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SECTION 5'S FORGOTTEN YEARS: CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AMENDMENT BEFORE *KATZENBACH V. MORGAN*

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ABSTRACT—Few decisions in American constitutional law have frustrated, inspired, and puzzled more than *Katzenbach v. Morgan*. Justice Brennan's 1966 opinion put forth the seemingly radical claim that Congress—through its power, based in Section 5 of the Fourteenth Amendment, to "enforce, by appropriate legislation," the rights enumerated in that Amendment—shared responsibility with the Court to define the meaning of Fourteenth Amendment rights. Although it spawned a cottage industry of scholarship, this claim has never been fully embraced by a subsequent Supreme Court majority, and in *City of Boerne v. Flores*, the Supreme Court rejected the heart of the *Morgan* decision as subversive of the American constitutional order. Today, *Morgan* stands largely as an aberration of American constitutional law.

This Article attempts to place *Morgan* back into the stream of historical development from which it arose. When properly situated in its historical context, Justice Brennan's opinion appears less puzzling and less aberrational. *Morgan* in fact built upon several decades of debates in the courts, in Congress, and among legal commentators over the scope of congressional enforcement power under Section 5—debates that largely have been missing from Section 5 scholarship. In reconstructing the history from this period, this Article also identifies the political and legal conditions that supported claims of shared constitutional interpretive responsibility in the past and considers whether these conditions might again be met in the future.

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INTRODUCTION

Congress's role in protecting the rights contained in the Fourteenth Amendment is a perennially contentious area of constitutional politics.[1] Congressional responsibility in this area derives from Section 5 of the Fourteenth Amendment, which empowers Congress to "enforce, by appropriate legislation," the rights guaranteed in the Amendment,[2] including the first Section's guarantees of the privileges and immunities of citizenship, due process, and equal protection.[3] The crux of the issue is whether, in exercising its enforcement power, Congress shares responsibility with the judiciary for interpreting the meaning of those rights. For at least the last two decades, the position of the Supreme Court on this issue has been clear: the judiciary is the sole arbiter of the definition of constitutional rights. As the

[1] *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 56–59 (1988), http://www.ialsnet.org/documents/Patersonmaterials2.pdf [https://perma.cc/8FLK-7EMR]; Pamela S. Karlan, *The Supreme Court, 2011 Term, Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 55–57 (2012); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, *passim* (1997).

[2] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[3] *Id.* § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Court asserted in *City of Boerne v. Flores*,[4] Congress has the power under Section 5 to pass legislation to protect Fourteenth Amendment rights, so long as these statutory remedies do not expand the court-defined rights. To the extent legislation involves preventative measures, they must be "congruen[t] and proportional[]" to the scope of any record of constitutional violations by the state.[5] But to allow Congress shared responsibility in giving meaning to the substance of Fourteenth Amendment rights, the Court held, would undermine the proper functioning of the American constitutional system.[6]

The Court has used the *Boerne* approach to justify striking down Congress's attempts to use Section 5 to expand religious free exercise rights,[7] to provide federal remedies for victims of gender-motivated violence,[8] to allow individuals to sue states for patent infringement,[9] and to allow state employees to sue their employers for money damages as a remedy for discrimination based on age[10] or disability.[11] A narrow reading of the congressional enforcement power also informed the Court's ruling in *Shelby County v. Holder*,[12] which struck down a core provision of the Voting Rights Act of 1965 as beyond Congress's authority to enforce the Fifteenth Amendment.[13]

Those who are uncomfortable with *Boerne*'s vision of judicial supremacy on questions of constitutional interpretation can find a starkly different conception of congressional enforcement power in the 1966 Supreme Court opinion in *Katzenbach v. Morgan*,[14] in which Justice William

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[4] 521 U.S. 507 (1997).

[5] *Id.* at 520.

[6] *See, e.g.*, *id.* at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

[7] *Id.*

[8] United States v. Morrison, 529 U.S. 598, 627 (2000) (Violence Against Women Act not authorized under Section 5).

[9] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999) (Patent Remedy Act not authorized under Section 5).

[10] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (Age Discrimination in Employment Act not authorized under Section 5).

[11] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Title I of the Americans with Disabilities Act of 1990 not authorized under Section 5); *see also* Coleman v. Court of Appeals, 566 U.S. 30, 43–44 (2012) (self-care provision of the Family and Medical Leave Act not authorized under Section 5). Using the *Boerne* standard, the Court has also upheld several exercises of Congress's Section 5 power. *See* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (Title II of the Americans with Disabilities Act, as applied to access to courts); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003) (family leave provision of the Family and Medical Leave Act).

[12] 570 U.S. 529, 553–57 (2013).

[13] U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

[14] 384 U.S. 641 (1966).

Brennan indicated a willingness to share with Congress the responsibility for defining the constitutional guarantees of the Fourteenth Amendment. But while the *Morgan* decision has served as a foundation for recent efforts to recognize the value of constitutional responsibility outside the courts[15]—and the Supreme Court has never overruled it—as a matter of constitutional history, the opinion has generally been considered an outlier in the American constitutional tradition.[16]

By most accounts, *Morgan* was a brief, singular moment in constitutional history, marking the fateful intersection of the Warren Court at its ambitious heights and a Congress willing to pass transformative civil rights legislation. Scholars have explained away the decision as another of Justice Brennan's clever constitutional sleights of hand.[17] It has become a precedent of predominantly symbolic value—a suggestive testament to lost possibilities for some, a misguided exercise in constitutional impracticalities for others, and often simply an object of puzzlement.[18] Particularly after *Boerne* and subsequent decisions reiterating *Boerne*'s dismissal of *Morgan*,[19]

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[15] *See, e.g.*, Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 35 (2003) (describing *Morgan* as "paradigmatic" of a Section 5 jurisprudence that "recogniz[es] the distinct constitutional roles of Congress and the Court in ways that respected the autonomy of each").

[16] *See, e.g.*, Robert A. Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 83 (describing *Morgan* as "embracing an unaccustomed view of congressional relations with the Court in defining the substance of equal protection of the laws"); Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 303 (1983) (describing Brennan's opinion as "a bold excursion into largely uncharted territory").

[17] *See, e.g.*, LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 263 (2000) ("Brennan's majority opinion was nothing short of a constitutional tour de force, although when one reaches its end it is difficult to restate with accuracy how he did it.").

[18] Scholarship on *Morgan* and Section 5 is voluminous. The most comprehensive examination of Section 5 jurisprudence is WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW (2015). Other important works include Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79; Burt, *supra* note 16; Stephen L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Choper, *supra* note 16; William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Archibald Cox, *The Supreme Court—1965 Term: Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) [hereinafter Cox, *Constitutional Adjudication*]; Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000); Post & Siegel, *supra* note 15.

[19] *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2000) (holding that Section 5 does not authorize Congress "to rewrite the Fourteenth Amendment law laid down by this Court"); *see also supra* notes 8–11 (citing cases applying *Boerne*'s congruence and proportionality requirement).

Justice Brennan's opinion has become a monument to the Warren Court at its visionary—or reckless—heights.

In this Article I argue that this portrayal of *Morgan* is misleading and that a more complete history provides a better description of the various roles Section 5 has played in American constitutionalism. My first and primary goal is historical: to explain Justice Brennan's striking interpretation of Section 5 by reconstructing the largely forgotten history of Section 5 in the years between Reconstruction and *Morgan*. My second goal is more theoretical and prospective: to draw on this history to identify the conditions that have supported or undermined claims of congressional interpretive authority.

The history of Section 5 typically has been told in three parts. It begins with the drafting of the Fourteenth Amendment in 1866, the subsequent flurry of civil rights laws Congress passed under the Amendment's Section 5 authority, and Supreme Court decisions assessing these laws in the 1870s and 1880s. The story then jumps to the 1960s and *Morgan*.[20] In this second phase of Section 5's standard history, after decades of being all but forgotten, Section 5 was resurrected by a Congress inspired by the demands of the Civil Rights Movement, and with the *Morgan* decision, the Court offered its own innovative interpretation of the Section 5 power. In the several decades following *Morgan*, the Court seemed willing to accept, albeit tentatively, some level of independent congressional responsibility for defining the Fourteenth Amendment. Then, in 1997, *Boerne* signaled the third stage of Section 5's history. Rejecting *Morgan*'s recognition of Congress's independent interpretive authority, this decision initiated a period marked by bold assertions of judicial interpretive supremacy over the meaning of the Constitution and by more stringent judicial oversight of congressional power to enforce Fourteenth Amendment rights.

This Article offers a more complete constitutional history of Section 5, one that recovers its historical development between Reconstruction and *Morgan*. These are Section 5's forgotten years. By the time the Court decided *Morgan*, Congress and the Supreme Court had been considering the question of overlapping interpretive authority under Section 5 for decades. Beginning in the 1940s, congressional power under Section 5 became a pressing issue of constitutional politics. To recover this history requires moving beyond Supreme Court opinions; only bits and pieces of this discussion made it into the Justices' published opinions in this period. I locate a constellation of debates over the congressional enforcement power that took place among members of Congress, executive branch lawyers, law professors, and

[20] *See, e.g.*, ARAIZA, *supra* note 18, at 84–110.

members of the Supreme Court as they engaged with one another at oral argument, during their private conferences, and in written correspondence. The constitutional discourse I piece together shows how a seemingly radical and destabilizing proposition—that there might be a gap between congressional and judicial understandings of the scope of Fourteenth Amendment rights—became commonly assumed and openly supported by jurists and lawmakers across the ideological spectrum. *Morgan* emerges from this account not as an exceptional episode of Warren Court creativity, but rather as a reflection of commonplace constitutional commitments developed over the preceding decades.

In Part I, I begin the Article with a brief summary of the scholarship on the history of the Fourteenth Amendment that historians and legal scholars produced in the 1940s, 50s, and 60s, in which they sought to revise dominant assumptions about the constitutional legacy of Reconstruction. This revisionist scholarship provided critical support for advocates of a broad enforcement power, particularly those who believed that Congress need not necessarily defer to the Court's interpretation of Fourteenth Amendment rights when exercising this power.

Part II then details a now largely forgotten series of constitutional debates on the nature of Section 5 in the decades leading up to *Morgan*. These debates, among a wide array of actors, inside and outside the courts, centered on legislative initiatives dealing with federal regulation of lynching, poll taxes, and racial discrimination in public accommodations, as well as one provocative hypothetical involving federal desegregation of public schools.

In Part III, I turn to the *Morgan* decision itself, along with the three other major decisions involving congressional power to enforce civil rights issued during a six-month period in the Supreme Court's October Term 1965: *South Carolina v. Katzenbach*,[21] which upheld the sweeping remedial requirements of the Voting Rights Act of 1965 under the enforcement provision of the Fifteenth Amendment; *Harper v. Virginia Board of Elections*,[22] in which the Court struck down the poll tax as a violation of the Equal Protection Clause, while the dissenters indicated that the issue should be left to Congress; and *United States v. Guest*,[23] a case interpreting a provision of the Civil Rights Act of 1870 in which six Justices agreed that the state action limitation of the Fourteenth Amendment did not constrain

[21] 383 U.S. 301 (1966).

[22] 383 U.S. 663 (1966).

[23] 383 U.S. 745 (1966).

Congress when acting under Section 5 in the same way it constrained courts when interpreting the provisions of Section 1.

When read against the backdrop of Section 5's forgotten history, even the most far-reaching constitutional implications of *Morgan* appear less aberrational than is commonly assumed. Indeed, I argue that the bolder Section 5 reading Justice Brennan offered—the one that recognized congressional authority to interpret the meaning of Fourteenth Amendment rights, and the one that Justice Kennedy in *Boerne* summarily rejected as contrary to experience—was, in the context of a more complete history of Section 5's development, quite uncontroversial. If anything, the innovation of *Morgan* is found in Justice John Marshall Harlan's dissenting opinion, in which he reconceptualized Section 5 power as a potential threat to judicial authority. It is here, in the introduction of separation of powers concerns, that we see the emergence of a new approach to Section 5 doctrine, one that would culminate in the *Boerne* decision.

An examination of this forgotten history not only helps to explain the context for the *Morgan* decision, it also offers insights into Section 5's role in American constitutionalism and the conditions under which judicial support for a broad conception of Section 5 power can flourish. This is the subject of the final Part of the Article. I offer a theory for why the Supreme Court has read Section 5 more broadly at certain times and more narrowly at others. Drawing on this theory, I also suggest possible future developments that might allow for a revitalization of the *Morgan* vision of congressional interpretative responsibility over the meaning of the Fourteenth Amendment. The history I offer in this Article demonstrates the valuable functions a broad reading of Section 5 has played—and perhaps may play once again—in the American constitutional tradition.

I. THE FRAMING OF THE FOURTEENTH AMENDMENT RECONSIDERED

Among the intellectual foundations for the broad conception of congressional power under Section 5 that permeated constitutional debates during the decades preceding *Morgan* was the work of historians and legal scholars who sought to revise inherited assumptions about Reconstruction and its constitutional legacy. In this Part, I describe how, beginning in the 1940s, growing numbers of scholars looked to the history of the framing of the Fourteenth Amendment, along with subsequent congressional legislation and Supreme Court decisions, and argued that this history justified a reconsideration of the Section 5 power. In the coming years, Justices, lawmakers, and scholars would draw on this revisionist historical scholarship in defending a reading of Section 5 under which Congress shared

responsibility with the courts in defining the scope of Fourteenth Amendment rights.

Prior to the 1940s, the dominant historiography of Reconstruction, often associated with the work of Columbia University historian William Dunning and his students, emphasized the failures of Reconstruction as a program for reform.[24] The Dunning School viewed Reconstruction as a tragic and misguided historical episode when federal intervention into the South and political empowerment of African Americans deepened racial and sectional animosities and led to an era of corruption and misgovernment.[25] The post-Civil War constitutional system required that Reconstruction's excesses be cabined, its advocates' vision of racial equality for the freed slaves and punishment for the Confederacy balanced with the needs for reconciliation and the federal system.[26] While such views remained powerful within the legal community well into the post-World War II period, they gradually ceded ground to revisionist accounts of the constitutional achievement of Reconstruction.[27]

In contrast to the Dunning School, revisionist scholarship emphasized the ambitious goals of the framers of the Fourteenth Amendment, including their assumption that Congress, under its Section 5 powers, would play a leading role in protecting constitutional rights. This historical revisionism provided a critical foundation for those who advocated a broad interpretation of congressional enforcement power. It featured prominently in discussions of Section 5 in the two decades preceding *Morgan*, and Justice Brennan relied on this scholarship in justifying his vision of Section 5 in *Morgan*.

Revisionists also drew more sympathetic portraits of the Fourteenth Amendment's framers, portraying them not as dangerous ideologues driven by an incoherent and reckless egalitarianism, as the Dunning School would have it, but as honorable men seeking to give a constitutional foundation to the principles of the abolitionist movement.[28] Revisionists celebrated the framers' efforts to overhaul the traditional federal structure of government

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[24] *See, e.g.*, JOHN W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION, 1866–1876 (1902); WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC, 1856–1877 (1907).

[25] *See, e.g.*, PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 13–14, 115–16 (1999); BURGESS, *supra* note 24; DUNNING, *supra* note 24.

[26] *See, e.g.*, CHARLES WALLACE COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 22–23 (1912); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 608 (1926).

[27] *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at xvii– xxii (Perennial updated ed. 2014) (1988).

[28] *See* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

and nationalize the protection of civil rights.[29] They further argued that central to this liberatory constitutional vision was a commitment to broad congressional power to protect constitutional rights—a commitment written into the text of the Constitution in the form of the enforcement provisions included in each of the Reconstruction Amendments.[30]

The case for a broad reading of the Section 5 power, as developed by these revisionists in the years following World War II, revolved around three pieces of historical evidence. First was the general skepticism the framers of the Fourteenth Amendment held toward the Supreme Court. The framers believed that Congress, not the Court, would take the lead in implementing the Amendment.[31] A central goal of the Fourteenth Amendment, these scholars pointed out, was to overturn the Supreme Court's holding in the *Dred Scott* case[32] that Blacks could not be citizens of the United States. Members of Congress who drafted and advocated for the Fourteenth Amendment "regarded Congress as the primary organ for the implementation of the guarantees of privileges and immunities, due process, and equal protection," because they "did not trust the judiciary in general and the Supreme Court in particular."[33]

A second piece of historical evidence the post-WWII revisionists emphasized was the drafting history of the Fourteenth Amendment. In its earliest incarnation, the Fourteenth Amendment was framed as entirely a grant of power to Congress: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities . . . , and to all persons in the several States equal protection in the rights of life, liberty, and property."[34] Critics in

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[29] *See, e.g.*, Howard Jay Graham, *The Fourteenth Amendment and School Segregation*, 3 BUFF. L. REV. 1, 5 (1953) ("That [the Fourteenth Amendment] was adopted and ratified to remove all doubt about national power to protect the freedmen and to assure progressive removal of the discriminations, denials and abridgments in rights that had been a part of the slave system is generally conceded.").

