



Fall 9-1-2002

Come Back to the Nickel and Five:* Tracing the Warren Court's Pursuit of Equal Justice Under Law

Jim Chen

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Jim Chen, *Come Back to the Nickel and Five:* Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 Wash. & Lee L. Rev. 1203 (2002).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol59/iss4/7>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Come Back to the Nickel and Five:^{*} Tracing the Warren Court's Pursuit of Equal Justice Under Law

Jim Chen^{**}

Table of Contents

I. The <i>Korematsu</i> Conundrum	1204
II. The Nickel and Five	1212
A. The "Nickel": Fifth Amendment Due Process and "Reverse Incorporation"	1215
B. The "Five": Civil Rights Enforcement Under Section Five of the Fourteenth Amendment	1228
C. Main Street U.S.A.	1244
III. The Nixonburger Interregnum	1248
A. Nixon as Nemesis	1249
B. The Nickel and Five Survives	1251
C. Affirmative Action as Armageddon	1264
IV. The Grand Rehnquisition	1280
V. The Fall of the House of Warren	1294

* It is somewhat deflating to explain the cultural allusion that inspired the title of one's law review article, but editing conventions dictate a word or two of clarification. In the motion picture *COME BACK TO THE FIVE AND DIME, JIMMY DEAN, JIMMY DEAN* (Sandcastle 5/Viacom Enterprises 1982), members of a James Dean fan club reunite and ponder how their lives have deviated from the paths they charted during the 1950s. The relevance to a Symposium on the jurisprudential legacy of the Warren Court should be obvious. Oblique references to James Dean movies appear throughout this article; finding them is left as an exercise for the reader.

** James L. Krusemark Professor of Law, University of Minnesota Law School <chenx064@maroon.tc.umn.edu>. Guy-Uriel Charles, Daniel A. Farber, Philip P. Frickey, Gil Grantmore, Ronald J. Krotoszynski, Jr., and Donald A. Norman provided helpful comments. Marcie Cornfield and Nicole Narotzky provided very capable research assistance. Special thanks to Kathleen Chen.

I. The Korematsu Conundrum

*The evil that men do lives after them;
The good is oft interred with their bones.*

William Shakespeare, *Julius Caesar*¹

*Brown v. Board of Education*² is justifiably hailed as the herald "of effective enforcement of civil rights in American law" and as "the watershed constitutional case of the [twentieth] century."³ Indeed, *Brown* is arguably "the most important decision in the history of the Court."⁴ But the origins of the Warren Court's civil rights jurisprudence predate *Brown* by more than a decade. In a very real sense, those origins stem from Earl Warren's career in California politics. The attack on Pearl Harbor shattered the longstanding belief, in California as in the rest of America, that "war always comes to someone else."⁵ On February 2, 1942, Attorney General Warren announced his belief that Americans of Japanese descent were organizing a "fifth column" campaign against the United States.⁶ Within two weeks, President Roosevelt, Congress, and the United States military set into motion the legal machinery that culminated in orders to curfew, evacuate, and detain all

1. WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc. 2, ll. 76-77, in THE OXFORD SHAKESPEARE: THE COMPLETE WORKS 1089, 1107 (Stanley Wells & Gary Taylor eds., 1994).

2. 347 U.S. 483 (1954).

3. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 286 (1993). See generally RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 34-44 (1979); S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689 (1971). At a minimum *Brown* was the leading case of the twentieth century. See generally HUGH W. SPEER, THE CASE OF THE CENTURY: A HISTORICAL AND SOCIAL PERSPECTIVE ON *BROWN V. BOARD OF EDUCATION OF TOPEKA*, WITH PRESENT AND FUTURE IMPLICATIONS (1993).

4. SCHWARTZ, *supra* note 3, at 286 (quoting Justice Stanley Reed, who added that *Brown*, if not the most important decision in the Court's history, was at least "very close"). But see EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977) (describing *Baker v. Carr*, 369 U.S. 186 (1961), as "the most important case of my tenure on the Court"). On *Baker v. Carr*, see generally Guy-Uriel Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

5. JOHN STEINBECK, EAST OF EDEN 480 (Penguin 2002) (1952).

6. See *Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones: Hearings on H. Res. 113 Before the Select Comm. Investigating National Defense Migration*, 77th Cong. 11,011-12 (1942) (Warren's testimony regarding the threat posed by Japanese Americans); MORTON GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION 94 (1949) (describing Warren's fear of an attack by Japanese Americans); JOHN D. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 105 (1967) (same).

persons of Japanese descent in the Pacific states. Even as U.S. military forces secured the Pacific theater, Governor Warren advocated the continued operation of the detention camps, lest freshly released saboteurs unleash "a second Pearl Harbor in California."⁷ Under Warren's administration, California joined Oregon and Washington in an amicus brief urging the Supreme Court to prolong the detention of the Issei and Nisei.⁸

And so Earl Warren came to link himself most ignominiously with one of the most embarrassing chapters in American race relations.⁹ But the future Chief Justice's entanglement supplies merely a fragment of this scandal's jurisprudential significance. In the *Hirabayashi*¹⁰ and *Korematsu*¹¹ cases, the Supreme Court made several curious legal maneuvers in defense of the wartime curfew, evacuation, and detention orders. Decoding the doctrinal conundrum presented by these cases holds the key to critical elements of the Warren Court's jurisprudence regarding the definition and enforcement of civil rights by the federal government.

Just how did equal protection principles come into play in *Hirabayashi* and *Korematsu*? Those cases declared, at least as a nominal matter, that racial classifications in federal law should draw intense judicial suspicion.¹² But a decade would elapse before *Bolling v. Sharpe*¹³ formally equated the federal government's obligations under the Due Process Clause of the Fifth Amendment with the states' obligations under the Equal Protection Clause of the Fourteenth Amendment.¹⁴ Of course, *Korematsu* was neither the first nor the last instance of premature adjudication. The *United States Reports* abound with outlandish constitutional pronouncements that came well before their time. How would American constitutional law look if

7. WEAVER, *supra* note 6, at 109.

8. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 157-58 (1997).

9. See generally, e.g., PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed. 1989); Eugene V. Rostow, *The Japanese American Cases - A Disaster*, 54 YALE L.J. 489 (1945). See also RABBIT IN THE MOON (New Day Films 1999) (motion picture documentary criticizing the Supreme Court's decisions in the internment cases).

10. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

11. *Korematsu v. United States*, 323 U.S. 214 (1944).

12. See *id.* at 216 (stating that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); *Hirabayashi*, 320 U.S. at 100 (noting the "odious" nature of "[d]istinctions between citizens solely because of their ancestry").

13. 347 U.S. 497 (1954).

14. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that racial segregation in public schools is a "denial of the due process of law guaranteed by the Fifth Amendment of the Constitution").

*Mitchum v. Foster*¹⁵ had predated *Younger v. Harris*,¹⁶ if the Supreme Court had reached *Geduldig v. Aiello*¹⁷ before *Roe v. Wade*,¹⁸ or if *Miami Herald Publishing Co. v. Tornillo*¹⁹ had preceded *Red Lion Broadcasting Co. v. FCC*?²⁰ Could the revival of Article IV privileges-and-immunities analysis in the *Camden* government contracting case²¹ have prevented the adulteration of dormant Commerce Clause doctrine in the so-called "Mayor White" case?²² Might the straightforward application of *Batson v. Kentucky*²³ to white criminal defendants in *Powers v. Ohio*²⁴ have forestalled the Sixth Amendment decision of *Holland v. Illinois*?²⁵ For the moment at least, let us consign such speculation to the realm of science fiction.²⁶ The concrete doctrinal puzzle at hand is fantastic enough in its own right.

As Justice Stevens is fond of observing in other contexts, "there is only one . . . Equal Protection Clause."²⁷ From Reconstruction through the

15. 407 U.S. 225 (1972).

16. 401 U.S. 37 (1971).

17. 417 U.S. 484 (1974).

18. 410 U.S. 113 (1973). See generally Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) (suggesting that the right to abortion should have been framed as a question of equal protection).

19. 418 U.S. 241 (1974).

20. 395 U.S. 367 (1969).

21. *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208 (1984).

22. *White v. Mass. Council of Constr. Employers*, 460 U.S. 204 (1983).

23. 476 U.S. 79 (1986).

24. See *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that a white criminal defendant has standing to challenge the use of peremptory challenges to eliminate jurors of a different race and that, under *Batson v. Kentucky*, 476 U.S. 79 (1986), peremptory challenges must give way "to the command of racial neutrality").

25. See *Holland v. Illinois*, 493 U.S. 474, 476-77 (1990) (explaining that under *Batson*, the Equal Protection Clause forbids the use of peremptory challenges to eliminate jurors of the defendant's own race, whereas the Sixth Amendment guarantees a venire that is a "fair cross section" of the community).

26. See generally Symposium, *The Sound of Legal Thunder: The Chaotic Consequences of Crushing Constitutional Butterflies*, 16 CONST. COMMENT. 483 (1999) (contemplating what would be different today if key cases in constitutional history had been decided differently).

27. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 514 n.5 (1989) (Stevens, J., concurring in part and concurring in the judgment); *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring); cf. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause.").

beginning of World War II, the Supreme Court consistently recognized that the Fifth Amendment, unlike the Fourteenth, contains no equal protection clause.²⁸ Indeed, the Constitution of 1787 and the Bill of Rights both omit all derivatives of the word "equal."²⁹ During the same Term in which the Court heard the first of its cases concerning the wartime treatment of Japanese Americans, the Justices declared that this key textual difference between the Bill of Rights and the Reconstruction Amendments strips citizens of any "guaranty against discriminatory legislation by Congress."³⁰ Whenever Congress made allegedly unequal "choices" in exercising its powers to lay and collect taxes, to regulate commerce among the several states, or to wage war, the Court treated "the question [as] one of wisdom and not of power."³¹ That the Fourteenth Amendment alone contained an Equal Protection Clause minimized judicial discretion to hold the federal government to a norm of nondiscrimination: "If this latitude of judgment is lawful for the states, it is lawful, *a fortiori*, in legislation by the Congress, which is subject to restraints less narrow and confining."³²

Hirabayashi and *Korematsu* recognized but did not attempt meaningfully to bridge the gap between Fifth Amendment due process and Fourteenth Amendment equal protection. Chief Justice Stone's opinion for the Court in *Hirabayashi* observed that "[t]he Fifth Amendment contains no equal protection clause and . . . restrains only such discriminatory legislation by Congress as amounts to a denial of due process."³³ In his concurring opinion, Justice Murphy acknowledged the textual difference between the Fifth and Fourteenth Amendments but insisted that "there may . . . be discrimination of such an injurious character in the application of the laws as to amount to a denial of due process."³⁴ A year later, Justice Murphy's *Korematsu* dissent explicitly argued that a military order effecting "an obvious racial discrimination . . . deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment."³⁵

28. *E.g.*, *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941); *Currin v. Wallace*, 306 U.S. 1, 14 (1939); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937); *La Belle Iron Works v. United States*, 256 U.S. 377, 392 (1921).

29. *Cf.* GARRY WILLS, *LINCOLN AT GETTYSBURG* 145 (1992) (observing how Lincoln and other Americans of the Civil War era noticed the absence of the word "equality" from what was then the Constitution).

30. *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943).

31. *Currin*, 306 U.S. at 14.

32. *Steward*, 301 U.S. at 584.

33. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

34. *Id.* at 112 (Murphy, J., concurring).

35. *Korematsu v. United States*, 323 U.S. 214, 234-35 (1944) (Murphy, J., dissenting).

The *Hirabayashi* majority repelled the charge of discrimination by adopting a level of scrutiny that modern eyes would recognize as rational basis review. Arguing that a potential Japanese "attack on our shores . . . set these citizens apart,"³⁶ Chief Justice Stone considered it "enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for [their] decision."³⁷ He explicitly upheld Congress's discretion to "hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent."³⁸ Though *Korematsu* nominally directed courts to treat "all legal restrictions which curtail the civil rights of a single racial group [as] immediately suspect,"³⁹ the Court ultimately refused to frame the controversy in terms "of racial prejudice, without reference to the real military dangers which were presented."⁴⁰

Despite having become one of the most despised cases in the constitutional canon,⁴¹ *Korematsu* is routinely cited for the proposition that facial classifications based on race, whether embodied in state law or adopted by the federal government, merit strict judicial scrutiny.⁴² Quite

36. *Hirabayashi*, 320 U.S. at 101.

37. *Id.* at 102.

38. *Id.* at 100.

39. *Korematsu*, 323 U.S. at 216.

40. *Id.* at 223.

41. *See, e.g.,* *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott* [*v. Sandford*, 60 U.S. (19 How.) 393 (1856)]."); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564 n.12 (1990) (comparing *Korematsu* with "South African apartheid" and "the 'separate-but-equal' law at issue in" *Plessy v. Ferguson*, 163 U.S. 537 (1896)), *overruled by* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (listing *Korematsu* among "the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it"); *see also* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215 n.* (1995) (acknowledging congressional redress of the "grave injustice [that] was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II" (quoting Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 903 (1988))); *Reno v. Flores*, 507 U.S. 292, 345 n.30 (1993) (Stevens, J., dissenting) (acknowledging the "reluctance to rely on *Korematsu*" as a basis for excusing the government from conducting "a case-by-case determination as to whether . . . an infringement" of personal liberty is "in fact necessary to effect the Government's compelling interest in national security"); *cf.* *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (acknowledging *Hirabayashi* and *Korematsu*'s exceptional status as cases upholding racial classifications); *DeFunis v. Odegaard*, 416 U.S. 312, 339 & n.20 (1974) (Douglas, J., dissenting) (same).

42. *E.g.,* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216-17 (1995); *Rowland v.*

extraordinarily, *Korematsu* has been cited as an interpretation of the Fourteenth Amendment in general⁴³ and of the Equal Protection Clause in particular.⁴⁴ At an extreme, the Court has identified *Korematsu* as the "apparent[] . . . genesis" of the doctrine under which "classifications . . . based upon 'suspect' criteria" of any sort must "be supported by a 'compelling' interest."⁴⁵

These assertions cannot bear even casual scrutiny. Neither *Hirabayashi* nor *Korematsu* made a credible effort to overcome the serious textual barrier to equating Fifth Amendment due process with Fourteenth Amendment equal protection. The Fourteenth Amendment, after all, also protects persons from the official deprivation of life, liberty, or property without due process of law. That "the Due Process Clause appears in both the Fifth and Fourteenth Amendments, whereas the Equal Protection Clause does not," makes it "quite clear that the primary office of the latter differs from, and is additive to, the protection guaranteed by the former."⁴⁶ Far from warranting aggressive constitutional reinterpretation, the inclusion of due process in the Fourteenth Amendment kept the meaning of that phrase "practically . . . the same as it" had been under the Fifth, "except so far as the amendment may place the restraining power over the States in this matter in the hands of the

Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari); *City of Mobile v. Bolden*, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978) (opinion of Powell, J.); *Moore v. City of E. Cleveland*, 431 U.S. 494, 551 (1977) (White, J., dissenting); *Mathews v. Lucas*, 427 U.S. 495, 504 & n.10 (1976); *Kahn v. Shevin*, 416 U.S. 351, 357 & n.3 (1974) (Brennan, J., dissenting); *Frontiero v. Richardson*, 411 U.S. 677, 682 & n.9 (1973) (plurality opinion of Brennan, J.); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 & n.64 (1973) (Marshall, J., dissenting); *Cruz v. Beto*, 405 U.S. 319, 326 & n.5 (1972) (Rehnquist, J., dissenting); *Lindsey v. Normet*, 405 U.S. 56, 73 & n.22 (1972); *Graham v. Richardson*, 403 U.S. 365, 372 & n.5 (1971); *Hunter v. Erickson*, 393 U.S. 385, 391-92 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964). See generally Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 554 (1977) ("In case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling.").

43. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 639 & n.7 (1969) (Stewart, J., dissenting).

44. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

45. *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974).

46. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 n.17 (1976); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213 (1995) (conceding that the Fifth Amendment's Due Process Clause "is not as explicit a guarantee of equal treatment as the Fourteenth Amendment") (emphasis omitted).

Federal government.⁴⁷ To equate due process with equal protection would render the latter phrase mere surplusage within section 1 of the Fourteenth Amendment.⁴⁸ Notwithstanding Chief Justice John Marshall's admonition that "it is a constitution we are expounding,"⁴⁹ the maxim *expressio unius est exclusio alterius* sometimes governs concise formulations of fundamental law as well as prolix legal codes. Nor do the words "due process" of their own force embrace the concept of equality. The "more or less vague" constitutional formulation of "due process, originally meaning 'according to the law of the land,' would be a highly inappropriate provision on which to rely to invalidate a 'law of the land' enacted by Congress under a clearly granted power."⁵⁰ Finally, it defies belief that the framers of the Bill of Rights, who undoubtedly knew and intended the original Constitution's separate and unapologetically unequal treatment of different races,⁵¹ could have intended the concept of due process to embrace a norm of racial nondiscrimination.

As attorney general and governor of California, Earl Warren fanned the flames of anti-Japanese prejudice. However "poignantly" he might have come to regret "his vehement – even rabid – support" for the resettlement order,⁵² Warren in the episode's immediate aftermath never mentioned "his own role in bringing on the evacuation."⁵³ Before writing his memoirs, he never apologized publicly.⁵⁴ During his first Term as Chief Justice of the

47. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873).

48. Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 391 (1821) (refusing to adopt a constitutional interpretation that would render portions of Article III "mere surplusage"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (observing that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect" and disfavoring interpretations that would render constitutional phrases "mere surplusage, entirely without meaning").

49. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.).

50. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 277-78 (1964) (Black, J., concurring).

51. See U.S. CONST. art. I, § 2, cl. 3 (distinguishing between "free Persons," "Indians not taxed," and "all other Persons" for purposes of congressional apportionment and direct taxation); *id.* art. I, § 9, cl. 1 (permitting the unfettered "Migration or Importation of such Persons" – namely, slaves – "as any of the States [then] existing shall think proper to admit . . . prior to the Year one thousand eight hundred and eight"); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407-27 (1856) (examining previous indications that different races are not equal), superseded by U.S. CONST. amend. XIV.

52. JACK HARRISON POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 79 (1979).

53. CRAY, *supra* note 8, at 159.

54. See WARREN, *supra* note 4, at 149 ("I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept

United States Supreme Court, however, Warren began formulating what would prove to be his response to the constitutional conundrum (if not the moral crisis) presented by *Korematsu*. Part II of this Article describes that effort and identifies it as an essential component of what became the Warren Court's three-pronged approach to the definition and enforcement of civil rights by the federal government. The Warren Court's civil rights consensus rested on three foundations: (1) the use of Fifth Amendment due process to bind the federal government to the sort of limitations imposed on the states by the Fourteenth Amendment's Equal Protection Clause; (2) the expansion of Congress's power to enforce the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and (3) the continuation of the New Deal's understanding of Congress's power to regulate interstate commerce.

Part III describes how the Burger Court, despite extending its predecessor in numerous and often surprising ways, ultimately undermined the Warren Court's civil rights consensus. The Burger Court's decisions did not accomplish this transformation by direct attack, for the Warren Court's visions of Fifth Amendment due process, section 5 of the Fourteenth Amendment, and the Commerce Clause all survived the appointment of Warren E. Burger as Chief Justice. Rather, affirmative action, the product of a profoundly cynical maneuver by President Richard Nixon, achieved indirectly what President Nixon's judicial appointments never delivered.

Part IV describes the sudden and final collapse of the Warren Court's civil rights consensus in a three-Term span during the Rehnquist Court. At the heart of the contemporary Supreme Court's initiative to revitalize judicial review of federal legislative power lie two landmark cases, the 1995 *Lopez* decision⁵⁵ and the 1997 *City of Boerne* decision,⁵⁶ that in turn dismantled the Warren Court's Commerce Clause and section 5 jurisprudence. Just in time to mark Congress's repudiation of the Japanese internment episode, the Rehnquist Court has reduced the Warren Court's civil rights legacy to a single prong: the "reverse incorporation" of Fourteenth Amendment equal protection obligations against the federal government through Fifth Amendment due process. Ironically, the Rehnquist Court's adherence to this principle has demolished Justice Brennan's final effort to realign the constitutional status of race-conscious legislation in favor of a group-based vision of equal protection.

of freedom and the rights of citizens."); see also CRAY, *supra* note 8, at 159 n.* (stating that Warren, before writing his 1974 memoirs, "never apologized publicly for advocating the evacuation").

55. *United States v. Lopez*, 514 U.S. 549 (1995).

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

Part V attributes the implosion of the Warren Court's civil rights vision to the weakness of its doctrinal formulations. In particular, the Warren Court's insistence upon equivalence in judicial review of racial classifications under federal and state law could not coexist with its vision of congressional enforcement of the Fourteenth Amendment. The simple pursuit of a magisterial, ethically appealing vision of "Equal Justice Under Law" would eventually unravel the Warren Court's legacy in the administration of justice.

II. *The Nickel and Five*

And thou shalt teach them ordinances and laws, and shalt show them the way wherein they must walk, and the work that they must do.

Exodus 18:20⁵⁷

How Earl Warren moved from "the corner pocket" in the capitol in Sacramento⁵⁸ to the center seat on the Supreme Court bench is the stuff of legend.⁵⁹ Though familiar, that legend is rarely given legal significance except insofar as Warren's performance as Chief Justice supposedly prompted President Eisenhower to call Warren's appointment "the biggest damned-fool mistake I ever made."⁶⁰ I shall recount the legend in order to stress the intensely political origins of Earl Warren's judicial career. Chief Justice Warren shepherded the Supreme Court from the first year of the Eisenhower administration to the dawn of the Nixon administration, but only because his Republican rivals had frustrated his presidential ambitions. Despite those modest origins, Earl Warren's subsequent judicial career converted his accession as Chief Justice into a jurisprudentially transformative moment in its own right.⁶¹

57. *Exod.* 18:20 (King James).

58. See WEAVER, *supra* note 6, at 115 (describing "the governor's corner suite in the [California] Capitol" as "'the corner pocket'").

59. So much for the usual rule that "Californians travel horribly." STEVEN VARNI, *THE INLAND SEA* 146 (Perennial 2001) (2000) (fictional novel in which the protagonist leaves the warmth of California's central valley for winter in the Midwest and is told, in anticipation of the seasonal and cultural changes that await him, that "Californians travel horribly").

60. Compare ELMO RICHARDSON, *THE PRESIDENCY OF DWIGHT D. EISENHOWER* 108 (1979) (describing this statement as Eisenhower's reaction to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)) with CRAY, *supra* note 8, at 337 (describing Eisenhower's outburst as his reaction to the "Red Monday" cases decided on June 17, 1957: *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); and *Yates v. United States*, 354 U.S. 298 (1957)). See also Irving R. Kaufman, *Keeping Politics Out of the Court*, N.Y. TIMES, Dec. 9, 1984, § 6, at 72, 87 (describing President Eisenhower's unhappiness with Chief Justice Warren's performance).

61. See generally Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV.

Having taken tentative steps toward national office in 1944 and 1948,⁶² including service as New York Governor Thomas E. Dewey's running mate on the 1948 Republican ticket,⁶³ Warren emerged as a dark-horse candidate for President during the 1952 campaign.⁶⁴ Too poorly financed to challenge former General Dwight D. Eisenhower and Senator Robert A. Taft of Ohio in much of the country, Warren slumped to the Republican National Convention with faint hopes of emerging as a compromise candidate in the unlikely event of a stalemate between Eisenhower and Taft.⁶⁵ Warren clutched seventy-six crucial delegates, including the seventy votes of the California delegation.⁶⁶ He hoped to hold his delegates "while Robert Taft and Dwight Eisenhower scrambled for votes among the remaining uncommitted."⁶⁷ Before the convention, "Warren issued a last disavowal of any cabinet or Supreme Court appointment in exchange for [his] seventy-six convention votes."⁶⁸

Meanwhile, however, Senator Richard M. Nixon of California had secured his own vice-presidential candidacy in the event Eisenhower won the nomination.⁶⁹ By surreptitiously "lead[ing] the delegation into the Eisenhower camp," Nixon undermined Warren's efforts to remain "a serious candidate" rather than "a kingmaker."⁷⁰ With the nomination in the balance, a desperate Taft offered Warren "anything [he] wanted," including the vice-presidency.⁷¹ Warren rebuffed the overture. Instead, he cast California's seventy votes in favor of a procedural rule that effectively awarded seventy-eight disputed southern votes to Eisenhower.⁷² Taft never recovered. He tried to recruit yet

1164 (1988) (treating presidential efforts to make historic judicial appointments as a unique constitutional phenomenon).

62. See POLLACK, *supra* note 52, at 5-6 (describing Warren's 1948 vice-presidential candidacy and his refusal in 1944 to join the Republican ticket as Dewey's running mate).

63. CRAY, *supra* note 8, at 187-93.

64. See *id.* at 226 (quoting son Earl Warren, Jr.: "My father realized . . . he's riding a dark horse, or at least a pretty gray one").

65. See *id.* at 227-28 (discussing Warren's service as a vice-presidential candidate).

66. In addition to California's seventy delegates, Warren won six delegates in the Wisconsin primary and none in the Oregon primary. Warren campaigned only in these three states. See *id.* (describing Warren's failure to extend his campaign beyond the California state line).

67. *Id.* at 229.

68. *Id.*

69. *Id.* at 230-32; see also WEAVER, *supra* note 6, at 181-82 (describing how Nixon's flirtation with Eisenhower violated his oath under California law to honor his delegate's statement of preference favoring Warren).

70. CRAY, *supra* note 8, at 232.

71. *Id.* at 239.

72. See *id.* at 240 (describing how the so-called Fair Play Amendment proposed by Eisenhower's campaign switched thirty-nine Texas, Georgia, and Louisiana delegates from Taft

another Californian, senior Senator William Knowland, as his running mate, but to no avail.⁷³ The Minnesota delegation, including Warren E. Burger, "cast the votes that put . . . Eisenhower over the top."⁷⁴ Having secured the nomination, Eisenhower fulfilled his promise to tap Nixon for the vice-presidency.⁷⁵ For his part, "Warren loyally fell into line" and "campaign[ed] in fourteen states, from Washington to Georgia," on a "particular assignment . . . to appeal to independents and Democrats."⁷⁶ Eisenhower's victory that fall returned the White House to Republican control after a twenty-year hiatus.

Although both Warren⁷⁷ and Eisenhower⁷⁸ denied the existence of a political bargain, President-elect Eisenhower offered Governor Warren "the first vacancy on the Supreme Court" in apparent fulfillment of a "personal commitment."⁷⁹ During the summer of 1953, the new administration "formally offered Warren the post of solicitor general" with an eye toward "clear[ing] away any possible objection to his fitness for the Supreme Court."⁸⁰ In what Felix Frankfurter would eventually describe as "the first indication that [he had] ever had that there is a God,"⁸¹ however, Chief Justice Fred M. Vinson died on September 8, 1953. Though President Eisenhower wavered, apparently never having contemplated that the first vacancy on the Court might be that of the Chief Justice,⁸² Warren held firm.⁸³ Vice-President

to Eisenhower); *see also id.* at 236 (describing how the Fair Play Amendment would have prevented the challenged delegates from voting on their own credentials).

73. *Id.* at 242.

74. *Id.* at 513; *see also id.* at 243 (describing how Burger and state delegation chairman Edward Thye pressured favorite son Harold Stassen into releasing his Minnesota delegates).

75. *Id.* at 244.

76. *Id.* at 245.

77. *See POLLACK, supra* note 52, at 133-34 (quoting Warren: "I have made no alliance with any other candidate and shall make none").

78. 1 DWIGHT D. EISENHOWER, MANDATE FOR CHANGE 228 (1963) ("The truth is that I owed Governor Warren nothing."); *see also* CRAY, *supra* note 8, at 250 (same); WEAVER, *supra* note 6, at 183 (same).

79. CRAY, *supra* note 8, at 247.

80. *Id.* at 249.

81. *Id.* at 278 (quoting two former law clerks' recollections of Justice Frankfurter's revelation). This sort of religious experience seems to arise quite often in connection with civil rights law. *Cf.* Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1121 (1997) (describing the survival of Justice Powell's "surprisingly resilient and supple" opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), as "proof that there is a god").

82. POLLACK, *supra* note 52, at 150.

83. *See* CRAY, *supra* note 8, at 250-53 ("Warren wanted that seat.").

Nixon, eager to remove Warren from California politics and to neutralize the three-term governor's presidential ambitions, encouraged the President to appoint Warren.⁸⁴ Eisenhower was likewise persuaded that installing Warren on the Court would defuse the "admittedly . . . remote" threat that Warren might mount another presidential campaign in 1956.⁸⁵ As a controversial set of school desegregation cases loomed, Earl Warren took office as the fourteenth Chief Justice of the United States on October 5, 1953.

Scarcely seven months later, Chief Justice Warren secured his place in American legal history as the architect of *Brown v. Board of Education*. Well before he retired on June 23, 1969, it had become obvious that Earl Warren had guided the Supreme Court through a monumental epoch. In 1964 Congress passed the Civil Rights Act,⁸⁶ the most significant piece of civil rights legislation in American history; a year later, it passed the comparably expansive Voting Rights Act of 1965.⁸⁷ Under Chief Justice Warren's leadership, the Supreme Court sustained both statutes.⁸⁸ Key pillars of Chief Justice Warren's jurisprudential legacy, however, rested on his Court's resolution of two seemingly peripheral doctrines: "reverse incorporation" of Fourteenth Amendment equal protection via the Fifth Amendment's Due Process Clause and the scope of Congress's power to enforce the Fourteenth Amendment. The decisions that built this constitutional edifice, which I shall call "The Nickel and Five," seemed even more insubstantial. Although Chief Justice Warren's judicial career may have arisen from colossal political struggles, the durability of his Court's decisions would eventually hinge on precise doctrinal puzzles.

*A. The "Nickel": Fifth Amendment Due Process
and "Reverse Incorporation"*

Of the myriad uses that the Supreme Court found for the notion of due process during the twentieth century, three continue to spark controversy. Procedural due process, at least after *Goldberg v. Kelly*,⁸⁹ heralded the rise of

84. POLLACK, *supra* note 52, at 6, 153.

85. *Id.* at 154.

86. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

87. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

88. See *infra* notes 303-17 (discussing the Court's upholding of the Civil Rights Act of 1964); *infra* notes 235-37 (detailing the Court's upholding of the Voting Rights Act of 1965).

89. 397 U.S. 254 (1970).

"new" property and the administrative state.⁹⁰ The mature Warren Court buried the *Lochnerian* variant of substantive due process,⁹¹ only to resurrect it two Terms later for controversies involving privacy, personhood, reproduction, and family formation.⁹² Like civilization itself, however, constitutional law has "advance[d] by extending the number of important operations which we can perform without thinking about them."⁹³ The incorporation of much of the Bill of Rights has a far deeper, more enduring impact than any other application of the Fourteenth Amendment's Due Process Clause.

