly regulates interstate commerce might be beyond Congress's Article I power if it trumps some other implicit federalism principle, such as the anti-commandeering rule.[104] Again, such a case might require a court to decide whether Section 5 provides an independent source of congressional authority.[105]

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99. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). The Spending Clause is another area where the current Court majority might be interested in trimming congressional power. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 (1999) (suggesting potential conditions under which conditional financial inducements provided by Congress to the states may amount to unconstitutional coercion). Nor is it out of the realm of possibility that the current Court could resurrect some version of *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), which would severely restrict the use of the Interstate Commerce Power to reach conduct of state governments themselves. *See Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) (predicting the overturning of *Garcia*); *id.* at 589 (O'Connor, J., dissenting).

100. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended at 42 U.S.C. § 13701).

101. *See Morrison*, 529 U.S. at 613.

102. *See id.* at 627.

103. Hate crimes laws, to the extent they do not involve what the Court characterizes as "economic activity," may be beyond the Interstate Commerce power, as construed in *Morrison* and *Lopez*. *See, e.g.*, *Morrison*, 529 U.S. at 610 (suggesting a near *per se* rule that non-economic crimes may not be regulated by Congress without a requirement of a direct nexus to interstate commerce). For a discussion of the constitutionality of federal hate crimes laws, see for example, John S. Baker, Jr., United States v. Morrison *and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191 (2000).

104. *See* United States v. Printz, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

105. The Supreme Court has not decided whether the anti-commandeering principle is trumped by the Section 5 power. If the Court's state sovereign immunity jurisprudence is an example, though, there is a good chance that the later-enacted Section 5 power, which operates as part of a direct redistribution of authority away from states and toward the national government, would trump the anti-commandeering principle implicit in the original constitutional structure. *See generally* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (using these same arguments to hold that a Section 5-based enactment trumps state sovereign immunity claims).

Arguments about the Section 5 authority for federal regulation of private conduct must, of course, contend with both the early Section 5 precedents and their modern progeny. In *United States v. Cruikshank*,[106] *United States v. Harris*,[107] and the *Civil Rights Cases*, the Court in the immediate post-Reconstruction period limited the reach of Section 5 by striking down laws aimed at private conduct. Over a century later, the Court in *Morrison* read these cases as standing for the broad proposition that the Section 5 power did not authorize Congress to regulate private conduct.[108]

Harris is especially problematic for any theory that would empower Congress to regulate private action that interfered with a judicially declared Fourteenth Amendment right. In *Harris,* a grand jury indicted a member of a mob that attacked African Americans held in state custody.[109] The indictment alleged a violation of Section 5519 of the Revised Statutes, which criminalized conspiracies

> for the purpose of depriving . . . any person . . . of the equal protection of the laws . . . or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving . . . to all persons within such State . . . the equal protection of the laws . . . .[110]

The Court struck down the indictment.[111] It concluded that Congress did not have the authority under Section 5 of the Fourteenth Amendment or other sources[112] to punish the private action involved. Significantly, the indictment in *Harris* alleged that Harris deprived his victims of equal protection and prevented the sheriff, who held the victims in custody, from providing equal protection.[113] The latter allegation seems analogous to the earlier sniper hypothetical in which an individual makes it impossible for the state to protect individuals' constitutional right to attend an integrated school safely.

On the other hand, it has been suggested that *Harris* and the other decisions of that period that seem to require that Section 5 legislation aimed at state action, do not, in fact, stand for such a draconian result. Writing nearly forty years ago, Laurent Frantz argued that these cases are better read as recognizing congressional power to

106. 92 U.S. 542 (1876).
107. 106 U.S. 629 (1883).
108. *See Morrison*, 529 U.S. at 621.
109. *Harris*, 106 U.S. at 630-31.
110. *Id.* at 632.
111. *See id.* at 644.
112. *Id.* at 640. Specifically, the Court discussed the Thirteenth and Fifteenth Amendments, and the Privileges and Immunities Clause of Article IV. *Id.* at 641-44.
113. *See id.* at 639-40.

reach at least some private conduct when states failed in their own obligations to provide equal protection.[114] In *Harris*, for example, there is language suggesting that the state in that case had in fact provided equal protection to its citizens, and that the defendants had conspired to deprive the victims of those rights provided by the state.[115] Indeed, that language suggests, albeit ambiguously, that Congress could reach private conduct when the state failed in its obligation to provide equal protection.[116]

If correct, this theory of Section 5 would dovetail nicely with congressional action designed to ensure desegregation. Recall that by the late 1960s the Court was insisting that the states' desegregative responsibilities were affirmative—to eliminate segregation and all its vestiges.[117] If it is true that segregated housing, employment, and public accommodations encouraged resistance to school integration or even propped up segregation,[118] then a state's failure to eradicate such private discrimination could be seen as a failure of the state to comply with its affirmative obligations under *Brown*,[119] thus justifying federal regulation of that private conduct.

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114. *See* Laurent Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964).

115. *See Harris*, 106 U.S. at 638 ("The enforcement of the [equal protection] guaranty does not require or authorize Congress to perform 'the duty that the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform.'").

> Section 5519 of the Revised Statutes is not limited to take effect only in case the State shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws. It applies, no matter how well the State may have performed its duty.

Id. at 639.

> In the indictment in this case, for instance, which would be a good indictment under the law if the law itself were valid, there is no intimation that the State of Tennessee has passed any law or done any act forbidden by the Fourteenth Amendment. On the contrary, the *gravamen* of the charge against the accused is that they conspired to deprive certain citizens of the United States and of the State of Tennessee of the equal protection accorded them by the laws of Tennessee.
>
> As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.

Id. at 639-40.

116. *See id.*

117. *See* Green v. County Sch. Bd., 391 U.S. 430, 438 (1968).

118. *See, e.g.*, ROSENBERG, *supra* note 97, at 97, 101-02 (workplace segregation); Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), *reprinted as amended in* 42 U.S.C. § 1982 (1978); *infra* note 133 (residential segregation).

119. *See* Act of February 10, 1964, Pub. L. No. 88-352, 1964 U.S.C.C.A.N (78 Stat. 241) 2355, 2364, 2368. Indeed, even as of ten years ago, four states did not have statutes banning employment discrimination. *See* LAUGHLIN MCDONALD & JOHN A. POWELL, THE RIGHTS OF RACIAL MINORITIES 63 (2d ed. 1993).