[30] *See, e.g.*, Laurent Frantz, *Enforcement of the Fourteenth Amendment*, 9 LAW. GUILD REV. 122, 130 (1949) ("The proponents of civil rights must insist upon a return to the intent of the framers, clearly and expressly set down in the text of the [Fourteenth] Amendment itself, that the Amendment is primarily a grant of broad new legislative powers to Congress. The possibilities of legislative enforcement are vast and untapped." (footnote omitted)).

[31] *See* ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT 53–55 (1960); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 165 (1950); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329–33 (1952).

[32] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[33] HARRIS, *supra* note 31, at 53–54.

[34] CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866); *see also* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46, 50–51, 61 (1914) (detailing drafting history).

Congress worried that the proposed amendment, phrased as an express grant of power to Congress, granted the federal government excessive control over the states.[35] The Joint Committee on Reconstruction eventually offered a new version of the proposed amendment.[36] Their proposal separated the definition of the rights in the opening section from the congressional enforcement provision in the closing section.[37] Generations later, revisionist scholars insisted the first version offered a key to identifying the ambitious, Congress-centered vision of the Fourteenth Amendment held by its framers.[38]

The third piece of evidence from the Reconstruction period that the revisionists relied upon was the 1880 Supreme Court opinion in *Ex parte Virginia*.[39] In this decision, the Court upheld a provision of the Civil Rights Act of 1875[40] that made it a crime to discriminate on racial grounds in jury selection. In upholding the indictment of a state judge for violating this provision, the majority opinion discussed the congressional enforcement power in sweeping terms:

> All of the [Reconstruction] Amendments derive much of their force from [their enforcement] provision[s]. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[41]

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[35] HARRIS, *supra* note 31, at 45–50.

[36] CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

[37] KENDRICK, *supra* note 34, at 83–84. Republican Representative Giles W. Hotchkiss, who objected to the first version of the Fourteenth Amendment, recognized congressional legislation as the primary tool for enforcing the Amendment, but he wanted to make sure that the Amendment's rights would be secure even if Congress came under control of Southern "rebels." CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866); *see also* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 55–57 (1988).

[38] *See, e.g.*, TENBROEK, *supra* note 28, at 187–90.

[39] 100 U.S. 339 (1880).

[40] 18 Stat. 335.

[41] *Ex parte* Virginia, 100 U.S. at 345–46.

This emphasis on judicial deference to a broad congressional enforcement power would offer powerful language for later generations interested in revitalizing Section 5.[42]

Revisionist scholarship regarding the Fourteenth Amendment provided a foundation for a strong Section 5 power and for congressional responsibility in making the Fourteenth Amendment effective in securing civil rights. Postwar revisionism appeared in briefs regularly and in written opinions occasionally, and in many instances, revisionist conclusions were simply declared as historical truth.[43] In *Morgan*, Justice Brennan included a footnote that embraced this revisionist scholarship. He listed three prominent works of revisionist historical scholarship that "suggest[ed] that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary."[44]

Revisionist scholarship on the constitutional and legal achievements of Reconstruction offered a valuable historical foundation for postwar judges and lawyers who believed Section 5 granted Congress broad authority to give meaning to as well as ensure the protection of Section 1 rights.

II. DEBATING THE CONGRESSIONAL ENFORCEMENT POWER

In this Part, I examine a series of debates in the 1940s, 50s, and 60s, inside and outside the courts, over the scope of congressional authority to enforce the Fourteenth Amendment. I consider debates over federal legislation prohibiting lynching, poll taxes, school desegregation, and racial discrimination in public accommodations. By resurrecting these now largely forgotten debates, I wish to emphasize the prevalence of an operative assumption shared by people with diverse ideological and jurisprudential commitments: in exercising its Section 5 authority, Congress need not necessarily be constrained by the judiciary's interpretation of Section 1. Participants in these overlapping processes of political and judicial constitutionalism, who often drew on the revisionist historical scholarship

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[42] *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 650 (1966); United States v. Guest, 383 U.S. 745, 784 (1966) (Brennan, J., concurring in part and dissenting in part); South Carolina v. Katzenbach, 383 U.S. 301, 326–27 (1966); Fay v. New York, 332 U.S. 261, 282–83 (1947); Frantz, *supra* note 31, at 1373–75.

[43] *See, e.g.*, Brief for Appellants at 34, *Morgan*, 384 U.S. 641 (No. 847) ("Though not expressly articulated [in the Thirty-Ninth Congress], it seems clear that the power to enact corrective legislation included authority, to be shared with the courts, to determine when there was a departure from the principles expressed in Section 1.").

[44] *Morgan*, 384 U.S. at 648 n.7 (citing Frantz, *supra* note 31, at 1356–57; HARRIS, *supra* note 31, at 33–56; and TENBROEK, *supra* note 28, at 187–217). Justice Brennan included a similar historical footnote in his opinion in *United States v. Guest*. 383 U.S. at 783 n.7 (concurring in part and dissenting in part) (citing HARRIS, *supra* note 31, at 53–54; JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 184 (1956); and Frantz, *supra* note 31, at 1356). I discuss *Guest* in Section III.C.

described above, developed and normalized the idea that the American constitutional system allowed for a gap between congressional and judicial understandings of the core provisions of the Fourteenth Amendment.

A. Anti-Lynching Legislation

From the late 19th century through the 1960s, there were periodic efforts to secure federal legislation that would make lynching a federal crime.[45] Several anti-lynching bills passed the House, but none made it through the Senate. Opponents regularly highlighted what they saw as the constitutional infirmities of this kind of federal involvement in local affairs. Among their arguments was that the congressional enforcement provision of the Fourteenth Amendment, the most commonly relied upon basis for anti-lynching legislation, did not authorize Congress to pass such a law.[46]

The constitutional question at issue was whether Congress, in enforcing the rights to equal protection and due process, could make private individuals criminally liable for taking part in a lynching when state and local law enforcement failed to act. This was a question of the "state action" limitation on the Fourteenth Amendment, filtered through the Section 5 enforcement power. Supporters of federal anti-lynching legislation offered two possible bases for federal intervention under Section 5. First, they looked to the history of the framing and found evidence that the framers did not intend to limit the Amendment just to state actors—or at least that the Amendment did not limit congressional authority to regulating state actors when enforcing the Amendment's provisions.[47] Second, they argued that states had a responsibility under the Fourteenth Amendment to provide equal protection of the laws and that, in failing to protect the lives of their black citizens, the states were abdicating this responsibility. The requisite state action, supporters suggested, could be found in the decision of the state not to act in these circumstances—"states are as much responsible for sins of omission as

[45] For a history of anti-lynching legislation focused on the constitutional issues involved, see MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 74–90 (1947).

[46] Beyond Section 5, other possible constitutional bases for anti-lynching legislation were the Commerce Clause, the Guarantee Clause, and the power of Congress to suppress domestic rebellions. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 107–12 (1947) [hereinafter PCCR]; William B. Harvey, Comment, *Constitutional Law—Anti-Lynching Legislation*, 47 MICH. L. REV. 369, 371 n.7 (1949); *Federal Power to Prosecute Violence Against Minority Groups*, 57 YALE L.J. 855, 870–71 n.101 (1948).

[47] *See, e.g.*, ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 39 (1947) (noting that Congress, during Reconstruction, passed legislation "providing federal protection of the rights of individuals against interferences either by public officials or by private individuals").

of commission"[48]—hence justifying federal intervention under Section 5. As the text of one proposed anti-lynching bill explained:

> A State shall be deemed to have denied to any victim or victims of lynching equal protection of the laws and due process of law whenever that State or any legally competent governmental subdivision thereof shall have failed, neglected, or refused to employ the lawful means at its disposal for the protection of that person or those persons against lynching or against seizure and abduction followed by lynching.[49]

Either of these justifications—that the state action doctrine was invalid on originalist grounds or that a state's unwillingness or inability to protect certain basic rights could be understood as a form of state action under the Fourteenth Amendment—challenged a doctrinal commitment that had been generally accepted since the late nineteenth century: that the Fourteenth Amendment did not apply to private actors.[50] Defenders of the state action doctrine worried about the consequences of opening the courts to Fourteenth Amendment suits against state and local government whenever they failed to protect individuals against private rights violations.[51] Supporters of federal anti-lynching legislation responded to these concerns by arguing that congressional authority to regulate private activity under its Section 5

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[48] *Federal Power to Prosecute Violence Against Minority Groups*, *supra* note 46, at 871.

[49] H.R. 800, 80th Cong. § 1 (1947); *see also* Federal Anti-Lynching Act, H.R. 4577, 80th Cong. § 1(a) (1947) ("A State deprives a person of life, liberty, or property without due process of law and denies him the equal protection of the laws when the State's inaction has the effect of a discriminatory withholding of protection.").

Most proposed anti-lynching bills required a failure of state law enforcement to prosecute perpetrators as a trigger for federal intervention. *See, e.g.*, L.C. Dyer & George C. Dyer, *The Constitutionality of a Federal Anti-Lynching Bill*, 13 ST. LOUIS L. REV. 186, 187 (1928) (summarizing the 1928 House proposal and noting, "the measure specifically gives the state every opportunity and incentive to deal with the menace of mob violence before the Federal authority and power are brought to bear"); Albert E. Pillsbury, *A Brief Inquiry into a Federal Remedy for Lynching*, 15 HARV. L. REV. 707, 708–09 (1902) (summarizing 1902 proposed legislation in House and Senate); David O. Walter, *Proposals for a Federal Anti-Lynching Law*, 28 AM. POL. SCI. REV. 436, 439 (1934) (summarizing various proposals); William B. Harvey, *supra* note 46, at 370–71 (describing the Wagner-Morse proposal, S. 1352, 80th Cong. (1947)).

For law review articles advancing state inaction theory as the basis for Section 5 authority to pass anti-lynching legislation, see *Federal Power to Prosecute Violence Against Minority Groups*, *supra* note 46, at 873; Frank & Munro, *supra* note 31, at 163; Pillsbury, *supra*, at 710; *The Federal Anti-Lynching Bill*, 38 COLUM. L. REV. 199, 207 (1938); and Comment, *State Action and the Enabling Clause of the Fourteenth Amendment*, 44 ILL. L. REV. 199 (1949).

[50] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("Since the decision of this Court in the *Civil Rights Cases*, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.").

[51] *See, e.g.*, Charles Wallace Collins, *Constitutional Aspects of the Truman Civil Rights Program*, 44 ILL. L. REV. 1 (1949); Frank K. Sloan, *Federal Civil Rights Legislation and the Constitution*, 1 S.C. L.Q. 245 (1949).

authority need not require courts to find that private rights violations infringed judicially recognized rights in Section 1. In other words, Congress, acting under Section 5, might be able to address activities that would not necessarily be actionable due process or equal protection claims if brought to court. A common working assumption (sometimes articulated explicitly) behind Section 5 rationales of anti-lynching laws, therefore, was the idea of a Section 1–Section 5 disconnect: the idea that there could be a gap between what courts recognized as violations of Section 1 and what Congress recognized as violations of Section 1 when exercising its Section 5 enforcement power.[52]

Advocates of federal anti-lynching legislation were working within the dominant assumptions of the post-1937 constitutional world, whose first premise was that Congress, with the support of the American people, could largely define for itself the scope of federal legislative power. "Again and again," explained the widely read 1947 report of the President's Committee on Civil Rights (PCCR), "the Constitution and its clauses have been construed to authorize positive governmental programs designed to solve the nation's changing problems."[53] Narrow judicial readings of congressional power should not stand in the way of federal policy serving the national interest. This assumption, well established by the 1940s in the context of economic regulation, was now being drawn upon as the basis for civil rights regulation. The general thrust of the constitutional claim, based in a recognition of national interest as a guide for congressional authority, would be echoed when advocates of other federal civil rights legislation made the case for a broad Section 5 authority.

B. Anti-Poll Tax Legislation

Beginning in 1939, when Congress debated a bill to prohibit the use of poll taxes, advocates offered several possible constitutional bases for such legislation.[54] When targeted specifically at the payment of a poll tax in

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[52] *See, e.g.*, Victor W. Rotnem, *The Federal Civil Right "Not to Be Lynched,"* 28 WASH. U. L.Q. 57, 68 (1943).

[53] PCCR, *supra* note 46, at 106. President Truman created the President's Committee on Civil Rights in late 1946 as a response to an outbreak of lynchings and other forms of brutality against African Americans in the South in the period immediately following the end of World War II. The committee's report, released in late 1947, provided the basis for the civil rights reform agenda Truman ran on in the 1948 presidential election. *See* Steven F. Lawson, *Introduction: Setting the Agenda of the Civil Rights Movement*, *in* TO SECURE THESE RIGHTS: THE REPORT OF HARRY S TRUMAN'S COMMITTEE ON CIVIL RIGHTS 1–41 (Steven F. Lawson ed., 2004).

[54] For an overview of the history of the campaign against the poll tax, see Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 71–79 (2009). This section of my Article is indebted to their excellent work. *See also* POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 278–88 (Thomas I. Emerson & David Haber eds., 1952) (describing

federal elections, proponents generally relied upon Congress's power to regulate the "times, places, and manner" of congressional elections.[55] But alongside this Article I authority, proponents of anti-poll tax legislation in federal elections also pointed to the enforcement clauses of the Reconstruction Amendments. And when they turned to the poll tax in state elections, the enforcement clauses were the primary bases for legislative proposals.[56] While the Fifteenth Amendment's enforcement provision at first blush might seem the most promising basis for federal anti-poll tax legislation, this Amendment was explicitly limited to protecting against *racial* discrimination in the franchise.[57] Those campaigning against the poll tax recognized that the poll tax was a central tool of Jim Crow, but they envisioned a broader, cross-racial movement against poll taxes. They thus turned to Section 5 of the Fourteenth Amendment, resting on the broader foundation of Section 1's protections, as the necessary foundation for federal action.[58] But the Supreme Court had considered a Fourteenth Amendment challenge to the poll tax in the 1937 case *Breedlove v. Suttles*[59] and, in a brief, unanimous opinion, had declared the poll tax did not violate the Fourteenth Amendment.[60] Therefore, advocates for a federal law advanced the idea that, in exercising its Section 5 power, Congress could go beyond the Court's definition of what constituted a violation of the Equal Protection Clause.[61]

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constitutional issues relating to anti-poll tax legislation); Janice E. Christensen, *The Constitutionality of Anti-Poll Tax Bills*, 33 MINN. L. REV. 217 (1949) (same); Joseph E. Kallenbach, *Constitutional Aspects of Federal Anti-Poll Tax Legislation*, 45 MICH. L. REV. 717 (1947) (same).

[55] U.S. CONST. art. I, § 4. By the 1940s, there was a long line of judicial precedent recognizing broad congressional authority under its Article I powers to regulate state and local affairs that interfered with the right to vote in federal elections. *See* United States v. Classic, 313 U.S. 299 (1941); United States v. Mosley, 238 U.S. 383 (1915); *Ex parte* Yarbrough, 110 U.S. 651 (1884); *Ex parte* Siebold, 100 U.S. 371 (1879).

[56] The second most commonly referenced basis for regulating the poll tax in state elections was the Guarantee Clause. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican form of government . . . ."); *see, e.g.*, Louis B. Boudin, *State Poll Taxes and the Federal Constitution*, 28 VA. L. REV. 1, 5–9 (1941); Christensen, *supra* note 54, at 243–45; Monroe R. Lazere, Note, *Payment of Poll Tax as a Prerequisite to Voting in a Federal Election*, 28 CORNELL L.Q. 104, 109–10 (1942).

[57] U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[58] *See, e.g.*, Kallenbach, *supra* note 54, at 723–24.

[59] 302 U.S. 277 (1937).

[60] *Id.* at 281 (noting that the poll tax has a long history in the United States).

[61] *See, e.g.*, Kallenbach, *supra* note 54, at 723–24 ("Supreme Court pronouncements sustaining state poll tax payment requirements in the face of attacks on constitutional grounds are not in point on the validity of the proposed anti-poll tax statute. These pronouncements merely establish the proposition that the Court does not feel impelled to nullify such requirements solely on the basis of existing constitutional guarantees *in the absence of an expression of Congressional view regarding their propriety.*").