Incorporation doctrine's true triumph lies in its invisibility. Deploying the entire Bill of Rights against the police powers of the states was arguably the leading jurisprudential project of Hugo Black's thirty-four-year career on the Court,⁹⁴ which spanned all sixteen years of Earl Warren's tenure as Chief Justice. No other line of Supreme Court decisions more perfectly frames Earl Warren's career as attorney general of California, governor of California, and Chief Justice of the United States than the sequence that began with the recognition of rights "implicit in the concept of ordered liberty" in *Palko v. Connecticut*⁹⁵ and ended with the overruling of *Palko*'s refusal to incorporate

90. See generally, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (stating that the termination of some benefits entails constitutional considerations because these benefits are "important rights"); Charles Reich, *The New Property*, 73 YALE L.J. 733, 783-86 (1964) (stating that the increasing importance of agency decisions and government benefits requires due process review of agency action and demands that society classify some benefits as "rights"); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1718-19 (1975) (relying on *Goldberg* to support the proposition that statutory benefits cannot terminate without prior adjudication and stating that the real issue is "the expansion of due process rights to procedural protections at the agency level").

91. See *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (stating that *Lochner*'s due process doctrine "has long since been discarded").

92. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (declining to use *Lochner* as a guide for due process issues raised by a law affecting the "intimate relation of husband and wife").

93. ALFRED NORTH WHITEHEAD, AN INTRODUCTION TO MATHEMATICS 61 (1911) ("It is a profoundly erroneous truism, repeated by all copy-books and by eminent people when they are making speeches, that we should cultivate the habit of thinking what we are doing. The precise opposite is the case."); accord, e.g., F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 528 (1945) (describing Whitehead's principle as one "of profound importance in the social field").

94. E.g., *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting), overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964). See generally GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977) (discussing Justice Black's incorporation of the Bill of Rights); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994) (same).

95. *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784 (1969).

the Fifth Amendment's prohibition on double jeopardy.⁹⁶ Between those bookends, the Warren Court incorporated hefty chunks of the Fourth, Fifth, and Sixth Amendments into the Due Process Clause of the Fourteenth Amendment.⁹⁷

By comparison, the "reverse" incorporation of Fourteenth Amendment equal protection against the federal government seems not only an anomaly but also an afterthought. Although *Bolling v. Sharpe*⁹⁸ is frequently and correctly considered the bridesmaid of *Brown*, it was *Bolling* that finally and decisively resolved the *Korematsu* conundrum.⁹⁹ Having decided in *Brown* "that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools," the Court in *Bolling* candidly admitted that "[t]he legal problem in the District of Columbia is somewhat different."¹⁰⁰ Chief Justice Warren's solution lay in importing equal protection analysis through the Due Process Clause of the Fifth Amendment. The two legal concepts, allegedly "stemming from our American ideal of fairness, are not mutually exclusive."¹⁰¹ Acknowledging that "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,'" the Court disavowed the implication "that the two are always interchangeable phrases."¹⁰² Rather, the Court emphasized the prospect that "discrimination may be so unjustifiable as to be violative of due process."¹⁰³

To buttress this proposition, Chief Justice Warren cited three cases:¹⁰⁴

96. *Benton*, 395 U.S. at 794. *Benton* was announced on June 23, 1969, Earl Warren's last day as Chief Justice. CRAY, *supra* note 8, at 512.

97. See *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968) (Sixth Amendment right to jury trial); *Washington v. Texas*, 388 U.S. 14, 16-19 (1967) (Sixth Amendment right to compulsory process for obtaining witnesses); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (Sixth Amendment right to confront witnesses); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (Fifth Amendment right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (Fourth Amendment exclusionary rule).

98. 347 U.S. 497 (1954).

99. See *Hutchinson*, *supra* note 3, at 46-47 (describing the "constitutional basis" of the plaintiffs' case in *Bolling* as an "amalgamation" of the internment cases with fundamental liberty cases and reasoning accordingly that the plaintiffs relied on Fifth Amendment due process rather than Fourteenth Amendment equal protection).

100. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

101. *Id.* at 499.

102. *Id.*

103. *Id.*

104. See *id.* at 499 n.2 (citing three cases supporting proposition that discrimination violates Fifth Amendment due process).

Detroit Bank v. United States,¹⁰⁵ *Currin v. Wallace*,¹⁰⁶ and *Charles C. Steward Machine Co. v. Davis*.¹⁰⁷ But none of these cases actually supported the bedrock principle on which Chief Justice Warren would build the jurisprudential framework of reverse incorporation. Both *Detroit Bank* and *Currin* stood for the opposite proposition. *Detroit Bank* unequivocally announced that "[u]nlike the Fourteenth Amendment, the Fifth contains no Equal Protection clause and [therefore] provides no guaranty against discriminatory legislation by Congress."¹⁰⁸ Justice Murphy's concurrence in *Hirabayashi* cited *Currin* in support of that very distinction between Fifth Amendment due process and Fourteenth Amendment equal protection.¹⁰⁹ Justice Murphy did state the proposition that Chief Justice Warren was trying to establish – "that there may . . . be discrimination of such an injurious character in the application of laws as to amount to a denial of due process."¹¹⁰ But *Bolling* never invoked this statement. Worst of all, *Steward* relied on the presence of an Equal Protection Clause binding the states, plus the correlative absence of a similar phrase binding the federal government, to declare Congress "subject to restraints less narrow and confining" than those of the states.¹¹¹ *Currin* reasoned that inequality occasioned by congressional legislation raised solely "question[s] . . . of wisdom and not of power."¹¹²

Having thus aligned Fifth Amendment due process with Fourteenth Amendment equal protection (however implausibly), *Bolling* then sought to establish a rule of presumptive invalidity under both provisions for racial segregation in public schooling. Once again Chief Justice Warren reached deep for precedential support. He cited *Korematsu* and *Hirabayashi* for the proposition that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."¹¹³ He quoted *Gibson v. Mississippi*¹¹⁴ for "the principle 'that the constitution . . . forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against

105. 317 U.S. 329 (1943).

106. 306 U.S. 1 (1939).

107. 301 U.S. 548 (1937).

108. *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943) (citing *Currin v. Wallace*, 306 U.S. 1 (1939)).

109. See *Hirabayashi v. United States*, 320 U.S. 81, 112 (1943) (Murphy, J., concurring) ("The Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection.").

110. *Id.* (Murphy, J., concurring).

111. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937).

112. *Currin*, 306 U.S. at 14.

113. *Bolling v. Sharpe*, 347 U.S. 497, 499 & n.3 (1954).

114. 162 U.S. 565 (1896).

any citizen because of his race."¹¹⁵ To reinforce that quotation, Chief Justice Warren then invoked *Steele v. Louisville & Nashville Railroad Co.*,¹¹⁶ a 1944 decision that avoided a constitutional controversy by refusing to construe federal labor law to permit parties to a labor contract to discriminate on the basis of race.¹¹⁷ Finally, he characterized *Buchanan v. Warley*¹¹⁸ as a case in which the Court had invalidated "a statute which limited the right of a property owner to convey his property to a person of another race" as "a denial of due process of law."¹¹⁹

None of these authorities provided genuine support. Chief Justice Warren omitted the inconvenient fact that *Gibson* failed to find "any error of law . . . committed by the courts of" Mississippi and ultimately refused to find "as [a] matter of law, that the conviction of the accused of the crime of murder was due to prejudice of race."¹²⁰ *Steele* represented an unexceptional application of the canon that courts ought to avoid interpreting the Constitution when some other basis for decision fairly presents itself.¹²¹ Any case invoking this precept provides no credible support for any reading of the Constitution. As for *Buchanan*, that Court ultimately phrased the question presented as whether "a white man [may] be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence."¹²² Other cases before *Bolling* had cited *Buchanan* merely as a case reaffirming the Reconstruction-era agenda of extending the dignity of property ownership to former slaves¹²³ or,

115. *Bolling*, 347 U.S. at 499 (quoting *Gibson v. Mississippi*, 162 U.S. 566, 591 (1896)).

116. 323 U.S. 192 (1944).

117. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198-99 (1945); see also *Bolling*, 347 U.S. at 499 & n.4 (construing *Steele* as a case supporting the proposition that racial classifications are "constitutionally suspect").

118. 245 U.S. 60 (1917).

119. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (describing the transaction underlying *Buchanan v. Warley*, 245 U.S. 60 (1912), "as an unreasonable discrimination").

120. *Gibson*, 162 U.S. at 592.

121. E.g., *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

122. *Buchanan*, 245 U.S. at 78.

123. See *Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (denying California's ability to enforce a racially restrictive covenant and noting that *Buchanan* prevented a state from "incorporat[ing such a restriction] in a statute"); *Shelley v. Kraemer*, 334 U.S. 1, 10-11 (1948) (stating that *Buchanan* "gives specific recognition to" the principle that "rights to acquire, enjoy, own and dispose of property" are "protected from discriminatory state action by the Fourteenth Amendment"); *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (citing *Buchanan* for the

even more modestly, as a standing case.¹²⁴ None treated *Buchanan* as having sustained a generalized attack on the compatibility of racial classifications with the notion of due process.¹²⁵

These doctrinal hurdles did not keep the Court from its final task: demonstrating how racial segregation would deprive public schoolchildren of life, liberty, or property without due process of law. Conceding that "the Court has not assumed to define 'liberty' with any great precision," Chief Justice Warren nevertheless stressed that "[l]iberty under law" is "not confined to mere freedom from bodily restraint," but rather "extends to the full range of conduct which the individual is free to pursue."¹²⁶ Liberty so defined, the Chief Justice reasoned, "cannot be restricted except for a proper governmental objective."¹²⁷ Racially segregated public schools flunked that test: "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."¹²⁸

This emphasis on the "liberty" interests of black students drew *Bolling* away from *Brown's* equal protection underpinnings. If anything, the Court's invocation of the Due Process Clause tilted *Bolling* toward an altogether distinct center of constitutional gravity. Though another decade would elapse before *Ferguson v. Skrupa*¹²⁹ would conclusively halt the use of substantive due process to invalidate ordinary social and economic legislation,¹³⁰ the Court in 1949 had already signaled its retreat from the *Lochnerian* practice of "so broadly constru[ing]" the Constitution's Due Process Clauses as to put "Congress and state legislatures . . . in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to

proposition that property rights "include the right to use, lease, and dispose of it for lawful purposes").

124. See *Barrows*, 346 U.S. at 266 n.7 (Vinson, C.J., dissenting) (citing *Buchanan* for the proposition that an interest in exercising a right is required for standing); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 141 (1951) (same); *Leach v. Carlile*, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting) (citing *Buchanan* for the proposition that a damaged party has standing despite its inaction).

125. See Hutchinson, *supra* note 3, at 45 & n.359 (explaining the Court's treatment of *Buchanan* before *Bolling*).

126. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

127. *Id.* at 499-500.

128. *Id.* at 500.

129. 372 U.S. 726 (1963).

130. See *Ferguson v. Skrupa*, 372 U.S. 726, 729-33 (1963) (holding that "courts do not substitute their social and economic beliefs for the judgment of the legislative bodies").

the public welfare.¹³¹ Substantive due process, however feeble its grip after the New Deal's realignment of constitutional law, presented Chief Justice Warren with a plausible (albeit wobbly) basis for deciding the District of Columbia's school segregation case.

The original draft of *Bolling* seized this opportunity. From 1923 through 1927, in a period better known for legal upheaval over the content of speech than for disputes over the languages in which controversial ideas were expressed,¹³² the Supreme Court decided four cases upholding the freedom of parents to shape the education of their children. In 1923, the Court invalidated two state laws, both enacted during World War I's anti-German hysteria, prohibiting foreign language instruction.¹³³ Two years later, *Pierce v. Society of Sisters*¹³⁴ used substantive due process to nullify a state statute requiring students to attend public rather than private schools.¹³⁵ Most intriguingly, the Supreme Court in 1927 used a Fifth Amendment theory of substantive due process to invalidate a ban, in what was then the Territory of Hawaii, on education in any language besides English or Hawaiian.¹³⁶ This final case, *Farrington v. Tokushige*,¹³⁷ had figured prominently in the original 1952 argument of *Bolling*, for *Farrington*'s reliance on the Due Process Clause of the Fifth Amendment made it the strongest case against Congress's ability to segregate public schools by race in a federal enclave.¹³⁸

131. *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949); *see also Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) ("[I]f our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.").

132. *But cf. Abrams v. United States*, 250 U.S. 616, 617 (1919) (observing that the war protestors at issue had published their pamphlets in English and in Yiddish, ostensibly to reach a larger proportion of fellow immigrants from Russia).

133. *Bartels v. Iowa*, 262 U.S. 404, 409-11 (1923); *Meyer v. Nebraska*, 262 U.S. 390, 396-403 (1923).

134. 268 U.S. 510 (1925).

135. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (invoking "the doctrine of *Meyer v. Nebraska*," which established "the liberty of parents and guardians to direct the upbringing and education of children under their control"). *Pierce* could not have rested on a free exercise theory, for the litigation involved not only the Society of the Sisters of the Holy Names of Jesus and Mary but also the Hill Military Academy, a wholly secular, private military school. *Id.* at 532-33.

136. *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927).

137. 273 U.S. 284 (1927).

138. *Farrington*, 273 U.S. at 296-99; 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 401-02, 407 (Philip B. Kurland & Gerhard Casper eds., 1975) (oral argument before *Bolling* Court) (relying on *Farrington* to oppose segregation by the federal government and admitting that *Farrington* is

The centrality of these language and education cases seems doubly odd in today's dominant constitutional discourse, which not only stresses equality over liberty but also tends to regard substantive due process as a doctrine primarily (if not solely) concerned with reproductive freedom, family formation, and personal identity through sexual expression. In a country that is, paradoxically, both polyglot and linguistically uniform, contemporary constitutional law does not treat linguistic discrimination as a serious civil rights issue.¹³⁹ Since 1927, the Supreme Court has only rarely addressed questions of language policy. The Court has implicitly upheld the federal ban on English-only elections as a proper exercise of Congress's powers under the Fourteenth and Fifteenth Amendments.¹⁴⁰ In *Alexander v. Sandoval*¹⁴¹ the Court held that alleged discrimination against non-English speakers cannot be redressed through a private lawsuit seeking enforcement of Title VI of the Civil Rights Act of 1964, which bars discrimination "on the ground of race, color, or national origin [in] . . . any program or activity receiving Federal financial assistance."¹⁴² *Alexander* disavowed any suggestion to the contrary in *Lau v. Nichols*,¹⁴³ which had held that a school system's failure to provide meaningful education to non-English speaking students violated Title VI.¹⁴⁴ In *Arizonans for Official English v. Arizona*,¹⁴⁵ the Supreme Court dismissed as moot – and therefore never considered on the merits – the only case ever to raise a direct constitutional attack on legislation declaring English the official language of a state.¹⁴⁶ At its most generous, the contemporary Court has suggested that conscious discrimination against native speakers of languages besides English may have a racially disparate impact.¹⁴⁷ By this

the "closest case in point so far").

139. Cf. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (contrasting linguistic diversity with its lack of constitutional protection).

140. See 42 U.S.C. § 1973b(e)(1) (1994) (prohibiting states' use of proficiency in English as condition of voting); *Briscoe v. Bell*, 432 U.S. 404, 405-06 & n.2 (1977) (reporting "overwhelming evidence" that showed "the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities"); *New York v. United States*, 419 U.S. 888, 888 (1974) (summarily affirming a three-judge district court's decision to invalidate an English-only election).

141. 532 U.S. 275 (2001).

142. 42 U.S.C. § 2000d (1994); *Alexander v. Sandoval*, 532 U.S. 275, 283 (2001).

143. 414 U.S. 563 (1974).

144. *Alexander*, 532 U.S. at 285.

145. 520 U.S. 43 (1997).

146. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 44 (1997).

147. See *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (conceding that "proficiency

reasoning, language discrimination triggers the constitutional standard of *Washington v. Davis*.¹⁴⁸

But the Warren Court was two generations closer to the *Lochner* era's controversies on education and foreign language instruction and to the waves of immigration that sparked those conflicts. Chief Justice Warren's original *Bolling* draft equated "arbitrary [racial] restraints on access to [public] education" with previously discredited "arbitrary restrictions on the parent's right to educate his child."¹⁴⁹ His concluding sentences squarely grounded *Bolling* in a substantive vision of due process: "We have declared that the Constitution prohibits the states from maintaining racially segregated public schools. It would be unthinkable that the Federal Government should have a lesser duty to protect what, in our present circumstances, is a fundamental liberty."¹⁵⁰

The *Bolling* Justices and litigants apparently overlooked a fifth case decided during the 1923-1927 sequence of language controversies. The 1926 case of *Yu Cong Eng v. Trinidad*¹⁵¹ involved the legality of the Chinese Bookkeeping Act,¹⁵² which the legislature of the Philippine Islands, then a United States territory, enacted in 1921.¹⁵³ The Supreme Court considered whether a Philippine statute "making it a crime for any one in the Philippine Islands engaged in business to keep his account books in Chinese" conflicted with the Philippine Bill of Rights.¹⁵⁴ The Philippine Bill of Rights, which Congress incorporated into the Philippine Autonomy Act of 1916,¹⁵⁵ provided that "[n]o law . . . enacted in th[o]se Islands . . . shall deprive any person of

in a particular language, like skin color," might be most properly "treated as a surrogate for race"); *cf.* *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (upholding the use of federal officers' perception of motorists' "apparent Mexican ancestry" to make selective referrals to secondary inspection areas at immigration checkpoints).

148. 426 U.S. 229 (1976).

149. Hutchinson, *supra* note 3, at 94 (reprinting Chief Justice Warren's Memorandum to Conference, May 7, 1954).

150. *Id.* at 94 (reprinting Chief Justice Warren's Memorandum to the Conference, May 7, 1954); *cf.* *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (citing *Bolling* for the proposition that "[t]he right of a student not to be segregated on racial grounds in schools so maintained" is "so fundamental and pervasive that it is embraced in the concept of due process of law").

151. 271 U.S. 500 (1926).

152. Act No. 2972, Feb. 21, 1921, of Philippine Legislature, *quoted in* *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 507-08 (1926).

153. *Yu Cong Eng*, 271 U.S. at 507-08.

154. *Id.* at 524.

155. Philippine Autonomy Act of 1916, ch. 416, § 3, 39 Stat. 545, 546; Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692-93.

life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."¹⁵⁶ The Supreme Court had previously held that the Philippine Bill of Rights extended "guaranties equivalent to the due process and equal protection of the law clause of the Fourteenth Amendment," as those provisions were understood "at the time when Congress made them applicable to the Philippine Islands."¹⁵⁷ *Yu Cong Eng* held that the Bookkeeping Act violated the territorial bill of rights.¹⁵⁸ Despite its heavy reliance on *Meyer v. Nebraska*¹⁵⁹ and other substantive due process cases,¹⁶⁰ the *Yu Cong Eng* Court described the violation as one not only of due process, but also of equal protection.¹⁶¹ Half a century later, Justice Stevens would cite *Yu Cong Eng* for the proposition that "the Due Process Clause," at least in the absence of a "special national interest," may be "construed as having the same significance as the Equal Protection Clause."¹⁶²

Whatever support *Yu Cong Eng* could have provided for *Bolling* is admittedly shaky. Unlike *Farrington*, which used the Due Process Clause of the Fifth Amendment to invalidate a territorial statute, *Yu Cong Eng* upheld the power of Congress to curb a territory's legislative authority. The Warren Court landmark that *Yu Cong Eng* most closely resembles, therefore, is not *Bolling v. Sharpe*, but *Katzenbach v. Morgan*.¹⁶³ Even this connection is tenuous. Because Congress enacted the Philippine Bill of Rights under its power to govern the territories of the United States,¹⁶⁴ *Yu Cong Eng* shed no

156. Philippine Autonomy Act of 1916, § 3, quoted in *Yu Cong Eng*, 271 U.S. at 524.

157. *Serra v. Mortiga*, 204 U.S. 470, 474 (1907); accord *Yu Cong Eng*, 271 U.S. at 524; see also *Kepner v. United States*, 195 U.S. 100, 123-24 (1904) (describing the Philippine Bill of Rights as differing slightly in form, but not in substance, from its American predecessor).

158. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524-28 (1926).

159. *Id.* at 526-27 (quoting and discussing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as a case recognizing a due process right "to acquire useful knowledge").

160. See *id.* at 527-28 (analyzing *Adams v. Tanner*, 244 U.S. 590 (1917), and *Truax v. Raich*, 239 U.S. 33 (1915), and citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

161. See *id.* at 528 (finding that the Chinese Bookkeeping Act was "obviously intended chiefly to affect [Chinese merchants] as distinguished from the rest of the community" and describing the act as "a denial . . . of equal protection of the laws").

162. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 n.18 (1976) (citing *Bolling* as well as *Yu Cong Eng* for this proposition).

163. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (stating that Congress has authority under section 5 of the Fourteenth Amendment "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of" that Amendment).

164. See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations Respecting the Territory or other Property belonging

direct light on the issue in *Morgan*: the extent of Congress's authority to "enforce" the Fourteenth Amendment through "appropriate legislation."¹⁶⁵ *Yu Cong Eng* did suggest, perhaps more than any other precedent available to the *Bolling* Court, that a statute offensive to substantive notions of due process can simultaneously violate equal protection. To be sure, *Yu Cong Eng* offered no reasoning in support of its naked assertion that the ban on Chinese-language bookkeeping violated equal protection as well as due process. Moreover, the *Yu Cong Eng* Court effectively equated the class of speakers of Chinese with the class defined by Chinese ethnicity. If *Hernandez v. New York*¹⁶⁶ provides any indication, the modern Court does not so readily equate language with race.¹⁶⁷ Nevertheless, *Yu Cong Eng* offered Chief Justice Warren a precedential bridge between the substantive due process doctrine of *Pierce* and *Meyer* and the equal protection concept illuminated in *Brown*. *Yu Cong Eng* gave the *Bolling* Court a chance to overcome the *Korematsu* conundrum. Its absence from the draft and final opinions in *Bolling* suggests, at the very least, that Chief Justice Warren missed an opportunity to reinforce his doctrinal position.

History does not report the precise course of the Justices' deliberations between the circulation of the May 7, 1954 draft of *Bolling* and the public release of Chief Justice Warren's opinion on May 17. Scholars have speculated that Hugo Black and Felix Frankfurter, the Justices most closely ideologically committed to burying *Lochnerian* substantive due process,¹⁶⁸ persuaded the Chief Justice to abandon his reliance on the education cases.¹⁶⁹ Biographer G. Edward White minced no words in

to the United States . . .").

165. U.S. CONST. amend. XIV, § 5; cf. *Morgan*, 384 U.S. at 647 n.5 (declining to delineate the power of Congress to regulate "Territory or other Property belonging to the United States").

166. 500 U.S. 352 (1991).

167. See *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (suggesting that the native ability to speak a language besides English might serve as a proxy for race in certain circumstances); cf. *Rice v. Cayetano*, 528 U.S. 495, 514-15 (2000) (treating descent from the eighteenth century inhabitants of Hawaii as an unlawful proxy for Polynesian ancestry). See generally *supra* notes 139-48 and accompanying text (reviewing the history of Supreme Court disputes over language).

168. See, e.g., *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 556 (1949) (Frankfurter, J., concurring) (opposing substantive due process primarily because "[j]udges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it"); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 537 (1949) (Black, J.) (declaring that the "due process philosophy" of the *Lochner* era "has been deliberately discarded").

169. See G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 226-28 (1982) (examining Warren's "relative indifference to the doctrinal basis of his opinions"); Hutchinson, *supra* note

describing the Chief Justice's motivation: "Warren omitted the fundamental liberty analysis in *Bolling* because he wanted to maintain unanimity in his Court."¹⁷⁰ Chief Justice Warren ultimately adopted the language that now appears in *United States Reports*: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."¹⁷¹

Chief Justice Warren had one last opportunity to give *Bolling* some legal basis besides the "unthinkable" nature of the contrary proposition, that somehow the Constitution could permit Congress to segregate public schools under its control while preventing the states from adopting that very policy.¹⁷² To buttress his final assertion, the Chief Justice cited *Hurd v. Hodge*.¹⁷³ But the Court had no basis for relying on *Hurd*. Decided the same day as *Shelley v. Kraemer*,¹⁷⁴ *Hurd* involved a covenant prohibiting the transfer of real property to nonwhites.¹⁷⁵ In a series of decisions stretching back to 1917, the Supreme Court had held that the enforcement of a racially restrictive covenant by a state court would violate equal protection.¹⁷⁶ *Hurd* acknowledged that the high court had "never . . . adjudicated" whether the enforcement of such covenants within the District of Columbia would be "forbidden by the due process clause of the Fifth Amendment."¹⁷⁷ Relying upon *Hirabayashi* and *Korematsu*'s nominal condemnation of race-based classifications, the *Hurd*

3, at 48-50 (speculating that Justices Frankfurter and Black persuaded Chief Justice Warren to drop due process analysis from *Bolling*). Justice Black evidently patrolled other draft opinions in order to block the "roving commission" of substantive due process. See CRAY, *supra* note 8, at 452-53 (describing how Justice Black persuaded Chief Justice Warren to "trim[] . . . offending passages" on substantive due process and references to *Meyer v. Nebraska*, 262 U.S. 390 (1923), from the draft of *Loving v. Virginia*, 388 U.S. 1 (1967)).

170. WHITE, *supra* note 169, at 227.

171. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

172. Cf. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 32 (2000) ("Apparently it was also unthinkable to hold that segregation in the South violated the Constitution and then to leave to Congress the option of retaining the only legally segregated schools in America.").

173. *Bolling*, 347 U.S. at 500 n.5 (citing *Hurd v. Hodge*, 334 U.S. 24 (1948)).

174. 334 U.S. 1 (1948).

175. *Hurd*, 334 U.S. at 26. *Shelley* also concerned the judicial enforcement of racially restrictive covenants. *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948).

176. See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (invalidating a statute forbidding blacks from living in primarily white neighborhoods); see also *City of Richmond v. Deans*, 281 U.S. 704, 704 (1930) (following *Buchanan*); *Harmon v. Tyler*, 273 U.S. 668, 668 (1927) (same).

177. *Hurd*, 334 U.S. at 28.

petitioners pressed this very claim.¹⁷⁸ Chief Justice Vinson, however, "found it unnecessary to resolve the constitutional issue" and ultimately barred the enforcement of racially restrictive covenants as a violation of the Civil Rights Act of 1866.¹⁷⁹

Bolling's feat of "[e]quating the Due Process Clause and the Equal Protection Clause . . . was nothing short of stunning."¹⁸⁰ "Never before had a Supreme Court opinion found the two clauses banned similar governmental behavior."¹⁸¹ Stripping *Bolling* of its supporting citations exposes the incredible flimsiness of its reasoning. "With a flick of the wrist," Chief Justice Warren "changed *Bolling v. Sharpe* from an education case into a race case, and the equal protection component of the fifth amendment was born."¹⁸² Equal protection, which Justice Holmes had mocked a mere twenty-seven years earlier as "the usual last resort of constitutional arguments,"¹⁸³ would become in the latter half of the twentieth century "the first resort of constitutional argument."¹⁸⁴ So complete was the transformation that the Court could assert two decades after *Bolling*, with equally minute amounts of shame and support, that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."¹⁸⁵

Although it may be tempting to conclude that *Bolling's* "result [of] outlawing segregation in the District of Columbia" was much more "significant" than "[h]ow that result was accomplished,"¹⁸⁶ greater wisdom lies elsewhere. *Bolling* sacrificed doctrinal coherence to achieve constitutional symmetry between the states and the federal government – and to conceal latent divisions among the Justices on a civil rights controversy of the highest magnitude.¹⁸⁷ "Warren preserved the Court's unanimous voice" in *Bolling* "at

178. *Id.* at 30.

179. *Id.*

180. POWE, *supra* note 172, at 32.

181. *Id.*

182. Hutchinson, *supra* note 3, at 46; see also WHITE, *supra* note 169, at 363 ("When others suggested that . . . there was no . . . 'fundamental' right [to an education], Warren turned *Bolling v. Sharpe* into an unconventional equal protection case.")

183. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

184. Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503, 507 (1999).

185. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

186. WHITE, *supra* note 169, at 363.

187. See Louis H. Pollak, *The Supreme Court Under Fire*, 6 J. PUB. L. 428, 443 (1957) (applying this criticism to both *Bolling* and *Brown*).

a substantial price."¹⁸⁸ Though substantive due process "stood on shaky, even discredited, ground," the new Chief Justice's novel Fifth Amendment theory "lacked both precedent and . . . analytical inevitability."¹⁸⁹ Unanimity barely concealed the Justices' "willingness to sacrifice established, if dubious, precedent for naked moral parity between *Brown* and *Bolling*."¹⁹⁰

Bolling, in the end, hinged on a single word: "unthinkable." Chief Justice Warren did what his colleague, John Marshall Harlan, would decry on several other occasions: the "substitut[ion] [of] resounding phrases for analysis."¹⁹¹ As Justice Harlan might have described the problem, *Bolling* rested on a "captivating phrase[]"¹⁹² that gave the Court an "all-too-easy opportunity to ignore the real" tension between equal protection and due process and to "solve the problem simply by labeling the . . . practice" of school segregation "as invidious 'discrimination.'"¹⁹³ Such analytical weakness diluted the Warren Court's doctrinal legacy. The jurists who were called upon to translate the Warren Court's landmarks in later cases could not accord serious respect to the reasoning beneath decisions such as *Bolling*.¹⁹⁴

B. The "Five": Civil Rights Enforcement Under Section 5 of the Fourteenth Amendment

The Warren Court's decisions upholding the Civil Rights Act of 1964¹⁹⁵ and the Voting Rights Act of 1965¹⁹⁶ resolved much of the unfinished business of Reconstruction. Despite recognizing that the Thirteenth, Fourteenth, and Fifteenth Amendments shared the common goal of protecting the newly freed slaves,¹⁹⁷ the post-Civil War Court considerably narrowed the

188. Hutchinson, *supra* note 3, at 50.

189. *Id.*

190. *Id.*

191. Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting).

192. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 683 (1966) (Harlan, J., dissenting).

193. Griffin v. Illinois, 351 U.S. 12, 36 (1956) (Harlan, J., dissenting).

194. See Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 232-34 (1972) (stating that *Bolling* omits "all examination of constitutional premises").

195. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

196. Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

197. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 68-71 (1873); see *Ex parte Virginia*, 100 U.S. 339, 344-45 (1879) ("One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the

scope of congressional power to defend civil rights. The Court under Chief Justice Morrison Waite repeatedly excluded purely private conduct from the reach of federal civil rights statutes. "The fourteenth amendment," said the Court in one of its earliest opportunities to construe the Amendment, "adds nothing to the rights of one citizen as against another."¹⁹⁸ This exclusion of purely private conduct from the Fourteenth Amendment's reach thus crippled the federal response not only to the impairment of blacks' voting rights,¹⁹⁹ but also to some of the most gruesome acts of racial violence in the post-war South.²⁰⁰

In the 1883 *Civil Rights Cases*²⁰¹ the Court invalidated the public accommodation provisions of the Civil Rights Act of 1875²⁰² and thereby constricted Congress's reach under the enabling clauses of the Reconstruction amendments – section 2 of the Thirteenth Amendment, section 5 of the Fourteenth, and section 2 of the Fifteenth.²⁰³ Insisting that the Fourteenth Amendment affected solely "[s]tate action of a particular character" without reaching "[i]ndividual invasion of individual rights,"²⁰⁴ the Court curbed

States."); see also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 785 (1985) (describing Congress's intent in ratifying the Fourteenth Amendment as "the amelioration of the condition of the freedmen").

198. *United States v. Cruikshank*, 92 U.S. 542, 554 (1875).

199. See *United States v. Reese*, 92 U.S. 214, 217 (1875) (noting that Congress did not provide for the punishment of a voting inspector who refused to receive and count blacks' votes). *But cf. Ex parte Yarbrough*, 110 U.S. 651, 666-67 (1884) (upholding the application of the Ku Klux Klan Act of 1871 to private actors who committed violence against black voters in a congressional election).

200. See *United States v. Harris*, 106 U.S. 629, 630, 640 (1882) (lynch mob murder of prisoners under the custody of a deputy sheriff); *Cruikshank*, 92 U.S. at 548-49 (massacre of freedmen and Republican partisans after a disputed election). Arising in the aftermath of "perhaps the bloodiest racial conflict in Louisiana history" – or, for that matter, in American history – *Cruikshank* invalidated the convictions of three members of a "veritable army" of "old time Ku Klux Klan" who killed no fewer than "60 freedmen . . . after they had surrendered" and left the victims' mutilated bodies "to rot in the parching sun." ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 175 (1985). On the history of Reconstruction, see generally ERIC FONER, *RECONSTRUCTION* (Henry Steele Comager et al. eds., 1989); ALLAN NEVINS, *THE EMERGENCE OF MODERN AMERICA, 1865-1878* (1927); KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* (1965).

201. 109 U.S. 3 (1883).

202. Civil Rights Act of 1875, Ch. 114, 18 Stat. 335.

203. See *The Civil Rights Cases*, 109 U.S. 3, 18-19 (1883) (holding that the "law in question cannot be sustained by any grant of legislative power" and that Congress has no authority to enact "primary and direct" legislation that "supersedes and displaces state legislation on the same subject").

204. *Id.* at 11; *cf. United States v. Harris*, 106 U.S. 629, 640 (1882) (invalidating a federal

Congress's power to punish "every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."²⁰⁵ The *Civil Rights Cases* held that section 5 of the Fourteenth Amendment conferred no power to pass "general legislation upon the rights of the citizen," but rather confined Congress to the task of enacting "corrective legislation . . . for counteracting" unconstitutional state legislation.²⁰⁶ A contrary reading empowering Congress to legislate beyond "provid[ing] modes of redress," Justice Bradley reasoned, would be "repugnant to the tenth amendment."²⁰⁷ The *Civil Rights* cases thus "firmly embedded" the principle that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."²⁰⁸

Four years before the *Civil Rights Cases*, however, the Court had given wide berth to federal legislative power in a trilogy of cases involving the exclusion of blacks from jury service. In *Strauder v. West Virginia*,²⁰⁹ a case best known for recognizing that "discriminat[ion] in the selection of jurors . . . against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State,"²¹⁰ the Court upheld Congress's power to "provid[e] for the removal of [the affected] case from a State court, in which the right is denied by the State law, into a Federal court."²¹¹ *Strauder* even lauded removal as a "very efficient and appropriate mode" of "protecting rights and immunities conferred by the Federal Constitution."²¹² In *Ex parte Virginia*,²¹³ the Court endorsed "[w]hatever legislation is appropriate, that is, adapted to carry out the objects" of the Reconstruction amendments and "tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal

anticonspiracy statute that was "directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers").

205. *Civil Rights Cases*, 109 U.S. at 24-25.

206. *Id.* at 13-14.

207. *Id.* at 15.

208. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *accord, e.g., United States v. Morrison*, 529 U.S. 598, 621 (2000); *District of Columbia v. Carter*, 409 U.S. 418, 423-24 (1973); *United States v. Guest*, 383 U.S. 745, 755 (1966).

209. 100 U.S. 303 (1879).

210. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

211. *Id.* at 311.

212. *Id.*

213. 100 U.S. 339 (1879).

protection of the laws."²¹⁴ Finally, although *Virginia v. Rives*²¹⁵ interpreted the federal removal statute to "authorize[] a removal of the case only before trial, not after a trial has commenced,"²¹⁶ that case reaffirmed the general principle that "[r]emoval of cases from State courts into courts of the United States has been an acknowledged mode of protecting [federal civil] rights" whose "constitutionality has never been seriously doubted."²¹⁷

Step by step, the Warren Court eased the tension between the *Civil Rights Cases* and the 1879 jury service trilogy.²¹⁸ Although the Supreme Court has never retreated from the *Civil Rights Cases*' requirement that legislation under section 5 "be adapted to the mischief and wrong" targeted by the Fourteenth Amendment at large,²¹⁹ the reconceptualization of equal protection in *Brown* extended Congress's power to grant and preserve civil rights. The Warren Court even temporarily crafted a definition of state action that swept many commercial activities within the reach of the Fourteenth Amendment.²²⁰ As for the *Civil Rights Cases*' invalidation of federal equal accommodations legislation, that "question [was] rendered largely academic by Title II of the Civil Rights Act of 1964."²²¹ The Warren Court cases upholding that statute as an exercise of Congress's power to regulate interstate commerce opened a productive new avenue for civil rights legislation.²²² The Court's expansive definition of the power to enforce the Thirteenth

214. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879); *accord* *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966) (relying in part on *Ex parte Virginia* to support the proposition that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting"). *Ex parte Virginia*'s resemblance to the classic statement of judicial deference in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), is unmistakable. Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 120 (1999).

215. 100 U.S. 313 (1879).

216. *Virginia v. Rives*, 100 U.S. 313, 319 (1879).

217. *Id.* at 318.

218. *Cf.* James M. McGoldrick, *The Civil Rights Cases: The Relevancy of Reversing a Hundred Plus Year Old Error*, 42 ST. LOUIS U. L.J. 451, 464-66 (1998) (arguing that creative alternatives to the direct application of Congress's section 5 power helped preserve the "undeserved longevity" of the *Civil Rights Cases*).

219. *The Civil Rights Cases*, 109 U.S. 3, 13 (1883).

220. *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-20 (1968) (holding that a self-contained business district cannot exclude members of the public seeking to exercise their constitutional rights), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

221. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

222. *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964).

Amendment²²³ and of state-law complicity in superficially private conduct²²⁴ gave Congress other legislative options.

But these developments carried at best secondary significance for civil rights enforcement. The crucial question of the reach of the Fourteenth Amendment's Enabling Clause loomed on the Court's docket. Before and during the Warren era, the Supreme Court routinely analyzed Congress's power under section 2 of the Thirteenth Amendment,²²⁵ section 2 of the Fifteenth Amendment,²²⁶ and even section 2 of the Eighteenth Amendment²²⁷ according to the elaboration of the Necessary and Proper Clause²²⁸ in *McCulloch v. Maryland*.²²⁹ "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the

223. See *Jones*, 392 U.S. at 438-39 (stating that Congress's power to enforce the Thirteenth Amendment includes the power to legislate in a manner "calculated to achieve . . . objective" of eradicating badges and incidents of slavery, even if the resulting legislation "regulate[s] the conduct of private individuals"); see also *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971) (holding that the Enabling Clause of the Thirteenth Amendment permits Congress to punish private, racially motivated violence against persons traveling between states); cf. *Butler v. Perry*, 240 U.S. 328, 332 (1916) (defining the scope of Congress's power to enforce the Thirteenth Amendment according to a legislative target's similarity "to African slavery").

224. See *United States v. Guest*, 383 U.S. 745, 756-57 (1966) (observing that "a charge of active connivance by agents of the State in the making of . . . 'false reports,' or other conduct amounting to official discrimination [is] clearly sufficient to constitute denial of rights protected by the Equal Protection Clause"); cf. *Bell v. Maryland*, 378 U.S. 226, 242 (1964) (Douglas, J.) (arguing that a private individual's invocation of state law enforcement and state court process to give effect to a private policy of racial discrimination would warrant the extension of equal protection rights to individuals targeted by the racial discrimination); *id.* at 286 (Goldberg, J., concurring) (same).

225. See *Jones*, 392 U.S. at 439 (stating that section 2 of the Thirteenth Amendment "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery'" (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883))); *Clyatt v. United States*, 197 U.S. 207, 217 (1905) (stating that Congress has power to legislate over individuals "so far as necessary or proper to eradicate all forms and incidents of slavery"); see also *United States v. Rhodes*, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151) (Swayne, Cir. J.) (stating that Congress has power to "select . . . the means that might be deemed appropriate to" abolish slavery).

226. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884).

227. *James Everard's Breweries v. Day*, 265 U.S. 545, 558 (1924).

228. See U.S. CONST. art. I, § 8, cl. 1 & 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

229. 17 (4 Wheat.) 316 (1819).

letter and spirit of the constitution, are constitutional."²³⁰ The antebellum Court had applied the same standard in construing other provisions of the Constitution, such as the Commerce Clause²³¹ and the Fugitive Slave Clause.²³² Much of the Warren Court's civil rights agenda therefore hinged on the interpretation of Congress's power under section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation, the provisions of" that amendment.²³³ That burden fell squarely on the shoulders of *Katzenbach v. Morgan*.²³⁴

Morgan seemed an unlikely candidate for landmark status. It was not even the most prominent voting rights case of the 1965 Term. In *South Carolina v. Katzenbach*,²³⁵ a case of such "urgent concern to the entire country" that the Justices "invited all of the States to participate . . . as friends of the Court,"²³⁶ the Court repelled a multifaceted attack on the epochal Voting Rights Act of 1965. Most significantly, *South Carolina v. Katzenbach* upheld Congress's power under section 2 of the Fifteenth Amendment to require federal administrative or judicial approval of state-law changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."²³⁷ Decided later during the same Term, *Morgan* involved a comparatively trivial portion of the Voting Rights Act.

Morgan involved section 4(e) of the Voting Rights Act, which provided that no person who "has successfully completed the sixth primary grade" in an "American-flag" school "in which the predominant language was other than English, shall be denied the right to vote in any Federal, State, or

230. *McCulloch v. Maryland*, 17 (4 Wheat.) 316, 421 (1819); cf. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) ("Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.").

231. *United States v. Coombs*, 37 U.S. 634, 638, 12 Pet. 72, 78 (1838); *Gibbons v. Ogden*, 22 U.S. 1, 3-4, 9 Wheat. 1, 187-88 (1824).

232. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 521-22 (1858); *Prigg v. Pennsylvania*, 41 U.S. 417, 423-24, 16 Pet. 539, 614-15 (1842); cf. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 542-43 (1856) (McLean, J., dissenting) (urging the adoption of the *McCulloch* standard for interpreting Congress's power to regulate the territories). See generally Engel, *supra* note 214, at 138-40 (discussing the use of *McCulloch*'s standard of review throughout the antebellum era).

233. U.S. CONST. amend. XIV, § 5.

234. 384 U.S. 641 (1966).

235. 383 U.S. 301 (1966).

236. *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

237. 42 U.S.C. § 1973c (1994); see *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (holding that portions of Act under review were "valid means" of enforcing the Fifteenth Amendment).

local election because of his inability to read, write, understand, or interpret any matter in the English language."²³⁸ An English literacy requirement in New York had disenfranchised "many of the several hundred thousand New York City residents who ha[d] migrated there from the Commonwealth of Puerto Rico" ²³⁹ In the 1959 case of *Lassiter v. Northampton County Board of Elections*,²⁴⁰ however, the Supreme Court had already repelled a Fourteenth and Fifteenth Amendment attack on North Carolina's English literacy requirement.²⁴¹ Because section 4(e) effectively displaced state laws that *Lassiter* would have upheld, *Morgan* had to explain whether "an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can . . . be sustained if the judicial branch determines that the state law is [not] prohibited by the [substantive] provisions of" that amendment.²⁴²

This obstacle did not detain Justice Brennan very long. Invoking the historical understanding that the Fourteenth Amendment was designed principally to expand congressional power rather than the power of the federal judiciary,²⁴³ Justice Brennan declined to "confine the legislative power" granted by section 5 "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment."²⁴⁴ Justice Brennan thus sidestepped the troubling task of reconciling his reasoning with *Lassiter*²⁴⁵

238. 42 U.S.C. § 1973b(e) (1994); see *Katzenbach v. Morgan*, 384 U.S. 641, 643, & n.1 (1966).

239. *Morgan*, 384 U.S. at 644.

240. 360 U.S. 45 (1959).

241. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (holding that a literacy requirement does not violate constitutional requirements).

242. *Morgan*, 384 U.S. at 648. Justice Brennan did not address alternative bases for resolving the controversy, including Congress's power to legislate in federal territories, regulate congressional elections, or guarantee each state a republican form of government. *Id.* at 647 n.5.

243. See *id.* at 648 & n.7 (citing, *inter alia*, *Ex parte Virginia*, 100 U.S. 339, 345 (1879), and Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1356-57 (1964)); see also Fullilove v. Klutznick, 448 U.S. 448, 509 (1980) (Powell, J., concurring) (emphasizing that the framers of the Fourteenth Amendment believed that Congress would bear primary responsibility for enforcing the Amendment); 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-68, PART ONE at 1295-96 (1971) (same).

244. *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966) (quoting *Fay v. New York*, 332 U.S. 261, 282 (1947)).

245. See *id.* at 649 (contending that the issue in *Lassiter* differed from the issue presented by *Morgan*).

even as he acknowledged the constitutionally commanded task of "determining whether" section 4(e) was "appropriate legislation to enforce the Equal Protection Clause."²⁴⁶

On the crucial question of the standard of review for legislation passed under section 5, Justice Brennan adopted the "classic" – and extremely deferential – rational basis formulation of *McCulloch v. Maryland*.²⁴⁷ He argued that the framers of the Fourteenth Amendment equated section 5's "appropriate legislation" formula with that of the Necessary and Proper Clause.²⁴⁸ This reasoning united the standard of review for section 5 legislation with the judicial standard for assessing legislation under the enabling clauses of the Fifteenth and Eighteenth Amendments.²⁴⁹ Forswearing serious judicial "review [of] the congressional resolution" of the myriad factors affecting section 4(e)'s "nullification of the English literacy requirement," Justice Brennan declared that an exercise of the section 5 power would stand as long as the Court could "perceive a basis upon which the Congress might [have] resolve[d] the conflict as it did."²⁵⁰

But Congress did no such thing. The mood of Justice Brennan's verbs betrayed Congress's failure to make any findings that could have rationalized its decision to abrogate state-law literacy requirements. At most, Justice Brennan could argue only that "Congress *might* well have questioned" the underlying intent of these literacy requirements, that "Congress *might* have also questioned whether denial of" the franchise "was a necessary or appropriate means of encouraging persons to learn English," and that "Congress *might* well have concluded that . . . an ability to read or understand Spanish is . . . effective" in informing a Spanish-speaking electorate "of election issues and governmental affairs."²⁵¹ By constantly repeating findings that "Congress might well have" made, *Morgan* implied that Congress had an "independent ability," in all respects "identical" with that of the judiciary, "to interpret the Constitution for itself."²⁵² By revealing the embarrassing truth that Congress had conducted no hearings and produced no reports in support of section 4(e),²⁵³ Justice Harlan's dissent mercifully removed this

246. *Id.* at 649-50.

247. *Id.* at 650.

248. *See id.* at 650 n.9, 651 (noting that an earlier draft of the Fourteenth Amendment used the phrase "necessary and proper" instead of the phrase "appropriate legislation").

249. *See id.* at 651 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), and *James Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924)).

250. *Id.* at 653.

251. *Id.* at 654-55 (emphases added and footnotes omitted).

252. POWE, *supra* note 172, at 264.

253. *Katzenbach v. Morgan*, 384 U.S. 641, 669 n.9 (1966) (Harlan, J., dissenting).

dispute from the set of legal questions that depend on the meaning of the word "is."²⁵⁴ Moreover, by reminding the majority that the Court had relied on Congress's consideration of concrete evidence in upholding the Civil Rights Act of 1964²⁵⁵ and the principal provisions of the Voting Rights Act of 1965,²⁵⁶ Justice Harlan showed the extent to which *Morgan* had relaxed an already deferential standard of review. No longer would Congress be required to demonstrate that the alleged injury at issue "is in truth an infringement of the Constitution, something that [supposedly was] the necessary prerequisite to bringing the § 5 power into play at all."²⁵⁷

But Justice Harlan's harshest criticism triggered the most remarkable aspect of *Morgan*. Justice Harlan charged that the majority's interpretation of section 5 gave "Congress the power to define the *substantive* scope of the Amendment," a dangerous sort of "discretion" that Congress could abuse "by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court."²⁵⁸ This was not an idle prospect, for the politics of the Warren era were, by contemporary standards, virulently hostile to civil rights. At its most grotesque, the Senate's Southern gerontocracy elevated massive resistance to a global stage, attempting through the Bricker Amendment to insulate Jim Crow from international human rights treaties.²⁵⁹

254. *Cf., e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 55-60 (1987) (holding that section 505 of the Clean Water Act, 33 U.S.C. § 1365, which authorizes civil actions "against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation," requires proof of an ongoing violation) (emphasis added).

255. *See Morgan*, 384 U.S. at 668-69 (Harlan, J., dissenting) (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)).

256. *See id.* at 667 (Harlan, J., dissenting) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308-15 (1966)).

257. *Id.* at 666 (Harlan, J., dissenting). Three years later, in *Gaston County v. United States*, 395 U.S. 285 (1969), the Court sustained the federal ban on literacy tests in a county in which no evidence existed that the test was discriminatory or had been administered in a discriminatory manner. The Court concluded that the county's "systematic[]" history of "depriv[ing] its black citizens of the educational opportunities it granted to its white citizens" all but guaranteed the deprivation of blacks' voting rights even if the county undertook impartial administration of an impartial test. *Id.* at 296-97; *accord Oregon v. Mitchell*, 400 U.S. 112, 233-35 (1970) (Brennan, J., concurring in the judgment in part and dissenting in part).

258. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting).

259. *See generally, e.g.,* NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 94-116 (1990); DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988); Louis Henkin, *U.S. Ratification of the Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995). *Cf. POWE, supra* note 172, at 112 (listing segregation among the "local customs and institutions" that, according to the fears of the Bricker Amendment's proponents, were threatened by obligations under international treaties).

Justice Harlan warned, in effect, that *Morgan's* reasoning exposed *Brown* to legislative override. Justice Brennan responded with footnote ten, the source of *Morgan's* celebrated "one-way ratchet":

Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be – as required by § 5 – a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.²⁶⁰

One final obstacle remained. *Morgan* all but invited the allegation of unequal treatment that accompanies any extension of civil rights to an identifiable group. Though section 4(e) enfranchised Spanish-speaking voters educated in Puerto Rico, the Voting Rights Act wholly neglected other voters. *Lassiter's* underlying holding having survived *Morgan*, all non-English-speaking voters, including native speakers of Spanish, educated in non-American-flag schools remained subject to state literacy requirements. This disparity raised a final objection to section 4(e): New York argued that the provision "itself works an invidious discrimination in violation of the Fifth Amendment by" distinguishing between non-English speakers "educated in American-flag schools" and those "educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English."²⁶¹

Justice Brennan disagreed. He reasoned that constitutional doctrine otherwise demanding "the closest scrutiny of distinctions in laws denying fundamental rights" did not apply to "a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise."²⁶² Invocation of the one-way ratchet effectively excused Congress from the "need [to] 'strike at all evils at the same time.'"²⁶³ Observing that Congress "may take one step at a time, addressing itself to the phase of the problem which seems most acute to [its] legislative mind," Justice Brennan swept away the objection.²⁶⁴

260. *Katzenbach v. Morgan*, 384 U.S. 641, 651-52 n.10 (1966).

261. *Id.* at 656.

262. *Id.* at 657.

263. *Id.* (quoting *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935)).

264. *Id.* (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

This aspect of *Morgan* was deeply ironic. Though no member of the Court bothered to take note, New York could not have deployed this equal protection argument but for the reverse incorporation doctrine of *Bolling v. Sharpe*. Moreover, *Morgan*'s resort to this bedrock principle of rational basis review contradicted the Warren Court's contemporaneously developed doctrine of strict scrutiny for state laws impairing the fundamental right to vote. The Court decided the leading case in this vein, *Harper v. Virginia Board of Elections*,²⁶⁵ in the same Term as *Morgan*.²⁶⁶ Justice Brennan acknowledged, but did not resolve, the tension.²⁶⁷ Had the Warren Court followed a different course in 1954, Justice Brennan might have been able to distinguish *Harper* and kindred cases by arguing that those decisions had rested on the Equal Protection Clause and therefore did not control an allegation of inequality within the federal Voting Rights Act. But *Bolling v. Sharpe*'s notion of reverse incorporation foreclosed such a strategy. If Fifth Amendment due process demands that the federal government respect the equivalent of Fourteenth Amendment equal protection, then federal laws affecting voting rights deserve the same level of scrutiny that would befall similar legislation at the state level. Alone among the Justices who voted to uphold section 4(e), Justice Douglas disassociated himself from *Morgan*'s resolution of the conflict.²⁶⁸

Footnote ten secured *Morgan*'s place in the civil rights jurisprudence of the Warren era. By liberating Congress from the ministerial task of merely ratifying judicial decisions and awarding it discretion to grant rights not yet recognized by the Supreme Court, *Morgan* represented the Warren Court's most aggressive effort to enlist Congress as a creative agent in the struggle over civil rights. In contrast with the Warren Court's assumption in other settings,²⁶⁹ this strategy treated elective politics as the preferred avenue for achieving substantive justice.²⁷⁰ The gambit foreshadowed Justice Brennan's

265. 383 U.S. 663 (1966).

266. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (holding that a state law conditioning the franchise upon payment of a poll tax violates equal protection).

267. See *Katzenbach v. Morgan*, 384 U.S. 641, 647, & n.6 (1966) (recognizing how the "Equal Protection Clause itself has been held," in cases such as *Harper*, "to forbid some state laws that restrict the right to vote"); *id.* at 654 n.15 (citing *Harper* and other cases for the proposition that "States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened").

268. *Id.* at 658-59 (separate statement of Douglas, J.).

269. *Cf., e.g., NAACP v. Button*, 371 U.S. 415, 429 (1963) ("Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (extolling "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" and describing "that principle . . . as a permanent and indispensable feature of our constitutional system").

270. *Cf. Perkins v. Lukens Steel Co.*, 310 U.S. 113, 131 & n.29 (1940) ("[L]egislatures are

later attempt to enlist state courts in a similar campaign to extend civil rights and liberties.²⁷¹ In this sense *Morgan* represents the mirror image of the Fourteenth Amendment as its ratifying Congress saw it. *Morgan* interpreted section 5 as granting Congress a new source of legislative authority even as the self-executing provisions of section 1 "[e]nlist[ed] the judiciary" as an auxiliary force in future struggles over civil rights.²⁷²

Morgan thus transforms section 5 into "a tool that permits the Congress to use its power to enact ordinary legislation to engage the Court in a dialogue about our fundamental rights, thereby 'forcing' the Justices to take a fresh look at their own judgments."²⁷³ Extended to its logical limits, *Morgan* confers "the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights."²⁷⁴ Indeed, in the immediate wake of *Morgan*, six Justices went so far as to suggest that the absence of state action no longer represented an obstacle to Congress's invocation of its section 5 power.²⁷⁵ The one-way ratchet is so symbolically alluring that *Morgan* has become an essential element of the cult of William J. Brennan, Jr., as the Warren Court's great doctrinal visionary. For "Brennan, more than any other single justice, most fully assimilated the full jurisprudential consequences of the Warren Court's revolutionary new vision of the American polity."²⁷⁶

ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." (quoting *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904)).

271. See generally William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Certain attributes of state law, such as retention elections, may curb judicial independence. Judith S. Kaye, *State Courts at the Dawn of a New Century*, 70 N.Y.U. L. REV. 1, 14 (1995).

272. Engel, *supra* note 214, at 128.

273. Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986).

274. Archibald Cox, *The Supreme Court, 1965 Term - Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966).

275. See *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., joined by Black, J., & Fortas, J., concurring) ("[T]here can now be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies - with or without state action - that interfere with Fourteenth Amendment rights."); *id.* at 782 (Brennan, J., joined by Warren, C.J., & Douglas, J., concurring in part and dissenting in part) ("A majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy."). This suggestion had no binding effect because a majority of Justices agreed that the complaint at issue had successfully alleged the degree of state-law complicity needed to satisfy the Fourteenth Amendment's traditional state action requirement. *Id.* at 756-57.

276. Robert C. Post, *William J. Brennan and the Warren Court*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 123, 129 (Mark Tushnet ed., 1993).

Indeed, "[t]o the extent that the [Warren] Court . . . has any intellectual legacy that is accessible to those trained in doctrine and not in ethics, it is Brennan who is responsible."²⁷⁷

At bottom, *Morgan* draws most of its notoriety from the one-way ratchet's latent subversion of *Marbury v. Madison*'s dogma that "[i]t is emphatically the province and duty of the judicial department to say what the law is."²⁷⁸ In so doing, *Morgan* epitomized and extended that proud tradition in American constitutional law, argument by *ipse dixit*. After all, *Marbury* grounded the entire institution of judicial review in a single adverb, "emphatically."²⁷⁹ She who lives by the *ipse dixit* shall die by the *ipse dixit*.²⁸⁰

But one must mourn for the Constitution. When juxtaposed, *Bolling* and *Morgan* are fatally incoherent. The first step in exposing the incompatibility of reverse incorporation with the one-way ratchet consists of treating both doctrines as variants of "the oldest question of constitutional law."²⁸¹ Although both *Bolling* and *Morgan* are "case[s] about federalism,"²⁸² they point in squarely opposite directions. Whereas *Bolling* reinvigorated the

277. Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 924 (1983).

278. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); accord, e.g., *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *United States v. Nixon*, 418 U.S. 683, 703 (1974); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); see, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-14, at 342 (2d ed. 1988) (arguing that *Morgan* displaced *Marbury* by prescribing judicial deference to congressional interpretation of the Constitution); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (same); Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right: Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 811-12 (1998) (noting the tension between *Marbury*'s vision of judicial supremacy and decisions that expand the scope of Congress's interpretive power); cf. *Oregon v. Mitchell*, 400 U.S. 112, 204-05 (1970) (Harlan, J., concurring in part and dissenting in part) (arguing that the Court's "duty . . . to make an independent determination whether Congress has exceeded its powers" extends beyond *Marbury*'s dictum and "inheres in the structure of the constitutional system itself" insofar as "Congress is subject to none of the institutional restraints imposed on judicial decisionmaking").

279. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 6 (1962) (noting the lack of textual evidence to support *Marbury*'s view of judicial review); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 22 (stating that the text of the Constitution does not indicate how laws are to be reviewed for constitutionality). But see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001) (marshaling historical support for *Marbury*'s conclusions on the nature of mandamus, the meaning of the Judiciary Act of 1789, and the meaning of Article III of the Constitution).

280. *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

281. *New York v. United States*, 505 U.S. 144, 149 (1992). See generally H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1993).

282. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). For a forceful description of *Morgan* from the perspective of federalism, see Cohen, *supra* note 278, at 604-09.

Fifth Amendment's Due Process Clause as a restraint on federal legislative power, *Morgan* aggressively expanded the power of Congress to enforce the Fourteenth Amendment. *Bolling* used *Brown*'s expansion of equal protection to constrain federal power, while *Morgan* ratified a congressional bid to protect the franchise more aggressively than the Supreme Court had in *Lassiter*. Reverse incorporation shackles the federal government in a fashion akin to the way incorporation of the Bill of Rights handicaps the states. In contrast, coextensive congressional enforcement of the Fourteenth Amendment represents a dramatic expansion in federal authority over civil rights.

Moving from federalism's structural perspective to a more overtly substantive assessment heightens the tension between *Bolling* and *Morgan*. Reverse incorporation under *Bolling* invokes a rigidly formal conception of equality. Subjecting the federal government and the states to identical equal protection analysis grows out of a very simple sense of fair play. In America, "'playing fair' means making everyone play by the same rules" – precisely what it meant when most Americans learned in kindergarten to "clean up your own mess" and not to "take things that aren't yours."²⁸³ A similar attraction to formal equality animated the Warren Court's criminal procedure decisions.²⁸⁴

In contrast, *Morgan*'s one-way ratchet implicitly endorses the antisubordination interpretation of equal protection.²⁸⁵ According to this theory, the equality that matters is substantive rather than formal; structural equality achieves nothing unless the law can bring historically downtrodden groups into parity with socially dominant groups. As if to express faith in the inevitability of progress through constitutional law,²⁸⁶ footnote ten represents a constitutional variant of the Voting Rights Act's nonretrogression principle.²⁸⁷ *Morgan* reads as though the only sin greater than America's fall

283. Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 481 (1997) ("These fundamentals reflect our liberal attachment to individualism and formal neutrality."). See generally ROBERT FULGHUM, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS* (1988).

284. See generally FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 27-66 (1970) (discussing the impact of racial equality on the Warren Court's "Due Process Revolution" in the constitutional law of criminal procedure).

285. On the antisubordination principle, see generally, for example, CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215-34 (1989); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1006-10 (1986); Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 60-63 (1990).

286. See, e.g., CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* (1991) (examining the widespread faith in the inevitability of progress and the limitations on that belief).

287. The nonretrogression principle prevents a federal court from approving a proposed

from grace was the failure to learn from the nation's historic shortcomings.²⁸⁸ "A man, though wise, should never be ashamed / of learning more, and must unbend his mind. / Have you not seen the trees beside the torrent, / the ones that bend them saving every leaf, / while the resistant perish root and branch?"²⁸⁹

Bolling's brand of formal equality and *Morgan's* narrative of learning through learning cannot coexist in formal, doctrinal terms. These doctrines, however intuitively appealing when considered individually, consume each other. *Bolling's* variant of formal equality is "irreconcilable" with any use of the one-way ratchet to implement "the antisubordination principle" and a "group-based approach to equal protection."²⁹⁰ *Morgan* established the principle that "legislation enacted pursuant to section five must not violate another constitutional right, because it would then fail the 'appropriate legislation' requirement" of that provision.²⁹¹ This is hardly an impressive demand; even the weakest standards of constitutional validity require compliance with independent constitutional commands.²⁹² But almost every use of the one-way ratchet struggles to clear even this modest hurdle. Virtually every effort to lift one historically downtrodden group *vis-à-vis* the dominant majority creates an incipient violation of equal protection, an obligation incorporated against the federal government through *Bolling's* interpretation of Fifth Amendment due process. *Morgan* itself showed how "ratcheting up" the rights of one group can be construed as "ratcheting down"

voting change that will lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976); *accord* *Bush v. Vera*, 517 U.S. 952, 983 (1996); *Shaw v. Reno*, 509 U.S. 630, 654 (1993).