Obviously, the question of whether Section 5 authorizes Congress to regulate private action, and if so, under what circumstances, is a large and difficult one, whose definitive resolution lies well beyond the scope of this Article. Instead, this Article uses the example of school desegregation to argue that an absolute prohibition on Section 5-based regulation of private conduct places significant roadblocks in the way of ultimate vindication of core Fourteenth Amendment rights, and thus should call such a prohibition into question. This example illuminates how the differing institutional capacities of Congress and the courts reveal the former to be crucial in the vindication of rights identified by the latter. In particular, the complex causal relationships impacting the desegregation of public schools, and the political difficulties attending federal court supervision of important and sprawling local government bureaucracies suggest the necessity, or at least the appropriateness, of a broad congressional role. The affirmative nature of the state's obligation to desegregate justifies congressional authority as a doctrinal matter, as it provides a way to view the situation as one of insufficient state protection of equal protection rights, which triggers federal regulatory power under the theory discussed above.[120]

Thus, if a doctrinal path is opened for at least some congressional regulation of private action under the Section 5 power, then the school integration example illustrates how best to imagine the scope of such congressional authority. As discussed below, the differing institutional capacities of the courts and Congress make a strong case for congressional authority when considered in light of the unique difficulties posed by school desegregation, which in turn, provides valuable lessons for the more general question—the scope of the Section 5 power. Indeed, the school desegregation example should influence the doctrinal debate about the scope of the Section 5 power, including the question of whether it authorizes regulation of private conduct, since that example demonstrates the difficulty of vindicating rights against the state when remedial legislation is confined to a narrow channel. If a provision's internal logic and consistency play any role in determining its meaning, then Congress's unique capability to vindicate Fourteenth Amendment rights, as illuminated by the school desegregation example, argues in favor of a broad interpretation of Section 5.

120. *See* Frantz, *supra* note 114.

The next part of this Article discusses Congress's institutional capacities as they relate to the types of judgments that must be made to vindicate Fourteenth Amendment rights. It discusses three particular aspects of Congress as an institution that suggest its particular enforcement competence, and illustrates them through the first significant Supreme Court desegregation case in which the Supreme Court was sharply split, *Milliken v. Bradley*.

II. CONGRESS'S INSTITUTIONAL CAPACITIES

The analysis in Part I suggests that the affirmative obligation to dismantle a segregated school system requires broad action cutting across society. Even leaving aside the problem of private discrimination that encourages school segregation, the "mere" obligation to dismantle the purely governmental apparatus of segregation entangles enforcement entities—typically federal courts—in a wide variety of complex policy decisions affecting every facet of what is perhaps the largest and most important bureaucratic function of state and local governments. The problem of symbiotic private discrimination merely increases the scope and complexity of the problem.

It makes intuitive sense to believe that Congress is better suited than the courts to complete this difficult and sensitive task. This part of the Article examines Congress's institutional capacities from the standpoint of its suitability to oversee the desegregation process. It identifies and describes, briefly and abstractly, three characteristics of legislatures and courts that make the former better suited to desegregate schools. It then examines the issues surrounding *Milliken v. Bradley* in order to illustrate legislatures' particular institutional competence.

A. Legislatures' Popular Mandate

Most fundamentally, legislatures enjoy the political legitimacy of electoral success. Their popular mandate should make them better able to take actions that unelected courts may find difficult to impose, if those actions require broad reordering of basic governmental institutions and longstanding social relationships.

Consider the intent requirement in anti-discrimination law. In *Washington v. Davis*,[121] the Court held that the Equal Protection

121. 426 U.S. 229 (1976).

Clause protected only against intentional discrimination based on an inappropriate characteristic, such as race, as opposed to classifications that had produced disparate results based on that characteristic.[122] The *Davis* Court reached this decision in part because of the practical implications of a disparate impact rule. As the Court noted, a variety of taxing, social welfare, and regulatory programs probably impacted minorities, who as a group tend to be poorer, differently than whites, who tend as a group to be wealthier.[123] The implications of casting such programs into constitutional doubt clearly worried the Court.[124] It noted, though, that Congress had mandated a disparate impact test in the field of employment discrimination generally—that is, applicable to private and public employers, as authorized by the Interstate Commerce Clause.[125] It also implied that Congress might be able to legislate such a rule against state governments as part of its power to enforce the Fourteenth Amendment.[126] When combined, the Court's concern about the implications of a disparate impact rule and its apparent suggestion to Congress that it could enact such a rule if it wished, suggests the view that such broad social reordering may be best enacted by Congress, at least when the Constitution does not compel that rule. That view must be based, at least in part, on the fact that Congress has the political legitimacy to make such a rule and that the Court does not, at least when text and precedent do not require such a result.

Clearly, school integration is an area that would have benefited, and indeed, still could benefit, from federal action backed by the political mandate of Congress. Resistance to *Brown*, as exemplified in statements such as the Southern Manifesto,[127] relied in large part on the alleged non-judicial character of the Court's decision. Undoubtedly, southern resistance ultimately flowed from an opposition to integration, not a mere structural or formal concern with the origins of the integration mandate in the Supreme Court. Nevertheless, much of the

122. *See id.* at 239.

123. *See id.* at 248.

124. *See id.*

125. *See id.* at 247-48.

126. *See generally id.* Such a rule could be applied against state governments through Congress's power under the Interstate Commerce Clause. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). However, the Court has held that Article I does not authorize courts to award damages and other retrospective relief against states. *See generally* Seminole Tribe v. Florida, 517 U.S. 44 (1996). Statutes authorized by Section 5 powers, however, can include such retrospective relief.

127. 102 CONG. REC. 4515-16 (1956).

rhetorical heat resulting from *Brown* relied on the argument that courts had acted extra-legally, by imposing their own policy choices on society.

Congressional action implementing *Brown*, or citing *Brown* as the justification, would not have removed, even ostensibly, what in some white southern eyes was the sin of the decision itself. By joining its voice to that of the Court, however, Congress could have done much to still the argument that *Brown* was an unprincipled power grab by unelected judges. No doubt opponents of desegregation would have opposed congressional action with other formal and structural arguments, such as the federalism arguments made by southern Senators in opposition to the 1964 Civil Rights Act. But early post-*Brown* arguments about judicial remaking of basic social institutions would have been much less convincing had the remaking been supplemented with legislative action.

B. The Limitations of the Adjudicative Format

The adjudicative format may also hamper the courts' ability to ensure effective desegregation. That format involves individual parties where the defendant's liability arises out of its particular actions or policies. Such a format is not particularly well-suited to the enunciation of broad rules of conduct. Of course, a decision by a superior court on a legal issue has *stare decisis* effect. In the face of determined resistance, however, a lawsuit's focus on a particular challenged action and the limited number of parties formally bound by a court's ruling create the potential for significant delay in the broad implementation of that legal rule. This dynamic was present in the early years after *Brown*. Recalcitrant school boards and legislatures vowed to enact rules designed to frustrate desegregation, and, if those were struck down, to enact others, forcing constant rounds of time and resource-consuming litigation.[128] In addition to this game of temporal cat-and-mouse, *Brown* resisters also vowed to fight desegregation claims district-by-district, again hoping to exhaust and ultimately defeat forces seeking to implement *Brown*.[129]

This attempt to exploit the piecemeal nature of judicial action posed a threat to the Court's authority to declare broad principles of

128. *See, e.g.*, ROBERT CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 697-98 (2002) (describing this strategy).