By the 1940s, judicial deference to broad congressional power was widely accepted as the framework from which to consider possible poll tax legislation—regardless of whether the Court was willing to find the practice itself a violation of the Constitution. "A finding by the Court that a federal anti-poll tax statute lies within the range of Congressional power would fit easily into this pattern of recent judicial decisions of a nationalizing character," summarized one assessment.[62] The 1947 PCCR report called for the abolition of the poll tax,[63] and Truman's subsequent push for comprehensive civil rights reform included a bill prohibiting the poll tax in federal elections, which was passed by the House but blocked in the Senate.[64]

Push for federal regulation of the poll tax gained momentum in the 1960s. In 1964, the nation ratified the Twenty-Fourth Amendment, which prohibited the poll tax in all federal elections. This prohibition, limited as it was to federal elections, would seem to have been well within the powers of Congress to make through the legislative process.[65] Civil rights groups actually opposed the Amendment out of concern that it would inhibit future efforts at civil rights legislation by setting a precedent that major civil rights reform required the laborious processes of an Article V amendment.[66]

This concern materialized when Congress considered including a provision outlawing poll taxes in state elections (by this point only four states in the South maintained the practice) in the Voting Rights Act of 1965. The recent passage of the Twenty-Fourth Amendment led some to argue that the state poll tax could not be prohibited through the legislative process, and that nothing less than a constitutional amendment was required.[67] This line of argument was picked up not only by Southern opponents of anti-poll tax legislation, but also by the Johnson Administration.[68] Johnson initially favored a legislative poll tax prohibition, but Attorney General Nicholas

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[62] Kallenbach, *supra* note 54, at 727 (citing Smith v. Allwright, 321 U.S. 649 (1944), and United States v. Classic, 313 U.S. 299 (1941)).

[63] PCCR, *supra* note 46, at 160.

[64] *See Poll Tax: Hearings on H.R. 29 Before the S. Comm. on Rules and Admin.*, 80th Cong. (1948); *Anti-Poll-Tax Legislation: Hearings on H.R. 29 et al. Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 80th Cong. (1947); Christensen, *supra* note 54.

[65] The passage of the Twenty-Fourth Amendment in Congress was largely the product of the efforts of Spessard Holland, a segregationist senator from Florida who opposed the major federal civil rights legislation of the 1960s. He insisted that the target of the Amendment was wealth classifications, not racial ones. On Spessard's curious story and the history of the passage of the Twenty-Fourth Amendment, see generally Ackerman & Nou, *supra* note 54, at 69–87.

[66] *Id.* at 70, 82–84.

[67] *Id.* at 88–98.

[68] Brief for the United States as Amicus Curiae at 27 n.25, *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (No. 48) (describing Justice Department's concerns); Ackerman & Nou, *supra* note 54, at 89–93, 98–99 (same); Cox, *Constitutional Adjudication*, *supra* note 18, at 96 n.37 (same).

Katzenbach convinced him not to press for this. "[B]ecause the constitutionality of the poll tax was already in the courts," Katzenbach later explained, "and I was quite confident that the Supreme Court would find it an unconstitutional burden on the right to vote," he saw no need for Congress to take on the issue.[69] "If the law contained a prohibition, I thought the Court might postpone its decision until the legislative ban was before it, which could delay a decision a couple of years."[70]

Despite opposition from the Johnson Administration, congressional liberals continued to support an anti-poll tax provision. The Senate Judiciary Committee voted in support of the provision, favoring the supportive assessments they received from various legal scholars over Katzenbach's warnings.[71] As reported in the *New York Times*:

> Fears that a poll tax might lead to a court upset of the whole law have been effectively rebutted by such distinguished constitutional scholars as Profs. Paul A. Freund and Mark De Wolf Howe of the Harvard Law School. They assert that the courts would actually welcome a Congressional declaration of policy and judgment in this marginal area.[72]

Professor Freund wrote a particularly influential letter to Senator Edward Kennedy offering his opinion that the Court would uphold a congressional prohibition of the poll tax.[73] In a letter to the *New York Times*, Kennedy cited Professor Freund in explaining his support of the poll tax provision.[74]

While congressional liberals supported a legislative prohibition on all poll taxes,[75] opponents, strengthened by the counsel of the Attorney General, blocked these proposals.[76] The end result was a compromise. Section 10 of the Voting Rights Act declared that Congress was of the opinion that the state poll tax violated the Fourteenth Amendment and commanded the

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[69] NICHOLAS DEB. KATZENBACH, SOME OF IT WAS FUN: WORKING WITH RFK AND LBJ 173 (2008).

[70] *Id.* On the potential impact of a congressional prohibition on the poll tax on the pending litigation, Katzenbach said in congressional hearings on the voting rights bill:

> I do not think anything that Congress says under the power of the 14th amendment helps very much. That is a congressional judgment that it violates the 14th amendment is no better, in fact not quite as good, as a judgment by the Supreme Court that it violates the 14th amendment.

Voting Rights Legislation: Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong. 95 (1965) (statement of Nicholas Katzenbach, Att'y Gen. of the United States).

[71] S. REP. NO. 89-162 pt. 3, at 35 (1965) ("[A] decision on the poll tax in the absence of congressional action is not relevant to the issue of congressional power to act.").

[72] *Race and the Poll Tax*, N.Y. TIMES, May 2, 1965, at E10.

[73] Letter from Paul A. Freund to Sen. Robert F. Kennedy (May 17, 1965), *reprinted in* 111 CONG. REC. 11,062 (1965).

[74] Edward M. Kennedy, Letter to the Editor, *Poll-Tax Ban Sought*, N.Y. TIMES, May 10, 1965, at 32.

[75] Ackerman & Nou, *supra* note 54, at 99–100.

[76] *Id.* at 100–04.

Department of Justice to pursue litigation on this question.[77] The issue was thus left to the Supreme Court for final determination. In *Harper v. Virginia Board of Elections*,[78] the Court would eventually strike down the poll tax.[79]

Although neither anti-lynching legislation nor anti-poll tax legislation ever got the votes to pass Congress, debates surrounding these proposed pieces of legislation provided an opportunity for lawmakers and legal commentators to explore the scope of congressional authority under Section 5. Supporters often defended the constitutionality of these bills by insisting that Section 5 gave Congress the authority to protect constitutional rights beyond those recognized by the courts. Because these bills never passed, the Supreme Court never had an opportunity to join in these constitutional debates. The next debate I examine brings the Justices into the story.

C. School Desegregation Legislation (Before Brown*)*

One of the most remarkable discussions about the scope of congressional power under Section 5 in the decades preceding *Morgan* came during the Supreme Court's deliberations over the constitutionality of school segregation in *Brown v. Board of Education*.[80] In the early 1950s, as the Court moved toward its decision in *Brown*, several of the Justices expressed an interest in the possibility of congressional, rather than judicial, leadership in declaring segregated schools a violation of the Fourteenth Amendment. Despite the fact that everyone knew Congress was nowhere near passing such a law, the issue arose repeatedly during oral arguments. The most striking aspect of all was the assumption, openly embraced by several Justices, that Congress had the power under Section 5 to overrule *Plessy v. Ferguson*[81] and thereby desegregate the nation's schools.

By the early 1950s, practically all the Justices recognized that segregated schools were morally abhorrent, pervasively discriminatory, and damaging to the nation's national security interest in the Cold War struggle for the loyalties of people of color around the world.[82] At the same time, a number of the Justices questioned whether the Supreme Court should lead

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[77] Voting Rights Act of 1965, Pub. L. No. 89-110, § 10, 79 Stat. 442–43 (codified at 52 U.S.C. § 10306(a)–(b) (2012)).

[78] 383 U.S. 663, 664–66 (1966).

[79] *See infra* Section III.B.

[80] 347 U.S. 483 (1954).

[81] 163 U.S. 537 (1896).

[82] *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (describing how Cold War diplomacy concerns bolstered support for civil rights); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (describing growing support for civil rights in American society and politics in the 1940s and 1950s).

the charge on this issue by reinterpreting the Equal Protection Clause and overruling *Plessy*'s "separate but equal" doctrine. Considering the Southern stranglehold on the levers of power in Congress, particularly in the Senate, and the (at best) divided support for school desegregation among the national populace, these discussions about the possibility of congressional action were ultimately little more than theoretical.[83] Recent sessions of Congress were unable to pass far less transformative civil rights legislation (such as an anti-lynching bill).[84] Congress was not even close to desegregating schools. The Justices all knew this; the lawyers knew this.

Yet, reflecting their concerns with protecting the institutional legitimacy of the Court, several Justices wanted to make clear that they would rather have Congress take responsibility for this issue, thereby removing the growing pressure on the Court to act. As Justice Jackson observed to the NAACP lawyers during oral arguments: "I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress."[85] In an unpublished draft concurrence in *Brown*, Justice Jackson bluntly stated: "We are urged, however, to supply means to supervise transition of the country from segregated to nonsegregated schools upon the basis that Congress may or probably will refuse to act. That assumes nothing less than that we must act because our representative system has failed."[86] For Justice Jackson, the Court was being forced to decide this pressing national issue because of a breakdown of the political process.

During oral arguments, Justice Jackson spun out his congressional hypothetical—including its basis in Section 5—in more detail: "Suppose Congress should enact a statute, pursuant to the enabling clause of the Fourteenth Amendment, which nobody seems to attach any importance to here, as far as I have heard, that segregation was contrary to national policy, to the national welfare, and so on, what would happen?"[87] The Court's questions to the litigants in calling for reargument of the case in 1953 also reflected its interest in the possibility of congressional action. The Court asked the litigants to prepare arguments addressing a number of issues,

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[83] Although Southerners did not hold numerical majorities in Congress, they held a disproportionate number of leadership positions, which gave them considerable power over the legislative process. *See* Michael J. Klarman, *Court, Congress, and Civil Rights*, *in* CONGRESS AND THE CONSTITUTION 178–80 (Neal Devins & Keith E. Whittington eds., 2005).

[84] *See* POWE, *supra* note 17, at 47.

[85] ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–55, at 244 (Leon Friedman ed., 1969).

[86] Robert H. Jackson, Memorandum by Mr. Justice Jackson 17 (Mar. 15, 1954) (Robert H. Jackson Papers, Box 184, Manuscript Division, Library of Congress, Washington, D.C.) [hereinafter Jackson Memorandum].

[87] ARGUMENT, *supra* note 85, at 93.

including the question of whether "future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish" school segregation, even if such an action might conflict with the original understanding of the Amendment.[88]

The Justices on the *Brown* Court were well aware of the history of the framing of the Fourteenth Amendment, as this was a central issue in their evaluation of the school desegregation cases. Alexander Bickel, in his history of the framing of the Fourteenth Amendment—initially prepared during his clerkship for Justice Frankfurter in October Term 1952—concluded that the framers intentionally left the precise scope of the Amendment's objectives "open, to be decided another day."[89] With respect to the original understanding of Section 5, Bickel concluded, "Such expectations as the Radicals had were centered quite clearly on legislative action. . . . Most probably they had little hope that the Court would play a role in furthering their long-range objectives."[90] Thus, those most responsible for drafting the Amendment anticipated that Congress, not the Court, would make necessary "future determination[s]" of its coverage.[91]

In conference, Justice Black also expressed his preference for congressional action.[92] He went on to accept, however, that the situation had changed, that "the courts have taken jurisdiction" over the question, and that the protections of the Equal Protection Clause should be considered as a "self-executing agreement."[93] Chief Justice Vinson, who failed to stake out a clear position on school segregation as a Section 1 issue prior to his death

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[88] Brown v. Bd. of Educ., 345 U.S. 972, 972 (1953). The Court followed this question about congressional power with a question about whether "it [is] within the judicial power, in construing the Amendment, to abolish segregation in public schools?" *Id.* Frankfurter's initial draft of this question was even more explicit in theorizing the relationship between Section 5 and Section 1: "[A]ssuming further that it was the understanding of the Framers that Congress might, in the exercise of its powers under § 5, act to apply the Amendment so as to abolish primary school segregation, does a judicial power to do so exist concurrently with that of Congress?" Felix Frankfurter, Memorandum for the Conference: Re: The Segregation Cases (May 27, 1953) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A27).

[89] Alexander M. Bickel, *The Original Understanding and the Segregation Decisions*, 69 HARV. L. REV. 1, 63 (1955).

[90] *Id.* at 64.

[91] *Id.*

[92] THE SUPREME COURT IN CONFERENCE (1940–1985), at 648 (Del Dickson ed., 2001) [hereinafter IN CONFERENCE] ("If we had decided this case right after passage of the Civil War Amendments, I believe that we would have held originally that the way to enforce this was through Congress."); *see also id.* ("I don't think that Congress went as far as they thought the Civil War Amendments went.").

[93] *Id.*

in 1953, had no doubts that Congress had the power to desegregate schools and that he would prefer for Congress to do so.[94]

During the *Brown* litigation, the Justices' enthusiasm for congressional initiative posed tactical difficulties for the lawyers. Consider, for instance, when Justice Jackson pressed the attorney defending the segregation policy of Virginia's Prince Edward County School Board on this possibility. The lawyer responded that such action would require a constitutional amendment and, if passed as a statute alone, the Court should strike it down.[95] The segregationist lawyer's point actually received some support from opposing counsel, because those challenging segregated schools feared that recognizing a role for Congress here might take pressure off the Court to overrule *Plessy*. Thus, Solicitor General J. Lee Rankin (arguing for the Court to strike down segregation in schools) said in response to Jackson's question: "[T]he whole concept of constitutional law is that those rights that are defined and set out in the Constitution are not to be subject to the political form which changes from time to time, but are to be preserved under the holdings of this Court over many, many years by the orders of this Court granting the relief prayed for."[96] Similarly, the NAACP brief, submitted in response to the Court's reargument order, emphasized the framers' recognition of the self-enforcing nature of Fourteenth Amendment rights.[97] NAACP counsel Spottswood Robinson took a slightly different approach, recognizing that Congress had power under Section 5 to prohibit segregated schooling but then contending that congressional inaction should not prevent the Court from taking the initiative.[98]

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[94] *Id.* at 647 ("As to having mixed school classes, I think that Congress has the power to act for the District of Columbia and for the states. . . . I don't think much of the idea that it is for *Congress* and not for us to act. If they *do not act*, this leaves us with it. It would be better if Congress would act. Congress may act for the District of Columbia, but probably will *not* act for the states." (footnote omitted)).

[95] ARGUMENT, *supra* note 85, at 93.

[96] *Id.* at 244.

[97] Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 19, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 3, 5) ("While the Amendment conferred upon Congress the power to enforce its prohibitions, members of the 39th Congress and those of subsequent Congresses made it clear that the framers understood and intended that the Fourteenth Amendment was self-executing and particularly pointed out that the federal judiciary had authority to enforce its prohibitions without Congressional implementation."); *id.* at 124–25 ("[T]he judicial power to enforce the prohibitory effect of section 1 was not made dependent upon Congressional action. . . . To now hold Congressional action a condition precedent to judicial action would be to stultify the provisions in the Federal Constitution protecting the rights of minorities. In effect, this Court would be holding that action by a state against an unpopular minority which the Constitution prohibits cannot be judicially restrained unless the unpopular minority convinces a large majority (the whole country as represented in Congress) that a forum in which to ask relief should be provided for the precise protection they seek.").

[98] ARGUMENT, *supra* note 85, at 101–02.

There were also some breaks in the ranks among the lawyers defending segregation. While most echoed the Virginia lawyer's argument that Congress lacked the power to desegregate schools, the lawyer representing Kansas offered a variation on the Section 1–Section 5 gap theory in arguing that, while the Court did not have the constitutional authority, Congress did.[99] The Kansas attorney argued that while there remained an important role for the Court in enforcing the protections of the Fourteenth Amendment, "when it is sought to extend the federal jurisdiction into those undefined areas on the periphery of equal protection, we believe the framers intended that the Congress and not the courts should supply the impetus."[100] Kansas officials were never as enthusiastic about defending their segregation policy as their counterparts from the other states involved in the *Brown* litigation. In fact, the state had abandoned its school segregation policy while *Brown* was still being argued.[101] The Kansas Attorney General's focus on the need for congressional initiative, and the value of allowing a Section 1–Section 5 disconnect when confronting "those undefined areas on the periphery of equal protection," was an effort to carve out a more moderate defense of states' rights, one that distinguished federal judicial action from congressional action.

The assumption behind the Justices' questions—that Congress had the *power* to desegregate schools under its Section 5 powers, even if the Court had not yet explicitly overruled *Plessy*—resonated not only within the Court but also among many of the leading legal scholars of the day. As the Court neared its decision in *Brown*, Professor Paul Freund of Harvard Law School made explicit the point that would have been obvious to any observer of the oral arguments in the case: "Whatever may be the outcome of the present cases on segregation in the public schools, it is scarcely to be doubted that if Congress itself were to pronounce the doom of segregated primary education in the public schools the mandate would be cheerfully accepted by the Supreme Court."[102] Several years after the decision, Professor Freund suggested that "[t]he court might . . . have treated the [desegregation] issue as a 'political question,' to be determined by Congress under its specific power to legislate in order to carry out the provisions of the Fourteenth Amendment."[103] In the hand-wringing that followed the decision by those

[99] Brief for the State of Kansas on Reargument at 49, *Brown*, 347 U.S. 483 (No. 1) ("If, in spite of evidence to the contrary, it be conceived that the equal protection clause does provide for the abolition of segregation in the public schools, then Congress must so indicate by an exercise of its power under section 5.").

[100] *Id.* at 50.

[101] *Id.* at 14.