288. 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 997 (Pantheon Books 1972) (1944) ("Nothing is irredeemable until it is past."), *quoted in* Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 934 (1994).

289. SOPHOCLES, *Antigone* (Elizabeth Wyckoff trans., 1954) *in* SOPHOCLES I, at 157, 183 (David Grene & Richard Lattimore eds., 1954). Formerly segregated public school systems, of course, are charged to eliminate the vestiges of such "racial discrimination . . . root and branch." *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968); *accord, e.g., Freeman v. Pitts*, 503 U.S. 467, 486 (1992); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 213 (1973); *Monroe v. Board of Comm'rs*, 391 U.S. 450, 458 (1968).

290. Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J.L. & POL. 381, 419 n.141 (2000).

291. Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 676 (2000).

292. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (acknowledging that "constitutional provisions" besides the Tenth Amendment "may provide an independent bar to the conditional grant of federal funds"); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (requiring that the regulation of symbolic conduct fall "within the constitutional power of the Government"); *cf. Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (declining to give full credit to "a free exercise claim unconnected with any communicative activity[,] . . . parental right," or other interest protected by another provision of the Constitution).

on the rights of another. "[F]rom the perspective of voters who could read English," section 4(e) of the Voting Rights Act "diluted their rights to control the outcomes of elections by adding in a number of unqualified voters who might tip the election scales."²⁹³ The point applies readily outside the voting context and is just as easily summarized: Every effort to "expand" civil rights for some may abridge the civil rights of others.

The 1993 case of *Heller v. Doe*²⁹⁴ illustrates this central contradiction. In *Addington v. Texas*,²⁹⁵ decided in 1979, the Supreme Court held that involuntary commitment for reasons other than criminal conviction could proceed, as a matter of due process, only upon presentation of clear and convincing evidence.²⁹⁶ *Heller* involved Kentucky's separate procedures for the involuntary commitment of the mentally retarded and of the mentally ill. Although Kentucky satisfied the *Addington* threshold for both classes, it provided an additional layer of protection for the mentally ill. The mentally ill, unlike the mentally retarded, could be involuntarily confined only upon a showing of proof beyond a reasonable doubt.²⁹⁷ In addition, family members could participate "as if a party" in involuntary commitment proceedings involving the mentally retarded, but not in proceedings involving the mentally ill.²⁹⁸

Like *Morgan*, *Heller* involved a selectively applied one-way ratchet. Kentucky boosted the procedural protection afforded to one socially disfavored class (the mentally ill) without elevating the protection afforded to another disfavored class (the mentally retarded). Kentucky at no point violated the mentally retarded class's entitlement, as a matter of due process, to a standard of review based on clear and convincing evidence.²⁹⁹ Although a majority of the Court eventually concluded that key differences between mental illness and mental retardation justified this procedural difference,³⁰⁰ no fewer than three Justices reasoned that Kentucky's "decision to provide [a]

293. POWE, *supra* note 172, at 264.

294. *Heller v. Doe ex rel. Doe*, 509 U.S. 312 (1993).

295. 441 U.S. 418 (1979).

296. *Addington v. Texas*, 441 U.S. 418, 433 (1979).

297. *Heller*, 509 U.S. at 317.

298. *Id.* at 315.

299. *Id.* at 323.

300. *Id.* at 321-25. The *Heller* majority acknowledged that mental retardation is typically manifested in childhood and is therefore easier to diagnose, *id.* at 321-22, that mentally retarded persons requiring involuntary commitment often compile a more extensive record of danger to themselves and to others, *id.* at 324, and that mental retardation involves "much less invasive" therapy than does mental illness, *id.* at 324. For extensive discussions of mental retardation in the context of capital sentencing, see *Atkins v. Virginia*, 536 U.S. 304, ___, 122 S. Ct. 2242, 2250-52 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989).

high burden of proof in involuntary commitment proceedings where illness is alleged" undermined the state's claim that distinctions between mental illness and retardation "can rationally justify provision of less protection" in cases involving alleged retardation.³⁰¹ Indeed, the *Heller* dissenters ultimately accused the majority of allowing Kentucky "to draw a distinction that is difficult to see as resting on anything other than the stereotypical assumption that the retarded are 'perpetual children.'³⁰²

C. Main Street U.S.A.

The third plank of the Warren Court consensus on civil rights was its least innovative – and, consequently, its most doctrinally secure.³⁰³ Title II of the Civil Rights Act of 1964 and the Warren Court decisions upholding it – *Heart of Atlanta Motel, Inc. v. United States*³⁰⁴ and *Katzenbach v. McClung*³⁰⁵ – buried the old ghosts of the *Civil Rights Cases* and implemented equal access to public accommodations after eighty-one years of frustration.³⁰⁶ *Heart of Atlanta* and *McClung* exploited the lone channel of legislative authority not foreclosed in the *Civil Rights Cases*: the power of Congress "[t]o regulate Commerce . . . among the several States."³⁰⁷ But the Commerce Clause jurisprudence that performed the heavy lifting had already been fully developed during the New Deal, particularly in the decisional triad of *NLRB v. Jones & Laughlin Steel Corp.*,³⁰⁸ *United States v. Darby*,³⁰⁹ and *Wickard v.*

301. *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 338-39 (1993) (Souter, J., dissenting).

302. *Id.* at 348 (Souter, J., dissenting).

303. Cf. Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 926 (2001) (describing the "perverse incentive[s]" that give rise to "original, creative, even brilliant" constitutional theories that are also "quite obviously wrong"). See generally Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987) (arguing that legal scholarship places too much emphasis on "brilliance" at the expense of common sense); Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (same).

304. 379 U.S. 241 (1964).

305. 379 U.S. 294 (1964).

306. See *supra* notes 201-08 and accompanying text (detailing the Court's rejection of congressional power to remedy private discrimination in the *Civil Rights Cases*).

307. U.S. CONST. art. I, § 8, cl. 3; see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 278 (1964) (Black, J., concurring) (stating that *Civil Rights Cases* did not prevent Congress from enacting antidiscrimination statutes under its Commerce Clause power); *The Civil Rights Cases*, 109 U.S. 3, 18-19 (1883) (leaving open the possibility of antidiscrimination legislation under Congress's power to regulate interstate commerce).

308. 301 U.S. 1 (1937).

309. 312 U.S. 100 (1941).

Filburn.³¹⁰ These three cases, especially *Jones & Laughlin*, are widely acknowledged as establishing the crucial turning point in the Supreme Court's Commerce Clause jurisprudence.³¹¹ By contrast, the Warren Court's Commerce Clause cases cut little if any new doctrinal ground. Even a quick glance at *Heart of Atlanta* and *McClung* suffices to demonstrate how unexceptional both cases really were.

Subjecting both the Heart of Atlanta Motel and Ollie's Barbecue to the Civil Rights Act breathed life into the established proposition that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."³¹² *McClung* in particular confirmed *Wickard v. Filburn*'s principle that a single actor's impact on interstate commerce, though "trivial by itself," may nevertheless fall within "the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, is far from trivial."³¹³ *Heart of Atlanta* reaffirmed an even older truism of Commerce Clause jurisprudence. After all, the Court had said nearly half a century earlier that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses . . . is no longer open to question."³¹⁴ (Indeed, the notion that Congress may direct its commerce power against immoral activity is at least as old as *Champion v. Ames*.³¹⁵) Both *Heart of Atlanta* and *McClung* adopted a rational basis standard of review for challenges to congressional uses of the commerce power.³¹⁶ *McClung* added one final observation: that "Congress . . . included

310. 317 U.S. 111 (1942). All three of these decisions figured in *Heart of Atlanta*'s catalogue of cases upholding uses of Congress's Commerce Clause power. *Heart of Atlanta*, 379 U.S. at 256-57.

311. See *United States v. Morrison*, 529 U.S. 598, 608 (2000) ("[I]n the years since *NLRB v. Jones & Laughlin Steel Corp.*, Congress has had considerably greater latitude . . . than our previous case law permitted."); *United States v. Lopez*, 514 U.S. 549, 556 (1995) ("*Jones & Laughlin Steel, Darby, and Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress."); *id.* at 573 (Kennedy, J., concurring) (describing *Jones & Laughlin* as the "case that seems to mark the Court's definitive commitment to the practical conception of the commerce power").

312. *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949); accord *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

313. *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942); accord *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964).

314. *Caminetti v. United States*, 242 U.S. 470, 491 (1917); accord *Heart of Atlanta*, 379 U.S. at 256.

315. See *Champion v. Ames*, 188 U.S. 321, 357 (1903) ("Congress for the purpose of guarding the people . . . against the 'widespread pestilence' of lotteries, may prohibit the carrying of lottery tickets from one state to another.").

316. See *McClung*, 379 U.S. at 303-04 ("[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce,

no formal findings" was "not fatal to the validity of the statute" under review.³¹⁷

Unlike *Bolling* and *Morgan*, therefore, *Heart of Atlanta* and *McClung* registered primarily political rather than doctrinal points. These decisions expanded racial integration beyond its origins in public school desegregation and voting rights and made its impact felt squarely at the motel, the barbecue shack, and every other business on Main Street U.S.A. The suggestion that the Civil Rights Act of 1964 had been passed "to relieve a burden on interstate commerce [was] so much hogwash," for Congress plainly intended to "control discrimination by individuals."³¹⁸ If the Warren Court covered any new ground in Commerce Clause jurisprudence, it did so in *Maryland v. Wirtz*,³¹⁹ which developed the "enterprise concept" in upholding the extension of the Fair Labor Standards Act³²⁰ to hospitals, institutions, and schools operated by state and local governments.³²¹ *Wirtz*'s second significant holding, that the Tenth Amendment afforded these governments no immunity against federal regulation,³²² would become the *casus belli* in the Burger Court's leading foray into the law of federalism. *Wirtz* also withheld judgment on the ability of Congress to abrogate the states' sovereign immunity under the Eleventh Amendment.³²³ The Rehnquist Court, of course, would eventually develop a deep body of case law on that topic.³²⁴ *Wirtz*'s travails notwithstanding, the

our investigation is at an end."); *Heart of Atlanta*, 379 U.S. at 258 ("The only questions are: . . . (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."); *id.* at 252 ("[T]he means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution The Constitution requires no more.").

317. *McClung*, 379 U.S. at 304 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

318. RICHARD CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA* AND *MCCLUNG* CASES 115 (2001) (quoting Moreton Rolleston, counsel for the Heart of Atlanta Motel).

319. 392 U.S. 183 (1968).

320. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1964 & Supp. II 1968) (current version at 29 U.S.C. § 201 (1994 & Supp. V 1999)).

321. *Maryland v. Wirtz*, 392 U.S. 183, 192-93 (1962), *overruled by* 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).

322. *See id.* at 197 ("[I]f a state is engaging in economic activities that are validly regulated by the federal government when engaged in by private parties, the state too may be forced to conform its activities to federal regulation.").

323. *Id.* at 199-200.

324. *See infra* notes 668-79 and accompanying text (describing the elaboration of Eleventh Amendment jurisprudence by the Rehnquist Court).

Warren Court's extension of the civil rights agenda into the private sphere would remain a *fait accompli*.

The Civil Rights Act cases do illuminate the contrast between *Bolling* and *Morgan*. *Heart of Atlanta* and *McClung* continued a trend that had begun during the New Deal. Under Chief Justices Hughes and Stone, the Court had effectively forsworn two potent sources of judicial leverage over Congress. Soon after the celebrated "switch in time" of *West Coast Hotel Co. v. Parrish*,³²⁵ the Court jettisoned the substantive component of Fifth Amendment due process.³²⁶ At the same time, *Jones & Laughlin, Darby*, and *Filburn* also abandoned any serious effort to enforce internal limits on Congress's power to regulate interstate commerce. The Warren Court not only relied upon these Commerce Clause cases in upholding the Civil Rights Act; it also adopted the same rational basis standard of judicial review for federal legislation arising under the Commerce Clause and under section 5 of the Fourteenth Amendment.³²⁷ Within this pattern of deference to the federal government's legislative prerogative, the lone exception was *Bolling*. *Heart of Atlanta* and *McClung* merely reinforced the doctrinal incongruity of subjecting Congress to closer judicial scrutiny in the name of due process and equal protection while simultaneously expanding congressional authority to enforce those very principles, at least as against the states.

However, whatever the legal infirmities of the Nickel and Five, *Bolling*, *Morgan*, and the Civil Rights Act duology pointed uniformly toward heightened vigilance against racial discrimination – and toward the political triumph of the Warren Court's civil rights agenda. Though *Bolling* and *Morgan* might have been legally incongruent, the confluence of those decisions promised great political success. "Shackling" the federal government gave *Brown* greater legitimacy, especially in the face of a Cold War in which the opposition tried to use the example of Southern segregation to discredit American culture. The persistent "gap between promise and achievement in the United States" would demoralize, even repulse, potential allies abroad, "particularly in what would become known as the Third

325. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (holding that a state legislature has the power to set minimum wages), *overruling* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

326. *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 125 (1941) (holding that a federal minimum wage law did not deny due process under the Fifth Amendment); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 148 (1938) (holding that a federal ban on the interstate shipment of filled milk did not infringe Fifth Amendment due process rights).

327. *Katzenbach v. Morgan*, 384 U.S. 641, 651, 653 n.11 (1966).

World.³²⁸ "Racism thus became unpatriotic";³²⁹ opposition to it by any judicial means necessary became a Cold War imperative.³³⁰ But as the Bricker Amendment showed, there lurked the dangerous prospect that hostile congressional forces could transmogrify *Morgan* into an instrument of racial oppression. This menace explains why Justice Brennan took pains in footnote ten of that opinion to ensure that Congress could not roll back judicial advances in civil rights.³³¹ Earl Warren, who had crossed the Pacific to amass international credentials in preparation for his failed presidential campaign,³³² proved uniquely suited to play the combined role of Cold Warrior and civil rights champion.

And so these three abode, *Bolling*, *Morgan*, and the Warren Court's Commerce Clause jurisprudence. That these cases were in significant respects impossible to reconcile is neither surprising nor inescapably debilitating, for "[t]he necessity of choosing between absolute claims is . . . an inescapable characteristic of the human condition."³³³ Indeed, a "clash of doctrines is not a disaster – it is an opportunity."³³⁴ The task of harmonizing the constituent parts of the Nickel and Five, however, would fall upon the Warren Court's successors.

III. The Nixonburger Interregnum

Never ascribe to malice that which is adequately explained by stupidity.

Folk aphorism known as "Hanlon's Razor"³³⁵

328. CRAY, *supra* note 8, at 276.

329. *Id.*

330. *See generally* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

331. *Morgan*, 384 U.S. at 651-52 n.10.

332. *See* CRAY, *supra* note 8, at 219 (describing Warren's gradual acquisition of "competence in the international arena" on par with "that of Ohio Senator Robert A. Taft," from his involvement in "the founding session of the United Nations in San Francisco" to a 1951 encounter in Japan with the wounded of California's division in the Korean War).

333. Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 169 (1969).

334. ALFRED NORTH WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 266 (1929).

335. "Hanlon's Razor" is quoted in many sources, most of them online. One printed source is ARTHUR BLOCH, *MURPHY'S LAW BOOK TWO: MORE REASONS WHY THINGS GO WRONG!* 52 (1980). A very similar quotation, "You have attributed conditions to villainy that simply result from stupidity," appears in a science fiction story by Robert A. Heinlein. ROBERT A. HEINLEIN, *Logic of Empire*, in *THE GREEN HILLS OF EARTH* 195, 247 (1951). The maxim's popularity among hackers suggests that "Hanlon" is simply a corruption of "Heinlein." Numerous other online sources attribute the following version of the proverb to Napoleon: "Never ascribe to malice that which is adequately explained by incompetence." Research in English- and French-language sources, however, failed to unearth any firm documentation that the Emperor of

A. Nixon as Nemesis

Earl Warren's judicial career ended much as it had begun: as a byproduct of Republican presidential politics and, in particular, of Richard Nixon's machinations. It is gross understatement to mention, as one of the Chief Justice's biographers has, that "Warren's distrust of [Richard] Nixon was long-standing."³³⁶ Earl Warren never lost his hatred for "Tricky Dick," whom he called "a crook and a thief."³³⁷ Over its long course, the bitter rivalry between these California Republicans warped the Supreme Court.

The June 5, 1968 assassination of Democratic candidate Robert F. Kennedy gave Richard Nixon, the Republican frontrunner, "an unanticipated political advantage" in the 1968 presidential campaign.³³⁸ The suddenly palpable prospect of a Nixon presidency accelerated Chief Justice Warren's retirement schedule.³³⁹ Hoping to enable President Johnson to appoint his successor, Earl Warren tendered his resignation "as Chief Justice of the United States effective at [the President's] pleasure."³⁴⁰ That summer, however, Richard Nixon's presidential campaign pounded the Warren Court in order to win support from "southerners still smarting from *Brown*, . . . whites in northern cities worried about rising crime rates, [and] country folk who had lost their veto power in state legislatures."³⁴¹ Conservative Republicans assailed what they perceived as Chief Justice Warren's attempt to manipulate the choice of his own successor.³⁴²

President Johnson made a final, fatal return to his inner political circle. He tapped two cronies for the Court, designating Associate Justice Abe Fortas as Earl Warren's successor and nominating Fifth Circuit Judge Homer Thornberry to fill what would be Fortas's vacant seat.³⁴³ The Fortas nomination became a fiasco. Justice Fortas endured a catastrophic barrage of

France ever uttered this phrase.

336. POLLACK, *supra* note 52, at 9.

337. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY* 21 (1983) (quoting Earl Warren, Jr.); Hutchinson, *supra* note 277, at 927; *see also* POLLACK, *supra* note 52, at 286-88 (detailing the longstanding antagonism between Nixon and Warren).

338. POLLACK, *supra* note 52, at 275.

339. CRAY, *supra* note 8, at 494; POLLACK, *supra* note 52, at 275.

340. CRAY, *supra* note 8, at 496.

341. *Id.* at 497-98; *see also* POLLACK, *supra* note 52, at 269 ("Opposition to *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] became a campaign rallying cry . . . [and] a major issue in Richard Nixon's presidential campaign in 1968.").

342. CRAY, *supra* note 8, at 498-99; POLLACK, *supra* note 52, at 276.

343. CRAY, *supra* note 8, at 499; POLLACK, *supra* note 52, at 278.

questions before a hostile Senate Judiciary Committee³⁴⁴ and eventually came under fire for having received \$15,000 in exchange for conducting nine seminars at American University on social aspects of the law.³⁴⁵ Vanquished by a Senate filibuster, Justice Fortas asked President Johnson to withdraw his nomination on October 2.³⁴⁶ Aware that he would "leave the impression he had elected to retire because he feared Richard Nixon would appoint his successor," Chief Justice Warren did not withdraw his resignation.³⁴⁷ On Monday, October 7, less than a week after the implosion of the Fortas nomination, Earl Warren presided over the Supreme Court in his sixteenth and final Term as Chief Justice.³⁴⁸

Chief Justice Warren could do little besides watch Richard Nixon sweep toward the presidency. When Nixon's "mean-spirited presidential campaign" targeted "Attorney General Ramsey Clark – as if he were responsible for crime in local communities" – an angry Earl Warren took the unprecedented step of rebuking a presidential candidate.³⁴⁹ But Nixon would not be denied the White House – or an opportunity to reshape the Supreme Court to his liking. "The chief justice saw his worst fear realized: Richard Nixon was president-elect, and the question of Earl Warren's retirement 'at the pleasure of the president'" lay entirely in Nixon's hands.³⁵⁰

In one of the twentieth century's most ironic political moments, Chief Justice Earl Warren swore in Richard M. Nixon as President on January 20, 1969. But for Nixon, the Chief Justice told a friend, Earl Warren might have taken that oath in 1953.³⁵¹ President-elect Nixon had agreed that Chief Justice Warren would continue to preside over the Supreme Court until the end of the 1968 Term.³⁵² Nixon held one final trump card, however. Weeks before the end of the Term, a *Life* magazine article revealed that Justice Fortas accepted a \$20,000 annual fee as director of financier Louis Wolfson's charitable foundation.³⁵³ Justice Fortas was "on a lifetime retainer of a man later convicted of securities fraud."³⁵⁴ Nixon's Justice Department threatened

344. CRAY, *supra* note 8, at 500-01; POLLACK, *supra* note 52, at 280-81.

345. CRAY, *supra* note 8, at 501; POLLACK, *supra* note 52, at 281.

346. CRAY, *supra* note 8, at 501; POLLACK, *supra* note 52, at 282.

347. CRAY, *supra* note 8, at 502.

348. *Id.*

349. *Id.* at 503-04.

350. *Id.* at 504.

351. *Id.* at 505; *see* SCHWARTZ, *supra* note 337, at 723 (identifying Warren's confidant as Herbert G. Klein).

352. CRAY, *supra* note 8, at 505; POLLACK, *supra* note 52, at 285.

353. CRAY, *supra* note 8, at 508-10; POLLACK, *supra* note 52, at 288-90.

354. CRAY, *supra* note 8, at 509.

impeachment. Justice Fortas's resignation on May 14, 1969, coupled with Warren's retirement, opened the "path . . . for Nixon to fill not one but two Court vacancies."³⁵⁵ On June 23, 1969, before a Supreme Court audience, Earl Warren presented Warren E. Burger as the fifteenth Chief Justice of the United States.³⁵⁶

And so the "Nixonburger" Court displaced the Warren Court. Richard Nixon became the first presidential candidate to treat the composition of the Supreme Court and the content of its decisions as campaign fodder. "Some of our judges have gone too far," he asserted, "in assuming unto themselves a mandate which is not there, and that is, to put their social and economic ideas into their decisions."³⁵⁷ President Nixon would eventually appoint four Justices – Warren E. Burger, Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist. These four were merely the first among eleven consecutive Supreme Court appointments by Republican Presidents; a full quarter-century, from October 2, 1967 (Thurgood Marshall) to August 10, 1993 (Ruth Bader Ginsburg), passed between Supreme Court appointments by Democratic Presidents. Having prevailed on the presidential stage that proved to be Earl Warren's lone political defeat, Richard Nixon stood on the verge of remaking American constitutional law through raw political will.

B. *The Nickel and Five Survives*

Despite Nixon's lifelong rivalry with Warren, the "Nixonburger" Court never did carry out its threatened revolution. The subtitle of a prominent collection of essays on the Burger Court says it all: "The Counter-Revolution That Wasn't."³⁵⁸ "The Burger Court, far from reversing or otherwise undoing its predecessor Warren Court, was marked by a generally surprising penchant for judicial activism, even in such unexpected areas as civil rights and civil liberties."³⁵⁹ Rather than "engage in wholesale reversals of liberal precedents," a Court dominated by Nixon appointees succeeded at most in "limit[ing] rights for criminal defendants" but "ultimately disappointed conservatives" by moving "in liberal directions on so many other important issues, most notably

355. POLLACK, *supra* note 52, at 290.

356. CRAY, *supra* note 8, at 514.

357. MELVIN I. UROFSKY, *THE CONTINUITY OF CHANGE: THE SUPREME COURT AND INDIVIDUAL LIBERTIES, 1953-1986*, at 18 (1991) (quoting Nixon).

358. *See generally* *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983).

359. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 349 (3d ed. 1992).

in abortion and affirmative action.³⁶⁰ As for the threatened demolition of the Warren Court's civil rights legacy, the Burger Court can be accused at most of approaching that task with "all deliberate speed."³⁶¹

In the civil rights arena, the Burger Court did not eclipse, but rather extended, the Warren Court. Differences in these Courts' Eighth Amendment and equal protection decisions are illustrative. Despite acknowledging "the arguments . . . against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment," Chief Justice Warren himself wrote that "the death penalty . . . cannot be said to violate the constitutional concept of cruelty."³⁶² It was the Burger Court that suspended every capital sentence in the nation.³⁶³ In imposing the capital punishment moratorium, the Burger Court disregarded year-old precedent squarely on point³⁶⁴ and, in so doing, outperformed the Warren Court in "cast[ing] overboard numerous settled decisions, and indeed even whole areas of law, with an unceremonious 'heave-ho.'"³⁶⁵ The Warren Court's successors have given real meaning to the old Chief Justice's observation that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³⁶⁶

Changes in equal protection doctrine were even more dramatic. Whereas the Warren Court had succeeded in adding exactly one class – bastards³⁶⁷ – to the list of "discrete and insular" groups warranting special

360. Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1116 (1994).

361. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

362. *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Warren, C.J.) (dictum).

363. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam).

364. *McGautha v. California*, 402 U.S. 183, 208 (1971).

365. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 109 (1993) (Scalia, J., concurring).

366. *Trop*, 356 U.S. at 101 (plurality opinion of Warren, C.J.); *accord, e.g., Atkins v. Virginia*, 536 U.S. 304, ___, 122 S. Ct. 2242, 2247 (2002) (subjecting cruelty claims to standards "that currently prevail"); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (stating that "[n]o static 'test' governs the determination of whether a certain punishment is cruel and unusual"); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *id.* at 269-70 (Brennan, J., concurring); *id.* at 327, 329 (Marshall, J., concurring); *id.* at 383 (Burger, C.J., dissenting); *id.* at 409 (Blackmun, J., dissenting); *see id.* at 425 (Powell, J., dissenting) (acknowledging that "[t]he plurality opinion in *Trop v. Dulles* . . . in large measure . . . provides the foundation for the present attack on the death penalty"); *id.* at 429 (Powell, J., dissenting).

367. *See Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (invalidating a state statute that denied illegitimate children the opportunity to recover damages for the wrongful death of their mother); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968) (finding no rational basis for the denial under state law of recovery for the wrongful death of an illegitimate son).

judicial solicitude,³⁶⁸ the Burger Court adopted some form of heightened scrutiny for sex-based classifications³⁶⁹ and for alienage. Under these conditions, the Nickel and Five survived. Despite the doctrinal weaknesses underlying *Bolling* and *Morgan*, the Burger Court did not affirmatively dismantle any of the components of the Warren Court's civil rights consensus. The Burger Court never questioned the authority of *Bolling* or *Morgan*. Overruling either case would have been, in *Bolling*'s words, "unthinkable."

By the same token, the Burger Court did not stretch *Bolling* and *Morgan* to their logical limits. In particular, alienage cases of that era exposed subtle differences between Fifth Amendment due process and Fourteenth Amendment equal protection – nuances that *Bolling* had missed. The 1971 case of *Graham v. Richardson*³⁷⁰ recognized for the first time that aliens as a class "are a prime example of a 'discrete and insular' minority" and that classifications on that basis therefore merit "close judicial scrutiny."³⁷¹ Two years later, the Court relied upon *Graham* to invalidate not only a state law restricting competitive civil service positions to United States citizens,³⁷² but also a state law excluding aliens from the practice of law.³⁷³

The real test came in a pair of 1976 controversies that contested whether "overriding national interests may provide a justification for a citizenship requirement in . . . federal [law] even though an identical requirement may not be enforced by a State."³⁷⁴ An affirmative answer would contradict *Bolling*'s assertion that "it would be unthinkable that" Fifth Amendment due process "would impose a lesser duty on the Federal

368. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

369. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *cf. Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality opinion of Brennan, J.) (declaring "classifications based upon sex . . . inherently invidious" and subjecting such classifications "to strict judicial scrutiny"); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (invalidating a legal "difference in the sex of competing applicants" for lacking "a rational relationship to a [legitimate] state objective").

370. 403 U.S. 365 (1971).

371. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *Carolene Prods.*, 304 U.S. at 152 n.4).

372. *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973). *Sugarman* did permit the states to deny aliens the "right to vote or to hold high public office," giving the state particularly wide latitude to regulate "functions that go to the heart of representative government." *Id.* at 647; *accord Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

373. *See In re Griffiths*, 413 U.S. 717, 724 (1973) (finding committee failed to show relevance of citizenship to lawyers' ability to represent clients). *Sugarman* and *Griffiths* were both decided on June 25, 1973.

374. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976).

Government" than Fourteenth Amendment equal protection imposes on the states.³⁷⁵ But the Constitution vests the power to regulate immigration and naturalization in the federal government to the exclusion of the states,³⁷⁶ and this intrinsically political federal power is uniquely ill-suited to extensive judicial review.³⁷⁷ *Mathews v. Diaz*,³⁷⁸ which involved the federal equivalent of *Graham's* state-law restriction on welfare payments to aliens, declined to infer "invidious[ly]" "disparate treatment" from the "fact that an Act of Congress treats aliens differently from citizens."³⁷⁹ After observing that classifications affecting aliens "are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary,"³⁸⁰ *Diaz* concluded that "the relationship between aliens and the States" and the relationship "between aliens and the Federal Government" were "significantly" and sufficiently different to warrant different "equal protection analysis" in the two settings.³⁸¹

Hampton v. Mow Sun Wong,³⁸² the second alienage case decided on June 1, 1976, provided an even more extensive justification for "selective federal legislation that would be unacceptable for an individual State."³⁸³ *Mow Sun Wong* was the federal analogue of *Sugarman*; it involved a Civil Service Commission regulation barring noncitizens, including lawfully admitted resident aliens, from competitive positions in the federal civil service.³⁸⁴ Justice Stevens reasoned, however, "that the paramount federal power over immigration and naturalization forecloses a simple extension of the holding in *Sugarman*."³⁸⁵ *Mow Sun Wong* recognized what *Bolling* categorically denied: that the equal protection component within "the Fifth Amendment's guarantee of due process" and the Equal Protection Clause of the Fourteenth Amendment "are not always coextensive."³⁸⁶ Despite the differences in "the language of the two Amendments," Fifth Amendment due process and Fourteenth Amendment equal protection do "hav[e] the same

375. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

376. *E.g.*, *Truax v. Raich*, 239 U.S. 33, 42 (1915).

377. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (noting that the power to exclude or expel aliens greatly affects international relations).

378. 426 U.S. 67 (1976).

379. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

380. *Id.* at 81.

381. *Id.* at 84-85.

382. 426 U.S. 88 (1976).

383. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

384. *Id.* at 90.

385. *Id.*

386. *Id.*

significance" when federal law governs "only a limited territory, such as the District of Columbia, or an insular possession," or "when there is no special national interest" at stake.³⁸⁷ Neither condition applied to a nationwide rule restricting aliens' eligibility for positions in the federal civil service.