129. *See id.* at 698.

constitutional law. The Court's aggressive statement in *Cooper v. Aaron*[130] that its own constitutional interpretations are themselves "the Constitution" can be seen as a response to that threat. The status of *Brown* as the Constitution itself obviated, at least theoretically, the problem of having to prove liability district-by-district, at least where those districts were segregated de jure. Even here though, the problem remained of having to haul a district into court and enlist the court's assistance in forcing compliance. Moreover, *Cooper* did not eliminate the problem of districts abandoning de jure segregation, but enacting, in its place, ostensibly neutral laws that were designed to ensure continued de facto segregation. It would take another decade after *Cooper*, until *Green v. County School Board of New Kent County, Virginia*, for the Court to get tough with such obfuscatory half-measures.

Even given a particular defendant and a particular fact pattern, liability determinations in this area present difficult tasks for courts. The classic example of litigation is the private lawsuit raising a common law claim. In its most basic form, a single plaintiff sues a single defendant over an event where the relevant disputed facts are findable through a discrete set of documents and testimony, and where the requested relief is quantifiable and its performance easily monitored by the courts. A suit in contract or tort is the quintessential example. In such a suit, a court can determine liability based on information that is easily accessible and understandable to a generalist court or jury, and which maps easily into the template provided by the law. Further, all the parties that are necessary for an adjudication of the claim can be brought into the adjudicative process without particular difficulty. The court can easily oversee the relief, especially if it takes the form of legal relief such as a damages award.

School desegregation cases are obviously far more complicated. Their facts are often the type that, if not classic legislative facts, nevertheless involve the long-term workings of complex institutions. Finding them often requires making difficult judgments about causation and institutional intent, concepts that, even if not theoretically more fictional than simpler causation and intent findings,[131] are certainly

130. 358 U.S. 1 (1958).

131. *Cf.* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 217-19 (1973) (Powell, J., concurring in part and dissenting in part) (criticizing the concept of a school district's intent to segregate); Michael Gerhardt, *Institutional Analysis of Municipal Liability Under Section 1983*, 48 DEPAUL L. REV. 669, 682 (1999) (discussing the relevance of institutional identity to factors such as culpability and causation).

beyond the range of the fact finding in which courts normally engage. In addition, the relevant group of entities is far larger than that in the typical private litigation, even when the issue is the actions of a single school district. In large part this larger cast is due to school districts' bureaucratic complexity, given their myriad links to local and state governments. In *Milliken*, for example, the State of Michigan was implicated in some of the segregative effects identified by the district court, due to the state's involvement in several facets of the district's operations.[132]

Moreover, relief issues are inherently more difficult. Relief in school desegregation cases involves the restructuring of a large government institution in order to place the plaintiff in a position he would have occupied absent the long-term implementation of a principle as foundational as race discrimination has been in America. This problem goes beyond the difficulties inherent in overseeing injunctive relief, because the entity being enjoined is so large and complex, and because the change demanded is so far-reaching given the pervasiveness of the illegal conduct. To make matters even more complex, the problem of school desegregation is to some significant degree, one for which officials other than educators are also responsible. School segregation was part of an interlocking and mutually reinforcing structure of racial separation.[133] Thus, to the extent that the remedial goal is to erase all vestiges of school segregation, the non-school components would have to be forced to change as well. The inclusion of each additional government bureaucracy—housing, income support, transportation, to name but the most obvious—multiplies the complexities identified above. Leaving aside the daunting problems of finding legal theories to allow these non-school actors to be held legally liable to the student-plaintiffs, one may wonder how courts could ever successfully manage the type of broad-ranging relief necessary to uproot the system of educational segregation.

Courts have responded in many ways to this complexity, from using special masters to relying on co-operation from the parties in de-

132. *See Milliken*, 418 U.S. at 743-44.

133. *See, e.g.*, Dowell v. Sch. Bd., 219 F. Supp. 427, 433-34 (W.D. Okla. 1963) (discussing the link between school segregation and state-maintained residential segregation); Orfield, *supra* note 95; Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55 (2002); *see also* JAMES A. KUSHNER, APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES 37-44 (1980) (linking social welfare policies and residential segregation).

vising effective injunctive relief.[134] Ultimately, though, the determinations of law and fact must be made in ways consistent with the judicial model, and decisions about relief must correspond to limitations inherent in that model, such as the principle that innocent parties may not be subject to judicial coercion. (Other limitations, not necessarily inherent in the judicial model, for example, federalism concerns about local control of education, only make the courts' tasks more difficult.) These limitations necessarily mean that courts will be blocked from being fully effective in grappling with a large-scale interlocking problem. The Supreme Court seems to have suspected this early on, when it cautioned, in its broadest statement of the courts' equitable powers to eliminate segregation that, "[o]ne vehicle can carry only a limited amount of baggage."[135]

Can legislatures do any better? Beyond their greater political legitimacy, discussed above, and their superiority in finding the relevant facts, discussed below, legislatures enjoy other advantages based on their freedom from the requirements of the judicial process. One obvious advantage lies in legislatures' ability to act generally and proactively. Legislatures may regulate across-the-board, specifying generally applicable rules of conduct. Legislation, especially when combined with administrative action as an adjunct, can set forth a detailed regulatory code into which all schools can situate themselves, thus obviating the uncertainty inherent in case-by-case adjudication.

In addition, a legislature can regulate parties without a prior showing of liability, based purely on its determination that doing so would help effectuate an underlying goal. Courts, while possessing great flexibility in designing remedies, are nevertheless limited by their need to assert jurisdiction over an entity before regulating it.

134. *See generally* Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955) (noting the "primary responsibility" of school officials in solving the practical problems raised by the desegregation mandate); Armstrong v. Bd. of Sch. Dirs., 616 F.2d 305, 318 (7th Cir. 1980) ("Indeed, it appears that school desegregation is one of the areas in which voluntary resolution is preferable to full litigation because the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy."); Geoffrey F. Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformulation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L.Q. 739, 741 (1980) (discussing the use of special masters); Peter Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1110-11 (1984) (noting the importance of cooperation from school officials in ensuring effective desegregation). For an evaluation of the lower courts' reliance on defendants' cooperation in shaping desegregative remedies, see for example, Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation, and District Court Judges*, 81 N.C. L. REV. 1623 (2003).

135. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 22 (1971).