[102] Paul A. Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561, 564 (1954).

[103] Paul A. Freund, *Storm over the American Supreme Court*, 21 MOD. L. REV. 345, 351 (1958).

who opposed segregated education but struggled to locate an adequate legal rationale for *Brown*, the possibility of congressional, rather than judicial, leadership remained prominent. In his much-noted Harvard Law School lectures in which he confessed his discomfort with the reasoning the Court offered in *Brown*, Judge Learned Hand noted: "It is curious that no mention was made of section [five], which offered an escape, from intervening, for it empowers Congress to 'enforce' all the preceding sanctions by 'appropriate legislation.'"[104] In his equally noteworthy lectures delivered the following year, with much the same uncertainty about the principle behind the *Brown* ruling, Columbia Law School Professor Herbert Wechsler observed that having the Court "remit the issue to the Congress, acting under the enforcement clause of the [fourteenth] amendment" was "a possible solution, to be sure."[105]

In short, the under-examined assumption of the *Brown* Court was that a gap between Section 5 and Section 1 could exist, with two possible consequences for the Court's equal protection jurisprudence. One possibility was that the Court would recognize and accept this gap, perhaps under a kind of "necessary and proper" reading of Section 5. For example, Justice Frankfurter noted in oral argument that the intentions of the framers of the Fourteenth Amendment might be different when focused on Section 5 versus Section 1:

> [P]atently Congress looked forward to implementing legislation; implementing legislation patently looked forward to the future, and if Congress passed a statute doing that which is asked of us to be done through judicial decree, the case would come here with a pronouncement by Congress in its legislative capacity that in its view of its powers, this was within the Fourteenth Amendment and, therefore, it would come with all the heavy authority, with the momentum and validity that a congressional enactment has.[106]

Justice Frankfurter later added: "The Fourteenth Amendment is not unlike, in some aspect, the commerce clause. There are many things that the states cannot do merely because the commerce clause exists. There are many things that a state can do until Congress steps in."[107]

The other—and more likely—possibility was that the Court would *follow* Congress in redefining the meaning of the Equal Protection Clause.

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[104] LEARNED HAND, THE BILL OF RIGHTS 55 (1958).

[105] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959).

[106] ARGUMENT, *supra* note 85, at 94.

[107] *Id.* at 103; *see also id.* (reporting a question by Justice Reed: "But if segregation is not a denial of equal protection or due process, legislation by Congress could do nothing more except to express congressional views, and wouldn't that be decisive?").

In other words, the Court would adopt the congressional interpretation of equal protection as a self-enforcing constitutional right.[108] This was the approach that Justice Jackson seemed to favor, as evident in his unpublished draft concurrence in *Brown*.[109]

Justice Jackson's discussion of this Court–Congress collaborative model of Fourteenth Amendment law echoed arguments he had put forth seven years earlier in a 1947 opinion involving a Fourteenth Amendment challenge to the New York jury system. Justice Jackson's opinion for the Court in *Fay v. New York* rejected an equal protection challenge to the New York selection process for its juries, which had the effect of limiting representation by certain working-class professions and women.[110] In refusing to place these discriminatory practices on the same level as racial discrimination in jury selection, Justice Jackson relied not only on judicial precedent,[111] but also on congressional views as expressed in its Section 5 legislation.[112] Although Justice Jackson recognized that the Court had the power and the responsibility to strike down state legislation that violates the Fourteenth Amendment even in the absence of congressional action, he insisted any expansion of the scope of equal protection in these circumstances required "exacting requirements" demonstrating the constitutional violation.[113] In this case, the Court's "only source of power or guidance . . . is found in the cryptic words of the Fourteenth Amendment,

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[108] For a loosely analogous earlier episode, consider the progression from *United States v. Classic*, 313 U.S. 299 (1941) (recognizing congressional power to regulate primary elections) to *Smith v. Allwright*, 321 U.S. 649, 664–66 (1944) (applying Section 1 of the Fifteenth Amendment to primary elections). *See Smith*, 321 U.S. at 660 ("The fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries.").

[109] Jackson Memorandum, *supra* note 86, at 11 (noting that through Section 5, the Amendment "makes provision for giving effect from time to time to the changes of conditions and public opinion always to be anticipated in a developing society. A policy which it outlines only comprehensively it authorized Congress to complete in detail").

[110] *See* 332 U.S. 261, 270 (1947).

[111] One part of the Civil Rights Act of 1875 that survived *The Civil Rights Cases*, 109 U.S. 3 (1883), was a provision prohibiting racial discrimination in jury selection. *See Ex parte* Virginia, 100 U.S. 339, 349 (1880) (upholding Section 4 of the 1875 Civil Rights Act).

[112] By using its Section 5 power to single out racial discrimination as a violation of the Fourteenth Amendment, Justice Jackson explained, "Congress has put [racial discrimination] cases in a class by themselves." *Fay*, 332 U.S. at 282. Jackson would further elaborate:

> For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination. This statute was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress.

Id. at 282–83.

[113] *Id.* at 283–84.

unaided by any word from Congress or any governing precedent in this Court."[114] This, for Justice Jackson, was not enough.[115]

Justice Jackson's assumption in *Fay* that congressional Section 5 legislation could potentially change the landscape of the Court's equal protection analysis carried over to his evaluation of *Brown*. With regard to segregation and education, Justice Jackson explained in his unpublished *Brown* concurrence:

> [T]here can be no doubt that [the Amendment] gives Congress a wide discretion to enact legislation on that subject binding on all states and school districts. Admittedly, it explicitly enables Congress from time to time to exercise a wide discretion as to new laws to meet new conditions. The question is how far this Court should leave this subject to be dealt with by legislation, and any answer will have far-reaching implications.[116]

Justice Jackson's understanding of the scope of Section 5 was closely related to his skepticism about the efficacy of judicial action unaccompanied by the active support of the political branches.[117] Justice Jackson believed that "[a]

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[114] *Id.* at 285.

[115] In dissent in *Fay*, Justice Murphy took aim at Justice Jackson's reliance on congressional inaction as a basis for judicial rejection of the equal protection claim. "[L]egislation by Congress prohibiting the particular kind of inequality here involved is unnecessary to enable us to strike it down under the Constitution. . . . [Congress's] failure to legislate as to economic or other discrimination in jury selection does not permit us to stand idly by." *Id.* at 297 (Murphy, J., dissenting).

[116] Jackson Memorandum, *supra* note 86, at 11. On this point, Justice Jackson's clerk, E. Barrett Prettyman, took issue:

> I think Congress has no constitutional power to act in this field of state public education. You say that Congress may act if the 14th Amendment "deals with" segregation. There are two objections to this. (1) This Court has held until this decision that segregation per se is not invalid under the Amendment. You could hardly expect Congress to abolish segregation, citing the Amendment as its source of power, in the face of this Court's holding that the Amendment does not prohibit it. (2) More importantly, no matter what the Court has held or will hold about segregation and the 14th Amendment, that holding is not a grant of power to Congress. This is not the Commerce Clause, but an Amendment limiting the states. . . . The whole discussion about the constitutionality of a federal anti-lynching bill revolves around this very point.

Memorandum from E. Barrett Prettyman Jr., Law Clerk to Justice Jackson, to Justice Robert H. Jackson, Re. Nos. 1-4 at 5 (c. Mar. 1954) (Jackson Papers, Container 184). Prettyman went on to engage with the issue of institutional competence:

> Furthermore, even if Congress had power in the field, I am not sure that the precise question before the Court is one which could or should be delegated to the legislative branch. . . . [T]he question of whether Negroes have advanced so far that the mere fact of separation denies them equal protection seems to me to be a legal one.

Id. at 5–6.

[117] Jackson Memorandum, *supra* note 86, at 12 ("[I]n embarking upon a widespread reform of social custom and habits of countless communities we must face the limitations on the nature and effectiveness of the judicial process."). Justice Jackson distinguished between the Court striking down individual state support of educational segregation and Congress legislating a nationwide ban of it. *Id.* at 13–14 ("The Court can strike down legislation which supports educational segregation, but any constructive policy for abolishing it must come from Congress. Only Congress can enact a policy binding on all states and districts . . . .").

Court decision striking down state statutes or constitutional provisions which authorize or require segregation will not produce a social transition, nor is the judiciary the agency to which the people should look for that result."[118]

His concerns with questions of pragmatic policymaking and his belief that Congress was better positioned to create effective change led Justice Jackson to envision a constitutional system in which Congress had broad latitude to interpret and refine Fourteenth Amendment rights.

After *Brown* came down, critics of the decision frequently pointed to Section 5 as a basis for claiming that the issue should have been dealt with by Congress, not the Court. For example, the Southern Manifesto—the 1956 statement denouncing *Brown*, signed by nearly all Southern members of Congress—attacked the decision as "climax[ing] a trend in the Federal Judiciary undertaking to legislate, *in derogation of the authority of Congress*, and to encroach upon the reserved rights of the States and the people."[119] The Manifesto also stated:

> Though there has been no constitutional amendment *or act of Congress* changing this established legal principle almost a century old, the Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.[120]

Defenders of *Brown* countered that while the framers of the Fourteenth Amendment assumed a more powerful role for Congress, historical experience had demonstrated the need for judicial leadership to protect

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[118] *Id.* at 14. Justice Jackson suggested that "a considerable part of the inertia of Congress, if not the country, has been due to the belief that the existing system is constitutional"—a belief stemming from "the deference habitually paid by other branches of the Government to this Court's interpretation of the Constitution." *Id.* at 18.

[119] The Decision of the Supreme Court in the School Cases—Declaration of Constitutional Principles [the "Southern Manifesto"], 102 CONG. REC. 4460 (1956) (emphasis added).

[120] *Id.* (emphasis added); *see also* Eugene Cook & William I. Potter, *The School Segregation Cases: Opposing the Opinion of the Supreme Court*, 42 A.B.A. J. 313, 317 (1956) (describing the Court in *Brown II*, and its ruling providing guidelines for implementing school desegregation, as "usurping the prerogatives of the United States Congress" because "the Fourteenth Amendment itself vests in Congress the power of implementation" and Congress "has refused to interpret that amendment as compelling the commingling of the races in mixed schools against the wishes of the people"); Charles Fairman, *The Supreme Court 1955 Term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 85 (1956) ("[B]y section 5 of [the Fourteenth Amendment], . . . the people expressly reserved to themselves, through their representatives in Congress, the right to determine how it should be implemented." (quoting S.J. Res. 137, 84th Cong. (1956), and H.R.J. Res. 571, 84th Cong. (1956))); Ray Forrester, *The Supreme Court and the Rule of Law*, 4 S. TEX. L.J. 107, 119 (1959) (stating "there is no question of [Congress's] power" to "take action in the field covered by the segregation cases"); R. Carter Pittman, *The Law of the Land*, 6 J. PUB. L. 444, 454 (1957) (accusing the *Brown* Court of "usurp[ing] . . . from the Congress the power to enforce" the Fourteenth Amendment).

constitutional rights.[121] The position embraced by these defenders of *Brown* has largely won the day. *Brown* has come to symbolize the value, even the necessity, of judicial leadership in protecting civil rights. But as the preceding history of Section 5 and *Brown* demonstrates, a commitment to this position has been in some tension with a robust vision of congressional power under Section 5.

D. Public Accommodations Legislation

Unlike the debates over the scope of congressional authority under Section 5 in the context of anti-lynching or anti-poll tax legislation, which involved proposed legislation that never got through Congress, or in the context of school desegregation legislation, which never left the realm of the hypothetical, the debate detailed in this Section involved legislation that Congress passed and the Supreme Court then reviewed. The debate over the prohibition of racial discrimination in public accommodations that led to the passage of Title II of the 1964 Civil Rights Act involved contestation over the scope of congressional authority under Section 5 that took place in Congress and then in the Court. As with the debates discussed above, participants in this debate often recognized the possibility of an interpretive gap between Section 1 and Section 5. In this case, the gap theory would mean that the Court could recognize that Congress had authority under Section 5 to prohibit racial discrimination in public accommodations regardless of whether the Court, when interpreting Section 1, recognized nondiscriminatory access to public accommodations as a Fourteenth Amendment right.[122]

1. The Debate in Congress

By early 1963, the demands of civil rights protesters for nondiscriminatory access to restaurants, hotels, and other public accommodations were resonating across the nation, including in the halls of

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[121] In defending *Brown*, Harvard Law Professor Charles Fairman offered a ringing endorsement of the judiciary as the protector of constitutional principles:

> As our experience with the fourteenth amendment has unfolded it has been the Court to which the country has looked for authentic interpretation. Congress, which in the thinking of 1866 was to have so central a place, has come to play a minor role. It has seemed far more consistent with our polity that for the protection of fundamental rights the citizen look to the courts rather than be dependent upon the fluctuating views of the legislature. . . . So when the claim to desegregated treatment was presented in orderly litigation, the Court took not only the courageous but the normal course in deciding the issue itself.

Fairman, *supra* note 120, at 85.

[122] This Section draws on my lengthier treatments of the constitutional debate over the public accommodations provision of the 1964 Civil Rights Act. *See generally* CHRISTOPHER W. SCHMIDT, THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA 152–79 (2018); Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 802–23 (2010).

Congress.[123] While just a few years earlier the idea that Congress—the same institution that was unable to mobilize around even a federal law attacking lynching—would act to desegregate privately owned public accommodations seemed simply impossible.[124] However, by the spring of 1963, with the Birmingham protests capturing headlines, leading liberals in Congress, with the support of the Kennedy Administration, began seriously considering public accommodations legislation.[125] Once the Administration committed itself to what would become Title II of the Civil Rights Act of 1964, the debate turned to how to justify congressional power in this area.

Between the spring and fall of 1963, the constitutional basis for Title II was an issue of national debate, a debate that took place in congressional hearings, within the Kennedy Justice Department, and in the newspapers.[126] The debate centered on the relative merits of either a Section 5 or a Commerce Clause basis for the public accommodations law. While the Commerce Clause argument eventually emerged as the primary basis for Title II, the Section 5 rationale attracted considerable support, particularly in the early stages of the constitutional debate.

The Fourteenth Amendment approach resonated for several reasons. One was the fact that the Fourteenth Amendment was designed to deal with the legacy of slavery and racial inequality and the Commerce Clause was not. Section 5 advocates attacked the Commerce Clause rationale as, in the words of Stanford Law School Professor Gerald Gunther, "an inclination toward disingenuousness, cynicism and trickery as to constitutional principles."[127] As Senator John Sherman Cooper told the Senate Commerce Committee: "If there is to be a right to the equal use of accommodations held out to the public, it is a right of citizenship and a constitutional right under the 14th Amendment. It has nothing to do with whether a business is in interstate commerce."[128]

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[123] *See* SCHMIDT, *supra* note 122, at 65–90.

[124] *See, e.g.*, Earl Lawrence Carl, *Reflections on the "Sit-Ins,"* 46 CORNELL L.Q. 444, 455 (1961) (describing the possibility of a federal public accommodations law as "so remote that a discussion of it is largely academic").

[125] SCHMIDT, *supra* note 122, at 154–57.

[126] *See id.* at 157–63 (detailing executive branch and congressional debates over the constitutional basis for Title II).

[127] Arthur Krock, *When Justices and Law Professors Disagree*, N.Y. TIMES, July 16, 1963, at 30 (quoting a letter from Professor Gunther).

[128] E.W. Kenworthy, *Cooper Questions Rights Bill Basis*, N.Y. TIMES, July 4, 1963, at 1 (quoting Senator Cooper). Some in the press agreed. While the Commerce Clause may be acceptable for "a river and harbor bill," the *Washington Post* lectured, when "logrolling and adjustment" were required, it was not appropriate when "basic human rights are at issue." Editorial, *"Practical" Rights Bill*, WASH. POST, July 10, 1963, at A16.

After a brief initial period of political assessment and legal research, however, Administration support soon shifted toward the commerce power. While the Administration never abandoned Section 5, by the fall of 1963, it clearly regarded it as a secondary constitutional basis for congressional action. This growing reliance on the Commerce Clause came partly from considerations of legislative strategy. The predominantly liberal Senate Commerce Committee was a far friendlier place to civil rights legislation than the Senate Judiciary Committee—known as the "graveyard of civil rights legislation"[129]—whose chairman was arch-segregationist Senator James Eastland of Mississippi.[130] So framing the legislation as a regulation of interstate commerce justified sending it directly to the Commerce Committee, avoiding Eastland's graveyard.[131]

Yet other factors ultimately proved more consequential in shifting the Kennedy Administration away from Section 5. The gradual but steady undermining of the Kennedy brothers' initial assumption that Title II would derive from the Fourteenth Amendment started with discussions with legal experts in the Justice Department and in academia, many of whom believed the commerce power to be a safer foundation.[132] In particular, Harvard Law School Professor Paul A. Freund's recommendations strongly influenced the Administration's position.[133] Professor Freund's crucial contribution was to frame the Commerce Clause approach as more limited than the Fourteenth Amendment approach. In a statement submitted to the Senate Commerce Committee, Professor Freund warned that "any decision overruling the *Civil Rights Cases* has implications for judicial power and duty that transcend the immediate controversy."[134] The Commerce Clause "is primarily a grant of

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[129] CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 4 (1985); *see also* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, at 90 (1990).