Yet *Mow Sun Wong* did not drain all critical power from the equal protection component of Fifth Amendment due process. "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State," the Court held, "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."³⁸⁸ Because exclusion from the federal civil service effected the "deprivation of an important liberty" from a broad class of lawfully admitted resident aliens, the Court concluded, due process requires that such a decision, if made by a lower-level agency such as the Civil Service Commission rather than by the President or by Congress, "be justified by reasons which are properly the concern of that agency."³⁸⁹ This highly intricate elaboration of *Bolling's* "reverse incorporation" principle, however, had virtually no impact on the rest of the Burger Court's jurisprudence. In cases not involving alienage classifications, the Court continued to insist that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."³⁹⁰

As for *Morgan*, the second leg of the Warren Court's civil rights triad, the Burger Court entertained two landmark cases concerning the scope of Congress's power to enforce the Fourteenth Amendment. In *Oregon v. Mitchell*,³⁹¹ a horribly splintered Court reviewed three provisions of the Voting Rights Act Amendments of 1970.³⁹² One provision lowered the

387. *Id.* (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926)); *see also id.* at 100 n.17 ("Since the Due Process Clause appears in both the Fifth and Fourteenth Amendments, whereas the Equal Protection Clause does not, it is quite clear that the primary office of the latter differs from, and is additive to, the protection guaranteed by the former.").

388. *Id.* at 103.

389. *Id.* at 116.

390. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *accord Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (relying on *Buckley* for the proposition that "both Amendments require the same type of analysis"); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

391. 400 U.S. 112 (1970).

392. *See Oregon v. Mitchell*, 400 U.S. 112, 117 (1970) (Black, J.) (framing issues rising under the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1973-1973bb-1 (1994))).

minimum voting age in both state and federal elections from twenty-one to eighteen. Another imposed a five-year moratorium on literacy tests in state and federal elections in any area in which the Voting Rights Act of 1965 had not already banned such tests. Finally, a third provision prescribed uniform national rules for absentee voting in presidential and vice-presidential elections, effectively forbidding states from using state residency requirements to disqualify voters in such elections.³⁹³

No Justice voted to strike the literacy test provisions, and all members of the Court except Justice Harlan voted to uphold the absentee ballot provisions.³⁹⁴ *Mitchell's* bitterest controversy therefore centered on the voting age provisions. Justice Black's position controlled the fate of these provisions. Together with Justices Douglas, Brennan, White, and Marshall, he concluded that Congress could enfranchise eighteen-year-olds in national elections.³⁹⁵ Justice Black formed a separate alliance, again solely as to result, with Chief Justice Burger and Justices Harlan, Stewart, and Blackmun to invalidate the imposition of an eighteen-year-old voting age in state and local elections.³⁹⁶ On the whole, *Mitchell* upheld the eighteen-year-old vote provisions as applied to federal elections and invalidated them as applied to state and local elections.

Within the coalition to uphold the eighteen-year-old federal voting age, Justice Black alone rested on Congress's Article I, section 4 power to "make or alter . . . Regulations" affecting "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."³⁹⁷ Relying on *Morgan's* description of section 5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,"³⁹⁸ Justice Douglas was willing to assume that Congress could have "conclude[d] that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection."³⁹⁹ Speaking for himself as well as Justices White and Marshall, Justice Brennan characterized the question before the Court not as "one of judicial power under the Equal Protection Clause," but rather as a "question [of] . . . the scope of congressional power under § 5 of the Fourteenth

393. *Id.* (Black, J.).

394. *Id.* at 118-19 (Black, J.).

395. *Id.* at 118 (Black, J.).

396. *Id.* (Black, J.).

397. U.S. CONST. art. I, § 4, cl. 1; *see Mitchell*, 400 U.S. at 123-24 (Black, J.) (reasoning that Congress has "ultimate supervisory power over congressional elections").

398. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *accord Oregon v. Mitchell*, 400 U.S. 112, 141 (1970) (Douglas, J., concurring in the judgment in part and dissenting in part) (quoting language from *Morgan*).

399. *Mitchell*, 400 U.S. at 141 (Douglas, J., concurring in the judgment in part and dissenting in part).

Amendment."⁴⁰⁰ Invoking *Morgan* for the proposition that "Section 5 empowers Congress to make its own [factual] determination[s],"⁴⁰¹ Justice Brennan concluded that Congress has "ample power" under section 5 to lower the voting age in order to remedy perceived discrimination.⁴⁰²

To the extent that *Morgan* might have been interpreted as giving Congress an independent, substantive power to define civil rights, that suggestion garnered no more than four votes in *Mitchell*. Justice Black's principal opinion in *Mitchell* summarized what appeared to be the post-Warren Court consensus regarding the "limitations upon Congress' power to enforce the guarantees of the Civil War Amendments".⁴⁰³

First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination, or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.⁴⁰⁴

For Justice Black, the second of these three limitations proved crucial to the constitutionality of the 1970 amendments' voting age provisions. Implying that "state and local elections" represented "a domain . . . exclusively reserved by the Constitution to the [States]," he regarded as fatal Congress's failure to make "legislative findings that the twenty-one-year-old vote requirement [had been] used by the [States] to disenfranchise voters on account of race."⁴⁰⁵

Four other members of the *Mitchell* Court shared Justice Black's reluctance to expand section 5 into a general grant of legislative authority, especially with respect to matters committed to the jurisdiction of the states.

400. *Id.* at 246 (Brennan, J., concurring in the judgment in part and dissenting in part).

401. *Id.* at 248 (Brennan, J., concurring in the judgment in part and dissenting in part) (citing *Morgan*, 384 U.S. at 654-56).

402. *Id.* at 280-81 (Brennan, J., concurring in the judgment in part and dissenting in part).

403. *Id.* at 128 (Black, J.).

404. *Id.* at 128-29 (Black, J.) (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) and other cases).

405. *Id.* at 130 (Black, J.). Justice Black added that he had "serious[] doubt that such a finding, if made, could be supported by substantial evidence." *Id.* (Black, J.).

As he had in *Morgan*,⁴⁰⁶ Justice Harlan rejected Justice Brennan's aggressive interpretation of section 5.⁴⁰⁷ He took particular issue with the suggestion that *Morgan* authorized Congress to grant by statute any civil right as long as it does not dilute judicially recognized rights.⁴⁰⁸ "To allow a simple majority of Congress to have final say on matters of constitutional interpretation," he concluded, is "fundamentally out of keeping with the constitutional structure."⁴⁰⁹ According to Justice Harlan, Justice Brennan's emphasis on the factfinding competence of Congress *vis-à-vis* the federal judiciary was wholly inapposite in light of the Constitution's commitment "to the States" of discretionary choices over "voter qualifications."⁴¹⁰

Writing for himself, the Chief Justice, and Justice Blackmun, Justice Stewart also rejected the proposition that *Morgan* "established the power of Congress, under § 5 of the Fourteenth Amendment, to nullify state laws requiring voters to be 21 years of age or older if Congress could rationally have concluded that such laws are not supported by a 'compelling state interest.'"⁴¹¹ Justice Stewart distinguished the 1970 amendments' voting age provision from the literacy test provision at issue in *Morgan*. The voting age provision, he reasoned, required the Court to construe section 5 as granting Congress "the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are 'compelling.'"⁴¹² He accordingly rejected what he considered "an enormous extension of [*Morgan's*] rationale" into a substantive interpretation of section 5.⁴¹³

The Twenty-Sixth Amendment, which not only protected the "right of citizens . . . who are eighteen years of age or older[] to vote" against infringement "by the United States or by any State on account of age," but also granted "Congress . . . power to enforce this [guarantee] by appropriate legislation,"⁴¹⁴ conclusively removed *Mitchell* as an obstacle to a nationally

406. See *Morgan*, 384 U.S. at 667-68 (Harlan, J., dissenting) (stating that section 5 does not give Congress "power to define the substantive scope of the Amendment," but rather leaves to the judiciary the task of determining whether a constitutional violation has occurred).

407. *Oregon v. Mitchell*, 400 U.S. 112, 154-55 (1970) (Harlan, J., concurring in part and dissenting in part).

408. *Id.* at 205-06 (Harlan, J., concurring in part and dissenting in part).

409. *Id.* at 205 (Harlan, J., concurring in part and dissenting in part).

410. *Id.* at 208 (Harlan, J., concurring in part and dissenting in part).

411. *Id.* at 293 (Stewart, J., concurring in part and dissenting in part).

412. *Id.* at 296 (Stewart, J., concurring in part and dissenting in part).

413. *Id.* (Stewart, J., concurring in part and dissenting in part).

414. U.S. CONST. amend. XXVI.

prescribed minimum voting age. The exact scope of the section 5 power and its interpretation in *Morgan*, however, remained open. The Burger Court took pains not to contradict the Warren Court's inchoate suggestion "that Congress may . . . proscribe purely private conduct under § 5 of the Fourteenth Amendment."⁴¹⁵ At most, the Burger Court counseled a more cautious approach to statutory interpretation in the shadow of potentially cataclysmic constitutional issues. Whereas the Warren Court had construed a federal anticonspiracy statute "to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it,"⁴¹⁶ a comparable Burger Court decision argued that the "constitutional shoals that would lie in the path of interpreting" a federal anticonspiracy statute "as a general federal tort law can be avoided . . . by requiring, as an element of the cause of action, [proof] of invidiously discriminatory motivation" on the part of private actors.⁴¹⁷ The use of clear statement rules does represent a less than transparent effort to develop constitutional law,⁴¹⁸ and that strategy would eventually bear fruit in the Rehnquist Court's campaign to reconfigure the jurisprudence of federalism. Neither *Mitchell* nor any other section 5 decision rendered by the Burger Court, however, directly undermined *Morgan* and its one-way ratchet.

Indeed, the Burger Court discovered a new use for Congress's section 5 powers. The 1974 case of *Edelman v. Jordan*⁴¹⁹ intimated that a state's immunity from money damages granted by a federal court (a doctrine that the Supreme Court construed in 1890 from the penumbras and emanations of the Eleventh Amendment)⁴²⁰ could be waived by an appropriate demonstration of congressional intent to abrogate this species of sovereign immunity.⁴²¹ Two years later, the Court – speaking, surprisingly, through then-Justice

415. *District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973) (citations omitted).

416. *United States v. Price*, 383 U.S. 787, 805 (1966).

417. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); cf. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (applying clear statement rule in interpreting an alleged congressional abrogation of state sovereign immunity); *Employees v. Dept. of Health & Welfare*, 411 U.S. 279, 285-87 (1973) (same); *United States v. Bass*, 404 U.S. 336, 337, 347 (1971) (construing a statute that punished "[a]ny person who . . . receives, possesses, or transports in commerce or affecting commerce [any] firearm" so that "the phrase 'in commerce or affecting commerce'" [would] be an element "of all three offenses," in order to avoid raising doubts over the statute's constitutionality under the Commerce Clause).

418. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992).

419. 415 U.S. 651 (1974).

420. See *Hans v. Louisiana*, 134 U.S. 1, 15-17 (1890) (holding that a state may not be sued by one of its own citizens without its consent).

421. *Edelman v. Jordan*, 415 U.S. 651, 674 (1974).

Rehnquist – found that Congress had indeed satisfied the condition suggested by but not discovered in *Edelmen*: abrogation of the states' Eleventh Amendment sovereign immunity. *Fitzpatrick v. Bitzer*⁴²² observed "that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."⁴²³ Thanks to the substantive limits on state sovereignty embodied in the provisions of the Fourteenth Amendment, *Fitzpatrick* gave Congress broad discretion, "in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, [to] provide for private suits against States or state officials which are constitutionally impermissible in other contexts."⁴²⁴ Against the backdrop of what was then undisturbed Warren Court precedent establishing the authority of Congress to effect this abrogation through its Commerce Clause power,⁴²⁵ *Fitzpatrick* must have seemed utterly unexceptional. William H. Rehnquist, the future architect of a counterrevolution in the law of federalism, must have been occupied elsewhere.⁴²⁶ The explosiveness of *Fitzpatrick*'s underlying principle would lie dormant for another two decades.

The Court resumed the more direct strategy of confronting *Morgan*'s contested legacy in a pair of 1980 cases involving preclearance under the Voting Rights Act of 1965. A decade removed from the tumult of *Mitchell*, the Burger Court took a far more sanguine view of Congress's power to enforce the Reconstruction amendments. In *City of Mobile v. Bolden*,⁴²⁷ a plurality of the Court announced that both section 2 of the Fifteenth Amendment and section 5 of the Fourteenth Amendment authorize federal

422. 427 U.S. 445 (1976).

423. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (citations omitted).

424. *Id.*

425. See *Parden v. Terminal Ry. Co.*, 377 U.S. 184, 190-92 (1964) (holding that Congress may use its power to regulate interstate commerce to overcome the sovereign immunity of the states), *overruled by* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *cf. Fitzpatrick*, 427 U.S. at 452-53 (noting the difference between the Commerce Clause legislation at issue in *Parden* and Congress's invocation of its section 5 power in *Fitzpatrick*).

426. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (Rehnquist, J.) (holding that the Tenth Amendment requires Congress to refrain from abridging the ability of the states to control "how essential decisions regarding the conduct of integral government functions are to be made"), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The Court decided *National League of Cities* on June 24, 1976, four days before *Fitzpatrick*.

427. 446 U.S. 55 (1980).

voting rights legislation only in response to purposeful discrimination.⁴²⁸ On the same day, the Court also decided *City of Rome v. United States*.⁴²⁹ At issue in *City of Rome* were proposed city annexations and other electoral changes that had "a discriminatory effect" but concededly "had not been made for any discriminatory purpose."⁴³⁰ Appealing from a denial of preclearance, the city argued "that § 1 of the [Fifteenth] Amendment prohibits only purposeful racial discrimination in voting, and that in enforcing that provision pursuant to § 2, Congress may not prohibit voting practices lacking discriminatory intent even if they are discriminatory in effect."⁴³¹ The Court characterized this claim as "nothing less than" a demand that the Court "overrule [its] decision in *South Carolina v. Katzenbach*."⁴³² Writing for the majority, Justice Marshall assumed, without endorsing the position of the *City of Mobile* plurality, that section 1 of the Fifteenth Amendment prohibits only purposeful discrimination.⁴³³ After equating the standard of review for Congress's power under section 2 of the Fifteenth Amendment with the standard of review adopted in *Morgan and Mitchell*,⁴³⁴ Justice Marshall held that a federal "ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting, "as long as" Congress could rationally have concluded that . . . electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination."⁴³⁵

In practical terms, *City of Rome* enables Congress to fashion a civil rights remedy before courts identify a violation. What this constitutional holding merely implied, Congress soon codified in its 1982 amendments to the Voting Rights Act. In response to the *City of Mobile* plurality's declaration that "a violation . . . of the Fourteenth or Fifteenth Amendments" requires proof "that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose,"⁴³⁶ Congress

428. *City of Mobile v. Bolden*, 446 U.S. 55, 62, 67 (1980) (plurality opinion of Stewart, J.).

429. 446 U.S. 156 (1980).

430. *City of Rome v. United States*, 446 U.S. 156, 172 (1980).

431. *Id.* at 173.

432. *Id.* at 174 (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

433. *Id.* at 173 & n.11.

434. *See id.* at 176-77 (relying on, *inter alia*, *Morgan and Mitchell* to conclude that Congress can remedy racial discrimination by "appropriate" means).

435. *Id.* at 177 (citations omitted).

436. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (interpreting *City of Mobile*).

amended section 2 of the Voting Rights Act. The 1982 amendment banned any state or local "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."⁴³⁷ The amended section 2 of the Voting Rights Act created liability for voting rights violations in advance of any direct showing of discriminatory purpose. Because the "'results' test" codified earlier Supreme Court interpretations of the Fourteenth Amendment,⁴³⁸ the validity of the 1982 amendment to section 2 as an exercise of Congress's powers under the Enabling Clauses of the Fourteenth and Fifteenth Amendments has never been questioned.

Finally, the Burger Court did not disturb the Warren Court legacy in treating the Commerce Clause as an apt basis for civil rights legislation. In upholding the application of a federal criminal statute to a loan shark who alleged that he confined his activities to a single state, the Burger Court reaffirmed Congress's power to regulate "*a class of activities . . . without proof that [any] particular intrastate activity . . . had an effect on commerce.*"⁴³⁹ In a case involving the application of federal wage and price controls to state employees,⁴⁴⁰ the Burger Court even reaffirmed *Maryland v. Wirtz*.⁴⁴¹ That decision went so far as to recite the "aggregation" principle associated with *Darby* and *Wickard v. Filburn*: "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations."⁴⁴²

Admittedly, the Burger Court did overrule *Wirtz's* Tenth Amendment holding one Term later in *National League of Cities v. Usery*,⁴⁴³ thereby

437. Act of June 29, 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (1994)) (emphasis added).

438. See *Thornburg*, 478 U.S. at 83-84 (O'Connor, J., concurring in the judgment) (acknowledging that the relevant history of the 1982 amendments, S. Rep. No. 97-417, at 27-28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07, expressed congressional sentiment in favor of reinstating the "'results' test" applied in *White v. Regester*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971)).

439. *Perez v. United States*, 402 U.S. 146, 152 (1971) (emphasis added) (citing *United States v. Darby*, 312 U.S. 100, 120-21 (1941)).

440. *Fry v. United States*, 421 U.S. 542, 548 (1975), overruled by *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).

441. See *id.* at 548 (relying on *Maryland v. Wirtz*, 392 U.S. 183 (1968), to conclude that wage and price controls could apply to state and local governments in spite of their sovereign immunity).

442. *Id.* at 547; accord *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981).

443. See *Nat'l League of Cities*, 426 U.S. at 855 (overruling *Wirtz* and holding that

unraveling the extension of federal wage and hour regulation to state and local governments. But *National League of Cities* became the subject of a judicial frolic and detour that the Burger Court renounced on its own.⁴⁴⁴ Indeed, this Tenth Amendment adventure not only left the underlying Commerce Clause doctrine intact, but also coincided with aggressive interpretations of the statute underlying *Heart of Atlanta* and *McClung*. After all, the Burger Court endorsed the disparate impact theory of Title VII liability in *Griggs v. Duke Power Co.*⁴⁴⁵ and authorized private, voluntary affirmative action in *United Steelworkers of America v. Weber*.⁴⁴⁶ Both of these cases, but *Weber* in particular, upset "the bargain struck by the 88th Congress" and abrogated the "color-blind aspiration" underlying the Civil Rights Act of 1964.⁴⁴⁷

The Burger Court proved to be the last battleground on which Earl Warren and Richard Nixon played out their heated rivalry. By every measure, ranging from the Nickel and Five's admittedly arcane fate to Nixon's coldly political calculus, that battle ended in a bitter draw. Like twin stars, the two California titans faded together during the summer of 1974. As President Nixon reeled from the Watergate scandal, the former Chief Justice crept closer to death. The politically moribund Richard Nixon refused to grant executive approval for the mortally stricken Warren to be treated at Bethesda Naval Hospital.⁴⁴⁸ Warren was admitted instead to the Georgetown University Hospital and declined Nixon's belated and guilt-ridden offer to transfer him to Bethesda.⁴⁴⁹ On July 9, 1974, Justices Brennan and Douglas visited Warren at Georgetown, informing him that the Conference of the Justices had voted unanimously that day to reject President Nixon's claim of executive privilege and to compel the President's compliance with the subpoena demanding

Congress cannot "force . . . essential decisions regarding the conduct of integral government functions" on states).

444. See *Garcia*, 469 U.S. at 531 (overruling *National League of Cities*). See generally, e.g., Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1625-34 (1994).

445. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (holding that a lack of discriminatory intent does not redeem practices unrelated to a job that "operate as 'built-in headwinds' for minority groups").

446. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (holding a private employer's affirmative action plan permissible because it was designed to remedy past discrimination and was not unreasonable towards non-minority groups). For a revealing study of *Weber's* aftermath, including the subsequent career of plaintiff Brian Weber, see Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169 (2000).

447. Bernard Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 456 (1980).

448. POLLACK, *supra* note 52, at 321.

449. *Id.*

production of Watergate-related tapes and documents.⁴⁵⁰ Not three hours later, the former Chief Justice was dead.

On July 27, 1974, Chief Justice Burger delivered the opinion for a unanimous Court, minus a recused Justice Rehnquist, in *United States v. Nixon*.⁴⁵¹ Fifteen days later, on August 9, 1974, President Nixon resigned. The old Chief Justice had died exactly one month earlier. During these tense weeks, local parents and the Department of Health, Education, and Welfare were breathing new life into an old, unresolved school segregation case in Topeka, Kansas.⁴⁵² Within five years, Linda Brown Smith, the erstwhile schoolgirl on whose behalf *Brown v. Board of Education* had been litigated, would sue the same school district for the benefit of her own children.⁴⁵³ From 1979 through 1993, the case would wend through the federal courts, twice reaching the Supreme Court.⁴⁵⁴ Though the principals of the 1952 Republican National Convention had died, either physically or politically, the Warren Court's core battles raged on. But the object of the struggle – as well as the leading antagonists on each side – had changed.

C. Affirmative Action as Armageddon

Although President Nixon's appointment of Warren Burger as Chief Justice failed to loosen the jurisprudential grip of Earl Warren's Court, his subsequent appointment of William H. Rehnquist as an Associate Justice effectively "sow[ed] the wind" of judicial change.⁴⁵⁵ The future Rehnquist Court would eventually inherit the "task of reaping the whirlwind."⁴⁵⁶ Of the many issues that could spark constitutional revolution, affirmative action – a concept almost wholly alien to the cases that built the Nickel and Five –

450. CRAY, *supra* note 8, at 526.

451. 418 U.S. 683 (1974). See generally Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974).

452. See *Brown v. Bd. of Educ.*, 84 F.R.D. 383, 390 (D. Kan. 1979) (describing how the Department of Health, Education, and Welfare (HEW) threatened to cut off federal funds and how the school board, on Aug. 7, 1974, sought an injunction against the threatened HEW action).

453. See *id.* at 391 n.4 (stating that "[i]t is interesting to note" that Linda Brown Smith is one plaintiff, acting on behalf of her children).

454. *Brown v. Bd. of Educ.*, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993); *Brown v. Bd. of Educ.*, 892 F.2d 851 (10th Cir. 1989), *vacated mem.*, 503 U.S. 978 (1992).

455. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 255 (1979) (Rehnquist, J., dissenting).

456. *Id.*

would catch fire.⁴⁵⁷ At the time, a revolution in the Court's treatment of affirmative action must have seemed an unlikely prospect.⁴⁵⁸ Although the legality of race-conscious admissions and faculty hiring by public universities would emerge as "the richest prize at stake" in the Burger Court's prelude to "[a]ffirmative action Armageddon,"⁴⁵⁹ Chief Justice Burger fulfilled his role through ineptitude rather than malice. *Morgan's* one-way ratchet and the Warren Court's expansive definition of the commerce power may have endured no direct attacks during the Burger Court, but that period's developments in the law of affirmative action would eventually enable the Rehnquist Court to dismantle the Nickel and Five.

What Richard Nixon failed to achieve through his judicial appointments, he inadvertently triggered through his characteristically cynical manipulation of affirmative action.⁴⁶⁰ In the heady days of the Civil Rights Act and the Voting Rights Act, President Johnson had laid the groundwork for race-conscious hiring and contracting by the federal government in Executive Order 11,246.⁴⁶¹ The so-called "Philadelphia Plan" targeted the notoriously corrupt and racist business of government contracting.⁴⁶² The Johnson administration "quietly" rescinded the highly controversial Plan during its final days.⁴⁶³ It was the Nixon administration that rescued the Philadelphia Plan and thereby entrenched the institution of affirmative action into American law and society.⁴⁶⁴ Why? "Nixon saw affirmative action as a

457. Cf. *Gitlow v. New York*, 268 U.S. 652, 669-73 (1925) (Holmes, J., dissenting) (acknowledging that a "single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration," but withholding judgment on the propensity of "[e]loquence [to] set fire to reason").

458. See TRACY CHAPMAN, *Talkin' Bout a Revolution*, on TRACY CHAPMAN (WEA/Elektra Entertainment 1988) ("Don't you know/They're talkin' about a revolution/It sounds like a whisper").

459. Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1852 (1996) (arguing, in the immediate aftermath of *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), that this Armageddon was "yet to come"). But cf. Margaret A. Sewell, Note, *Adarand Constructors, Inc. v. Peña: The Armageddon of Affirmative Action*, 46 DEPAUL L. REV. 611 (1997) (prematurely awarding the coveted title of Armageddon to *Adarand*).

460. See Farber, *supra* note 288, at 896-97 (detailing Nixon's interest in using affirmative action to break white voters from the Democratic Party); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 47-49 (2002) (discussing the political motives behind Nixon's affirmative action policies).

461. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

462. *Id.*

463. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 296 (1990).

464. *Id.* at 322.

wedge with which to split organized labor away from the civil rights movement.⁴⁶⁵

Nixon saved affirmative action. The Comptroller General declared the Philadelphia Plan illegal⁴⁶⁶ and never abandoned this view.⁴⁶⁷ The Senate passed an appropriations rider mandating compliance with the Comptroller General's order.⁴⁶⁸ President Nixon personally lobbied the House against the rider,⁴⁶⁹ threatening to veto the appropriations bill at large if it contained the rider.⁴⁷⁰ On the day of reckoning in the House, Secretary of Labor George Shultz declared the vote on the rider "the most important civil rights vote in a long, long time."⁴⁷¹ Republican votes – that day in the House and upon reconsideration in the Senate – proved vital in derailing the rider and saving the Philadelphia Plan.⁴⁷² The Court of Appeals for the Third Circuit ultimately upheld the Plan.⁴⁷³ Thereafter, the Philadelphia Plan became the model for affirmative action throughout federal contracting.⁴⁷⁴ President Nixon achieved his political objective: For decades to come, divisions over affirmative action would split the coalition that was "principally responsible for the Civil Rights Revolution" like an overripe melon.⁴⁷⁵

465. Farber, *supra* note 288, at 897.

466. See GRAHAM, *supra* note 463, at 331 (stating that the Comptroller General's declaration of illegality "was an ambitious reach . . . under the [General Accounting Office]'s audit authority").

467. *Id.* at 338-39.

468. *Id.* at 339-40.

469. *Id.* at 340.

470. Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 749 (1972).

471. *Id.* at 749 n.141.

472. 115 CONG. REC. 40,921, 40,749 (1969); see also Fullilove v. Klutznick, 448 U.S. 448, 512 n.12 (1980) (Powell, J., concurring) (discussing the House of Representatives' refusal to accept an amendment to the bill that would have had the effect of overruling the Plan); GRAHAM, *supra* note 463, at 340 (stating that Republican votes were the "crucial difference" that defeated the House rider and influenced the Senate's decision to "drop its now hopeless proposal"); Schuwerk, *supra* note 470, at 749 & nn.145-46 (detailing the influence of the White House on the defeat of supplemental appropriations bill).

473. *Contractors Ass'n v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

474. GRAHAM, *supra* note 463, at 342-45.

475. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327-28 (1986) (noting how this progressive political coalition "has been riven by bitter disagreement over the means by which American society should attempt to overcome its racist past" – namely, over whether to adopt or to oppose race-based affirmative action).

The issue of official race-consciousness reached the Supreme Court during the 1973 Term. The Justices agreed to review *DeFunis v. Odegaard*,⁴⁷⁶ in which a white applicant alleged that his race had played a role in his denial of admission to the University of Washington School of Law.⁴⁷⁷ Rather prophetically, the Supreme Court of Washington refused to invalidate race-conscious admissions to a public university per se⁴⁷⁸ but it did require a demonstration "that [the] consideration of race in admitting students is necessary to the accomplishment of a compelling state interest."⁴⁷⁹

In retrospect, *DeFunis* posed the deepest threat to affirmative action; the Court has never come closer to ending the practice outright.⁴⁸⁰ According to one journalistic account, "all nine Justices leaned [initially] toward holding that . . . fixed racial quotas" in university admissions "were unconstitutional."⁴⁸¹ Even Justice Marshall feared that "uphold[ing a] fixed quota for minorities might create an unfortunate precedent which could be used eventually to exclude minorities."⁴⁸² Another account reports that Justice Brennan had collected four votes to permit some consideration of race in university admissions.⁴⁸³

The Supreme Court dismissed the case as moot.⁴⁸⁴ As the four Nixon appointees – Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist – accepted Justice Stewart's "offer[]" to write a *per curiam* declaring the case moot, "[e]ven the liberals breathed a sigh of relief that the case was gone."⁴⁸⁵ (Relieved though they might have been, the liberals took pains to protest the mootness decision.)⁴⁸⁶ *DeFunis* ended not with a bang but

476. 414 U.S. 1038 (1973), *granting cert. to* 507 P.2d 1169 (Wash. 1973).

477. See *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1973) (recounting the allegation that the state "invidiously discriminated against [plaintiff] on account of his race").

478. *DeFunis v. Odegaard*, 507 P.2d 1169, 1181 (Wash. 1973), *vacated*, 416 U.S. 312 (1974).

479. *Id.* at 1182.

480. See Jim Chen, *DeFunis, Defunct*, 16 CONST. COMMENT. 91, 94 (1999) (stating that scholars have forgotten about "the Court's close call in *DeFunis*").

481. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 282 (1979).

482. *Id.*

483. See BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 33-34 (1988) (discussing the Court's eagerness to rid itself of the case on mootness grounds).

484. See *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974) (concluding that the Court could not decide *DeFunis* because the petitioner had nearly finished his studies and because not even an adverse decision would prevent his graduation).

485. WOODWARD & ARMSTRONG, *supra* note 481, at 282.

486. *DeFunis*, 416 U.S. at 320 (Douglas, J., dissenting); *id.* at 349 (Brennan, J.,

a whimper.⁴⁸⁷

A mere four years later, *Regents of the University of California v. Bakke*⁴⁸⁸ fulfilled the *DeFunis* dissenters' prediction that educational affirmative action would "inevitabl[y] return" to the Court.⁴⁸⁹ Whereas *DeFunis* had allowed an aggrieved white student to graduate without addressing the merits of affirmative action, *Bakke* approved race-conscious admissions in the name of "diversity" even as it ordered Allan Bakke admitted to the medical school at the University of California at Davis.

Today *Bakke* is known primarily for two things. First, it upbraided the California courts for their failure "to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin" and reversed "so much of the . . . judgment [below] as enjoined" the University of California "from any consideration of the race of any applicant."⁴⁹⁰ Second, it declared that "the attainment of a diverse student body" "clearly is a constitutionally permissible goal for an institution of higher education."⁴⁹¹ Of the former pronouncement, John Hart Ely declared: "That is the Opinion of the Court in *Bakke*. I'll take it."⁴⁹² The latter pronouncement has led an entire generation of commentators to devote more attention to *Bakke* than perhaps any other Supreme Court decision⁴⁹³ – more because of than in spite of⁴⁹⁴ the Court's subsequent failure to revisit the question of affirmative action in a university setting.⁴⁹⁵

dissenting).