Those parties may be well beyond the court's jurisdiction, if, for example, they are not found to have violated any law.[136] Indeed, one way to understand the distinction between Sections 1 and 5 of the Fourteenth Amendment is that Section 1, by prohibiting certain actions on the part of states, focuses on discrete actions or omissions that can be tested against a judicially-applied standard—an "abridgement" of one's privileges or immunities, a "deprivation" of liberty without due process, or a "denial" of due process. By contrast, Section 5 can be understood as authorizing broad-based prophylactic action to ensure that the rules laid down by courts are made reality. Such action, while triggered by judicial statements of the underlying rule, need not target the actions that themselves violate Section 1. Of course, the Section 5 power still requires federal legislation to have some link to the guarantees provided in Section 1. But to insist, as the Court's current Section 5 jurisprudence does, that the linkage consist of evidence of conduct that would violate Section 1,[137] is to impose a rigidity that ignores the differing institutional roles of the courts and Congress, a difference that is reflected in the division of labor that the drafters of the Fourteenth Amendment seem to have contemplated.[138]

The distinction between the institutional limits on judicial and legislative power becomes especially relevant in the school desegregation context, where a large variety of parties may be capable of assisting in the desegregation effort without being formally liable for any legal violation. Private housing discrimination, for example, clearly aggravates school segregation, yet such discrimination, as private action, does not violate the Fourteenth Amendment. Moreover, if a particular liability determination is difficult to make, due perhaps to complex causal relationships[139] or the need to establish whether the defendant institution had the requisite intent,[140] the limitations on ju-

136. *See, e.g.*, *Milliken*, 418 U.S. 717.

137. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 369-72 (2001).

138. *See* SCATURRO, *supra* note 80 (recounting evidence of the drafters' intent that Section 5 provide Congress with broad power going beyond Section 1's prohibition on certain actions by the states).

139. *See, e.g.*, Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 875 (1991) (noting the difficulty of causation analysis in school desegregation litigation).

140. *Cf.* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 233-34 (1973) (Powell, J., concurring in part and dissenting in part); Gerhardt, *supra* note 131.

dicial action become even starker, relative to the plenary power enjoyed by a legislature acting within its proper sphere of authority.[141]

C. Congress as Fact Finder

Daunting empirical issues confront any government decision maker concerned about school segregation. To understand an institution as large and basic to American life as public schools, the decision maker must uncover broad, basic social facts, such as public attitudes about race and education, the operation of government entities charged with public education, and the relationship between public education and functions as diverse as land use planning, provision of public and highway transportation, and residential financing. An investigation of school desegregation thus requires the uncovering of complex causal links and relationships both within and between large-scale government and private institutions.

Unquestionably, legislatures are better suited than courts to perform this task. Legislatures are better suited to uncover broad, empirical facts about society. This insight has permeated American law, influencing doctrine on topics ranging from the scope of the procedural due process guarantee,[142] to the appropriateness of imposing ex parte bars and other procedural requirements on administrative rulemaking,[143] to the interpretation of the Bill of Attainder Clause.[144] There is no reason to doubt the applicability of this insight to facts relevant to school desegregation, for example, the determination of

141. Of course, the conclusion that legally innocent parties might be useful to the vindication of a constitutional right, and that legislatures, free of the need to restrict their actions to legal wrongdoers, thus enjoy at least some institutional advantage over courts, does not establish that Congress has the constitutional authority to act. In other words, there remains a need for a doctrinal theory that authorizes Congress to regulate such parties. This part of the Article merely establishes the institutional capacity argument for congressional power.

142. *Compare* Londoner v. Denver, 210 U.S. 373 (1908) (holding that due process requires a hearing when the costs of paving a street are assessed to each property owner on the street), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (holding that due process does not require an individualized hearing when an agency revalues for tax purposes every parcel of land in a city, and distinguishing *Londoner* on the grounds that the plaintiffs in that case were a small group, affected individually on grounds particular to each individual).

143. *See* Administrative Procedure Act, 5 U.S.C.A. § 554(d) (West 1966) (limiting *ex parte* communications in cases of formal adjudication but not formal rule-making); *see also* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 584 (4th ed. 1999) (noting that cases have interpreted statutory language more restrictively when the claim is that the language requires a formal rule-making process, as compared with demands for formal adjudicative processes).

144. *See* William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1090-92, 1095-96 (1999) (discussing the Bill of Attainder Clause).

the relationship between government housing policies and school segregation. Perhaps even more fundamentally, the determination of when such relationships reach a point that justifies oversight by the federal government is sufficiently value-laden that one should prefer that such causal "facts" be judged by politically responsive bodies, rather than by courts.

None of this is to suggest that courts act illegitimately, or invariably stumble when they shoulder the burden of finding these types of facts. The question here is the relative competencies of the courts and Congress, which in turn speaks to the appropriate scope of the Section 5 power. Congress's clear advantage here, while not detracting from judicial responsibility to act when called upon, nevertheless suggests the appropriateness of a wide scope for congressional power, especially when that power is used to complement the judicial action that remains the primary source for individuals seeking to vindicate their rights.

Given this understanding of the nature of the facts at issue in segregation cases, it is hardly surprising that courts have found themselves unable to do more than, at best, attack the most obvious symptoms of the systemic disease of segregation. Even assuming away doctrinal limitations and judicial reticence, the problem of the courts' institutional inability to grasp fully the social and political relationships described above, on a scale appropriate to a full understanding of the issue, by itself poses a daunting barrier to judicial uprooting of segregated schools. As a matter of common sense division of responsibilities, it should be clear that Congress's institutional superiority in grasping those relationships should entitle it to a broad role in assisting in the uprooting process.

D. *Milliken* as an Illustration

The factors discussed above are illustrated by the situation in *Milliken*. In that case, the district court involved the suburban school districts surrounding Detroit in a desegregation injunction based on a finding of the Detroit school district's liability.[145] The court included the suburban districts in its remedy because it concluded that a remedy confined to Detroit itself would not render its schools unitary given the white flight that left Detroit schools populated mainly by

145. Milliken v. Bradley, 418 U.S. 717, 738-39 (1974).

black students.[146] The district court treated local school district lines as "matters of political convenience" that "may not be used to deny constitutional rights."[147]

The Supreme Court rejected this approach.[148] It allowed lower courts to consolidate districts only when the suburban districts were either themselves constitutional wrongdoers,[149] or when wrongdoing in the urban district had "a significant segregative effect"[150] in the suburban ones.[151] The Court identified several considerations in adopting this narrow approach to inter-district remedies. First, it thought this approach was appropriate given the tradition of local control of schools, as reflected in local control over the drawing of district lines.[152] Second, the Court expressed concern with what it considered the practical problems that would arise from a court's partial consolidation of school districts, in particular, the reorganization of the decision-making entities to reflect districts' new status as partially linked to other districts and partially independent.[153] The Court worried that district courts were incapable of accomplishing this task, which it described as more appropriate to "legislative authority."[154] Finally, it stated that its narrower approach was consistent with the principle that the appropriate scope of judicial remedies was determined by the nature and scope of the constitutional violation.[155]

The Court's analysis, if taken as a reflection of sincere judicial concern with the appropriate scope of federal judicial authority, rather than as simple hostility to the idea of courts conscripting suburban districts in the fight against segregation, illustrates the different institutional competencies of the courts and Congress. For example, the tradition of local control over schools is the type of factor that should weigh less on congressional action, as opposed to judicial action, given Congress's political mandate. While courts should have broad discretion to impose remedies in order to vindicate constitutional rights, as a practical matter, Congress's electoral mandate gives

146. *See id.*
147. *Id.* at 739 (quoting district court order).
148. *See id.* at 752.
149. *See id.* at 745.
150. *Id.* at 744-45.
151. *See id.*
152. *Id.* at 741-43.
153. *See id.* at 742-44.
154. *See id.* at 743-44 (internal quotes omitted).
155. *Id.* at 744.

it more political legitimacy than the courts in overriding basic structural decisions made by a local government.[156]

Congressional action may also stand on more solid ground due to the different characteristics of the legislative and the judicial decision making processes, and their outputs. The adjudicative process is simply not as well suited as the legislative process to uncovering complex causal and institutional relationships. A full understanding of those relationships requires both technical expertise and real world experience that legislators are in a better position either to have already possessed (as politicians and government officials) or to obtain. More specifically, with regard to the adjudicative process, to the extent that such relationships are often best understood based on broad exposure to, and information about, similarly situated actors across the nation (for example, all suburban school district officials), the adjudicative format is simply ill-suited to discover what is really happening. In other words, it may take exposure to, and information about, an entire class before one can truly understand what is transpiring with regard to a particular member of that class.