[130] In the House there was no such concern: the House Judiciary Committee was chaired by Representative Emanuel Celler, a strong civil rights proponent. GRAHAM, *supra* note 129, at 90.

[131] *See* Unsigned Memorandum (June 18, 1963), *in* 13 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT—1945–1968: SECURING THE ENACTMENT OF CIVIL RIGHTS LEGISLATION: CIVIL RIGHTS ACT OF 1964, at 35, 35 (Michal R. Belknap ed., 1991) [hereinafter SECURING THE ENACTMENT] (giving a blueprint of the Kennedy Administration's strategy in proposing the legislation); *see also* GRAHAM, *supra* note 129, at 90 (detailing the Kennedy Administration's legislative strategy); E.W. Kenworthy, *One Rights Plea Expected to Fail*, N.Y. TIMES, June 20, 1963, at 1 (same).

[132] *See, e.g.*, KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 156–59 (1997); Burke Marshall, Legislative Possibilities (May 20, 1963), *in* SECURING THE ENACTMENT, *supra* note 131, at 26, 26–27.

[133] *See* GORMLEY, *supra* note 132, at 140–42; VICTOR S. NAVASKY, KENNEDY JUSTICE 284–85 (1971).

[134] *See Civil Rights—Public Accommodations: A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearings on S. 1732 Before the S. Comm. on*

legislative power to Congress, which can be exercised in large or small measure, flexibly, pragmatically, tentatively, progressively, while guaranteed rights, if they are declared to be conferred by the Constitution, are not to be granted or withheld in fragments."[135] Professor Freund's critical assumption was that the coverage of Section 1 and Section 5 was coterminous: "[I]t is necessary to arrive at some conception of the range of rights which an overruling of the *Civil Rights Cases* would create for the courts and the Congress to enforce."[136]

Yet Professor Freund then suggested a different possibility, referencing the idea of decoupling congressional power under Section 5 from the judicial definition of the substantive right in Section 1. He suggested that Section 5 might be treated in a way analogous to the Commerce Clause: as a general grant of legislative power, the scope of which would be largely defined by the policy evaluation of the Congress, taking heed of both constitutional principles and the challenges of implementing federal antidiscrimination policy.[137] Under this approach, the Court would "draw as wide a gap as possible" between congressional Section 5 power and "the self-executing, judicially enforced prohibitions of section 1."[138] Yet this approach also posed potential risks for the Court, Professor Freund warned. For pursuing this path would make "the responsibility on Congress . . . all the greater to think through the implications of its action for constitutional claims that are not precisely those recognized in the bill but in principle may be comparable."[139] In highlighting these judicial "implications" of congressional exercise of its Section 5 power, Professor Freund seemed to be moving away from his earlier suggestion of a gap between judicially enforceable Section 1 rights and congressionally enforceable Section 5 rights. Professor Freund's tentative suggestion on the possibility of a Section 1–Section 5 gap was never picked up by the bill's Justice Department advocates. It was his larger argument—that the Commerce Clause was not only the stronger foundation

Commerce, 88th Cong. 1187 (1963) (brief of Professor Paul A. Freund) [hereinafter *Hearings on S. 1732 Before the S. Comm. on Commerce*].

[135] *Id.*

[136] *Id.*

[137] *Id.* at 1188–89.

[138] *Id.* at 1189.

[139] *Id.* The comparable constitutional claims that Professor Freund had in mind related to First Amendment and due process limitations. *Id.* at 1188–89. Burke Marshall would echo these concerns in his testimony before the Senate Commerce Committee. *Id.* at 239–40 (statement of Burke Marshall, Assistant Att'y Gen. of the United States).

for Title II, but also the more desirable for its pragmatic and readily delineated qualities—that would prove most influential.[140]

The theme of detaching Section 1 and Section 5 to which Professor Freund alluded also emerged in the congressional testimony of Harvard Law School Dean Erwin Griswold. When Dean Griswold claimed that the Fourteenth Amendment would be a sufficient constitutional basis for the law, he was asked if this meant "that today there is a violation of constitutional rights of Negroes when they are rejected in places of public accommodations if those places are in any fashion affected by State regulation?"[141] "Yes, I think this is true," Dean Griswold responded.[142] "It may be an abstract violation of constitutional rights for which there is at present no remedy, and the question is now whether Congress should not provide a remedy for it."[143]

The influential opinions of Professor Freund and the Justice Department officials helped move Attorney General Robert Kennedy to become a powerful advocate in the congressional debates for basing Title II predominantly on the Commerce Clause. But his acceptance of the Commerce Clause rationale stemmed more from pragmatic concerns than constitutional analysis. Initially, upon introduction of the bill, the official Administration position was that both the Fourteenth Amendment and Congress's commerce power would be relied upon. President Kennedy, in his June 19 message to Congress calling for passage of the sweeping civil rights bill, highlighted both constitutional bases for Title II.[144] The Attorney General made the same point in his presentations to congressional committees.[145] As the Title II debate evolved, however, Robert Kennedy would continue to assert his personal opinion that the Section 5 basis was sufficient and would be upheld in the Supreme Court,[146] yet he would increasingly emphasize that the Administration stood squarely behind the

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[140] *See* SCHMIDT, *supra* note 122, at 162–63 (detailing the triumph of the commerce power rationale in congressional debate over Title II).

[141] *Hearings on S. 1732 Before the S. Comm. on Commerce*, *supra* note 134, at 785 (question by Sen. Philip Hart to Erwin Griswold).

[142] *Id.* (remarks of Erwin Griswold).

[143] *Id.* Dean Griswold's remarks allude to the concept of "underenforced" constitutional rights, which has been subsequently developed most prominently in the work of Professor Lawrence Sager. *See generally* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[144] John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities*, THE AM. PRESIDENCY PROJECT (June 19, 1963), http://www.presidency.ucsb.edu/ws/?pid=9283 [https://perma.cc/QC3Q-XYB9].

[145] *Hearings on S. 1732 Before the S. Comm. on Commerce*, *supra* note 134, at 23 (statement of Robert Kennedy, Att'y Gen. of the United States).

[146] *See id.* at 26, 28, 74, 78.

Commerce Clause and that Section 5 was best treated as a secondary justification. He repeatedly asserted that the Supreme Court would have little trouble approving of the constitutionality of Title II under the Commerce Clause.[147] Furthermore, picking up Professor Freund's critical contribution to the discussion, Attorney General Kennedy argued that the Commerce Clause framework added a valuable limiting factor to the scope of the law.[148] In his appeal to moderates in Congress, Robert Kennedy emphasized this limiting argument as the critical advantage for the Commerce Clause approach.[149]

The Attorney General also picked up a point from Professor Freund's brief that the Fourteenth Amendment rationale opened a Pandora's box of other constitutional claims.[150] The assumption here, as in the Freund brief, was that for the Court to uphold congressional policy passed under Section 5, it would necessarily need to bring its Section 1 jurisprudence into alignment.

The Administration was successful in its campaign to fight the expanded version of Title II by highlighting the limiting role of the Commerce Clause. The Commerce Clause rationale for Title II, framed by the Administration as the less far-reaching approach, became a central tool for attracting congressional moderates.[151] The alternative Section 5-based rationale was soon abandoned, and by the end of 1963, supporters of the bill were relying predominantly on the Commerce Clause rationale, with Section 5 remaining to cover any facilities affected by official state segregation policy and as a secondary rationale for covering other public accommodations.[152] By the opening of 1964, with the constitutional basis of Title II largely settled, the debate turned toward getting the bill through Congress. The House passed the omnibus civil rights bill, including Title II, on February 10, 1964, on a vote of 290–130. After a lengthy filibuster, the

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147 *See id.* at 23, 73.

148 *See, e.g.*, *id.* at 57–60, 74.

149 *See, e.g.*, *id.*

150 Press Conference of Attorney Gen. Robert F. Kennedy (Oct. 15, 1963), *in* SECURING THE ENACTMENT, *supra* note 131, at 67, 88 (asking whether a Section 5 rationale for Title II would mean that private employers would have to grant due process rights to employees before firing them or that religious schools could be sued for violating the First Amendment).

151 E.W. Kenworthy, *Capital Girds for Battle over Civil Rights Program*, N.Y. TIMES, June 23, 1963, at 147.

152 In its final form, Title II applied to a public accommodation "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." 42 U.S.C. § 2000a(b) (2012).

Senate did the same on June 19, by a vote of 73–27. With President Johnson's signature, the Civil Rights Act of 1964 became law on July 2.[153]

2. The Debate in the Supreme Court

The constitutionality of Title II was challenged immediately after it was passed, and before the year ended, the Supreme Court upheld it as a legitimate exercise of the commerce power,[154] while reserving the question of Section 5 as a basis for the law.[155]

In the years preceding passage of the Civil Rights Act, the Justices struggled with a series of cases involving appeals of criminal convictions of young African-American men and women who had taken part in lunch counter sit-in protests.[156] Throughout their deliberations in the sit-in cases, the Justices remained sharply divided on the basic state action question: whether, as a self-enforcing right to be recognized in the courts, the Fourteenth Amendment protected against discrimination in privately owned public accommodations.[157] Yet a majority—perhaps even all—of the Justices expressed a willingness to recognize congressional power to regulate public accommodations through Section 5 of the Fourteenth Amendment.[158] Thus, by the time members of Congress seriously started to consider the constitutional basis for a federal public accommodations law, a Court sharply divided on the question of state action under Section 1 appeared to be in agreement on recognizing some level of congressional latitude in defining state action under Section 5.

For those Justices who concluded that proprietors of public accommodations were state actors for purposes of the Equal Protection Clause,[159] congressional enforcement in this area was straightforward: there was no question that Congress, under Section 5 of the Fourteenth Amendment, had the power to enforce a judicially recognized equal protection right. But for those Justices who refused to extend Section 1 to cover public accommodations discrimination, the Section 5 question posed some difficulty. This group of Justices, led by Justice Black, began to make the case for the Court extending to Congress some measure of interpretive

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[153] *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBRARY OF CONGRESS, https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html [https://perma.cc/D65W-APX5].

[154] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253–58 (1964); Katzenbach v. McClung, 379 U.S. 294, 299–300, 304–05 (1964).

[155] *Heart of Atlanta*, 379 U.S. at 249–50.

[156] *See generally* SCHMIDT, *supra* note 122, ch. 5.

[157] *Id.*

[158] *Id.* at 170.

[159] For most of October Term 1963, this included Chief Justice Warren and Justices Brennan, Douglas, and Goldberg. SCHMIDT, *supra* note 122, at 134–47, 169–71.

latitude in defining state action under its Section 5 enforcement powers. Among themselves at least—for only hints of this would reach published Court opinions—they recognized that a congressional definition of state action (under Section 5) might go beyond a judicial definition (under Section 1).

In the Court's confrontation with public accommodations discrimination, Justice Black emerged as not only the staunchest defender of the state action doctrine (when considered as a Section 1-only question) but also the most outspoken proponent of the constitutional validity of federal public accommodations legislation under Section 5. During deliberations in the sit-in cases, he said he would be willing to abandon the *Civil Rights Cases*—referring to its Section 5 holding, not its definition of the state action doctrine as applied to judicially enforceable (i.e., Section 1) rights.[160] In his dissent in *Bell v. Maryland*, where he denounced the tactics of the sit-in protesters and rejected their Fourteenth Amendment claim, he repeatedly referenced congressional Section 5 power to prohibit discrimination in public accommodations.[161] And after the Court heard the challenge to Title II, he told his colleagues: "I would prefer to go on the Fourteenth Amendment, but I think that Congress limited the act to the commerce clause. Otherwise, I would be for overruling the *Civil Rights Cases*."[162] In his concurrence in one of the Title II cases, Justice Black emphasized that his *Bell* dissent did not pass judgment on the scope of Section 5 power and that he agreed with the opinion of the Court that this question should not be faced in these cases.[163]

Justice Brennan struggled to reconcile the Court's handling of the sit-in cases with the constitutional basis for the public accommodations legislation that Congress was considering. In a handwritten note to Justice Douglas, presumably written from the bench during oral arguments in the October Term 1963 sit-in cases,[164] Justice Brennan sought to make sense of the novel situation in which the Court found itself, with a Congress that appeared poised to press ahead of the Court on a major civil rights issue. His words captured the Supreme Court's emerging Section 5 doctrine:

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[160] *See* IN CONFERENCE, *supra* note 92, at 712; Earl Warren, Conference Notes, n.d. (Warren Papers, Box 510, "Sit-In cases, O.T. 1963: Combined Cases").

[161] *See* 378 U.S. 226, 326, 331, 343, 345 (1964) (Black, J., dissenting).

[162] IN CONFERENCE, *supra* note 92, at 727.

[163] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 278–79 (1964) (Black, J., concurring).

[164] The note is on generic Supreme Court stationary (not the personalized stationary typically used when Justices communicate with one another from their chambers) and is found in Justice Douglas's *Bell* file. Memorandum from William J. Brennan to William O. Douglas, n.d. (Douglas Papers, Box 1315, "No. 12 – Bell v. Maryland: Misc. Memos, Cert Memo").

> [I]s it "enforcing" legislation if the Court holds that section 1 does not protect the Negroes' right to service but rather the owner's right to exclude them? What then does Congress "enforce"? . . . [M]ay [Congress] under section 5 erase a right this Court holds is protected by section 1? I ask, not because I'm opposed to the result, but because I don't know.[165]

When the Justices discussed the sit-in cases in conference, Justice Brennan again raised this concern.[166] Ultimately, however, he would conclude that Congress had not expressed any intent in Title II to press beyond existing judicial interpretation of the state action doctrine.[167]

Justice Douglas's approach to Section 5 was more the product of strategy than constitutional principle. He adjusted his views of Section 5 according to the leverage it could bring for his preferred interpretation of Section 1. When he sought to sway his brethren to his position on the constitutional claim of the sit-in protesters, he emphasized the need to have a tight linkage between Section 1 and Section 5. "Apart from the Commerce Clause, Congress has no power to legislate in this field if there is no state action in the meaning of the Fourteenth Amendment," he wrote in an October 21, 1963 memorandum.[168]

> [I]f we hold that restaurants and other businesses serving the public cannot discriminate against people on account of race, Congress can "enforce" that construction of the Fourteenth Amendment. But if we hold that this kind of discrimination is beyond the purview of the Fourteenth Amendment there is nothing for Congress to "enforce" and the Civil Rights Cases are vindicated.[169]

Later that term, however, when he recognized that he lacked the votes for this Section 1 position, Justice Douglas took quite a different line, accepting the Section 1–Section 5 decoupling he had recently rejected. He wrote: "Congress by reason of § 5 has some leeway to define what due process requires in protection of federally protected rights. Moreover,

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[165] *Id.*

[166] Hugo Black, Conference Notes, Oct. 23, 1963, *in* The Deliberations of the Justices in Deciding the Sit-In Cases of June 22, 1964, at 4 (A.E. Dick Howard & John G. Kester eds.) (Hugo L. Black Papers, Box 376, "Oct. Term 1963: Sit-In Cases," Library of Congress, Manuscript Division, Washington, D.C.) ("[Justice Brennan] does not see how Congress could bar store discrimination on account of race unless we hold that the 14th Amendment prohibits these trespass statutes.").

[167] IN CONFERENCE, *supra* note 92, at 728 (arguing that Title II's "'state action' definition followed the *Civil Rights Cases*, and that these cases must go on the commerce clause").

[168] William O. Douglas, Memorandum to the Conference (Oct. 21, 1963) (William O. Douglas Papers, Box 1315, "No. 12: Bell v. Maryland: Law Clerks-3," Manuscript Division, Library of Congress, Washington, D.C.) [hereinafter Douglas, Memorandum to the Conference]; *see also* Douglas, draft dissent in Robinson v. Florida 7–9 (Mar. 11, 1964) (Douglas Papers, Box 1314, "No 12: Bell v. Maryland: Galley Proofs-2") (making same point).

[169] Douglas, Memorandum to the Conference, *supra* note 168.

Congress has authority to define what is 'state' action within the meaning of the Fourteenth Amendment in order to protect federal rights against dilution."[170]

In the end, only Justices Douglas and Goldberg insisted that the Section 5 issue needed to be faced.[171] Justice Goldberg noted in the Justices' private conference that "[t]he legislative history shows confusion on the Fourteenth Amendment issue."[172] Justice Goldberg seemed to understand Congress as having relied on the Court's definition of state action, rather than having fashioned its own definition. Justices Douglas and Goldberg found authority for Title II in both the Commerce Clause and Section 5 of the Fourteenth Amendment.[173]

* * *

These debates among judges, lawyers, lawmakers, and academics over the scope of congressional authority to enforce the Fourteenth Amendment reveal the articulation and widespread acceptance of what might appear a striking premise: that Congress may define for itself what the provisions of the Fourteenth Amendment mean, even if such definitions do not align with the way the courts have defined its provisions. Those involved in these debates generally did not see this premise as some kind of bold or radical innovation. To the contrary, it was often advanced as a more cautious route to constitutional change, one that allowed Congress, rather than the courts, to take a leading role in confronting the challenges of breaking down the structures of white supremacy in American law and society.