487. Louis H. Pollack, *DeFunis Non Est Disputandum*, 75 COLUM. L. REV. 495, 495 (1975).

488. 438 U.S. 265 (1978).

489. *DeFunis*, 416 U.S. at 350 (Brennan, J., dissenting).

490. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978); see also *id.* at 326 (Brennan, J., concurring in the judgment in part and dissenting in part) (noting Justice Powell's contribution to "five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future").

491. *Id.* at 311-12.

492. John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10 n.33 (1978).

493. E.g., Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 813 (1998); Daniel A. Farber, *Missing the "Play of Intelligence"*, 36 WM. & MARY L. REV. 147, 159-60 (1994).

494. Cf. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effect upon an identifiable group."). Other cases drawing this distinction include *Vacco v. Quill*, 521 U.S. 793, 802-03 (1997), and *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

495. E.g., *Texas v. Hopwood*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033

In all the hullabaloo, however, one easily forgets that *Bakke* refused to "hold that discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'"⁴⁹⁶ Instead, *Bakke* adopted a strict scrutiny standard of review: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."⁴⁹⁷ A four-member concurring coalition led by Justice Brennan proposed a more relaxed standard of review that would have sustained a "benign" race-conscious program as long as "an important and articulated purpose for its use [has] been shown."⁴⁹⁸ But the Brennan standard flunks the test for divining the holding from a "fragmented" decision in which "no single rationale explain[s] . . . the assent of five Justices."⁴⁹⁹ Justice Powell's embrace of strict scrutiny, being the "position taken by those Members who concurred in the judgment[] on the narrowest grounds," is thus "the holding of the Court" in *Bakke*.⁵⁰⁰

For the purpose of illustrating the impact of affirmative action jurisprudence on larger questions of civil rights enforcement, a second aspect of *Bakke* also bears remembering. *Bakke* at heart was a case about legislative due process.⁵⁰¹ Justice Powell's solo opinion acknowledged the use of race-conscious remedies for employment discrimination "where a legislative or administrative body charged with [appropriate] responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination."⁵⁰² Justice Powell

(1996); *Kirwan v. Podberesky*, 956 F.2d 52 (4th Cir. 1992), *cert. denied*, 514 U.S. 1128 (1995); *cf.* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1746 (1996) ("The Supreme Court has said a lot about contracting and rather little about education."). What effect the pending University of Michigan cases will have on this landscape is unknown. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (U.S. Dec. 2, 2002) (No. 02-241); *Gratz v. Bollinger*, 277 F.3d 803 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 602 (U.S. Dec. 2, 2002) (No. 02-516).

496. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 (1978).

497. *Id.* at 291.

498. *Id.* at 361 (Brennan, J., concurring in the judgment in part and dissenting in part). The resemblance to what was then the very fresh formulation of intermediate scrutiny is unmistakable. *See* *Craig v. Boren*, 429 U.S. 190, 197 (1976) (Brennan, J.) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

499. *Marks v. United States*, 430 U.S. 188, 193 (1977).

500. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

501. *See generally* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222-35 (1976) (grounding a theory of legislative due process in legislators' knowledge of current affairs and in legislative goals).

502. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 301 (1978) (opinion of the Court).

also described *Lau v. Nichols*⁵⁰³ and *United Jewish Organizations v. Carey*⁵⁰⁴ as "case[s] in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity" – whether public schooling (as in *Lau*) or voting (as in *Carey*).⁵⁰⁵ The admissions plan in *Bakke*, he stressed once more, lacked a "determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts."⁵⁰⁶ Justice Powell reserved special disdain for the Board of Regents' argument that societal discrimination justified race-conscious admissions: "Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality."⁵⁰⁷

Justice Powell did take care, though, to reserve safe harbors for "congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965" and for "legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination."⁵⁰⁸ Distinguishing those "isolated segments of our vast governmental structures"⁵⁰⁹ which lack "the authority and capability to establish . . . that [a racial] classification is responsive to identified discrimination,"⁵¹⁰ Justice Powell "recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."⁵¹¹

Thanks to the enormous "burden the term 'diversity' has been asked to bear in the [contemporary] United States," ranging from "a permanent justification for policies seeking racial proportionality in all walks of life" to

503. 414 U.S. 563 (1974).

504. 430 U.S. 144 (1977).

505. *Bakke*, 438 U.S. at 305.

506. *Id.* at 305.

507. *Id.* at 309.

508. *Id.* at 302 n.41 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

509. *Id.* at 309 (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976)).

510. *Id.* (citing *Califano v. Webster*, 430 U.S. 313 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977)).

511. *Id.* at 302 n.41.

"a synonym for proportional representation itself,"⁵¹² *Bakke* has occasioned the greatest amount of dishonesty in the squalid debate over affirmative action.⁵¹³ The much more broadly applicable holding in *Weber* was arguably even "more destructive [of] the notion of equality."⁵¹⁴ (Hard as it may be for legal academics to believe, the significance of private labor markets, measured solely by bodies rather than dollars, exceeds that of higher education by a factor of five.)⁵¹⁵ But nothing else in affirmative action jurisprudence surpasses *Fullilove v. Klutznick*⁵¹⁶ as a doctrinal atrocity.

Fullilove involved a 1977 congressional decree requiring recipients of federal funds for local public works projects to spend ten percent of their grants on services or supplies from Minority Business Enterprises (MBEs).⁵¹⁷ Unlike every other affirmative action case that had preceded it, *Fullilove* involved a racial classification under federal law.⁵¹⁸ The dispute split the Court into even thirds. Chief Justice Burger's opinion for himself and Justices White and Powell relied dispositively on this distinction. The Chief Justice softened the judiciary's "close examination" to a "program that employs racial or ethnic criteria" by invoking the Court's obligation to give "appropriate deference to the Congress, a co-equal branch charged by the Constitution with

512. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 356 (D.C. Cir. 1998).

513. See, e.g., Lackland H. Bloom, Jr., Hopwood, *Bakke* and the Future of the Diversity Justification, 29 TEX. TECH L. REV. 1, 72 (1998) (admitting that the "diversity justification has been seriously abused by educational institutions"); Kingsley R. Browne, *Affirmative Action: Policy-Making by Deception*, 22 OHIO N.U. L. REV. 1291, 1299-1300 (1996) (arguing that policy which allows use of race or sex as "factors" but claims that they are "not necessarily dispositive" is deceptive because the only way that these preferences can have an effect is by compelling the hiring of the otherwise less-qualified candidates); Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RIGHTS J. 881, 902-03 (1996) (arguing that the "fig leaf" of diversity has enabled race-conscious educators to pursue "primary purpose[s] . . . other than diversity," such as role modeling, community service, or proportional representation for its own sake or merely as basis for patronage); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979) (suggesting that the "primary motivation" for racial preferences is not promoting diversity, but rather "countering the effects of societal discrimination"); Wayne McCormack, *Race and Politics in the Supreme Court: Bakke to Basics*, 1979 UTAH L. REV. 491, 530 (admitting that diversity "is simply not the most honest statement of . . . objective[s]").

514. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting).

515. Compare STATISTICAL ABSTRACT OF THE UNITED STATES 544 (120th ed. 2000) (reporting 74.55 million employees as of 1995 in establishments with twenty or more employees, excluding those employed in government or railroads and the self-employed) with *id.* at 152 (reporting 14.26 million students enrolled in higher education as of 1995).

516. 448 U.S. 448 (1980).

517. *Fullilove v. Klutznick*, 448 U.S. 448, 453 (1980) (Burger, C.J.).

518. *Id.* (Burger, C.J.).

the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment.⁵¹⁹ The federal MBE set-aside, the Chief Justice reasoned, arose not from "a choice made by a single judge or a school board, but on a considered decision of the Congress and the President."⁵²⁰ Indeed, he regarded it "fundamental" that "no organ of government, state or federal," possesses "a more comprehensive remedial power than . . . the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."⁵²¹

Justice Powell's concurrence reinforced Chief Justice Burger's emphasis on the institutional difference between Congress and other official decisionmakers. Seeking to distinguish Congress from the University of California's Board of Regents and *Fullilove* from *Bakke*, Justice Powell stressed that "the National Legislature[']s . . . competen[ce] to find constitutional and statutory violations" gave Congress the power (and the obligation) to "address directly the problems of discrimination in our society."⁵²² Moreover, Justice Powell emphasized Congress's "unique constitutional power of legislating to enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments."⁵²³ He attributed no significance to Congress's failure to make specific findings regarding the "statutory or constitutional violations" that the MBE set-aside would purportedly remedy.⁵²⁴ Rather than subject Congress to the institutional limits on "an adjudicatory body called upon to resolve specific disputes between competing adversaries," Justice Powell advocated a more relaxed standard of review that would enable Congress to fulfill "its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue."⁵²⁵ Without disavowing *Bakke*'s distrustful characterization of "racial classifications" as "fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses," Justice Powell concluded that *Fullilove* "turn[ed] on the scope of congressional power," specifically

519. *Id.* at 472 (Burger, C.J.) (quoting U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. amend. XIV, § 5).

520. *Id.* at 473 (Burger, C.J.); *see also id.* at 483 (Burger, C.J.) ("Here we deal not with the limited remedial powers of a federal court, . . . but with the broad remedial powers of Congress.").

521. *Id.* at 483 (Burger, C.J.).

522. *Id.* at 499 (Powell, J., concurring) (citing *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964)).

523. *Id.* at 500 (Powell, J., concurring).

524. *Id.* at 502 (Powell, J., concurring).

525. *Id.* at 502-03 (Powell, J., concurring).

Congress's "unique constitutional role in the enforcement of the post-Civil War Amendments."⁵²⁶

Careful examination of Chief Justice Burger's principal opinion and Justice Powell's concurrence reveals a standard of review closer to the intermediate scrutiny standard that Justice Brennan advocated in *Bakke*. Three more Justices in *Fullilove*, represented in Justice Marshall's concurrence in the judgment, explicitly endorsed the more lenient standard articulated in the Brennan concurrence in *Bakke*.⁵²⁷ Indeed, according to Justice Marshall's application of that standard of review, "the 10% minority set-aside provision at issue" was so "plainly constitutional" as to remove the dispute from the class of "close" legal questions.⁵²⁸ Yet Chief Justice Burger's opinion refused to "adopt, either expressly or implicitly, the formulas of analysis articulated in" *Bakke*.⁵²⁹ His complacent conclusion that "the MBE provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions" condemned the affirmative action debate to continuing confusion.⁵³⁰

One final Burger Court decision on affirmative action compounded the chaos. *Wygant v. Jackson Board of Education*,⁵³¹ decided in Warren Burger's final year as Chief Justice, returned to the realm of state-law classifications based on race. *Wygant* involved a collective bargaining agreement that exposed tenured nonminority public school teachers to layoffs while retaining minority teachers on probationary status.⁵³² Unlike *Bakke* and *Fullilove*, *Wygant* secured a majority of Justices on the crucial question of the appropriate level of judicial scrutiny.⁵³³ Adopting *Bakke*'s declaration that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call

526. *Id.* at 516 (Powell, J., concurring); *see also id.* at 510 (Powell, J., concurring) (concluding "that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination").

527. *See id.* at 519 (Marshall, J., concurring in the judgment) (declaring that a remedial racial classification can be justified by a showing of "an important issue and articulated purpose for its use" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, J.))).

528. *Id.* (Marshall, J., concurring in the judgment).

529. *Id.* at 492 (Burger, C.J.).

530. *Id.* (Burger, C.J.)

531. 476 U.S. 267 (1986).

532. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270-71 (1986) (Powell, J.).

533. Justice O'Connor concurred in all portions of Justice Powell's plurality opinion that outlined the relevant standard of review. *See id.* at 294 (O'Connor, J., concurring in part and concurring in the judgment) ("I . . . join in Parts I, II, III, and V of the plurality's opinion, and concur in the judgment.").

for the most exacting judicial examination,⁵³⁴ *Wygant* held explicitly that the Court "must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored."⁵³⁵ The Court ultimately rejected the "role model" rationale offered by the school board as a remedy "ageless in [its] reach into the past, and timeless in [its] ability to affect the future."⁵³⁶ The absence of a "logical stopping point," Justice Powell reasoned, would allow a school board using the "role model theory . . . to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."⁵³⁷

Wygant confirmed what the difference between *Bakke* and *Fullilove* had already intimated: the Burger Court had divided its affirmative action cases into two distinct categories. In cases involving racial classifications under state law, such as *Bakke* and *Wygant*, the Court adhered to strict scrutiny without regard to the putatively "benign" nature of affirmative action or the political check implicit in a white majority's decision to burden itself on behalf of a traditionally downtrodden racial minority. To the extent that *Fullilove* could be understood coherently, Chief Justice Burger and Justice Powell's opinions in that case appeared to adopt some standard of review short of strict scrutiny. *Fullilove*'s rationale for this departure was less obscure: Congress's power under the enabling clauses of the Reconstruction Amendments, especially section 5 of the Fourteenth Amendment, warranted greater judicial respect for the federal legislature's capacity to investigate discrimination on a societal scale and legal authority to fashion an appropriate, nationwide remedy.

This bifurcated approach to affirmative action was wholly consistent with *Katzenbach v. Morgan*. The MBE set-aside in *Fullilove* was not remedial in a judicial sense; no court had made any findings regarding official complicity in racial discrimination among contractors doing business with the federal government. Nor, for that matter, had Congress. As in *Morgan*, however, Chief Justice Burger and Justice Powell were willing to impute findings from the legislative record and from the solution Congress ultimately adopted.⁵³⁸ What section 5 of the Fourteenth Amendment gave Congress – the

534. *Id.* at 273 (Powell, J.) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978)).

535. *Id.* at 274 (Powell, J.).

536. *Id.* at 276 (Powell, J.).

537. *Id.* at 275 (Powell, J.).

538. See *Fullilove v. Klutznick*, 448 U.S. 448, 477-78 (1980) (Burger, C.J., White, J., & Powell, J.) (determining that Congress "had abundant evidence from which it could conclude" that a favored group had been "denied effective participation in public contracting" and concluding that Congress did not need to "compil[e] the kind of 'record' appropriate with

authority to enforce the Amendment through appropriate legislation – paralleled the power that the federal judiciary had asserted since *Marbury v. Madison*: a mandate to ensure compliance with the substantive demands of due process, equal protection, and the privileges and immunities of national citizenship. *Morgan* stands for that very proposition.⁵³⁹

On the other hand, *Bolling v. Sharpe* recoils at the mere suggestion that the federal government's resort to racial classifications might warrant less penetrating scrutiny than an identical use of race under state law. Astute observers recognized immediately that the Court had set a higher hurdle for state and local laws using racial criteria.⁵⁴⁰ So stark a difference between the Fourteenth Amendment's notion of equal protection and the equal protection component of Fifth Amendment due process would be, in Chief Justice Warren's words, "unthinkable."⁵⁴¹ The affirmative action jurisprudence of the Burger Court had set *Bolling* and *Morgan* on a collision course.

The line between state-law and federal racial classifications became searingly bright during the Rehnquist Court. *City of Richmond v. J.A. Croson Co.*,⁵⁴² decided in 1989, involved a public contracting scheme that the City of Richmond, Virginia, had adapted from the statute at issue in *Fullilove*.⁵⁴³ The minority contractor set-aside provision in *Croson* was identical to *Fullilove* in every relevant respect but one: the identity of the governmental agency that had adopted the race-based classification. The Court, however, declined the city's invitation to apply *Fullilove*'s standard of review.⁵⁴⁴ According to

respect to judicial or administrative proceedings").

539. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (describing section 5 as a "positive grant of legislative power authorizing Congress . . . to secure the guarantees of the Fourteenth Amendment").

540. See, e.g., *Associated Gen. Contractors of Cal. v. City & County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987) ("The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action."); Robert A. Bohrer, Bakke, Weber, and Fullilove: *Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 512-13 (1981) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone."); Drew S. Days, III, Fullilove, 96 YALE L.J. 453, 474 (1987) ("*Fullilove* clearly focused on the constitutionality of a congressionally mandated set-aside program.").

541. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

542. 488 U.S. 469 (1989).

543. Compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 550 n.11 (1989) (Marshall, J., dissenting) (stating that Richmond's ordinance used the same definition for "minority group members" that Congress had adopted in its legislation) with *Fullilove*, 448 U.S. at 454 (Burger, C.J.) (reprinting section 103(f)(2) of Public Works Employment Act of 1977).

544. See *Croson*, 488 U.S. at 489 (O'Connor, J.) ("Appellant and its supporting amici rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief."); *id.* at 491 (O'Connor,

Justice O'Connor, the city "ignore[d] . . . that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."⁵⁴⁵ That Congress enjoys "the power to define situations which . . . threaten principles of equality and to adopt prophylactic rules to deal with those situations," she wrote, "does not mean that, a fortiori, the States and their political subdivisions are [equally] free to decide that such remedies are appropriate."⁵⁴⁶ She feared that a contrary rule could permit the "mere recitation of a benign or compensatory purpose for the use of a racial classification" to cloak "the States [with] . . . the full power of Congress under § 5 of the Fourteenth Amendment and [to] insulate any racial classification from judicial scrutiny under § 1."⁵⁴⁷

Croson thus followed *Bakke* and *Wygant* in applying strict scrutiny to a racial classification under state law.⁵⁴⁸ In particular, the Court "reaffirm[ed] the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."⁵⁴⁹ Doubting the ability of judges to distinguish between classifications that "are 'benign' or 'remedial'" and those that "are in fact motivated by illegitimate notions of racial inferiority or simple racial politics," Justice O'Connor stressed the power "of strict scrutiny . . . to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."⁵⁵⁰ The city failed, almost catastrophically, to satisfy the evidentiary burden imposed by strict scrutiny's narrow tailoring requirement.⁵⁵¹ Richmond could not rely on amorphous, unsupported assertions of discrimination against groups that arguably had never contributed to the city's economy or political scene.⁵⁵² Nor did the

J.) ("[O]ur treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here.").

545. *Id.* at 490 (O'Connor, J.).

546. *Id.* (O'Connor, J.) (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

547. *Id.* (O'Connor, J.); see also *id.* (O'Connor, J.) ("To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions."); *id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment) (observing that the question of a race-based classification under federal law was not before the Court).

548. *Id.* at 493-97 (O'Connor, J.).

549. *Id.* at 494 (O'Connor, J.).

550. *Id.* at 493 (O'Connor, J.).

551. See *id.* at 498-506 (criticizing the defects of Richmond's ordinance).

552. See *id.* at 506 (conjecturing that no "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut" person had ever faced discrimination in Richmond's contracting industry and concluding

Court detect "any consideration of . . . race-neutral means to increase minority business participation in city contracting."⁵⁵³

During the following Term, *Metro Broadcasting, Inc. v. FCC*⁵⁵⁴ leveraged *Croson's* description of Congress's section 5 power into a firm holding on the standard of review for race-based classifications in federal law. For the first time since *Fullilove*, the Supreme Court considered the constitutionality of an affirmative action program arising under federal law.⁵⁵⁵ Justice Brennan accomplished a unique feat in the Supreme Court's constitutional case law on affirmative action: He assembled a five-vote majority for his entire opinion.⁵⁵⁶ "It is of overriding significance," he wrote, "that the FCC's minority ownership programs have been specifically approved – indeed, mandated – by Congress."⁵⁵⁷ Exploiting the failure of *Fullilove* to "apply strict scrutiny to the race-based classification at issue" there⁵⁵⁸ – or, for that matter, to adopt any standard of review – Justice Brennan held "that benign race-conscious measures mandated by Congress – even if those measures are not 'remedial' . . . – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."⁵⁵⁹

Even as he limited *Croson* to "minority set-aside program[s] adopted by a municipality," Justice Brennan noted that "much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."⁵⁶⁰ After this argumentative stroke, the Court's actual holding – that the FCC's minority ownership policies "serve[d] the important governmental objective of broadcast diversity" and were "substantially related to the achievement of that objective" – seemed an afterthought.⁵⁶¹ *Metro Broadcasting's* real accomplishment was transforming the unbroken chain of

in any event that the city had offered no concrete evidence of such discrimination).

553. *Id.* at 507.

554. 497 U.S. 547 (1990).

555. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552 (1990) (framing the issue as whether federal "minority preference policies violate the equal protection component of the Fifth Amendment"), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

556. Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan's opinion. *Id.* at 550.

557. *Id.* at 563.

558. *Id.* at 564.

559. *Id.* at 564-65 (footnote omitted).

560. *Id.* at 565.

561. *Id.* at 566.

decisions on Congress's power under section 5 of the Fourteenth Amendment into the basis for a holding that the Court had rejected in every other affirmative action case: a softer standard of review for "benign" race-based classifications. But Justice Brennan's sleight of hand did not come free of cost. Reliance on section 5 confined his view of race-conscious measures to judicial review of federal law. The resulting bifurcation between standards of review plunged affirmative action doctrine into deep confusion.⁵⁶²

More important, at least for the integrity of the Nickel and Five, the contrast between *Croson* and *Metro Broadcasting* exposed the fundamental incompatibility of *Bolling* and *Morgan*. Legislation to "enforce" the Fourteenth Amendment cannot be "appropriate" if it violates some independent limit on Congress's power or the substantive principles underlying the Fourteenth Amendment itself. The constitutional logic implicit in *Morgan's* one-way ratchet supports *Metro Broadcasting's* deferential stance toward a congressional embrace of race-conscious remedies. But combining *Croson's* rule of strict scrutiny for even putatively benign and remedial uses of race in state law with *Bolling's* rule equating Fifth Amendment due process with Fourteenth Amendment equal protection yields a radically different result. The treacherous prospect that "legislation enacted by Congress to enforce the Equal Protection Clause [might] violate the equality rights of others" is therefore "most likely to arise in the affirmative action context in which special protection rights for one group arguably collide with the equality rights of another group."⁵⁶³

Of the Justices in *Croson* and *Metro Broadcasting*, only Justices Stevens and White voted with the prevailing side in each case.⁵⁶⁴ Justice Stevens explained his preference for forward-looking schemes such as the FCC's minority ownership programs, which "focus on the future benefit, rather than the remedial justification" underlying compensatory, retrospective schemes such as the MBE set-asides in *Croson* and *Fullilove*.⁵⁶⁵ Justice White, who wrote nothing in either *Croson* or *Metro Broadcasting*, presented a

562. E.g., Charles A. Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 113-17 (1990); Douglas O. Linder, *Review of Affirmative Action After Metro Broadcasting v. FCC: The Solution Almost Nobody Wanted*, 59 UMKC L. REV. 293, 316-17 (1991).

563. Colker, *supra* note 291, at 680 (concluding nevertheless that "[i]t is possible for special protection legislation not to infringe the equality interests of others").

564. Compare *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 550 (1990) (Justice Brennan's majority opinion joined by Justices White, Marshall, Blackmun, and Stevens), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) with *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 473 (1989) (Justice O'Connor's majority opinion as to Parts I, III-B, and IV joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy).

565. *Metro Broad.*, 497 U.S. at 601 (Stevens, J., concurring).

tougher puzzle. The solution lies in the simple (albeit dangerously unreliable) expedient of taking those cases at face value. Perhaps more so than any other member of the Court, Justice White earnestly believed that section 5 and *Morgan* dictated divergent standards of review for racial classifications under state and federal law. In two of the Burger Court's signature clashes over separation-of-powers doctrine, *INS v. Chadha*⁵⁶⁶ and *Bowsher v. Synar*,⁵⁶⁷ Justice White wrote dissents championing Congress's prerogative to structure the federal legislative process without judicial interference.⁵⁶⁸ One Term after *Metro Broadcasting*, he dissented again from the Court's decision to invalidate a governing board empowered to review the decisions of the Metropolitan Washington Airports Authority.⁵⁶⁹ Justice White evidently did not construe his belief in congressional supremacy as a more generalized acceptance of legislative license at lower levels of government.

Like Justice Brennan, Justice White was a Warren era holdout on the Burger Court. These two Justices, however, drew their inspiration from distinct elements of the Warren Court's civil rights legacy. Justice Brennan, seemingly more inspired by the antidiscrimination component of the Warren agenda, generalized *Morgan*'s one-way ratchet into something resembling the antisubordination principle. Nothing more succinctly summarizes his attraction to gentler scrutiny of "benign" racial classifications, a yearning he first expressed in *Bakke* and finally consummated in *Metro Broadcasting*. In contrast, Justice White, an intellectual heir of the New Deal, favored a robust federal government and judicial deference to the political process. He stayed true to the structural underpinnings of the Warren Court's section 5 and Commerce Clause jurisprudence. In matters implicating the relationship between the states and the national government, *Morgan*, *Heart of Atlanta*, and *McClung* counsel federal supremacy. As to the distribution of powers within the national government, these cases upheld the New Deal's preference for judicial deference to Congress's superior fact-finding prowess and political pedigree.

But the die had been cast. At a minimum, the affirmative action cases foreshadowed the demolition of the Nickel and Five. Less charitably, one could accuse those cases of foreordaining that catastrophic conclusion. As

566. 462 U.S. 919 (1983).

567. 478 U.S. 714 (1986).

568. See *Bowsher v. Synar*, 478 U.S. 714, 759-76 (1986) (White, J., dissenting) (disagreeing with the majority's invalidation of the Gramm-Rudman-Hollings Act, a balanced budget measure); *INS v. Chadha*, 462 U.S. 919, 967-1003 (1983) (White, J., dissenting) (arguing against the majority's invalidation of the legislative veto).

569. *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 277-93 (1991) (White, J., dissenting).

Bakke begat *Wygant* and *Croson*, so *Fullilove* begat *Metro Broadcasting*. And *Metro Broadcasting* was not only Justice Brennan's last opinion; it was also the most doctrinally unstable and politically vulnerable of the Supreme Court's affirmative action decisions.⁵⁷⁰ The affirmative action cases, though falling far short of settling this politically charged dispute,⁵⁷¹ had inflicted mortal doctrinal damage to the Warren Court's vision of civil rights. By the end of the Supreme Court Term following *Metro Broadcasting*, the first President Bush had replaced two surviving Warren Court veterans, William Brennan and Thurgood Marshall, with David Souter and Clarence Thomas. The rapidly maturing Rehnquist Court was now poised to deliver the *coup de grâce* to the Nickel and Five.

IV. *The Grand Rehnquisition*⁵⁷²

It comes into existence in the way of denying established institutions. Its office is rather to destroy the old world, than fully to reveal the new.

Henry James, *Democracy and Its Issues*⁵⁷³

Exactly four decades after the Supreme Court ruled against him, Fred Korematsu successfully overturned his conviction for violating the wartime exclusion order affecting persons of Japanese descent.⁵⁷⁴ Four years later, in 1988, Congress repudiated America's wartime treatment of Japanese-Americans.⁵⁷⁵ The deepest regret of Earl Warren's political career was thereby expiated. Meanwhile, the deepest disappointment of that career had all but

570. See Neil Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 (1990) ("*Metro Broadcasting* may prove to be a sign post, the final landmark of a period when individuals like William Brennan helped lead the Court.").

571. *Contra* Herman Swartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524, 576 (1987) (concluding that "the effort to kill affirmative action programs has failed").

572. The term "Rehnquisition" appears to have originated in a *Harvard Law Review* publication from the early 1970s. Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273, 273 n.a (1987). Cf. Orrin G. Hatch, *Avoidance of Constitutional Conflicts*, 48 U. PITT. L. REV. 1025, 1034 (1987) (using the term "Rehnquisition" to describe the attacks on William H. Rehnquist during his confirmation hearings as Chief Justice).

573. HENRY JAMES, SR., *Democracy and Its Issues* (1853), quoted in R.W.B. LEWIS, *THE AMERICAN ADAM: INNOCENCE, TRAGEDY, AND TRADITION IN THE NINETEENTH CENTURY* 13 (1955).

574. *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

575. See Act of Aug. 10, 1988, Pub. L. No. 100-383, 102 Stat. 903 (extending an apology to the detainees on behalf of the nation and providing reparations for their suffering).

run its course. Even as Congress and the federal courts brought closure to America's wartime embarrassment, William H. Rehnquist succeeded Warren E. Burger as Chief Justice of the United States.

The summer of 1994 marked the twentieth anniversary of Earl Warren's death. In the seasons that immediately followed, a significant portion of the old Chief Justice's jurisprudential legacy would also wither and die. On July 25, 1994, the U.S. District Court for the District of Kansas approved a desegregation plan submitted by Unified School District #501 of Topeka. The court's admonition that the parties should "negotiate and cooperate in bringing the case to an end" effectively closed one of the longest, most bitterly contested, and most doctrinally significant cluster of legal proceedings in American history.⁵⁷⁶ The resolution of Topeka's desegregation controversy confirmed what the Supreme Court had only recently signaled in *Board of Education v. Dowell*⁵⁷⁷ and *Freeman v. Pitts*:⁵⁷⁸ *Brown v. Board of Education* was dead. Three summers later, in July 1997, Woolworth's, the original five-and-dime chain, declared bankruptcy and announced that it would mothball all of its remaining stores.⁵⁷⁹ Between the end of the Supreme Court's 1993 Term and the beginning of October Term 1997, therefore, death came not only for *Brown v. Board of Education* but also the great American five-and-dime. Death came too for the Nickel and Five, the basis of the Warren Court's civil rights consensus.

From the beginning of October Term 1994 through the end of October Term 1996, the Rehnquist Court took three scarce Terms to dismantle the Warren Court consensus on civil rights. In 1995, Chief Justice Rehnquist led the Court where no majority of Justices had gone in six decades: invalidating a federal statute for having exceeded the limits of Congress's power to regulate interstate commerce. That same Term, the Court used *Bolling* to undermine an affirmative action standard of review derived from a generous view of Congress as a coequal enforcer of Fourteenth Amendment values. At long last the obligation of the federal government to respect equal protection consumed

576. Paul E. Wilson, *Ad Astra per Aspera*: *Brown v. Board of Education of Topeka*, 68 UMKC L. REV. 623, 635-36 (2000).

577. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-51 (1991) (remanding a segregation case for a determination regarding the need for ongoing judicial supervision).

578. *Freeman v. Pitts*, 503 U.S. 467, 471-99 (1992) (removing a formerly segregated school district from the supervision of a federal court).