Again, consider *Milliken*. After reciting the principle against most inter-district remedies, the Court considered findings supporting an exception to that principle in that case—namely, findings that suburban districts around Detroit either segregated or experienced segregative effects due to the Detroit district's segregative conduct.[157] The Court disposed of most of these findings by concluding that they were either: (1) too trivial to justify a large-scale inter-district remedy,[158] (2) supported by evidence that provided at best ambiguous support for those findings,[159] or (3) based on theories that had not been litigated.[160]

156. On a related point, the Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-48 (1985), relied on the states' participation in the federal legislative process as providing federalism's main protection against federal regulatory encroachments on states, when Congress legislates pursuant to its Article I powers. The relevance of Congress's mandate in the school desegregation context is similar, but not precisely the same. It reflects the popularly-chosen and accountable nature of Congress, which this article submits justifies interference with popular choices about structuring institutions of self-government lower in the constitutional hierarchy. Thus, congressional action restructuring school boards is legitimate, the argument goes, not because states are represented in Congress, but because the people are.

157. *See Milliken*, 418 U.S. at 750.

158. *See id.* at 749-50 (discussing evidence that a predominantly black suburban district without a high school sent its black high school students to a predominantly black school in Detroit).

159. *See id.* at 750-51 (discussing evidence of state legislation rescinding Detroit's voluntary desegregation plan and the state's school building program and its allegedly segregative effects).

160. *See id.* at 751-52 (discussing differential state financing for urban and suburban schools).

The problems the Supreme Court identified with the district court's findings were all, to a greater or lesser degree, evidentiary problems that might have been mitigated by broader and deeper findings of the type most often associated with legislative action. Consider, for example, the district court's finding that the State of Michigan was the real wrongdoer because it had influenced the Detroit district's school siting decisions, a finding that helped the district court justify the imposition of remedies against the suburban districts.[161] According to the Supreme Court, the evidence spoke only to how those state-influenced siting decisions produced segregation within the city, not between the city and its suburbs.[162] Nationwide evidence on the effect of school siting decisions, however, would have helped in determining whether the Michigan officials' conduct really did respect district lines so scrupulously. When the issue is the behavior of large bureaucracies such as state education agencies at a high level of abstraction, it seems logical that data from analogous parties in similar situations can help interpret the evidence about the conduct of the particular parties before the court. The usefulness of such broader data depends, of course, on the type of facts at issue. Certainly, if one were asking whether a person named Smith had committed a particular burglary, one would not perform a broad investigation of how many burglaries had occurred in the nation last year, or even how many burglars convicted last year were named Smith. Instead, we would insist on individualized fact finding of the type best suited to courts.[163] By contrast, if one wanted to determine whether school siting decisions in Michigan contributed to segregative effects not just in Detroit but in the surrounding suburbs, it might be helpful to know how other state-generated siting decisions had impacted not just the target urban districts but also the surrounding suburban ones. Some facts, one might say, are inherently more legislative in nature.

If the need for remedial action is to be determined by consideration of broader social evidence, then logically, the remedy itself should also recognize that broader evidence. In *Milliken*, for example, if one accepts the probative value of nationwide evidence about the effect of school siting decisions on surrounding districts for the question of whether Michigan's particular siting decisions had effects beyond Detroit, then presumably it makes sense to consider the problem

161. *See id.* at 750-51.
162. *Id.* at 751.
163. *Cf.* U.S. CONST. art. I § 9, para. 3 (Bill of Attainder prohibition).

as concerning more than the particular actions of Michigan officials at a particular time. If that is true—that is, if the real problem extends beyond the discrete actions of a particular group of officials—then a broader remedy seems appropriate. While lower courts could not impose nationwide remedial requirements, the Supreme Court could. Such a solution, though, compares unfavorably with legislative action. We normally expect broad remedial mandates to emanate from legislatures, which are better suited to respond to widespread problems reflecting larger social patterns more than the particular misconduct of identifiable individuals.

At the same time, legislative action may in some ways also be superior in its ability to particularize. In *Milliken*, the Supreme Court rejected the district court's shouldering of the task of revamping district lines to ensure effective desegregation.[164] Implicit in that task was the rewriting of the rules of local government—in this case, what functions should be handled at what level of state government, and how the state is organized for purposes of public education. Federal court supervision or even supplanting of state performance of that task raises questions of both separation of powers and federalism. In questioning the district court's willingness to take on that task, the Supreme Court addressed both concerns. With regard to the separation of powers, the Court described the functions involved in that task as legislative, and questioned whether the district court had the capacity to make those decisions.[165] The Court's concern seems reasonable, not just because of the detailed nature of the decisions involved, but also because of their discretionary nature, as decisions not compelled by law but simply reflecting the will of the state's polity. The discretionary nature of such decisions makes them particularly appropriate for political determination. On that score, legislative action—be it federal or state—would have been superior. The Court also focused on the federalism aspect of the problem, noting the importance of deferring to the tradition of local control over schools.[166] Because *Milliken* concerned federal court intervention, both of these factors counseled against the district court's action. The Court, however, did not have to consider what happens when these factors point in oppo-

164. *See Milliken*, 418 U.S. at 743-44.

165. *Id.*

166. *See id.* at 741-42; *see also* Missouri v. Jenkins, 515 U.S. 70 (1995) (noting the return of control over school districts to local officials as an important factor influencing desegregation orders); Freeman v. Pitts, 503 U.S. 467 (1992).

site directions—that is, when the federal legislature, with its democratic legitimacy, asserted an interest in intruding on the tradition of local control, in furtherance of the federal interest in ensuring equality. If vindication of an equal protection right created a colorable federal interest in these decisions, their detailed nature and discretionary quality militates in favor of their supervision by Congress, rather than the courts acting alone.