III. *MORGAN* AND THE OCTOBER TERM 1965

In the spring of 1966, the Supreme Court issued a series of landmark decisions involving congressional enforcement power under the Reconstruction Amendments, culminating in *Katzenbach v. Morgan*. The Justices' treatment of these cases built upon the Section 5 discussions of the previous decades. While the specific questions considered in the 1965 Term cases were novel—mostly involving Congress's use of its enforcement power in passing various provisions of the Voting Rights Act of 1965—the

[170] William O. Douglas, draft dissent, Bell v. Maryland 27 (Mar. 24, 1964) (Douglas Papers, Box 1314, "No. 12: Bell v. Maryland: Galley Proofs"). Douglas also found congressional authority to enact a public accommodations law under the enforcement clause of the Thirteenth Amendment. *Id.*

[171] IN CONFERENCE, *supra* note 92, at 727–28.

[172] *Id.* at 728 ("It utilized § 5 as they thought § 5 might be read, no matter how broadly.").

[173] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 286–91 (Douglas, J., concurring); *id.* at 291–93 (Goldberg, J., concurring).

assumptions behind the Court's emerging Section 5 jurisprudence were already largely established, the result of the previous decades of debates, inside and outside the courts, over the scope of the congressional enforcement power.

A. South Carolina v. Katzenbach

The Voting Rights Act of 1965[174] included broad protections of the franchise, justified under the enforcement provision of the Fifteenth Amendment.[175] The law authorized the Justice Department to suspend literacy tests in any county in which fewer than half the eligible voters were registered.[176] It also authorized the Justice Department to have federal officials assume control over the voter registration process in certain states, and affected states had to preclear any changes in voting practices.[177]

President Johnson signed the bill on August 6, 1965, and South Carolina immediately challenged the law as outside the scope of congressional enforcement power under the Fifteenth Amendment.[178] The Court moved quickly, and on March 7, 1966, it issued a resounding stamp of constitutional approval.[179]

Chief Justice Warren's opinion for the Court in *South Carolina v. Katzenbach* left no doubt that Congress had broad authority to protect the right to vote.[180] In response to South Carolina's contention that the sweeping remedial scheme of the law threatened the prerogatives of the courts in defining the scope of constitutional protections,[181] Chief Justice Warren broadly interpreted Congress's power under Section 2 of the Fifteenth Amendment: "By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1."[182] He cited language from *Ex parte Virginia* that indicated that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[183] Chief Justice Warren

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[174] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2012)).

[175] The law was titled: "An Act to enforce the fifteenth amendment to the Constitution of the United States, and for other purposes." *Id.*

[176] *Id.* at § 4(a)–(b).

[177] *See id.* at § 5.

[178] *See* South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).

[179] *See id.* at 301, 337.

[180] *Id.* at 308 ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.").

[181] *Id.* at 325.

[182] *Id.* at 325–26.

[183] *Id.* at 326 (citing *Ex parte* Virginia, 100 U.S. 339 (1879)).

then brought the role of the Court in reviewing congressional enforcement power into alignment with the deferential posture it embraced under Congress's other enumerated powers. Chief Justice Warren explained that in reviewing any exercise of congressional lawmaking authority, the "basic test" for the courts should be the one Chief Justice John Marshall famously laid down in *McCulloch*: "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 letter and spirit of the constitution, are constitutional."[184] The rest of the Court accepted the standard Chief Justice Warren offered.[185]

B. Harper v. Virginia Board of Elections

On its face, *Harper v. Virginia Board of Elections*[186] seems to have nothing to do with Section 5. The central question the Court confronted was a Section 1 issue: Does the poll tax violate the Equal Protection Clause? To this, the Court answered with a resounding and sweeping yes.[187] Justice Douglas's opinion for the majority defended the idea of a living Constitution—probably the most extreme articulation of this principle ever to emerge from the Court. "[T]he Equal Protection Clause is not shackled to the political theory of a particular era," Justice Douglas wrote.[188] "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality . . . ."[189] Rather, Justice Douglas assumed the Justices of the Court would determine when "historic notions of equality" were no longer sufficient.[190] *Harper* has generally been remembered for this commitment to an evolving Constitution with the Court as the arbiters of its evolving meaning.[191]

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[184] *Id.* (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

[185] Justice Black dissented with regard to the preclearance requirement contained in Section 5 of the Voting Rights Act (based on his belief that it unconstitutionally interfered with state sovereignty), *id.* at 358 (Black, J., concurring in part and dissenting in part), but he accepted the Court's deferential approach to review of Congress's powers under Section 2 of the Fifteenth Amendment, *id.* at 355 ("[Section] 2 of the Amendment unmistakably gives Congress specific power to go further [than the prohibitions of § 1] and pass appropriate legislation to protect this right to vote against any method of abridgment no matter how subtle.").

[186] 383 U.S. 663 (1966).

[187] The poll tax, wrote Justice Douglas for the Court, constituted an "invidious" form of wealth discrimination, *id.* at 668 (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)), and "wealth or fee paying has, in our view, no relation to voting qualifications," *id.* at 670.

[188] *Id.* at 669.

[189] *Id.*

[190] *Id.*

[191] *See* Ackerman & Nou, *supra* note 54, at 111–13.

But *Harper* is also significant for what the Court did not discuss, for a major Section 5 debate lurked in the background. In the debates that led to the 1965 Voting Rights Act, Congress had considered abolishing the poll tax in all state elections.[192] While a straight prohibition did not make it into the final draft, the final bill did include a provision in which Congress expressed its opinion that the poll tax violated the Fourteenth Amendment and ordered the Attorney General to press this position in federal court. The Court was thus able to avoid squarely facing the Section 5 issue. Rather than considering whether Congress had the power under Section 5 to strike down the poll tax—despite the fact that *Breedlove v. Suttles* held that the poll tax was constitutional[193]—the Court considered *Harper* solely as a Section 1 challenge without mentioning that Congress had already weighed in on this issue.

When the Justices first considered *Harper* in early 1965, a six-Justice majority was ready to summarily reject the challenge and reassert the validity of *Breedlove* in a single-sentence per curiam decision.[194] But Justice Goldberg planned to dissent, and his draft opinion, which drew on the ratification of the Twenty-Fourth Amendment as a basis for undermining *Breedlove* (the Voting Rights Act had yet to be passed), convinced some of his colleagues to reconsider.[195] By the time the Court heard full arguments in the case, the Voting Rights Act had passed, and its poll tax provision featured prominently in the Justice Department's argument before the Court.[196]

The dissenters in *Harper* were left to raise the question of Section 5. At oral argument, Justice Black lashed out at the Justice Department for counseling Congress not to strike down the poll tax under its enforcement powers—either Section 5 of the Fourteenth Amendment or the analogous Section 2 of the Fifteenth Amendment—on the expectation that the Court would deal with the issue.[197] Although Justice Black would write a scathing

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[192] The poll tax had been abolished in federal elections the previous year by the Twenty-Fourth Amendment. U.S. CONST. amend. XXIV.

[193] 302 U.S. 277, 283 (1937).

[194] Ackerman & Nou, *supra* note 54, at 112, 114; Bernard Schwartz, *More Unpublished Warren Court Opinions*, 1986 SUP. CT. REV. 317, 320–21.

[195] Schwartz, *supra* note 194, at 321, 332.

[196] Brief for the United States as Amicus Curiae at 27, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (No. 48) ("The problem of the poll tax has been before the Congress for some years. Congress has studied it and concluded, with ample basis in fact and experience, that the poll tax is not a justifiable exercise of State power to establish voting qualifications. Without going so far as to suggest that this judgment is binding upon the Court, we submit that it is entitled to great weight." (footnote omitted)).

[197] Transcript of Oral Argument in *Harper*, 383 U.S. 663 (No. 48), *reprinted in* 62 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1050 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Harper* Oral Arguments] ("[T]hey wanted to pass the burden over to us to act on constitutional grounds.").

dissent in *Harper*, he went out of his way to recognize the power of Congress to strike down the poll tax.[198] His decision contains two points. The first is that the Court was making policy, reminiscent of the discredited *Lochner*[199] Court, when it reinterpreted the Equal Protection Clause to prohibit the poll tax.[200] This attack on the "old 'natural law due process formula'" approach to constitutional interpretation is well-known. His second major point—the one that often gets lost beneath the Douglas–Black confrontation over interpreting Section 1—was that Congress, in Justice Black's view, unquestionably has power to reinterpret the meaning of the Fourteenth Amendment.[201] What Justice Black denounced Justice Douglas for doing, he believed Congress was fully empowered to do.

> [T]he people, in § 5 of the Fourteenth Amendment, designated the governmental tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of Government they chose was not the Judicial Branch but the Legislative. I have no doubt at all that Congress has the power under § 5 to pass legislation to abolish the poll tax in order to protect the citizens of this country if it believes that the poll tax is being used as a device to deny voters equal protection of the laws. But this legislative power which was granted to Congress by § 5 of the Fourteenth Amendment is limited to Congress. . . . [Section] 5 of the Fourteenth Amendment in accordance with our constitutional structure of government authorizes the Congress to pass definitive legislation to protect Fourteenth Amendment rights which it has done many times. For Congress to do this fits in precisely with the division of powers originally entrusted to the three branches of government—Executive, Legislative, and Judicial. But for us to undertake in the guise of constitutional interpretation to decide the constitutional policy question of this case amounts, in my judgment, to a plain exercise of power which the Constitution has denied us but has specifically granted to Congress.[202]

It was on this broad power of Congress under Section 5 and the way it allows both the Court and Congress to better fulfill their constitutional duties that Justice Black concluded his *Harper* dissent. The failure of Congress to exercise its authority—and the role of the Johnson Administration in convincing Congress not to act—was clearly still on Justice Black's mind

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198 *Harper*, 383 U.S. at 678–80 (Black, J., dissenting).

199 Lochner v. New York, 198 U.S. 45 (1905).

200 *Harper*, 383 U.S. at 670–78 (Black, J., dissenting).

201 The edited version of *Harper* contained in most constitutional law casebooks does not include Justice Black's Section 5 discussion. *See, e.g.*, JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1365 (10th ed. 2006); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 840 (15th ed. 2004). On the essential erasure of Congress and Section 10 of the Voting Rights Act from the history of *Harper*, see generally Ackerman & Nou, *supra* note 54.

202 *Harper*, 383 U.S. at 678–80 (citations omitted).

when the Court delivered its decision on March 24, 1966. In announcing his dissent, Justice Black again attacked Attorney General Katzenbach for advising Congress that it lacked such power under Section 5.[203]

C. United States v. Guest

United States v. Guest[204] involved a challenge to an indictment of six private individuals under the civil rights conspiracy statute, 18 U.S.C. § 241 (1964), a law derived from the Civil Rights Act of 1870 and based on Congress's Section 5 power. The six men were accused of conspiring to deprive African Americans of certain rights protected under the Constitution and federal civil rights law, including their right to travel freely across state borders and their right of access to public accommodations.[205] The crux of the case was whether § 241 applied to purely private action and, if so, whether Congress had the authority under Section 5 to prohibit such private activity when it would not necessarily violate the Fourteenth Amendment because it lacked the requisite state action.[206] Writing for a divided Court, Justice Stewart found a means to avoid this difficult issue. He located a state action basis for the indictment by noting that the indictment alleged that the private conspirators "caus[ed] the arrest of Negroes by means of false reports that such Negroes had committed criminal acts"[207]—thereby creating a direct linkage between the private actors and the state.[208]

Nonetheless, Justice Stewart's opinion explicitly reserved the question of the extent to which Congress might prohibit behavior under Section 5 that would not be unconstitutional itself. When aimed at prohibiting conspiracies to infringe upon equal protection rights, the coverage of § 241, Stewart noted, was directly coterminous with the coverage of the Equal Protection Clause: "[W]e emphasize that § 241 by its clear language incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive, as opposed to remedial, implementation to any rights

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[203] *See* John P. MacKenzie, *Supreme Court Outlaws All Poll Taxes*, WASH. POST, Mar. 25, 1966, at A1, A19 ("Without mentioning names, Black also chided Attorney General Nicholas deB. Katzenbach for advising Congress that it lacked power to ban state poll taxes in the Voting Rights Act. He said he had no doubt about congressional power under a section of the 14th Amendment, but 'some great enthusiast' decided to let the Court handle the matter."); Opinions of William J. Brennan, Jr., October Term 1965, at xxx (William J. Brennan Papers, Box II: 6, Folder 8, Manuscripts Division, Library of Congress) (memorandum prepared by Justice Brennan and law clerks) [hereinafter Brennan Memo].

[204] 383 U.S. 745 (1966).

[205] *Id.* at 747 n.1.

[206] *Id.* at 754–55. A companion case to *Guest*, *United States v. Price*, 383 U.S. 787 (1966), involved a similar civil rights conspiracy indictment against a conspiracy involving both private individuals and state officials.

[207] *Guest*, 383 U.S. at 756.

[208] *Id.*

secured by that Clause."[209] Yet Justice Stewart went on to suggest that Congress's Section 5 power extends further:

> Since we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.[210]

Justice Clark wrote a short concurrence, joined by Justices Black and Fortas, in which he sought to clarify his view on the Section 5 issue that Justice Stewart refused to confront. Justice Clark concluded: "[I]t is, I believe, both appropriate and necessary under the circumstances here to say that there now can 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."[211]

Justice Brennan, joined by Chief Justice Warren and Justice Douglas, wrote a sweeping opinion that foreshadowed the broad reading of Section 5 that he would rely upon several months later in his *Morgan* opinion. This broad reading included the recognition of a gap between the reach of possible congressional regulation when acting under its Section 5 power and the reach of the Fourteenth Amendment absent congressional action. Like Justice Clark, Justice Brennan construed § 241 to apply to private conspiracies to interfere with constitutionally protected rights.[212] Even if the Constitution itself did not prohibit private interference with a particular constitutional right, Justice Brennan wrote, Section 5 legislation designed to "secure" that constitutional right could do so:

> A right is "secured . . . by the Constitution" within the meaning of § 241 if it emanates from the Constitution, if it finds its source in the Constitution. Section 241 must thus be viewed, in this context, as an exercise of congressional power to amplify prohibitions of the Constitution addressed, as is invariably the case, to government officers; contrary to the view of the Court, I think we are dealing

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[209] *Id.* at 754–55. Justice Stewart's distinction between "substantive" and "remedial" enforcement of the Fourteenth Amendment under Section 5 would be further developed in Justice Harlan's dissent in *Katzenbach v. Morgan*, 384 U.S. 641, 666–68 (1966), an opinion Justice Stewart joined.

[210] *Guest*, 383 U.S. at 755.

[211] *Id.* at 762 (Clark, J., concurring).

[212] *Id.* at 775–81 (Brennan, J., concurring in part and dissenting in part). He noted,

> I believe that § 241 reaches such a private conspiracy, not because the Fourteenth Amendment of its own force prohibits such a conspiracy, but because § 241, as an exercise of congressional power under § 5 of that Amendment, prohibits *all* conspiracies to interfere with the exercise of a "right . . . secured . . . by the Constitution."

Id. at 777 (quoting 18 U.S.C. § 241 (1964)).

> here with a statute that seeks to implement the Constitution, not with the "bare terms" of the Constitution. Section 241 is not confined to protecting rights against private conspiracies that the Constitution or another federal law also protects against private interferences. No such duplicative function was envisioned in its enactment.[213]

Rather than the strict remedial–substantive distinction favored by Justice Stewart (and embraced by Justice Harlan in *Morgan*[214]), Justice Brennan here argued that Congress has power under Section 5 to "amplify" and "implement" an established Fourteenth Amendment right.

Justice Brennan noted:

> 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.[215]

He then explained that:

> [Section] 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection. It made that determination in enacting § 241 and, therefore § 241 is constitutional legislation as applied to reach the private conspiracy alleged in the . . . indictment.[216]

In addressing the narrow reading of Section 5 in the *Civil Rights Cases*, Justice Brennan wrote: "I do not accept—and a majority of the Court today rejects—this interpretation of § 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary; and it attributes a far too limited objective to the Amendment's sponsors."[217]

Justice Brennan's opinion put forward the idea that the proper framework for analyzing the scope of congressional power under Section 5 was the one outlined in *South Carolina v. Katzenbach* (soon reiterated and

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[213] *Id.* at 779.

[214] *See Morgan*, 384 U.S. at 666–68 (Harlan, J., dissenting).