579. KAREN PLUNKETT-POWELL, REMEMBERING WOOLWORTH'S: A NOSTALGIC HISTORY OF THE WORLD'S MOST FAMOUS FIVE-AND-DIME 11 (1999); see also Jennifer Steinhauer, *Woolworth Gives Up on the Five-and-Dime*, N.Y. TIMES, July 18, 1997, at A1 (summarizing the history of "America's first great retail chain"); Natalie Merchant, *Motherland, on MOTHERLAND* (Indian Love Bride Music 2001) ("Oh, my five and dime queen tell me what have you seen? The lust and the avarice, the bottomless, the cavernous greed, is that what you see?").

its power to enforce the Fourteenth Amendment. Two Terms later, *Morgan* having been shown impotent to influence the course of affirmative action jurisprudence, the Court squarely rejected any prospect that Congress could use section 5 to effect its own substantive interpretation of the Fourteenth Amendment. The Nickel and Five lay in ruins. All of these landmark decisions arguably came to the Court by way of "aggressive grant[s]" of certiorari – petitions not granted out of a need to resolve a circuit split or out of a sense of institutional responsibility, but rather out of the desire of certain Justices to score ideological points or to cut new doctrinal ground.⁵⁸⁰

The first of these decisions, *United States v. Lopez*,⁵⁸¹ contested the constitutionality of the Gun-Free School Zones Act of 1990,⁵⁸² which made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone."⁵⁸³ The Supreme Court held "that the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States.'"⁵⁸⁴ Chief Justice Rehnquist began by reviewing Commerce Clause precedents from *Gibbons v. Ogden*⁵⁸⁵ to *Jones & Laughlin, Darby*, and *Wickard v. Filburn* – the New Deal cases "that greatly expanded the previously defined authority of Congress" under the Commerce Clause.⁵⁸⁶ Without purporting to overrule any precedent, Chief Justice Rehnquist summarized the "three broad categories of activity that Congress may regulate under its commerce power":⁵⁸⁷

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.⁵⁸⁸

580. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 80 (1998). On the certiorari process generally, see H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

581. 514 U.S. 549 (1995).

582. 18 U.S.C. § 922(q) (1994) (amended 1996).

583. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (quoting 18 U.S.C. § 922(q)(1)(A) before its amendment in 1996).

584. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3).

585. 22 U.S. (9 Wheat.) 1 (1824); see *Lopez*, 514 U.S. at 553 (summarizing the *Gibbons* Court's interpretation of the "nature of Congress' commerce power").

586. *Lopez*, 514 U.S. at 556.

587. *Id.* at 558.

588. *Id.* at 558-59 (citations omitted).

Of particular interest to the *Lopez* Court was the gun possession statute's apparent lack of connection "with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."⁵⁸⁹ The Court also faulted the absence of a "jurisdictional element which would ensure, through case-by-case inquiry, that the" proscribed activity "in question affects interstate commerce."⁵⁹⁰ Although the Chief Justice putatively affirmed older cases relieving Congress of the obligation "to make formal findings as to the substantial burdens that an activity has on interstate commerce,"⁵⁹¹ he complained that their absence in this controversy left "no . . . substantial effect" on commerce "visible to the naked eye."⁵⁹² Chief Justice Rehnquist accordingly rejected a lenient standard of review that would "authorize a general federal police power" with the potential to embrace subjects at the heart of traditional state regulation, "such as family law and direct regulation of education."⁵⁹³ Declining what he considered an invitation "to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," the Chief Justice declared himself "unwilling" to erase the "distinction between what is truly national and truly local."⁵⁹⁴

In at least a formal sense, *Lopez* overruled none of the Court's Commerce Clause precedent. Justice Thomas's concurrence hinted that the Court "must [eventually] modify [its] Commerce Clause jurisprudence,"⁵⁹⁵ perhaps by restoring a narrow definition of "commerce" distinct from agriculture, manufacturing, and other activities leading to "the production of goods."⁵⁹⁶ But Justice Thomas's comments in a concurring opinion about the proper conception of commerce were just that: comments in a concurring opinion.⁵⁹⁷ The *Lopez* majority posed its deepest threat to Commerce Clause precedent when it designated *Wickard v. Filburn* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."⁵⁹⁸

589. *Id.* at 561.

590. *Id.*

591. *Id.* at 562 (citing *Perez v. United States*, 402 U.S. 146, 156 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964)).

592. *Id.* at 563.

593. *Id.* at 564-65.

594. *Id.* at 567-68.

595. *Id.* at 602 (Thomas, J., concurring).

596. *Id.* at 587 (Thomas, J., concurring).

597. *Cf.* *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980) ("The comments in the dissenting opinion about . . . the correct statement of the equal protection rational-basis standard . . . are just that: comments in a dissenting opinion.").

598. *United States v. Lopez*, 514 U.S. 549, 560 (1995). For a discussion of the impact of

Nevertheless, *Lopez* has stripped the New Deal and Civil Rights Act of much of their authority. *Lopez* was a classic instance of "cite and switch," the Court's emerging strategy of paying nominal homage to precedent before proceeding to ignore or eviscerate it.⁵⁹⁹ Whatever its doctrinal consequences, *Lopez* assuredly signaled the Rehnquist Court's intent to recalibrate the frontiers of a "commerce power [that] ha[d] swelled to a proportion that would leave the framers 'rubbing their eyes' with amazement."⁶⁰⁰

Six weeks after *Lopez*, the Court dropped another bombshell. *Adarand Constructors, Inc. v. Pena*⁶⁰¹ overruled *Metro Broadcasting*.⁶⁰² Because *Adarand* involved a federal affirmative action plan, Justice O'Connor's discussion of the appropriate standard of review began with a reconsideration of the *Korematsu* conundrum. *Adarand* hinged on the "varying degrees of significance [accorded] to the difference in the language of" the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause.⁶⁰³ Justice O'Connor described *Bolling* as the "first time" that the Court had "explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications."⁶⁰⁴ She accepted *Bolling*'s reverse incorporation principle as controlling, declining to accord controlling weight to "a few contrary suggestions in cases" such as *Mow Sun Wong*, "in which [the Court] found special deference to the political branches of the Federal Government to be appropriate."⁶⁰⁵ Having begun with this premise, Justice O'Connor effectively committed the Court to unifying the bifurcated standards of review established by *Croson* and by *Metro Broadcasting*. But which level of scrutiny, strict or intermediate, would prevail?

Strict scrutiny won out. Justice O'Connor adopted "three general propositions" for understanding the constitutional status of "governmental

Wickard v. Filburn, 317 U.S. 111 (1942), on Commerce Clause jurisprudence, see *supra* notes 312-17 and accompanying text.

599. Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087, 2136 (2002).

600. Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 658 (2000) (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)).

601. 515 U.S. 200 (1995).

602. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

603. *Id.* at 213.

604. *Id.* at 215.

605. *Id.* at 217-18.

racial classifications.⁶⁰⁶ "First, skepticism," in the sense of strict scrutiny.⁶⁰⁷ "Second, consistency," in the sense that the standard of review ought not vary according to the race of those benefited or of those burdened by a challenged classification.⁶⁰⁸ The notion of "congruence," in the sense suggested by *Bolling's* equivalence between federal and state governments' obligation to accord equal treatment, completed the picture. "Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."⁶⁰⁹ *Metro Broadcasting* could not survive *Adarand's* holding "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."⁶¹⁰

In the final weeks of its 1994 Term, the Rehnquist Court thus gutted *Heart of Atlanta* and *McClung* in *Lopez* and used *Bolling* as the principal weapon in *Adarand* for projecting strict scrutiny across all affirmative action cases. Among the legs in the Warren Court's civil rights triad, an appointment with *Morgan* awaited. *Morgan* proved too weak to stave off *Adarand's* use of *Bolling* to bludgeon the use of intermediate scrutiny to review "benign" racial classifications in federal law, a doctrine that *Metro Broadcasting* had derived from section 5 of the Fourteenth Amendment. *Morgan's* suggestion of a substantive section 5 power was ripe for repudiation.

The inevitable collision took place two Terms later in *City of Boerne v. Flores*.⁶¹¹ *Boerne's* origins lay in the 1990 case of *Employment Division v. Smith*,⁶¹² which subjected religious practices to neutral, generally applicable laws even in the absence of a compelling governmental interest.⁶¹³ Seeking to restore the Free Exercise Clause balancing test of *Sherbert v. Verner*⁶¹⁴ and *Wisconsin v. Yoder*,⁶¹⁵ Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).⁶¹⁶ RFRA prohibited any government – federal, state, or

606. *Id.* at 223.

607. *Id.*

608. *Id.* at 224.

609. *Id.*

610. *Id.* at 227.

611. 521 U.S. 507 (1997).

612. 494 U.S. 872 (1990).

613. *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990).

614. 374 U.S. 398 (1963).

615. 406 U.S. 205 (1972).

616. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

local – from "substantially burden[ing]" the exercise of religion absent demonstration of a "compelling governmental interest" and proof that the burden is "the least restrictive means of furthering that . . . interest."⁶¹⁷ RFRA effectively expanded civil liberties beyond the limits marked by the Supreme Court in *Smith*. As applied against a state or local government, that expansion operated against the backdrop of the incorporation of the Free Exercise Clause into the Due Process Clause of the Fourteenth Amendment.⁶¹⁸ Because RFRA had been deployed against the Texas city of Boerne and its historic preservation ordinance, *Boerne* squarely presented the issue of Congress's authority to pass that statute under its power to "enforce" the Fourteenth Amendment "by appropriate legislation."⁶¹⁹ *Morgan's* interpretation of section 5 lay before the Court.⁶²⁰

Boerne represented the first time that the Supreme Court unequivocally rejected a substantive interpretation of section 5. Equating the constitutional word "enforce" with the judicial shorthand of "remedial," the Court reasoned that the "design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."⁶²¹ The "power 'to enforce,'" wrote Justice Kennedy, is "not the power to determine what constitutes a constitutional violation."⁶²² "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."⁶²³ To mark the unclear "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," the Court adopted the following test: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁶²⁴ Legislation that fails this test is "substantive in operation and effect" and therefore lies beyond Congress's section 5 power.⁶²⁵ Even Justice O'Connor, despite dissenting from the Court's decision to invalidate RFRA, acquiesced in the "congruence and

617. 42 U.S.C. § 2000bb-1 (1994).

618. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (declaring that the "fundamental concept of liberty embodied in" the Due Process Clause of the Fourteenth Amendment "embraces the liberties guaranteed by the First Amendment").

619. U.S. CONST. amend XIV, § 5; *City of Boerne v. Flores*, 521 U.S. 507, 516-17 (1997).

620. See *Boerne*, 521 U.S. at 527-29 (construing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

621. *Id.* at 519.

622. *Id.*

623. *Id.* ("Congress does not enforce a constitutional right by changing what the right is.")

624. *Id.* at 519-20.

625. *Id.* at 520.

proportionality" formulation of the standard of review for congressional invocations of section 5.⁶²⁶

Boerne specifically addressed the prospect that certain "language" in *Katzenbach v. Morgan* "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment."⁶²⁷ Justice Kennedy rejected this suggestion outright. He recharacterized section 4(e) of the Voting Rights Act and *Morgan* as having rested on Congress's factual basis for remedying discrimination against Puerto Ricans in procuring governmental services and establishing voting qualifications.⁶²⁸ A contrary reading of *Morgan*, one permitting Congress to "define its own powers by altering the Fourteenth Amendment's meaning," would allegedly reduce the Constitution from its status as "superior paramount law, unchangeable by ordinary means," and place it "on a level with ordinary legislative acts."⁶²⁹ In a single stroke, *Boerne* not only eased *Morgan*'s implicit threat to *Marbury v. Madison* but also effectively decommissioned the one-way ratchet without resort to that unruly word, "overrule."

After *Boerne*, *Morgan* will never again enjoy iconic status. *Morgan* once stood for the proposition that Congress holds equal footing *vis-à-vis* the federal courts in interpreting the Constitution. Because institutional differences between branches of government yield systematic differences between legislative and judicial readings of the Constitution,⁶³⁰ *Morgan* ensured that Congress and the courts would provide checks and balances against each other in an interpretive *pas de deux*. No longer: *Boerne* holds, in effect, that the Constitution's allocation of interpretive authority permits no differences of this sort, and the Supreme Court will prevail over Congress in any case of conflict.⁶³¹ Whether an act of Congress "come[s] under [one of]

626. *Id.* at 545-46 (O'Connor, J., dissenting).

627. *Id.* at 527-28.

628. *Id.* at 528.

629. *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

630. See, e.g., David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 59 (arguing that institutional differences between Congress and the federal courts justify distinct interpretations of the Fourteenth Amendment); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 185 (1997) (stating that differences in constitutional interpretation by legislative and judicial bodies "are not solely a product of intellectual disagreement" but also a result of institutional differences).

631. Cf. Ana Maria Merico-Stephens, *United States v. Morrison and the Emperor's New Clothes*, 27 J.C. & U.L. 735, 736-37 (2001) ("[T]he Rehnquist Court firmly believes that categorical federalism lines not only can be drawn, but that they should be drawn by the Court."):

the constitutional power[s] of Congress . . . is ultimately a judicial rather than a legislative question, and can be settled finally only by th[e] Court."⁶³² Soon after William Rehnquist's accession as Chief Justice, the official voice of conservatism distinguished sharply "between the Constitution and constitutional law,"⁶³³ between "judicial pronouncements" and extrajudicial efforts to interpret the Constitution.⁶³⁴ A decade later, *Boerne* took its place in the ongoing conservative transformation of the Supreme Court with a striking endorsement of judicial supremacy.

More practically speaking, *Boerne* destroys what had been symmetry among the Enabling Clauses of the Reconstruction Amendments. *Morgan* carefully unified judicial review under those Enabling Clauses according to the deferential standard first outlined in *McCulloch v. Maryland*. Although *Boerne* heralds a more rigorous approach to the Enabling Clauses of the Fourteenth and Fifteenth Amendments, it leaves untouched the Court's approach to section 2 of the Thirteenth Amendment. That the Thirteenth Amendment, unlike the Fourteenth and Fifteenth Amendments, reaches purely private conduct, wholly devoid of state-law complicity, may justify this difference. Whether a phantom or an abiding spirit, the state action requirement of the *Civil Rights Cases* has never haunted the Thirteenth Amendment. Nevertheless, by driving a wedge between section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment, *Boerne* does upset the historical understanding of those closely related constitutional provisions.⁶³⁵

Of the components of the Warren Court's civil rights triad, *Morgan* fared the worst under fire. All three of the cases in this "Grand Rehnquisition" – *Lopez*, *Adarand*, and *Boerne* – vividly demonstrate the unsustainable nature of *Morgan*'s one-way ratchet. Like any other affirmative action case, *Adarand* gives constitutional voice to members of groups disfavored by putatively benign forays into official race-consciousness. *Lopez*

632. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1965) (Black, J., concurring); *accord* *United States v. Morrison*, 529 U.S. 598, 614 (2000); *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995).

633. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981 (1987).

634. *Id.* at 989.

635. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-25 (1999) (discussing how the Court's differing interpretations of similar language in section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment create an "obvious inconsistency" that *Boerne* does not resolve); William G. Buss, *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 IOWA L. REV. 391, 417-18 (1998) (contrasting the historic deference accorded to Congress under section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment with *Boerne*'s apparent realignment of legislative power under the Fourteenth Amendment).

shows how congressional regulation of guns under the Commerce Clause can be construed as an intrusion into the state regulatory sphere and into such personal rights as may be bundled into the Second Amendment. Finally, *Boerne* ran ashore on the intrinsic First Amendment tension between free exercise and establishment; every decision crediting a claim under either of the religion clauses raises an incipient violation of the other clause.⁶³⁶ These countervailing claims are not necessarily meritorious; they need only to be plausible to expose footnote ten's incredible fragility. *Heller v. Doe* was right: One person's antisubordination claim is another's equal protection violation.⁶³⁷ *Morgan's* vulnerability to this assault helped torch the Warren Court consensus on civil rights.

What I have called the Grand Rehnquisition represents only the leading edge of what appears to be a doctrinal offensive by the Rehnquist Court. Soon after the conclusion of this three-Term *tour de force*, *United States v. Morrison*⁶³⁸ combined *Lopez* and *Boerne*. That the Court would condemn the Violence Against Women Act (VAWA)⁶³⁹ for failing to satisfy either *Lopez's* Commerce Clause test or *Boerne's* section 5 test was all but a foregone conclusion. At issue was petitioner Christy Brzonkala's pursuit of a federal remedy for her rape by two fellow students at the Virginia Polytechnic Institute.⁶⁴⁰ *Morrison* narrowed VAWA's Commerce Clause query strictly to one of congressional "regulation of activity that substantially affects interstate commerce."⁶⁴¹

Chief Justice Rehnquist, writing for the same five-Justice majority that decided *Lopez*, distilled four "significant considerations" from that case.⁶⁴² First, the putatively "economic" nature of the regulated "endeavor" is crucial to judicial approval of "federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce."⁶⁴³ Second, a

636. See, e.g., *NLRB v. Catholic Bishop*, 440 U.S. 490, 518 n.11 (1979) (Brennan, J., dissenting) (observing that a judicial exemption for church-operated schools from the National Labor Relations Act, inspired by a desire to avoid the potential infringement of free exercise, "generates a possible Establishment Clause question of its own") (emphasis omitted).

637. The road to social dysfunction, after all, often begins with the "naive inability to understand or appreciate that other individuals . . . have rights" and ends in the intractable propensity to be "intolerant of the demands and pleas of the community, scornful of communal enterprise and spirit, [and] suspicious of the motives of community minded people." ROBERT LINDNER, *REBEL WITHOUT A CAUSE* 7 (1944).

638. 529 U.S. 598 (2000).

639. 42 U.S.C. § 13981 (1994).

640. *United States v. Morrison*, 529 U.S. 598, 604-05 (2000).

641. *Id.* at 609.

642. *Id.* at 609-12.

643. *Id.* at 611.

"jurisdictional element" in the text of a statute "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."⁶⁴⁴ Third, though congressional findings regarding the activity's impact on interstate commerce are not indispensable, *Morrison* repeated the Court's previously expressed preference for findings.⁶⁴⁵ Finally, the Chief Justice emphasized the "attenuated" nature of "the link between gun possession" and the "effect on interstate commerce" alleged in *Lopez*.⁶⁴⁶

VAWA failed this analysis. "Gender-motivated crimes of violence," Chief Justice Rehnquist proclaimed, "are not, in any sense of the phrase, economic activity."⁶⁴⁷ Nor did VAWA contain a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."⁶⁴⁸ But VAWA differed from the gun possession statute in *Lopez* insofar as Congress made "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."⁶⁴⁹ These findings nevertheless proved unavailing. Chief Justice Rehnquist refused to treat "the existence of congressional findings . . . , by itself," as "sufficient . . . to sustain the constitutionality of Commerce Clause legislation."⁶⁵⁰ *Morrison* characterized these findings' connection of sex-based violence with interstate commerce as so "substantially weakened" that their use as a foundation for Commerce Clause legislation would "completely obliterate the Constitution's distinction between national and local authority."⁶⁵¹ The Court feared that the inexorable extension of "the but-for causal chain from the initial occurrence of violent crime" would permit "Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."⁶⁵² This reasoning concluded in a stunning limitation on the "aggregation" principle that had been a hallmark of Commerce Clause jurisprudence since *Darby* and *Wickard v. Filburn*: "We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."⁶⁵³

644. *Id.* at 612.

645. *Id.*

646. *Id.*

647. *Id.* at 613.

648. *Id.*

649. *Id.* at 614.

650. *Id.*

651. *Id.* at 615.

652. *Id.*

653. *Id.* at 617.

Morrison also dismissed the "alternative argument that [VAWA's] civil remedy should be upheld as an exercise of Congress' remedial power under § 5 of the Fourteenth Amendment."⁶⁵⁴ Despite acknowledging the "voluminous congressional record" supporting Brzonkala and the United States' "assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence,"⁶⁵⁵ Chief Justice Rehnquist sought refuge in "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."⁶⁵⁶ He rejected the suggestion that the *Civil Rights Cases* and other sources for this proposition had been overruled in *United States v. Guest*⁶⁵⁷ and *District of Columbia v. Carter*.⁶⁵⁸ Reaffirming *Boerne*'s requirement that "prophylactic legislation under § 5 . . . have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'"⁶⁵⁹ Chief Justice Rehnquist characterized VAWA as aimed solely "at individuals who have committed criminal acts motivated by gender bias," to the exclusion of "any Virginia public official involved in investigating or prosecuting Brzonkala's assault."⁶⁶⁰ He thereupon distinguished VAWA from "any of the § 5 remedies that [the Court] ha[d] previously upheld."⁶⁶¹

For his part, Justice Thomas wrote a separate concurrence to repeat his view, first articulated in *Lopez*, "that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with th[e] Court's early Commerce Clause cases."⁶⁶² He urged the Court to "replace[] its existing Commerce Clause jurisprudence

654. *Id.* at 619.

655. *Id.* at 619-20.

656. *Id.* at 621.

657. 383 U.S. 745 (1966).

658. 409 U.S. 418 (1973); see *United States v. Morrison*, 529 U.S. 598, 622-24 (2000) (rejecting the suggestion that *Guest* or *Carter* casts doubt on the *Civil Rights Cases*). *Guest* held that the Fourteenth Amendment could reach conduct that was neither exclusively nor directly state action. *United States v. Guest*, 383 U.S. 745, 755 (1965). A claim that police had arrested blacks on false reports made by private parties provided sufficient state action. *Id.* at 756. *Carter* stated in dicta that the Fourteenth Amendment did not reach "purely private conduct." *District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973) (emphasis added).

659. *Morrison*, 529 U.S. at 625-26 (quoting *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

660. *Id.* at 626.

661. *Id.* (discussing *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Ex parte Virginia*, 100 U.S. 339 (1879)).

662. *Id.* at 627 (Thomas, J., concurring).

with a standard more consistent with the original understanding."⁶⁶³ Justice Souter's principal dissent focused strictly on VAWA's validity under the Commerce Clause and never "reach[ed] the question whether it might also be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment."⁶⁶⁴

Morrison merely punctuates – albeit loudly – the Court's restructuring of Commerce Clause and section 5 jurisprudence in *Lopez* and *Boerne*. The contemporary Court has severely devalued "the traditional interest in the uniform enforcement of civil rights,"⁶⁶⁵ an interest informed by awareness of the states' historical shortcomings in civil rights enforcement and, indeed, of state actors' more-than-occasional forays into affirmative discrimination.⁶⁶⁶ At an extreme, *Lopez* and *Morrison* have "single[d] out civil rights laws as being uniquely beyond the scope of Congress's commerce power."⁶⁶⁷

Lest this emphasis on *Morrison*'s extension of principles previously outlined in *Lopez* and *Boerne* suggest that the Grand Rehnquist is approaching its logical limits, let us recall that the Rehnquist Court had laid down an even more extensive agenda for doctrinal reconstruction during the 1995 Term. Between *Adarand* and *Boerne*, the Supreme Court handed down *Seminole Tribe v. Florida*,⁶⁶⁸ which overruled yet another decision by Justice Brennan⁶⁶⁹ in holding that Congress may not abrogate state sovereign immunity merely by exercising its Article I powers, including the commerce power.⁶⁷⁰ The Court later held that legislation arising under section 5 of the Fourteenth Amendment may indeed abrogate state sovereign immunity, but Congress in so doing must satisfy the "congruence and proportionality" test of

663. *Id.* (Thomas, J., concurring).

664. *Id.* at 628 n.1 (Souter, J., dissenting).

665. Julie Goldschie, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 131-32 (2000).

666. For traditional expressions of federal distrust of the states in the realm of civil rights enforcement, see, for example, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989); *Patsy v. Bd. of Regents*, 457 U.S. 496, 505-06 (1982); *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

667. Louis J. Virelli III & David S. Leibowitz, "Federalism Whether They Want It or Not": *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 976 (2001).

668. 517 U.S. 44 (1996).

669. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (opinion of Brennan, J.) (permitting Congress to abrogate state sovereign immunity by exercising its Commerce Clause powers), *overruled by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

670. *Seminole Tribe*, 517 U.S. at 72.

Boerne.⁶⁷¹ As a result, *Boerne* has now displaced *Morgan* not only as the source of the standard of review for legislation arising under section 5, but also as controlling precedent in the Eleventh and Fifteenth Amendment contexts. Together, "*Lopez*, *Seminole Tribe*, and *Boerne* put a triple whammy on congressional authority."⁶⁷² To the extent that the Supreme Court has endorsed certain civil rights statutes as exercises of Congress's commerce power, but not necessarily as exercises of Congress's section 5 power,⁶⁷³ a broad swath of federal antidiscrimination legislation will remain vulnerable to the Court's Eleventh Amendment jurisprudence after *Seminole* and *Boerne*.⁶⁷⁴ For its part, the sovereign immunity concept now extends to suits against states in their own courts⁶⁷⁵ and to federal administrative proceedings against states.⁶⁷⁶ The Nickel and Five has imploded. What the Rehnquist Court is building in its place remains, for the moment, invisible to the naked eye.⁶⁷⁷

671. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636-37 (1999).

672. Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1722 (2002) (suggesting, however, "that due process of lawmaking [offers] a way out of the bind").

673. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 243 & n.18 (1983) (declaring that the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1994 & Supp. V 1999), is a valid exercise of the commerce power); cf. *Chisom v. Roemer*, 501 U.S. 380, 412 (1991) (Scalia, J., dissenting) (acknowledging that "it is questionable whether Congress was invoking its powers under the Fourteenth Amendment (rather than merely the Commerce Clause)" in subjecting the states to the ADEA, as described in *Gregory v. Ashcroft*, 501 U.S. 452, 467-68 (1991)). Compare *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 261 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 on a Commerce Clause theory without reaching the section 5 question) with *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-53 & n.9, 456 n.11 (1976) (describing the application of Title VII to state and local governments as having proceeded under section 5 of the Fourteenth Amendment).

674. See Note, *The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146, 2147 (2001) ("[T]he valid federal authorization . . . of private suits against states for money damages for violations of federal antidiscriminatory laws now rests solely on section 5 of the Fourteenth Amendment.").

675. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

676. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, ___, 122 S.Ct. 1864, 1865 (2002).

677. Cf. *United States v. Lopez*, 514 U.S. 549, 563 (1995) ("But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."). Compare John O. McGinnis, *Reviving*

The extension of *Boerne's* interpretation of section 5 into Eleventh Amendment jurisprudence turns the Fourteenth Amendment on its head. The extent to which the Eleventh Amendment was intended to preserve the sovereign immunity of the states is highly contestable and hotly contested.⁶⁷⁸ Whatever intent may have underlain the Eleventh Amendment, the history of the Fourteenth Amendment knows no such ambiguity. That Amendment was intended, unequivocally, to enhance federal judicial and legislative power at the expense of the states in the wake of the Civil War. Applying *Boerne's* stringent congruence and proportionality test to congressional abrogations of state sovereign immunity thus betrays the intended function of the Reconstruction Amendments as "limitations of the powers of the States and enlargements of the power of Congress."⁶⁷⁹

V. The Fall of the House of Warren

No golden age endures forever . . . [F]or reasons which escape our grasp, the best and most creative minds of a generation are drawn to a particular field . . . After a generation or two of intense activity the job is done; the best and most creative minds of the next generation follow their genius into new fields. But it will be a long time before anyone realizes that the last great play has already been written, the last great symphony composed.

Grant Gilmore, *The Ages of American Law*⁶⁸⁰

Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery, 90 CAL. L. REV. 485, 491 (2002) (defending the Rehnquist Court's agenda as one that advances local control and associational freedom) with Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002) (accusing the incumbent Court of being motivated by hostility toward newer, more aggressive extensions of antidiscrimination law).

678. See generally *Hans v. Louisiana*, 134 U.S. 1 (1890).

679. *Ex parte Virginia*, 100 U.S. 339, 345 (1879); accord *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989) (plurality opinion); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1976); *Bell v. Maryland*, 378 U.S. 226, 252 (1964) (Douglas, J., concurring); see also *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (describing the Reconstruction Amendments as "specifically designed as an expansion of federal power and an intrusion on state sovereignty"); *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) (acknowledging the Fourteenth Amendment as the "centerpiece" of "the new structure of law that emerged in the post-Civil War era" and that thereby "clearly established" "the role of the Federal Government as a guarantor of basic federal rights against state power"); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1873) (noting that the Reconstruction Amendments granted "additional powers to the Federal government" and laid "additional restraints upon those of the States").

680. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 40 (1977); cf. JONI MITCHELL, *Big Yellow Taxi*, on *LADIES OF THE CANYON* (Warner Bros. Records Inc. 1970) ("Don't it always seem to go / That you don't know what you've got / Till it's gone").

The Warren Court's consensus on civil rights rested on three premises. First, Fifth Amendment due process binds the federal government no less than Fourteenth Amendment equal protection binds the states. Second, Congress stands as the peer of the federal judiciary in enforcing the Fourteenth Amendment and consequently may grant civil rights regardless of whether they are formally recognized by courts. Third, discrimination on the basis of race was America's original sin,⁶⁸¹ whose expiation began in earnest during the Civil War and endures through continuing elaboration of the Reconstruction Amendments. By extending the New Deal Court's understanding of the Commerce Clause, the Warren Court upheld the Civil Rights Act of 1964 and thereby overcame some of the disappointments of Reconstruction. These three premises combined the basic ingredients of American constitutionalism – federalism, separation of powers, and civil liberty – in an almost Aristotelian set of unities.

In its time the Warren Court undertook "a program of constitutional reform almost revolutionary in its aspiration and . . . in its achievements."⁶⁸² It "spurred . . . great [social] changes . . . and inspired and protected those who sought to implement them."⁶⁸³ Yet the two judicial generations that succeeded Earl Warren have systematically dismantled his Court's civil rights legacy. A jurisprudential house divided between *Bolling* and *Morgan* could never stand, and the Burger Court's inept articulation of equal protection doctrine in affirmative action controversies exposed a doctrinally unstable Nickel and Five to radical restructuring in the Rehnquist Court. A cycle of cases spanning October Terms 1994 and 1996 have resolved the internal tension between *Bolling* and *Morgan* sharply in favor of *Bolling*. That resolution has dramatically heightened the Supreme Court's power *vis-à-vis* that of Congress. Whatever truth lies in the frequent characterization of the Warren Court as an institution dedicated to judicial activism, this much cannot be denied: The Rehnquist Court has greatly expanded the federal judiciary's power relative to that of Congress. Indeed, the Rehnquist Court deserves the

681. Cf. Chen, *supra* note 459, at 1843 ("For the Framers so loved the land . . . that they gave us their only written Constitution, that whosoever believeth in it should not perish, but have everlasting power.' The Constitution commanded equal protection, not in order to condemn the land, but that the union through equal protection might be saved." (footnotes omitted)). See generally Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (arguing "that the Court has approved affirmative action only as precise penance for the specific sins of racism a government, union, or employer has committed in the past").