Of course courts would have an indispensable role to play in making congressional remedies work. Broad rules emanating from Congress would be just that—broad, with courts performing the important task of molding the rule to fit the circumstances of the particular parties. But such a task would be far easier than the task the courts have in fact been confronted with under *Brown*. In the school desegregation context, congressional inaction meant that courts had to do it all. The Supreme Court was forced to: formulate the basic substantive rule and remedial formula,[167] determine when schools had violated the basic liability rule,[168] and impose limits on allowable remedies.[169] Moreover, the lower courts had to convert these Supreme Court pronouncements into concrete action. Congress's failure to assist the courts, despite its significant institutional advantages, must be considered as a large reason for the incomplete vindication of *Brown*'s promise. The incompleteness of the work, and the existence of Congress's institutional advantages, not only holds lessons of historical significance and significance to present school desegregation cases, but also teaches about the overall appropriateness of a broad conception of the Section 5 power. The next part of this Article considers those lessons.

III. LESSONS

The above analysis suggests much about Congress's authority to eradicate school segregation and the underlying private discrimination that encourages it. But it also speaks more generally to the question of how far the Section 5 power should extend.

167. *See* Brown v. Bd. of Educ. 347 U.S. 483 (1954) (Brown I) (basic rule) and Brown v. Bd. of Educ., 349 U.S. 294 (1955) (Brown II) (basic remedial formula).

168. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (setting forth the basic rule with regard to non-*de jure* segregation).

169. *See Jenkins*, 515 U.S. 70; *Freeman*, 503 U.S. 467; Bd. of Educ. v. Dowell, 498 U.S. 237 (1991); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); *Milliken*, 418 U.S. 717.

A. Private Conduct

First, this analysis suggests that the Section 5 analysis in *United States v. Morrison* is severely flawed. At best, *Morrison*'s flat statement that Section 5 does not authorize Congress to regulate private conduct fails to recognize states' direct role in creating inequality, as in *Morrison* itself by failing to prosecute gender-based crimes as energetically as they should. The situation in *Morrison* is quite dissimilar, in fact, to that in the *Civil Rights Cases*, where the Court found no evidence of state failures to guarantee equality in public accommodations.[170] Indeed, one could go further and conclude that public accommodations discrimination, unless somehow encouraged by the state,[171] is not itself attributable to the state in the way that a state's failure to prosecute a gender-based crime is, given the sovereign nature of the criminal prosecution function. Thus, the state action nexus is far stronger in *Morrison*, and should have justified at least the distinguishing of the *Civil Rights Cases*.

The Court in *Morrison* acknowledged this argument, but dismissed it, concluding that the Congress that enacted the statute struck down in the *Civil Rights Cases* was in fact aware of unequal state enforcement of public accommodations laws.[172] But this move is unsatisfactory, as it essentially revisits and rejects the *Civil Rights Cases* Court's evaluation of the factual record in front of it. That evaluation found that the statute made no reference to unconstitutional actions by the states, acted without distinction both on states that guaranteed equal access to public accommodations and those that did not, and did not require as a predicate for its operation any showing that a state had failed in its obligation to provide equal protection.[173] At most,

170. *See* United States v. Morrison, 529 U.S. 598, 630-31 & n.7 (2000); (Souter, J., dissenting) (noting the evidence Congress had collected about gender bias from state task forces).

171. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (holding that a California constitutional provision enshrining the right to discriminate in real estate transactions sufficiently involved the state in the private discrimination it authorized to make that discrimination attributable to the state).

172. *See Morrison*, 529 U.S. at 624-25.

173. *See* The Civil Rights Cases, 109 U.S. 3, 13-14 (1883). A similar reading can be given to *United States v. Harris*, 106 U.S. 629 (1883), the other case cited by the *Morrison* Court for the proposition that Section 5 allows Congress to regulate only state government conduct. *See Morrison*, 529 U.S. at 621-24. In *Harris*, the Court struck down a statute criminalizing conspiracies to deprive any person of the equal protection of the laws, as applied in a case where a mob lynched a person held in state custody. *See Harris*, 106 U.S. at 644. The Court in the *Harris* case, finding that the statute was "unconstitutionally overbroad," Griffin v. Breckenridge, 403 U.S. 88, 104 (1971) (describing the result in *Harris*), based its holding on the observation that the statute applied "no matter how well the State may have performed its duty" to protect individuals' equal protection rights, "without reference to the laws of the State, or their administration by the

the analysis in the *Civil Rights Cases* requires what might be labeled today as a "congruence and proportionality" analysis of the scope of a statute's operation and the breadth of the unconstitutional action engaged in by states.

The problem posed by school desegregation suggests the logic of this alternative reading of the *Civil Rights Cases*. The broad affirmative duty of the state to desegregate, when combined with the complex links between school segregation and private conduct such as public accommodations discrimination, suggests the appropriateness of allowing Congress to use its Section 5 power to reach at least some private conduct. The particular features of the school segregation problem do not make it a unique issue doctrinally; such an analysis would apply, for example, to private acts of violence when an insufficient response by states implicates constitutional concerns, for example, states' tolerance of lynchings of African Americans or acts of gender-motivated violence.[174] What makes school segregation unique is, first, its complex factual context, which ties the constitutional violation to a whole host of private and government conduct, and, second, the affirmative nature of the state's duties to uproot all vestiges of the segregated system. These duties impose significant obligations on states, the failure of which to satisfy calls forth congressional remedial authority, consistent even with the *Civil Rights Cases* and *Harris*. These characteristics make school desegregation a starker, and thus clearer, illustration of this general approach to the Section 5 power.

B. The "Congruence and Proportionality" Standard

In defense of *Morrison*, it might be said that the above observations about school desegregation, and the resulting argument about broader Section 5 power, would fit within the scope of modern Section 5 jurisprudence via the "congruence and proportionality" formula. The argument would be that the current Court understands, and indeed acknowledges, that difficult and intractable problems

officer . . . ." *Harris*, 106 U.S. at 639-40. Just as in the *Civil Rights Cases*, then, *Harris* can easily be read as finding fault with the statute based on the statute's failure to consider whether the state was in fact violating the commands of Section 1 of the Fourteenth Amendment, and not simply based on the fact that it acted on private parties.

174. By contrast, for example, a state's failure to adequately guard against private violence in general, or its failure to guard against violence based on a characteristic that does not raise as much of a constitutional issue, for example, union affiliation, would either not justify a Section 5-based response, or at least would require a heightened showing by Congress that the state's action had in fact crossed the line into unconstitutional animus. *Cf., e.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

might call for unusually broad congressional action. Broader action, this formula might conclude, is "congruent and proportional," and thus, a constitutional response to more severe problems.