[215] *Guest*, 383 U.S. at 782 (footnote omitted). Justice Brennan included in this count the Justices who joined the Clark concurrence (Justices Black and Fortas) and the Justices who joined his opinion (Chief Justice Warren and Justice Douglas). *Id.* at 782 n.6. He noted that Justice Stewart's "opinion d[id] not purport to deal with this question." *Id.*

[216] *Id.* at 782.

[217] *Id.* at 783 (footnote omitted).

extended in *Morgan*),[218] which drew on Chief Justice Marshall's famous language from *McCulloch*.[219] He explained:

> Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. . . . And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.[220]

Justice Brennan concluded his opinion by admitting that the vagueness of § 241 makes it "certainly not model legislation for punishing private conspiracies."[221] Yet the appropriate "remedy [wa]s for Congress to write a law without this defect. . . . [I]f Congress desires to give the statute more definite scope, it may find ways of doing so."[222]

Justice Harlan was the only member of the *Guest* Court to explicitly reject the possibility that § 241 could prohibit purely private conspiracies.[223] He rested his decision completely on statutory grounds, refusing to address the underlying constitutional question of whether Congress could have prohibited private conspiracies under Section 5 if it chose to do so. And he lashed out at Justices Clark, Black, and Fortas for "cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached" by the Stewart opinion, an action that seemed to Justice Harlan, "to say the very least, extraordinary."[224] Although he steered away from discussing Section 5 power in a general way, he spent several pages explaining his belief in the importance of rigorous judicial oversight of the state action requirement—a discussion that begins in the context of the "nebulous" right to travel, but that blends into a general defense of the state action doctrine.[225] Ultimately, Justice Harlan simply did not see the need for federal power to protect against private interference with interstate travel, a position he described as justified based on "policy as well as precedent."[226]

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[218] "It seems to me," Justice Brennan noted, "that this is also the standard that defines the scope of congressional authority under § 5 of the Fourteenth Amendment." *Id.* at 784.

[219] *Id.* at 783–84 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

[220] *Id.* at 784.

[221] *Id.* at 785.

[222] *Id.* at 786.

[223] *Id.* at 762–73 (Harlan, J., concurring in part and dissenting in part).

[224] *Id*. at 762 n.1.

[225] *See id.* at 771–73.

[226] *Id.*

D. Katzenbach v. Morgan

Katzenbach v. Morgan, like *South Carolina v. Katzenbach*, involved a challenge to the Voting Rights Act of 1965.[227] At issue in *Morgan* was § 4(e) of the Voting Rights Act, a provision that prohibited the denial of the vote to non-English-language speakers who had completed the sixth grade in a Puerto Rican school.[228] The drafters of § 4(e) explicitly relied upon Congress's Section 5 powers.[229]

Section 4(e) appeared to be in conflict with *Lassiter v. Northampton County Board of Elections*,[230] a 1959 decision in which the Supreme Court unanimously upheld a literacy requirement for voting. The critical issue in *Morgan* was whether Congress, using its authority under Section 5 of the Fourteenth Amendment, could prohibit a literacy test that was, under existing case law, not itself a violation of the Fourteenth Amendment. In short, Could the Court uphold § 4(e) without overruling *Lassiter*?

Two separate three-judge district court panels heard challenges to § 4(e) before *Morgan* made its way to the Supreme Court. *Morgan* was first heard in a Washington, D.C. district court, which struck down the provision as beyond congressional power to enforce Fourteenth Amendment rights.[231] In striking down the provision, the D.C. district court's opinion was dismissive of the way in which § 4(e) was passed, characterizing the provision as essentially snuck into the larger bill with minimal consideration.[232] The decision also questioned the entire project of federal oversight of state elections.[233] Moreover, the D.C. district court gave practically no attention to the fact that it was an act of Congress that was at issue. The entire reasoning of the decision treated the issue as basically a Fourteenth Amendment challenge to New York's literacy test.

A New York district court panel heard another challenge to § 4(e) and upheld the provision.[234] In contrast to the D.C. panel's holding, the New York district court expressed its approval for the general goals of the Voting Rights Act and offered a sweeping interpretation of Section 5 that foreshadowed

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[227] 384 U.S. 641 (1965).

[228] *Id.* at 643–45.

[229] *See* 42 U.S.C. § 1973b(e) (2012) ("Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.").

[230] 360 U.S. 45 (1959).

[231] Morgan v. Katzenbach, 247 F. Supp. 196, 204 (D.D.C. 1965) (ruling on a challenge to the New York literacy test).

[232] *Id.* at 200.

[233] *Id.* at 202–03.

[234] United States v. Cty. Bd. of Elections, 248 F. Supp. 316, 323 (W.D.N.Y. 1965).

Justice Brennan's *Morgan* decision.[235] Although the Voting Rights Act was aimed primarily at disfranchisement of African Americans in the South, the larger goal was "to eliminate second-class citizenship wherever present"[236]—hence, § 4(e) was in line with the central thrust of the legislation. More significant was the court's description of the Section 5 power:

> Section 5 . . . would be superfluous if Congress' role was merely to passively await the determination by a court that there is a need for legislation to protect Fourteenth Amendment rights.
>
> Inherent in its power to enforce the Fourteenth Amendment, Congress must be considered as having some latitude to determine for itself what patterns of activity contravene Fourteenth Amendment rights.[237]

The opinion also referenced the institutional competence of Congress in evaluating certain issues: "We cannot say, therefore, that in view of the extensive backdrop to this legislation, Congress made a determination on a matter in which it lacked special competence and experience when it enacted Section 4(e). The judgment of Congress here, was one which it was superbly suited to make."[238]

On April 18, 1966, the Supreme Court heard oral arguments in *Katzenbach v. Morgan*.[239] To uphold § 4(e), the Court had four options: it could (1) use the case as an opportunity to overturn *Lassiter*; (2) uphold § 4(e) as an appropriate remedial scheme for protecting judicially established constitutional rights (even if the remedies prohibited activity that did not itself violate judicially recognized constitutional rights); (3) recognize that Congress might understand the precise coverage of Fourteenth Amendment rights in ways that differed from the Court's own jurisprudence, and act to enforce this congressional understanding; or (4) use some combination of these options. Justices Douglas and Fortas embraced the first option in a companion case to *Morgan*, *Cardona v. Power*.[240] Justice Brennan's majority opinion in *Morgan* contained both the second and third options.

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[235] *Id.* at 322.

[236] *Id.* at 317.

[237] *Id.* at 322.

[238] *Id.* at 322–23.

[239] 384 U.S. 641 (1966).

[240] 384 U.S. 672 (1966). Initiated prior to the passage of the Voting Rights Act of 1965, *Cardona* presented a direct Fourteenth Amendment challenge to the New York literacy test as applied to a New York citizen who was born and educated in Puerto Rico. *Id.* at 673. The Court remanded the case to see if the appellant was covered by Section 4(e) of the Voting Rights Act. *Id.* at 674. But Justice Douglas, joined by Justice Fortas, dissented on this point, calling for *Lassiter* to be narrowly construed. *Id.* at 675 (Douglas, J., dissenting). Justice Harlan included a discussion of the *Cardona* case in his *Morgan* dissent, rejecting the challenge based on *Lassiter*. *Morgan*, 384 U.S. at 659–64 (Harlan, J., dissenting). In his rather cursory dissent in *Cardona*, Justice Douglas largely ignored Congress, much as he did in his *Harper*

Morgan did not appear to be a particularly difficult decision for the Court. At their initial conference following oral arguments, only Justice Harlan was ready to strike down § 4(e) as outside Congress's Section 5 power.[241] Justice Stewart, who would join Justice Harlan's dissent late in the drafting process,[242] admitted to having "trouble with this case," but initially agreed with the majority.[243] The rest of the Court simply appeared to have little doubt about the validity of § 4(e) as an exercise of Congress's Section 5 power.[244] Chief Justice Warren set the tone for the discussion when he opened the conference by framing *Morgan* as a straightforward extension of *South Carolina v. Katzenbach*: "Congress may legislate against discrimination against voting under § 5 of the Fourteenth Amendment. Congress need not make findings or justify its actions if we can justify its conduct on any rational basis. Section 4(e) is constitutional."[245] Chief Justice Warren was simply summarizing what had become the generally accepted position within the Court: that the exercise of the Section 5 power, like the exercise of the commerce power, deserved the highest level of judicial deference.

Justice Brennan almost did not get the opportunity to write the majority opinion in *Morgan*. The Chief Justice initially offered it to Justice Black. Justice Black had been proclaiming his belief in a broad Section 5 power in his dissents in *Bell v. Maryland* and the recently announced *Harper* decision. But Justice Black refused the offer, explaining, according to Justice Brennan's account, "that his views as to the far-reaching scope of § 5 power would not obtain the support of a majority."[246] Chief Justice Warren then turned to Justice Brennan, a decision Justice Brennan assumed was based on his analysis of Section 5 in his *Guest* opinion.[247]

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opinion. *See Cardona*, 384 U.S. at 675–77 (Douglas, J., dissenting). He barely mentioned the existence of Section 4(e) of the Voting Rights Act, and he made no reference to the congressional interpretation of the Equal Protection Clause expressed in Section 4(e) as a factor in his decision. *Id.*

241 IN CONFERENCE, *supra* note 92, at 828.

242 Brennan Memo, *supra* note 203, at xxxvii.

243 IN CONFERENCE, *supra* note 92, at 828.

244 *See id.* at 827–28 (discussing the Justices' views at conference). According to Justice Brennan, Justice White felt some uncertainty with the Section 1–Section 5 disconnect on which Justice Brennan's opinion was premised, but after reading Justice Harlan's dissent, he decided to join the majority. Brennan Memo, *supra* note 203, at xxxvi–xxxvii. Justice White's comments at the Justices' conference, however, explicitly accepted a distinction between congressional and judicial interpretation of the Fourteenth Amendment. IN CONFERENCE, *supra* note 92, at 828 ("This is Congress's definition of 'equal protection,' and it is valid. . . . That means that we would allow Congress to declare what is a denial of equal protection. Without the statute, I would have trouble. But if it is not too far out of line i[t] is okay.").

245 IN CONFERENCE, *supra* note 92, at 827.

246 Brennan Memo, *supra* note 203, at xxxiv.

247 *Id.* In oral arguments in *Morgan*, Justice Brennan urged counsel to consider the connection between that case and *Guest*, which the Court decided a few weeks earlier. Transcript of Oral Arguments

Justice Black did, however, play an important advisory role in the drafting of Justice Brennan's *Morgan* opinion. Justice Brennan showed a draft to Justice Black before he distributed it to the other Justices.[248] Justice Black expressed enthusiasm for Justice Brennan's approach and urged him to make his Section 5 analysis even bolder.[249] He had Justice Brennan remove a footnote that suggested grounds on which *Lassiter* could be distinguished,[250] and in a subsequent draft, Justice Black made further suggestions designed "to emphasize the distinction between the legislative and judicial functions."[251] When Justice Black formally joined Justice Brennan's opinion in *Morgan*, he wrote: "I am happy to agree to this historic opinion, which for the first time gives § 5 of the Fourteenth Amendment the full scope I think it was intended to have."[252]

A central theme of Justice Brennan's opinion was the need for the Court to respect Congress's responsibility under Section 5:

> A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.[253]

The relevant question before the Court, Justice Brennan emphasized, was not whether New York's literacy test violated the Equal Protection Clause but rather the constitutionality of congressional regulation of that test when exercising its Section 5 power.[254]

Before evaluating this question, Justice Brennan briefly turned to the history of Section 5: "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment,

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in Katzenbach v. Morgan, 384 U.S. 641 (1966) (No. 847), *in* 63 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1165 (Philip B. Kurland & Gerhard Casper eds. 1975). The counsel, J. Lee Rankin, who was representing the New York City Board of Elections in support of § 4(e), responded to Justice Brennan's prompt by characterizing *Guest* as "a recognition that there is more to Section 5 than is found in Section 1." *Id.*

248 Brennan Memo, *supra* note 203, at xxxiv–xxxv.

249 *Id.*

250 *Id.* at xxxv.

251 *Id.*

252 *Id.*

253 Katzenbach v. Morgan, 384 U.S. 641, 648–49 (1966) (footnote omitted).

254 *Id.* at 649.

the same broad powers expressed in the Necessary and Proper Clause."[255] Justice Brennan supported this point with a footnote explaining that the earliest versions of the Fourteenth Amendment actually employed this "necessary and proper" phrasing.[256] "The substitution of the 'appropriate legislation' formula," Justice Brennan noted, "was never thought to have the effect of diminishing the scope of this congressional power."[257] He followed with a quotation from *Ex parte Virginia*,[258] an obligatory citation for any broad reading of Section 5.[259] Then he noted that a deferential rational basis test was the standard to apply in reviewing congressional regulation under Section 5.[260] "Correctly viewed, § 5 is 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."[261]

After considering the history of Section 5, Justice Brennan identified two rationales for upholding § 4(e). First, he treated the barring of the literacy test as remedial legislation designed to protect judicially recognized Fourteenth Amendment rights: "§ 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement."[262] With their right to vote protected, Puerto Ricans could secure "enhanced political power [that] will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.'"[263] The Court's standard for evaluating this legislative judgment was extremely deferential:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the

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[255] *Id.* at 650.

[256] *Id.* at 650 n.9.

[257] *Id.*; *see also supra* Part I (discussing drafting history of the Fourteenth Amendment).

[258] *Morgan*, 384 U.S. at 650 (quoting *Ex parte* Virginia, 100 U.S. 339, 345–46 (1880)).

[259] *See supra* Part I (discussing the significance of *Ex parte Virginia* for advocates of a broad reading of the Section 5 power).

[260] *Morgan*, 384 U.S. at 651.

[261] *Id.*

[262] *Id.* at 652.

[263] *Id.* at 652–53. In support of this broad reading of Congress's remedial power under Section 5, Justice Brennan cited Court decisions upholding congressional regulation in enforcing the Eighteenth Amendment and the Commerce Clause. *Id.* at 652 n.11.

> state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[264]

Second, Justice Brennan explained that the law could be upheld as a regulation directly targeting unconstitutional discrimination. Although the Court had not necessarily come to this conclusion with regard to literacy tests, Congress, for a number of possible reasons, could have come to a different conclusion.[265] He again emphasized that Congress's "specially informed legislative competence" must be respected by the Court, for "it was Congress' prerogative to weigh these competing considerations."[266] And the standard was again one of sweeping deference:

> [I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth-grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.[267]

The only dissenting opinion was written by Justice Harlan, who was joined by Justice Stewart.[268] His dissent revolves around two concerns. One is federalism. Regulating elections is an "area of primary state concern."[269] To allow Congress to ban the literacy test is "tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field."[270]

But it was to his other central concern involving "the separation between the legislative and judicial function"[271] that Justice Harlan dedicated most of his dissent. Although he agreed that "§ 5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action," Justice Harlan criticized the majority for "confus[ing] the issue of how much

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[264] *Id.* at 653.

[265] *Id.* at 654–55. This argument had been presented in the Justice Department's brief in the case. Brief for the Appellants at 30–41, *Morgan*, 384 U.S. 641 (No. 847).

[266] *Morgan*, 384 U.S. at 656.

[267] *Id.*

[268] *Id.* at 659–71 (Harlan, J., dissenting).

[269] *Id.* at 670.

[270] *Id.* at 671.

[271] *Id.* at 659.

enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature."[272] The definition of Fourteenth Amendment rights, Justice Harlan argued, are for the judiciary to determine. When Congress acts under its enforcement power, "it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all."[273] If one reads Section 5 "as giving Congress the power to define the *substantive* scope of the Amendment,"[274] there is the risk that Congress will "qualify" or "dilute" judicially defined rights.[275] In response to this critique, Justice Brennan added his famous "ratchet" footnote, insisting 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."[276]

Justice Harlan allowed that the Court should give Congress some latitude to enforce Fourteenth Amendment rights, particularly considering Congress's superior fact-finding capabilities.[277] But when Congress seeks not to set forth a factual basis for an application of its constitutional powers and instead makes a "legislative announcement" that a particular practice violates the Equal Protection Clause, then the Court should give such a "declaration . . . the most respectful consideration, coming as it does from a

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[272] *Id.* at 666.

[273] *Id.* at 666.

[274] *Id.* at 668.

[275] *Id.* at 667–68.