682. Owen Fiss, *A Life Twice Lived*, 100 YALE L.J. 1117, 1118 (1991).

683. *Id.*

label of "judicial activism" at least as much as the Warren Court did.⁶⁸⁴ The judicial supremacy of the Warren era has come home to roost: The premise that "the federal judiciary is supreme in the exposition of the law of the Constitution" has become "a permanent and indispensable feature of our constitutional system."⁶⁸⁵ In particular, the Rehnquist Court's campaign to expand the Tenth and Eleventh Amendments relies not on the text of the Constitution, but rather on the "premises and postulates" that the creative judicial mind can extract from these provisions.⁶⁸⁶

In treating the Supreme Court as a political instrument, the Rehnquist Court does not so much rebuke as emulate the Warren Court. In one sense, the Rehnquist Court has been quite true to the jurisprudential underpinnings of the Warren era. Formal equality – nothing more and nothing less than "the demand that government remain neutral" – "provides the framework underlying the jurisprudence of both the Warren Court and the Rehnquist Court."⁶⁸⁷ As usual, though, the devil lurks in the details. Although the Rehnquist Court may have inherited much of the Warren Court's political savvy and perhaps even some of its core legal instincts, the latent doctrinal weaknesses of the Warren Court's civil rights framework have minimized those decisions' precedential effect in an era of shifting judicial values. Thus, the doctrinal shortcomings of *Bolling* and *Morgan* have enabled the Rehnquist Court to undermine crucial elements of the Warren legacy. *Adarand* crushed Justice Brennan's farewell to the Supreme Court, *Metro Broadcasting*, and

684. See, e.g., Scott Fruewald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 MARQ. L. REV. 435, 438-40 (1999) (summarizing four points that show a "new judicial activism"); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 290 (2000) (accusing the Rehnquist Court of abandoning "institutional arrangements that have worked for two centuries" in favor of "a radical experiment in judicial activism"); Larry D. Kramer, *The Supreme Court, 2000 Term – Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) (accusing the Rehnquist Court of practicing "judicial sovereignty"); cf. GILMORE, *supra* note 680, at 93 ("The rebirth of judicial activism has gone hand in hand with a rebirth of the federalizing or nationalizing principle.").

685. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *accord* *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995).

686. Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 155 (1999); see also *Alden v. Maine*, 527 U.S. 706, 713 (1999) (admitting that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting) (describing the current Court's "dramatic expansion of the judge-made doctrine of sovereign immunity" as "unpredictable" and "defined only by the present majority's perception of constitutional penumbras rather than constitutional text"). See generally Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289 (2001).

687. Sherry, *supra* note 283, at 478.

with it Justice Brennan's group-based vision of equal protection. *Boerne* nominally upheld *Morgan* but effectively overruled it. The contemporary Court's federalism cases project *Boerne*'s theory of section 5 across a wide jurisprudential swath, ranging from the Commerce Clause to the Eleventh Amendment. Indeed, *Lopez*, *Boerne*, and *Morrison* now form a doctrinally sealed front in the Rehnquist Court's campaign to ensure that the sovereign prerogatives of the states routinely "command the support of a majority of [the] Court."⁶⁸⁸

Ever since Earl Warren took command of *Brown v. Board of Education*, the Supreme Court has exerted "pervasive influence on a wide range of issues that can only in a partial and peripheral way be considered legal rather than political."⁶⁸⁹ In an inversion of Alexis de Tocqueville's description of the young Republic, there is hardly a judicial question in the United States which does not sooner or later turn into a political one.⁶⁹⁰ As if to spite the frustration of his presidential ambitions, the transformation of the Supreme Court into a sophisticated and influential political institution represents Earl Warren's enduring legacy. As another Chief Justice who aspired to the White House once observed, "the Constitution is what judges say it is."⁶⁹¹ Warren and his cohorts neither created nor denied this state of affairs. They simply made their voices – and the constitutional messages they carried – heard in the halls of elected power.

688. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting); see also William Blodgett, *Just You Wait, Harry Blackmun*, 3 CONST. COMMENT. 3 (1986) (setting to music then-Justice Rehnquist's retort to Justice Blackmun's majority opinion in *Garcia*); cf., e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (admonishing the federal government that it "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program"); *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996) (preventing Congress from using the Indian Commerce Clause to abrogate state sovereign immunity); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the "Federal Government may not compel the States to enact or administer a federal regulatory program"); *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (upholding Missouri's mandatory retirement age for state judges as not prohibited by the ADEA or the Equal Protection Clause).

689. Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U.L. REV. 858, 860 (1990); cf. CRAY, *supra* note 8, at 496 (reporting the observation of Earl Warren, Jr., that the Chief Justice was "content[]" with his Court's work in "all major areas of social concern").

690. Cf. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Meyer ed. & George Lawrence trans., 1969) ("There is hardly a political question in the United States which does not sooner or later turn into a judicial one.").

691. CHARLES EVANS HUGHES, *ADDRESSES AND PAPERS* 139 (1908); see *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 550 (1991) (O'Connor, J., dissenting) (stating that "when the Court changes its mind, the law changes with it"); see also *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 115 (1993) (O'Connor, J., dissenting) (quoting this passage from *Beam*).

Critics have frequently belittled the Warren Court's record as one of "deeds without doctrines."⁶⁹² But Chief Justice Warren himself would have turned this epithet into a battle cry. Justice Potter Stewart noted that "Warren's great strength was his simple belief in the things [others] . . . laugh at – motherhood, marriage, family, flag, and the like."⁶⁹³ Warren remained true to the "basic beliefs" drawn from "his hard-working, injustice-hating, proletarian childhood."⁶⁹⁴ He "never forgot that people, individuals, stood behind each case," behind each petition for certiorari.⁶⁹⁵ What he lacked in "genuine intellectual distinction," he offset with "decency, stability, sincerity."⁶⁹⁶ Those characteristics manifested themselves in the Chief Justice's opinions. His typically "short, nontechnical" opinions, written in "direct and straightforward" language devoid of "legalisms," fell "well within the grasp of the average reader."⁶⁹⁷ This rhetorical simplicity gave the "important Warren opinions . . . a simple power of their own: if they do not resound with the cathedral tones of Marshall, they speak with the moral decency of a modern Micah."⁶⁹⁸ What does the law demand, but to do justice, love mercy, and walk humbly with the law?⁶⁹⁹ After all, the predominant rhetoric of the civil rights era combined the vengeful thunder of the Hebrew Bible with the merciful rhythms of the New Testament. "*Fiat justitia, ruat coelum*,"⁷⁰⁰ said the preacher. Whether the road to Washington runs through Sacramento or Selma, let justice be done. "Let justice be done, though the heavens may fall."⁷⁰¹

692. ROBERT G. MCCLOSKEY, *THE MODERN SUPREME COURT* 221 (1972); Robert G. McCloskey, *Deeds Without Doctrines*, 56 AM. POL. SCI. REV. 71 (1962).

693. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY* 139 (1983).

694. WARREN, *supra* note 4, at 376 (editors' epilogue).

695. CRAY, *supra* note 8, at 440.

696. JOHN GUNTHER, *INSIDE U.S.A.* 20-21 (1947); *see also id.* at 18 (noting that Warren would "never set the world on fire or even make it smoke").

697. Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 TULSA L.J. 477, 485 (1997).

698. *Id.* at 502.

699. *Micah* 6:8, as translated in the King James Version, states: "what doth the LORD require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?" The Revised Standard Version renders the verse in this fashion: "what does the LORD require of you but to do justice, and to love kindness, and to walk humbly with your God?"

700. *Morrison v. Olson*, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

701. *Id.* (Scalia, J., dissenting). The Latin maxim quoted by Justice Scalia has several historical precedents. *Fiat justitia et pereat mundus* – "Let justice be done, though the world perish" – was apparently the motto of Ferdinand I, King of Bohemia and Hungary and (from 1558-64) Holy Roman Emperor. *Fiat justitia, ruat coelum* has been attributed to a poet of the

But law does not live by rhetoric alone.⁷⁰² American legal culture prefers a clear separation of judicial craftsmanship from politics,⁷⁰³ the better to sustain "the Nation's confidence in the judge as an impartial guardian of the rule of law."⁷⁰⁴ Our tradition demands that judicial opinions, once issued, "will provide professional readers with explanations for the results reached."⁷⁰⁵ In response to the jurisprudential challenge posed by *Brown v. Board of Education*, Herbert Wechsler advocated a "genuinely principled" judicial process grounded in "analysis and reasons quite transcending the immediate result that is achieved."⁷⁰⁶ More than four decades later, Wechsler's "concept of neutral principles remains an article of faith" among American jurists.⁷⁰⁷

late Roman republic, Lucius Calpurnius Piso Caesoninus. BARTLETT'S FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 119 (Justin Kaplan ed., 16th ed. 1992). The maxim's popularity in English, especially in judicial opinions, is traceable to Lord Mansfield: "The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say '*fiat justitia, ruat coelum.*'" *Rex v. Wilkes*, 98 Eng. Rep. 327, 347 (K.B. 1770); *accord, e.g.*, Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 716 & n.174 (1996) (attributing the maxim to Lord Mansfield in *Wilkes*); Leon R. Yankwich, *The Art of Being a Judge*, 105 U. PA. L. REV. 374, 379 (1957) (same). See generally BURTON STEVENSON, *THE HOME BOOK OF QUOTATIONS: CLASSICAL AND MODERN* 1030-31 (1967) (tracing the maxim as used in numerous English literary and legal sources). Thanks to architect Lewis Broome, it appears today on the rotunda of the New Jersey State House in Trenton. See *The History of the New Jersey State House*, at http://www.state.nj.us/hangout_nj/government_statehouse.html (last visited Oct. 9, 2002).

702. See Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1297 (1995) ("Law does not live by words alone, but on every value given voice through participatory politics."); cf. *Deuteronomy* 8:3 (Revised Standard) ("man does not live by bread only"); *Matthew* 4:4 (Revised Standard) ("Man shall not live by bread alone"); *Luke* 4:4 (Revised Standard) ("Man shall not live by bread alone").

703. See, e.g., *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of Government. No misconception could do more lasting injury to this Court . . ."); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2026 (1996) (arguing that "judges are likely to take . . . institutionally induced beliefs about the way they should carry out their official functions . . . quite seriously"); Kathleen M. Sullivan, *The Supreme Court, 1991 Term - Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 120 (1992) ("Most judges hold deeply internalized role constraints and believe that judgment is not politics.").

704. *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting).

705. Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1465-66 (1995).

706. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

707. Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829,

Surprising though it may seem, "some judges feel an obligation to do the job right."⁷⁰⁸ The underlying faith in principled adjudication, however, is quite fragile. If even the Justices no longer believe in "precedents which are binding on the court without regard to the personality of its members," surely the public at large will expect "that on great constitutional questions [the] court [will] . . . depart from the settled conclusions of its predecessors."⁷⁰⁹ Doctrinal coherence "is the only thing that prevents [the] Court from being some sort of nine-headed Caesar, giving thumbs up or thumbs down to whatever outcome . . . suits or offends its collective fancy."⁷¹⁰ Should the typical Supreme Court decision begin to resemble "a restricted railroad ticket, good for this day and train only,"⁷¹¹ the Constitution, far from "embodying only relatively fundamental rules of right," would be perceived as "the partisan of a particular set of ethical or economical opinions."⁷¹²

Perhaps Robert Cover was correct in suggesting that prominent legal decisions or even trials convey constitutional meaning simply as historical events or cultural episodes, independent of any questions of law that are formally resolved.⁷¹³ But doctrine still matters. Doctrinal precision matters because, as the example of technological evolution shows, the yearning for and development of automated, user-friendly tools enables a doctrine – no

832 (2001) (reviewing EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000)). See generally Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995).

708. Thomas O. McGarity, *On Making Judges Do the Right Thing*, 44 DUKE L.J. 1104, 1105 (1995).

709. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting) (describing the Constitution under such circumstances as "a most dangerous instrument to the rights and liberties of the people"), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988).

710. *Dickerson v. United States*, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting). Justice Scalia has often accused his colleagues of reducing constitutional law to "the perceptions of decency, or of penology, or of mercy, entertained . . . by a majority of the small and unrepresentative segment of our society that sits on this Court." *Thompson v. Oklahoma*, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting); *accord* *Atkins v. Virginia*, 536 U.S. 304, ___, 122 S. Ct. 2242, 2265 (2002) (Scalia, J., dissenting) (accusing the Court of "cavalier[ly]" treating constitutional adjudication as "just a game" of discerning "the feelings and intuition of a majority of the Justices") (emphasis in original).

711. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

712. *Otis v. Parker*, 187 U.S. 606, 609 (1903) (Holmes, J.); *accord* Wechsler, *supra* note 706, at 19.

713. See Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) ("No set of legal institutions or prescriptions exists apart from the narratives that locate [law] and give [law] meaning. For every constitution there is an epic, for each decalogue a scripture.").

matter how complex in origins – to be used (though not necessarily understood) by a less skilled but vastly deeper audience.⁷¹⁴ The traditional practice of delegating doctrinal details to law clerks partially explains the phenomenon,⁷¹⁵ but it does not come close to providing a plausible justification.

The trouble is that constitutions and constitutional doctrines, like statutes and other forms of nonfundamental law,⁷¹⁶ take on a social meaning and political life of their own.⁷¹⁷ The not-so-secret political life of legal decisions corrodes their doctrinal integrity. A decade ago in *Planned Parenthood v. Casey*,⁷¹⁸ the Supreme Court decided to preserve key elements of *Roe v. Wade*⁷¹⁹ on almost no basis except assuaging the "entire generation" that had "come of age" since the Court began manipulating the Constitution's "concept of liberty in defining the capacity of women to act in society, and to

714. See generally, e.g., DONALD A. NORMAN, *THE PSYCHOLOGY OF EVERYDAY THINGS* 29-33 (1990) (discussing the "paradox of technology": because new devices embody more advances and features but must remain simple enough to be used by the general public, "clever design seeks to minimize apparent complexity"); DONALD A. NORMAN, *THINGS THAT MAKE US SMART: DEFENDING HUMAN ATTRIBUTES IN THE AGE OF THE MACHINE* 3-8 (1993) (illustrating how many technologies represent society's embodiment of complex concepts in easily used devices); Leon E. Wein, *Maladjusted Contrivances and Clumsy Automation: A Jurisprudential Investigation*, 9 HARV. J.L. & TECH. 375 (1996) (arguing that the law should encourage technology to be better adapted for human use). For further examination of the connections between cognitive science and legal reasoning, see Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197 (2001).

715. See Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 771 (1995) (describing how Justices routinely leave doctrinal details to law clerks who eventually become "legal academics and political theorists" and in that capacity will supply "sophisticated elaborations" on the shortcomings of Supreme Court opinions); cf. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 128 (1986) (arguing that the extensive role of law clerks undermines the historical value of the Supreme Court's finished opinions); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 752-53 (1992) (arguing that the Justices' use of clerks means that opinions do not necessarily "represent the work of the Justice" and that "examination of the internal working papers of the chambers" may be needed to understand the Justices' "use [of] constitutional theory"). See generally Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281 (1994) (arguing that law clerks' influence on Supreme Court opinions may be greater than the Justices themselves realize); David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509 (2001) (proposing an ethical requirement that judges not delegate writing to their clerks).

716. See generally William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

717. See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

718. 505 U.S. 833 (1992).

719. 410 U.S. 113 (1973).

make reproductive decisions.⁷²⁰ I do not mean to suggest that *Roe* is indefensible, doctrinally or theoretically, but rather that *Casey* rested almost entirely on the idea that *Roe* belonged to that class of legal propositions for which it is more important that the "law be settled than that it be settled right."⁷²¹ As with abortion, so too with affirmative action.⁷²² Sheer age has entrenched the *Bakke* decision, if only "as a matter of *stare decisis*."⁷²³ Just as men and women across "two decades of economic and social developments . . . have organized intimate relationships and made choices . . . in reliance on the availability of abortion in the event that contraception should fail,"⁷²⁴ "[a]n entire generation of Americans has been schooled under *Bakke*-style affirmative action, with . . . explicit blessing[s]" and meticulous, step-by-step guidance by the Supreme Court.⁷²⁵

Argumentive adverse possession, however, is a singularly repulsive way to resolve constitutional questions. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."⁷²⁶ No more dramatic demonstration of the need for periodic constitutional renewal exists than *Brown*'s triumph over the "separate but equal" creed of *Plessy v. Ferguson*.⁷²⁷ Therefore, if "[o]ur Constitution is a covenant running from" generation to generation, "[e]ach generation must [reject] anew . . . ideas and aspirations" not fit to "survive more ages than one."⁷²⁸ "Twenty-five years," roughly the span of a single human generation, "is a relatively long time for the Supreme Court to complete a constitutional hiccough."⁷²⁹ *Brown* and the rest of the Warren Court's civil rights agenda

720. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 860 (1992).

721. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

722. See Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1126-27 (1997) ("*Bakke* . . . is to affirmative action as *Roe* is to abortion."); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1044-46 (1996) (questioning whether *Bakke* has "the 'super-precedential' value of *Roe*" and concluding that "there are strong reasons to doubt that *Bakke* carries the same precedential value of *Roe*").

723. Farber, *supra* note 288, at 916.

724. *Casey*, 505 U.S. at 856.

725. Amar & Katyal, *supra* note 495, at 1769.

726. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), reprinted in 110 HARV. L. REV. 991, 1001 (1997); accord *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

727. 163 U.S. 537 (1896).

728. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 901 (1992).

729. Chen, *supra* note 480, at 98.

have reached that "most difficult period in the life of" any entity, human or legal: "middle age."⁷³⁰ These doctrines may be "no longer what [they] once [were] but there is . . . life in the old dog yet."⁷³¹ When constitutional doctrines become obsolete, shortcuts taken during the early stages of doctrinal development not only make it difficult (if not impossible) for the Justices closest to the original formulation to make improvements, but also expose a once vibrant legal innovation to capture and even perversion by hostile forces.

At some point the Justices must articulate and defend some body of coherent legal principles, for perpetual ad hocery (whatever its short-term virtues)⁷³² over the long run promotes no meaningful jurisprudential values.⁷³³ The prospects for such a careful and comprehensive approach, however, are grim. When legal academia by and large disdains scholars who concentrate on providing "sustained, disinterested, and competent criticism" of judicial doctrine, when most critics "of the [Supreme] Court's work seem to have little more to say . . . than that they do not like some of the results and yearn for ipse dixit their way instead of the Court's way," we drift further from the ideal state in which "reason is the life of the law and not just votes for your side."⁷³⁴ Judges are not likely to pay closer attention. Even Justice Brennan, the ingenious lieutenant who converted "Warren[']s . . . orders" into "the General's victories,"⁷³⁵ exhibited extreme impatience with what he considered "chicken-shit"⁷³⁶ and "cow shit" cases.⁷³⁷ In an age when "[i]deology rather than merit" dictates judicial appointments, the Supreme Court is unlikely to welcome new Justices who have the "temperament, maturity, and demeanor"

730. GILMORE, *supra* note 680, at 96.

731. *Id.*

732. See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Cass R. Sunstein, *The Supreme Court, 1995 Term – Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

733. See Neil Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1986 (1999) (arguing that "principal consequence" of avoidance "may be" shifting of authority from Supreme Court to lower courts); David Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (arguing that the requirement "that judges give reasons for their decisions" serves a "vital function" in constraining the judiciary because grounds for decision "can be debated, attacked, and defended").

734. Henry M. Hart, *The Supreme Court, 1958 Term – Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 125 (1959).

735. Hutchinson, *supra* note 277, at 929.

736. WOODWARD & ARMSTRONG, *supra* note 481, at 359 (reporting Justice Brennan's characterization of *Antoine v. Washington*, 420 U.S. 194 (1975)).

737. *Id.* at 419 (describing how Chief Justice Burger insulted Justice Brennan by assigning him *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273 (1976), a dreary "patent dispute over a water flush system designed to remove cow manure from the floor of dairy barns").

not only to "craft a brilliant opinion in a major constitutional ruling" but also to "stay awake and . . . pay[] equal attention" to dull cases whose doctrinal complexity exceeds their political visibility.⁷³⁸ It is a Court, after all, whose docket teems with "peewee" cases.⁷³⁹ *Bolling* and *Morgan* were far from "peewee" cases, but they played secondary roles in the Warren Court's grand dramas on school desegregation and voting rights. Doctrinal imperfections exposed these cases to capture, even perversion, by a later Court that learned its political savvy, but not its judicial values, from Earl Warren.

"The Warren Court is dead."⁷⁴⁰ Welfare rights and elaborate procedural safeguards for criminal defendants no longer dominate constitutional law.⁷⁴¹ Like so much of the rest of the Warren Court agenda, the Nickel and Five has collapsed. In the Rehnquist Court, the only "five" that survives is the eternal Supreme Court maxim that "five votes can do anything around here."⁷⁴² On a Court that is infallible because it is final,⁷⁴³ five is the loveliest number you will ever know.⁷⁴⁴ To this day it remains unclear whether Justice Brennan's five-finger salute in chambers signified a "rule of five" or "rule by five," whether he was reminding his clerks that it takes five votes to achieve anything at the Court or whether he was signaling that five votes enabled a Justice to achieve anything.⁷⁴⁵ Regardless, a constitutional edifice

738. Neil M. Richards, *The Supreme Court Justices' "Boring" Cases*, 4 GREEN BAG 2D 401, 407 (2001).

739. WOODWARD & ARMSTRONG, *supra* note 481, at 128 (quoting Justice John Marshall Harlan); accord Ronald J. Krotoszynski, Jr., *Cohen v. California: "Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1255 (1996) (noting how Justice Harlan initially characterized *Cohen v. California*, 403 U.S. 15 (1971), as an insignificant case but observing how Harlan eventually "look[ed] beyond . . . to the broader implications of [the] ruling").

740. Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 205 (1991); accord Mark Tushnet, *The Supreme Court, 1998 Term – Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 30 (1999) (adding that "the New Deal/Great Society political system" that produced the Warren Court "is no longer in place"); see also REBEL WITHOUT A CAUSE (Warner Bros. 1955) ("It's all over, the world ended.").

741. See, e.g., Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 736-38 (1997) (documenting the displacement of Warren-era constitutional concerns by an agenda grounded in preserving contraception and abortion as constitutionally protected rights).

742. See BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 6 (1996) (attributing this aphorism to Justice Brennan); JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 54 (1995) (same).

743. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

744. Cf. Paul H. Edelman & Jim Chen, *"Duel" Diligence: Second Thoughts About the Supremes as the Sultans of Swing*, 70 S. CAL. L. REV. 219, 233 (1996) ("On the Court, four is the loneliest number.").

745. Tushnet, *supra* note 715, at 763.

built from randomly assembled five-vote coalitions and laid upon a foundation of shifting doctrinal sands will not long endure in a contemporary Court less disposed than ever to respect precedent.⁷⁴⁶ "Power, not reason," has become the currency of this Court.⁷⁴⁷ "Precisely to the extent that a Justice needs five votes to do anything, articulating a coherent vision becomes more difficult."⁷⁴⁸

Chief Justice Warren himself initiated the jurisprudential cycle that would eventually undermine his Court's civil rights consensus. In lieu of a more careful elaboration of the difference between Fourteenth Amendment equal protection and Fifth Amendment due process, *Bolling* adopted a single approach to equal protection for federal as well as state law. For its part, *Morgan* endorsed a primitive variant of the antisubordination principle without resolving issues of formal inequality raised by the one-way ratchet. In its own way, each of these cases established an approach to equality no more sophisticated than the slogan carved into the west pediment of the Supreme Court building, "Equal Justice Under Law." It is harder to imagine a legal soundbite more profound – or more ostentatious.⁷⁴⁹ Since 1948 the Court has become fond of reciting that slogan,⁷⁵⁰ and the Justices often acknowledge the architectural prominence of the phrase.⁷⁵¹ When confronted with the gravest

746. See generally Krotoszynski, *supra* note 599, at 2131-33 (arguing that "the entire system of constitutional adjudication will break down" if judges disregard *stare decisis* in favor of results-oriented adjudication).

747. *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

748. Tushnet, *supra* note 715, at 767.

749. For exemplary uses of the phrase in legal scholarship, see DEAN ACHESON, MORNING AND NOON 69 (1965) (distinguishing "the justice of Louis IX or Harun al-Rashid" from "that described on the lintel of the Supreme Court Building, 'Equal Justice Under Law'"), *quoted in*, e.g., *United States v. Freeman*, 357 F.2d 606, 613 n.14 (2d Cir. 1966); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 29 (1984) ("If conditions continue to deteriorate, we might as well chisel off the legend above the Supreme Court's door, 'Equal Justice Under Law,' and replace it with a sign that says, 'Closed – No Just, Speedy, or Inexpensive Adjudication for Anyone.'"). Many other commentators, but few worth citing, suggest that disagreement with some contestable legal proposition or another would be tantamount to chiseling or sandblasting "Equal Justice Under Law" from the Supreme Court's portico. Perhaps it is time to retire the metaphor.

750. Justice Jackson appears to have been the first to use the phrase in *United States Reports*. See *Hirota v. MacArthur*, 335 U.S. 876, 877 (1948) (separate statement of Jackson, J.) (using the phrase "equal justice under law" to compare the Court's treatment of Germans convicted of war crimes with its treatment of Japanese convicted of war crimes); *Dennis v. United States*, 339 U.S. 162, 175 (1950) (Jackson, J., concurring) (speaking of "equal justice under law" in a discussion of civil liberties and communism).

751. See, e.g., *Barclay v. Florida*, 463 U.S. 939, 983-84 (1983) (Marshall, J., dissenting) (quoting *Barclay v. State*, 343 So. 2d 1266, 1271 (Fla. 1977), and noting a state court's reference to the Court's inscription); *Ollf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1044 n.2 (1972) (Douglas, J., dissenting from denial of certiorari) (noting the presence of the

challenge to the authority of its desegregation decisions and to the Court's very legitimacy, Chief Justice Warren declared that the "Fourteenth Amendment embodied and emphasized th[e] ideal" of "equal justice under law."⁷⁵² The old Chief Justice even opened his memoirs by invoking the "awesome sight" and "Grecian serenity" of the "most beautiful building in Washington, D.C.," and the "inspiring" words "chiseled in white marble above the main entrance."⁷⁵³ Equal justice under law, indeed.

Although the inscription in the west pediment of the Supreme Court building may confirm the Hebrew prophet Amos's contention that "justice has priority over law and that equal law under justice is the more fit order,"⁷⁵⁴ the Court itself has never acknowledged the vacuity of its architectural shibboleth.⁷⁵⁵ Would the Supreme Court building signify less if it simply read, "Justice Under Law"?⁷⁵⁶ After all, the slogan appears in none of the foundational texts of American constitutionalism – not the Constitution itself, nor in *The Federalist Papers*, nor in any Supreme Court opinion before 1948.⁷⁵⁷ The building's architect, Cass Gilbert, appears to have formulated the

phrase on the Court's portico); Francis J. Larkin, *The Legal Services Corporation Must be Saved*, 34 JUDGES' J. 1, 1 (1995) (quoting Justice Lewis F. Powell, Jr., as president of the American Bar Association: "Equal justice under law is not merely a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists It is fundamental that justice should be the same, in substance and availability, without regard to economic status.").

752. *Cooper v. Aaron*, 358 U.S. 1, 19 (1958).

753. WARREN, *supra* note 4, at 1.

754. MILNERBALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 23 (1985); cf. CRAY, *supra* note 8, at 9 (comparing Chief Justice Warren to "an Old Testament prophet, a conscience to remind us that this nation could be a more perfect union, that we individually could be better, even more noble"); *id.* at 7 (choosing *Psalms* 72:2, as an epigraph: "He will judge your people with righteousness / And your poor with justice").

755. See Arthur Miller, *Myth and Reality in American Constitutionalism*, 63 TEX. L. REV. 181, 194 n.62 (1984) (book review suggesting that the slogan is "used as if [it] mean[s] something, which gives the appearance but not necessarily the reality of justice") (emphasis in original).

756. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 558 (1982) (rhetorically asking whether the insertion of "Justice" yields "anything . . . besides redundancy and obfuscation"). No manner or frequency of transcription will infuse meaning into a vacuous phrase. Even if "emblazoned on the very heavens in skywriting," a "stale and contrived" battle cry will remain just that. EDNA FERBER, *GIANT 2* (Buccaneer Books 1996) (1952).

757. To be sure, Justice Black in 1956 acknowledged that the challenge of "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). He cited one source known to, but not explicitly embraced by, the framers of the Constitution: "'Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbor.'" *Id.* at 16 n.10 (quoting *Leviticus* 19:15 (King James)).

slogan on his own.⁷⁵⁸

In a very real sense, therefore, the rhetorical basis of American constitutional law finds its origins in an architect's hand.⁷⁵⁹ Chief Justice Warren failed to articulate a more persuasive case for equating the federal government's obligation to respect due process with the states' duty to accord equal protection to all persons within their jurisdiction. Neither he nor his greatest lieutenant, Associate Justice William J. Brennan, Jr., ever reconciled this vision of Fifth Amendment due process with the invocation of section 5 of the Fourteenth Amendment as a source of congressionally initiated "interpretation" of the Constitution. The resulting contradiction rendered the Warren Court's civil rights legacy equal parts edifice and artifice. Within half a century, the Warren Court's successors have smashed the Nickel and Five of a bygone jurisprudential generation:

For behold, the LORD commands, and the great house shall be smitten into fragments, and the little house into bits. Do horses run upon rocks? Does one plow the sea with oxen? But you have turned justice into poison and the fruit of righteousness into wormwood⁷⁶⁰

758. See Office of the Curator, Supreme Court of the United States, *The East Pediment: Information Sheet 2* (Aug. 18, 2000), at <http://www.supremecourtus.gov/about/eastpediment.pdf> (last visited Oct. 9, 2002). Perhaps because the Supreme Court building's east pediment is less visible, its inscription, "Justice the Guardian of Liberty," has never been quoted in a Supreme Court decision, even though it has a firmer judicial pedigree than "Equal Justice Under Law." See *id.* (describing how Chief Justice Charles Evans Hughes suggested "Justice the Guardian of Liberty" in place of Gilbert's proposal, "Equal Justice Is the Foundation of Liberty," and how Justice Willis Van DeVanter added a simple concurrence, "Good"). Indeed, "[t]he inscription on the East Pediment – Justice the Guardian of Liberty – is one of the few decisions regarding the architecture of the building that was made directly by one of the Justices." *Id.*; see also Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1268 (2001) (noting how Gilbert, for his part, hoped that the new Supreme Court building would combine "all the beauty, charm and dignity of the Lincoln Memorial" with "the practical qualities of a first-rate office building" (quoting a Jan. 16, 1929, letter from Cass Gilbert to William Howard Taft)). The closest reference in *United States Reports* comes from an 1895 decision describing "trial by jury . . . as the guardian of liberty and life, against the power of the court, the vindictive persecution of the prosecutor, and the oppression of the government." *Sparf v. United States*, 156 U.S. 51, 149 (1895).

759. Cf. Daniel A. Farber, *The Dead Hand of the Architect*, 19 HARV. J.L. & PUB. POL'Y 245, 246 (1996) (observing how architectural design all but dictates law school culture). For other expressions of this edifice complex, see LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999); Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

760. *Amos* 6:11-12 (Revised Standard).