So far, however, the Court's application of the "congruence and proportionality" principle does not justify optimism. The modern Section 5 case most relevant here is *Morrison*, as it deals with congressional action regulating private parties, namely, the perpetrators of gender-motivated violence.[175] After concluding that the Violence Against Women Act (VAWA) was not appropriate Section 5 legislation because Section 1 of the Fourteenth Amendment limited only state, not private, action, the Court then considered whether, nevertheless, the VAWA could be considered a congruent and proportional response to unconstitutional conduct by states:

> [T]he remedy [in the VAWA] is simply not corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of [s]tate officers. Or, as we have phrased it in more recent cases, prophylactic legislation under § 5 must have a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. [The VAWA] is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.[176]

In essence, the Court simply repeated the fact that the statute regulates private conduct to conclude that the statute failed the "congruence and proportionality" test. The Court so concluded even though it acknowledged the factual connection between state action (the failure to prosecute gender-based violence) and the statute's regulation of private parties.[177]

Even though the "congruence and proportionality" test emerged over forty years after *Brown*,[178] the complexity of the school desegregation issue serves as a silent refutation of the manner in which that

175. Previous applications of that test involved federal regulation of states. *See* Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (applying the Americans with Disabilities Act to the states); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (applying the Age Discrimination in Employment Act to the states); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (applying the patent protection requirements to the states); City of Boerne v. Flores, 521 U.S. 507 (1997) (applying the law protecting religious expression from infringement by state or local governments).

176. *Morrison*, 529 U.S. at 625-26 (internal quotations omitted).

177. *See id.* at 624-25.

178. *See City of Boerne*, 521 U.S. at 508.

test was deployed in *Morrison*. In particular, if a federal statute necessarily fails the "congruence and proportionality" test because it targets private conduct, then a variety of remedies Congress might have provided to assist courts in desegregating schools would have been automatically struck down as going beyond Congress's Section 5 power, regardless of whatever linkage was proven between that private conduct and the ultimate conduct of school officials. For example, considering *Morrison*, it is quite likely that the current Court would reject an argument that Title VII constituted appropriate legislation to enforce the rights found in *Brown*, despite the linkages between private conduct and school segregation.

The analysis offered here is not a criticism of the "congruence and proportionality" test in principle. Indeed, there must be some requirement of linkage between constitutional violations and actions proscribed under Section 5's authority, unless that authority is thought to provide Congress with power to interpret the Fourteenth Amendment. Moreover, some linkage is necessary if Section 5-based power to reach private conduct is not to morph into a general police power. But this analysis questions the unduly constricted understanding of the required linkage, as reflected in cases such as *Morrison*. The Court's understanding reflects little awareness of the interlocking nature of public and private discrimination, and of the consequences of the Court's own insistence on the elimination of all vestiges of government segregation.

C. The Current State of Section 5 Doctrine

Any fair examination of the courts' experience with school desegregation reveals the overwhelming obstacles they have faced in their attempts to effect broad-based change. Of course, the Supreme Court has been the source of many of those obstacles, as it has repeatedly reined in lower courts that have, in the Court's eyes, gone too far in their quest to implement *Brown*.[179] The correctness of the Supreme Court's imposition of restraints on lower courts has been hotly and exhaustively discussed, and, except to the extent implied early on, this Article does not join that debate.

Rather, the point of this Article is to make the argument for broad congressional authority to implement *Brown*, and by extension,

179. *See generally* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003).

to suggest how the history of school desegregation makes the argument for broad Section 5 power in general. Ultimately, what makes school segregation a uniquely valuable vehicle for considering the Section 5 power are the broad and deep causation and remedial issues involved. Those issues challenge the courts' legitimacy, as unelected bodies, and their competence, as non-experts operating within an adjudicative framework that is not conducive to the kinds of decisions called for in these cases.

These characteristics of judicial action suggest the indispensability of broad congressional authority. The cases decided under the Court's new Section 5 jurisprudence have not tested that authority against the claims made here. Instead, cases since *Boerne* have all involved relatively narrow intrusions on state government action, in response to relatively discrete constitutional problems. *Board of Trustees v. Garrett*[180] and *Kimel v. Florida Board of Regents*[181] directly addressed particular types of government discrimination by restricting that kind of discrimination, while *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*[182] dealt with state government infringements on patents by providing federal patent infringement remedies against state government infringers. Concededly, the Religious Freedom Restoration Act (RFRA), the most far-reaching of the statutes considered under the Court's new Section 5 jurisprudence, can be described as a "deep" intrusion, in the sense that its requirements permeated government decision making. Any government action that had the effect of impairing religious exercise, from a zoning decision to a health ordinance to a fire marshal's order, came within RFRA's regulatory mandate. Nevertheless, neither RFRA nor the other statutes described above required the restructuring of basic state governmental institutions. The VAWA is somewhat different, in that it provided a cause of action against private parties.[183] Nevertheless, that statute aimed directly at the state's failure to provide equal protection, by providing another means for injured parties to be made whole.[184]

It is hard to be optimistic about the current Court's attitude toward the broader type of congressional action suggested in this Arti-

180. 531 U.S. 356 (2001).
181. 528 U.S. 62 (2000).
182. 527 U.S. 666 (1999).
183. *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended at 42 U.S.C. § 1370).
184. *See id.*

cle, given its hostility to the more modest enforcement statutes discussed above. The Court's most recent Section 5 pronouncement, *Nevada Department of Human Resources v. Hibbs*,[185] provides only slight cause for optimism. In *Hibbs*, the Court upheld a somewhat more aggressive use of the Section 5 power.[186] That statute, the Family and Medical Leave Act (FMLA),[187] required employers, including states, to provide unpaid leave for employees needing time off to tend to family care needs.[188] Congress justified it as a measure to eradicate gender-based discrimination, which was said to inhere in traditional views about women as care-givers, which in turn made them less attractive as employees.[189] The FMLA attempted to remedy this situation by providing employees of both genders with equal rights to take such leave, in the hope that such stereotypes would break down as men began to shoulder care-giving responsibilities.[190]

The Court's analysis in *Hibbs* focused on the heightened scrutiny accorded gender classifications.[191] It then noted the failure of previous congressional attempts to eradicate gender discrimination,[192] and the evidence of continued gender discrimination by states in the provision of family and medical leave.[193] It then returned to the constitutional status of gender discrimination, and concluded that because of the suspect nature of such discrimination, "it was easier for Congress to show a pattern of state constitutional violations."[194] Turning to the provisions of the statute itself, the Court then concluded that the FMLA satisfied the "congruence and proportionality" standard because the difficulty and intractability of the problem justified remedial measures beyond those already taken in Title VII and the Pregnancy

185. 123 S. Ct. 1972 (2003).

186. *Id.*

187. Family and Medical Leave Act, 29 U.S.C. § 2601 (1993).

188. *See id.*; *see also Hibbs*, 123 S. Ct. at 1976.

189. *See, e.g., Hibbs*, 123 S. Ct. at 1982 (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 99th Cong., 2d Sess., 33 (1986) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project)).

190. *See Hibbs*, 123 S. Ct. at 1982-83.

191. *See id.* at 1982.

192. *See id.* at 1978, 1982 (discussing Title VII of the 1964 Civil Rights Act and the Pregnancy Discrimination Act).

193. *See id.* at 1980-81.

194. *Id.* at 1982.

Discrimination Act,[195] and because the statute confined itself to the topic on which the discrimination was evident.[196]

Thus, in *Hibbs*, for the first time, the Court made good on its assurance, made in all of its Section 5 opinions since *Boerne*, that serious problems of constitutional violations could be met by broad prophylactic legislation. The statute in *Hibbs* superficially benefited men by mandating equal leave time for male and female employees, altering a status quo in which, according to the Court, women were more likely than men to obtain this leave.[197] Of course, the Section 5 justification for the FMLA was premised on the idea that women's ostensible advantage in obtaining such leave came with a price—the reduced attractiveness that women experienced as employees due to their increased likelihood of taking leave.[198] Thus, the FMLA constituted an indirect means of ensuring equality for women. Such an analysis might seem to echo the argument made above, that school desegregation requires corrective measures that are perhaps more subtle and circuitous in their working. On the other hand, the FMLA aimed squarely at the substantive issue—the leave policy—where the discrimination existed.[199] As discussed above, the intensely complex relationship between school desegregation and a host of other decisions, both by government itself and ultimately traceable to government, suggests the appropriateness of congressional action on a variety of topics, some of them seemingly unrelated to schools. *Hibbs*, in other words, turns out to be a relatively easy case; a statute that attempts to benefit a suspect class by legislating on precisely the topic that is alleged to be the mechanism of the discrimination. It is perhaps unsurprising, then, that the *Hibbs* majority included two justices, O'Connor and Rehnquist, who had been reliable members of the bloc that created the Court's new Section 5 jurisprudence.

If this is true—if *Hibbs* really is a relatively easy case—then it does not represent a significant step away from the Court's restrictive approach to Section 5. Instead, the best way to read *Hibbs* is as one involving a statute with two saving graces: a subject-matter that the

195. *See id.*

196. *See id.* at 1983.

197. *See id.* at 1982.

198. *See id.* at 1982-83.

199. Moreover, the application of the FMLA challenged in *Hibbs* was in a case where the state government was the employer. No issue arose of whether Section 5 would justify application of the FMLA to private parties. Such issue is unlikely to arise, since the Interstate Commerce Clause provides such clear authority for applying the FMLA to private employers.

Court cares about as a Section 1 matter (gender), and a precise focus on the actions that directly violate Section 1 (discrimination by the state itself). Still, because *Hibbs* is the first post-*Boerne* Section 5 case to deal with a suspect or quasi-suspect class, its somewhat more relaxed approach to the evidentiary requirements faced by Congress, and indeed the case's result itself, may at least lay the seeds for a Section 5 approach that would countenance more deference to Congress, at least when dealing with conduct (school segregation) that is clearly established as constitutionally problematic. This Article has attempted to make a case for such deference. If *Hibbs* opens the door, even by just a crack, to such deference, then the story of school desegregation still has something to teach us about Section 5.

D. What *Brown* Suggests About the Section 5 Power

What should the Section 5 power look like, if we are to understand the lessons of *Brown*? Fundamentally, an appropriate understanding of Section 5 must recognize the complexity of many issues arising under the Equal Protection Clause, and Congress's superior capacity to resolve them. What this means in practice will vary with the problem, but the appropriate standard should recognize Congress's power to impose burdens on private parties and to provide rules for restructuring local government bodies, such as school districts.

This grant of power is not absolute and unreviewable. As congressional action goes beyond the core guarantees of Section 1, for example, by regulating private parties or government actors that have not themselves been found to violate the Fourteenth Amendment, it is reasonable that courts should examine the statute to determine whether the scope or intractability of the problem is sufficiently serious as to justify such a wider remedy. In theory, this limitation is no different than the "congruence and proportionality" test. As applied in *Morrison*, however, that test places *per se* limits on the scope of legislative authority. Such absolute limits are inappropriate. The school desegregation experience illustrates that problems may be sufficiently complex that their eradication requires aggressive congressional action.

But a deeper problem exists with the Court's current Section 5 doctrine. That doctrine tests Section 5 based legislation against a standard requiring Congress to demonstrate, to the Court's satisfaction,

the existence of violations of Section 1.[200] That standard relegates Congress to an adjunct role, whose main Section 5 authority is simply to regulate, in the aggregate, the violations of Section 1 that the Court would punish on a case-by-case basis. While the distinction between case-by-case and class-wide regulation is certainly one of the functional boundaries between courts and legislatures, this standard provides woefully inadequate deference to Congress's institutional capacity to be proactive. Not only does the ability to be proactive allow the sort of class-wide regulation the Court accepts as legitimate, but it also allows Congress to go beyond formal legal liability and regulate conduct which might not be illegal under Section 1, but which nevertheless impairs the enjoyment of Fourteenth Amendment rights. The Court's current Section 5 jurisprudence denies that flexibility to Congress, denying to the country the creativity and flexibility that legislatures bring to broad social problems. In addition, by forcing Congress to act like a court—compiling adjudicative facts speaking to whether a particular party violated the Fourteenth Amendment and all-but determining legal liability—the Court relegates Congress to a role it is institutionally unsuited to play.[201]

One issue school desegregation does *not* present is the difficulty of distinguishing, for Section 5 purposes, between remedial and substantive provisions. In many cases this is an extraordinarily difficult endeavor. RFRA, for example, was struck down as a substantive enactment, going beyond Congress's "enforcement" power. On the other hand, sometimes substantive enactments may be appropriate, if the judicial rule is based less on the Constitution itself and more on the courts' lack of competence to apply it accurately. It might be argued, for example, that some judge-made constitutional law, such as some applications of the rational basis test in equal protection cases, reflects not so much the requirements of the Constitution as courts' institutional limitations.[202] If so, then perhaps Congress may legitimately proscribe conduct that would be constitutional under that test,

200. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 369-72 (2001).

201. *See* INS v. Chadha, 462 U.S. 919, 959 (1983) (Powell, J., concurring) (concluding that a legislative veto of an administrative adjudication violated the separation of powers because it involved Congress in the determination of individual legal liability); Araiza, *supra* note 144, at 1090-96, 1099-1101 (discussing Justice Powell's opinion in *Chadha* from an institutional role standpoint); *see also* Robert Post & Reva Siegel, *Equal Protection by Law: Federal Anti-Discrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

202. *See, e.g.*, William D. Araiza, *ENDA Before it Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1, 58-65 (2002).

and do so as a substantive matter. Such an approach to Section 5 would require the Court to revise its Section 5 jurisprudence, which insists on courts' exclusive role in interpreting the Constitution.[203]

The school desegregation experience, however, ultimately does not present this problem. Analytically, the history of school desegregation illustrates a straightforward legal issue. All agree that school segregation is unconstitutional under court-made doctrine, and that victims of segregation have a legal right to be placed in the position they would have occupied absent that violation. The primary issue with which courts have struggled over the last fifty years has been the pace and completeness of the remedy, and the extent to which the remedy should and can be supervised by federal courts. The Supreme Court has made it clear that lower courts cannot legitimately do the entire job. If the Court believes this as a matter of principle, and not just because it does not want desegregation to go too far, the least it can do is let Congress help when the latter is institutionally suited to do so.

203. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 527-29 (1997).