[276] *Id.* at 651 n.10 (majority opinion). Professor William Cohen memorably compared Justice Brennan's Section 5 analysis to a one-way ratchet, allowing for the expansion but not the dilution of Fourteenth Amendment rights. Cohen, *supra* note 18. As Professors Robert Post and Reva Siegel of Yale Law School have noted, Justice Brennan's "ratchet" argument demonstrates that even as he was writing his *Morgan* opinion Justice Brennan was struggling with the implications of the opinion's theory of the Section 5 power. Post & Siegel, *supra* note 15, at 39–40. Rather than just declaring the question-begging ratchet principle that Section 5 gives Congress the power to expand but not dilute Fourteenth Amendment rights, the logic of the theory of a Section 1–Section 5 gap should have led Justice Brennan to a simpler and more persuasive response to Justice Harlan's concern about the possibility of Congress diluting constitutional rights. Justice Brennan could have recognized that judicial recognition of congressional authority to enforce a right in a way that diverges from judicial interpretation of that right does nothing to change the meaning of that very same constitutional right as a matter of judicial interpretation of Section 1. The Court could hold that Congress has the authority under Section 5 to pass a particular law, but the Court could then strike down that law for violating the very same Section 1 right that Congress claimed it was protecting. The same reasoning would apply in cases of conflicting rights. *See* Laycock, *supra* note 18, at 162–63.

[277] *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting). Justice Harlan went on to note that the passage of Section 4(e) lacked any relevant record of legislative findings. *Id.* at 669. For this reason, Justice Harlan rejected Justice Brennan's argument that 4(e) could be viewed as remedial legislation. *Id.*

concurrent branch and one that is knowledgeable in matters of popular political participation," but nevertheless must make its own independent constitutional judgment.[278] Respect, therefore, must not be confused with blanket deference.[279]

This concern with protecting judicial authority as the official interpreter of the Constitution's meaning was a new theme in the Section 5 debate. Prior to Harlan's *Morgan* dissent, it is difficult to find this separation of powers concern raised as a basis for limiting the scope of Section 5. The overwhelming theme of those who sought to minimize any potential gap between Section 1 and Section 5—from the seminal *Civil Rights Cases* through the debates over anti-lynching, poll tax, and public accommodations legislation—was a concern with expanding the power of the federal government at the expense of the states. Justice Harlan introduced judicial interpretive supremacy into this discussion. In the following years, this theme gained more adherents on the Court,[280] culminating in the *Boerne* decision.

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The 1965 Term cases are best understood as the Supreme Court's opportunity to fully join and, to a significant extent, ratify the rough consensus over Section 5 that had emerged from the debates that had been taking place since the 1940s. There was nothing particularly novel about the Court's interpretation of the congressional enforcement power in *South Carolina*, *Harper*, and *Guest*—or *Morgan*. These decisions expressed a constitutional common sense that had developed through the process of constitutional contestation of the preceding years.

The most innovative contribution to the Section 5 debate in the 1965 Term cases may very well have been contained in Justice Harlan's dissent in *Morgan*. Justice Harlan introduced two novel themes to the discussion that

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[278] *Id.* at 669–70.

[279] *Id.* at 670.

[280] Justice Harlan expanded on the themes he introduced in his *Morgan* dissent in *Oregon v. Mitchell*, 400 U.S. 112, 204–09 (1970) (Harlan, J., concurring in part and dissenting in part). *See, e.g.*, *id*. at 205 ("To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure."). In the following years, Justices skeptical of a broad enforcement power regularly looked to Justice Harlan's opinions in *Morgan* and *Mitchell* for support. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting) ("Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." (citing *Mitchell*, 400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part))); City of Rome v. United States, 446 U.S. 156, 220 n.8 (1980) (Rehnquist, J. dissenting) (singling out Justice Harlan's *Morgan* dissent as supporting a narrow, "remedial" understanding of the Section 5 power).

had developed in the ongoing constitutional discourse on Section 5: a concern that the exercise of Section 5 powers might infringe upon judicial prerogatives and a strict dichotomy between the definition of constitutional rights and the remedial protection of these rights. In the coming decades, Justice Harlan's contributions would prove more durable than the majority's conception of the Section 5 power.

IV. THE PAST, PRESENT, AND FUTURE OF SECTION 5

Between *Morgan* in 1966 and *Boerne* in 1997, the Supreme Court did little to clarify the provocative constitutional issues raised in Justice Brennan's *Morgan* opinion. Some opinions indicated support for Justice Brennan's more ambitious conception of the Section 5 power.[281] Some indicated skepticism.[282] Often, the Justices seemed content to avoid the issue.[283] In this Part, I explore the Court's marked shift from its interpretation in *Morgan* to the new rule laid down in *Boerne*. I conclude by examining the political and constitutional conditions that tend to support broad readings of Section 5, and then consider the function of Section 5 jurisprudence for American constitutionalism.

A. The Boerne *Model*

By the time the Justices considered *City of Boerne v. Flores*,[284] the Court faced a starkly different political and legal landscape than did the *Morgan*

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[281] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (assuming that Section 5 gave Congress authority to regulate discriminatory impact without evidence of discriminatory intent, even if intent was required for a judicial finding of an equal protection violation).

The most expansive readings of the congressional enforcement power came in the context of judicial review of legislation passed under the enforcement provisions of the Thirteenth and Fifteenth Amendments. *See City of Rome*, 446 U.S. 156; Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding a provision of the Civil Rights Act of 1866 as within the congressional enforcement power under the Thirteenth Amendment); *id.* at 440 (holding that Section 2 of the Thirteenth Amendment gives Congress "the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation"). It is notable that the Court's sweeping assertion of congressional authority in *Jones* includes no reference to *Morgan*. *See* 392 U.S. at 412–444. This is probably explained by the fact that Justice Stewart, the author of *Jones*, had joined Justice Harlan's dissent in *Morgan*. *See Morgan*, 384 U.S. at 659 (Harlan, J., dissenting).

[282] *E.g.*, *EEOC*, 460 U.S. at 262 (Burger, C.J., dissenting); *Bitzer*, 427 U.S. at 458 (Stevens, J., concurring in the judgment) (questioning whether Section 5 authorized statute); *Mitchell*, 400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part); *id.* at 287 (Stewart, J.**,** concurring in part and dissenting in part) (arguing that age discrimination in voting was not a violation of the Fourteenth Amendment and thus Congress could not regulate in this area).

[283] *E.g.*, *EEOC*, 460 U.S. at 260 n.6 (Burger, C.J., dissenting) ("The ability of Congress to define independently protected classes is an issue that need not be resolved here . . . ."). For a summary of the Court's treatment of the Section 5 power between *Morgan* and *Boerne*, see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 936–47 (3d ed. 2000).

[284] 521 U.S. 507 (1997).

Court. In its 1965 Term, when the Court decided *South Carolina*, *Guest*, and *Morgan*, all three branches of the federal government were largely in agreement on the need for federal involvement to protect civil rights. Whether considering newly passed legislation, such as in *South Carolina* and *Morgan*, or efforts by the Justice Department to expand the application of long-standing civil rights laws, as in *Guest*, the Court saw the legislative and executive branches as allies in the larger cause of eradicating Jim Crow and its remnants from American life.[285] After a decade of fighting the school-desegregation battle virtually on its own, the Court was grateful to have the other branches assume a leadership role in the civil rights struggle.[286] The *Boerne* Court, by contrast, saw Congress as a threat to its own institutional prerogatives. The law challenged in *Boerne*, unlike the Voting Rights Act of 1965, was not a congressional effort to share the burden of a cause the Court had already committed itself to. Rather, it was an effort to directly refute a previous Court decision. While *Morgan* involved the question of the distribution of responsibility for a shared cause, *Boerne* involved an inter-branch struggle for dominance in constitutional interpretation.

At issue in *Boerne* was the Religious Freedom Restoration Act (RFRA).[287] RFRA was passed in 1993 as a direct response to the Supreme Court's holding in *Employment Division v. Smith*,[288] a Free Exercise Clause case holding that neutral, generally applicable laws did not require a compelling state interest when applied to religious activities. Riding the wave of public criticism that met the *Smith* decision,[289] Congress mobilized to pass RFRA, which reinstated the compelling interest requirement for generally applicable regulations that substantially burden religious activity, thus returning First Amendment doctrine to its pre-*Smith* status—a goal made explicit in the text of the statute.[290] Congress based its authority on Section 5 of the Fourteenth Amendment.[291]

Justice Kennedy, writing for the majority, held that Congress exceeded its Section 5 power in passing RFRA. While acknowledging those

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[285] *See* POWE, *supra* note 17, at 214 ("The best description of the period is that all three branches of government believed they were working harmoniously to tackle the nation's problems. It was simply a matter of determining which institution was best-suited to handle a specific problem, and each went forward in its own way knowing the others were also seeking complementary results.").

[286] *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION 5–6, 229–35 (2014); Cox, *Constitutional Adjudication*, *supra* note 18, at 91.

[287] Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

[288] 494 U.S. 872 (1990).

[289] *See* McConnell, *supra* note 1, at 159–60.

[290] 42 U.S.C. § 2000(b) ("The purposes of this chapter are-(1) to restore the compelling interest test as set forth in [pre-*Smith* cases] . . . .").

[291] *See* City of Boerne v. Flores, 521 U.S. 507, 516 (1997).

precedents that emphasized the broad scope of Congress's Section 5 power,[292] he limited the potential reach of these precedents by embracing—and extending—the distinction between legislation that remedies constitutional violations and legislation that defines constitutional violations that Justice Harlan had introduced in his *Morgan* dissent[293]:

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.[294]

Although the line between remedial and substantive approaches "is not easy to discern," the critical criteria, for Kennedy, is the connection between the "injury to be prevented or remedied and the means adopted to that end."[295] The relationship must have "congruence and proportionality."[296]

Justice Kennedy claimed support for his position in the history of the Fourteenth Amendment's framing. He interpreted the abandonment of the early version of the Fourteenth Amendment—which was a straightforward grant of power to Congress to make laws protecting civil rights[297]—as a rejection of a broad congressional-enforcement power.[298] Critics of the initial version came from "across the political spectrum," Justice Kennedy noted, and they concluded that "[t]he proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure."[299] The revised version of the Fourteenth Amendment, with the rights defined in the opening section and the congressional-enforcement clause moved to the fifth section, meant that "Congress' power was no longer plenary but remedial."[300] Although there was almost no discussion of judicial independence in the framing history,[301] Justice Kennedy highlighted the

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[292] *Id.* at 517 (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966), and *Ex parte* Virginia, 100 U.S. 339, 345–46 (1880)).

[293] *Id.* at 518–19.

[294] *Id.* at 519.

[295] *Id.* at 519–20.

[296] *Id.* at 520.

[297] *See supra* Part I.

[298] *Boerne*, 521 U.S. at 523–24.

[299] *Id.* at 520.

[300] *Id.* at 522.

[301] Justice Kennedy located statements of two critics of the original version of the Fourteenth Amendment—Republican Representative Robert Hale of New York and Democratic Representative Andrew Rogers of New Jersey—who emphasized the importance of the courts in protecting individual rights. *Id.* at 524. He admitted, however, that the "widespread resistance" to the original proposal was based in federalism, not separation of powers concerns. *See id.*

issue, noting that "[t]he design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the judiciary."[302] Justice Kennedy thus embraced the theme that Justice Harlan had pioneered in his *Morgan* dissent, shifting Section 5 doctrine from a concern primarily with federal power *vis-à-vis* the states to a concern with protecting the judiciary's exclusive role in interpreting the Constitution.

Justice Kennedy supported his narrow reading of Section 5 with existing case law, and here he confronted *Morgan*: "There is language in our opinion in *Katzenbach* v. *Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment."[303] But he immediately dismissed this as "not a necessary interpretation . . . , or even the best one."[304] To accept the broader reading of *Morgan* as a valid interpretation of Section 5, Kennedy concluded, would allow "Congress [to] define its own powers by altering the Fourteenth Amendment's meaning."[305] And if this were so,

> no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.[306]

Thus, *Morgan* was narrowed—and its vision of the Section 5 power, built on decades of constitutional debates inside and outside the courts, was dismissed.

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Alongside his concern with protecting against federal overreach, Justice Kennedy framed *Boerne*'s assessment of the scope of Section 5 largely in terms of separation of powers and constitutional interpretive supremacy. In contrast, those who argued for Section 5 authority to pass anti-lynching legislation, to strike down school segregation, to prohibit discrimination in

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[302] *Id.* at 523–24.

[303] *Id.* at 527–28 (citation omitted).

[304] *Id.* at 528. Justice Kennedy justified his reading of *Morgan* by quoting Justice Stewart, a dissenter in *Morgan*. *See id.* (quoting Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (Stewart, J., dissenting)).

[305] *Id.* at 529.

[306] *Id.* (citations omitted).

public accommodations, or to prohibit poll taxes believed that such legislation posed no threat to the prerogatives or the legitimacy of the courts. These defenders of a broad Section 5 power more often assumed the opposite: that when Congress responded to growing national demands on these issues, it would lessen demands on the Court to respond on its own and thereby, as Archibald Cox explained in his 1966 *Harvard Law Review* Foreword, "relieve some of the stresses to which constitutional adjudication is subjected when the Court is forced to take the lead in a legal revolution."[307] Whether the Court would, in the process of reviewing a particular exercise of Section 5 power, reconsider its own interpretation of the Fourteenth Amendment was generally recognized as a distinct question. In the episodes described in this Article, the Court could very well have upheld an exercise of Section 5 power without feeling it necessary to revise its Section 1 doctrine. This is clearly what Justice Black had in mind when he asserted that Section 5 provided authority to prohibit segregation in public accommodations or the poll tax.[308]

From the Justices' perspective, this approach was both cooperative and deferential. As Justice Warren made explicit in *South Carolina v. Katzenbach*[309] and Justice Brennan reiterated in *Morgan*,[310] the model was basically the rational basis review approach the New Deal Court embraced regarding congressional power to regulate economic activities.[311] When Justices Jackson and Frankfurter mused about the possibility of congressional Section 5 legislation desegregating schools before *Brown*, or when Justice Black expressed a willingness to uphold congressional Section 5 legislation based on a congressional interpretation of the Equal Protection Clause that directly conflicted with his own, they were extending the same deference to Congress under Section 5 that they would extend under the commerce power. The *Morgan* vision of Section 5 derived from the Justices' effort to balance the lessons of the constitutional battles of the 1930s (that

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[307] Cox, *Constitutional Adjudication*, *supra* note 18, at 91.

[308] *See supra* notes 197–203 and accompanying text (discussing Black's dissent in *Harper*).

[309] 383 U.S. 301, 326 (1966) ("The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.").

[310] Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

[311] *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *see also* Cox, *Constitutional Adjudication*, *supra* note 18, at 91 ("If the Congress follows the lead that the Court has provided, the last Term's opinions interpreting section 5 will prove as important in bespeaking national legislative authority to promote human rights as the Labor Board decisions of 1937 were in providing national authority to regulate the economy." (footnote omitted)); *cf.* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 150 (1893) ("[T]he ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not." (emphasis omitted)).

courts should grant Congress broad deference in determining the boundaries of federal authority) with the lessons of the civil rights era (that the federal government had a special role to play in protecting individual rights).

B. Lessons from Section 5's Forgotten Years

What, then, were the political and legal conditions that encouraged the Supreme Court to embrace the robust vision of congressional authority under Section 5 that culminated in *Morgan*? The history of Section 5's forgotten years suggests three interrelated factors at play.

The first condition was the existence of a reform agenda with broad enough support that it might be advanced through congressional legislation based on the Section 5 power. This was the case with the civil rights agenda in the 1960s. But as the debates surrounding Congress, the Supreme Court, and school desegregation in the 1950s show, the actual passage of Section 5 legislation was not a necessary condition for the Justices to articulate a broad understanding of Section 5.[312] Hypothetical congressional action might also serve as the basis for debating and developing assumptions about Section 5. In fact, as the history of Section 5 in the 1950s and 1960s demonstrates, proposed or hypothesized legislation may be more effective than actual legislation for producing expressions of judicial support for a broad vision of Section 5.

The second condition was that some or all of the members of the Supreme Court supported, as a matter of principle and policy, this reform agenda. This was clearly the case with the Court and federal civil rights legislation in the 1960s, and it was clearly not the case with RFRA or the various other pieces of national legislation that the Court struck down following *Boerne*. From its birth in Reconstruction through today, the scope of Section 5 rose and fell in large part because of the shifting attitudes of the Justices toward the laws Congress was passing.

The third condition was that some or all of the Justices—with the support of other influential voices (such as Justice Department officials and legal commentators)—believed that judicial leadership in pushing this reform agenda would expend valuable institutional capital and put the legitimacy of the courts at risk. The Justices supported the reform agenda advanced, but they preferred Congress, not the Court, to lead the way.

This third condition can be further unpacked. At least two overlapping bases for this concern with judicial legitimacy are possible. One is an institutional concern with judicial competence. This idea stems from a belief that courts are not well suited to deal with certain issues, and that judges lack

[312] *Supra* Section II.C.

the competence to make the relevant policy analysis or that courts lack the capacity to implement the required reforms. Issues such as these, judges may conclude, are better left to legislative initiative. A concern with protecting the legitimacy of the courts may also stem from jurisprudential commitments. Ideas about what falls within the realm of legitimate judicial action can derive from substantive interpretive commitments about the nature of the Constitution and how it is interpreted. How a judge determines which rights are and are not protected under the Fourteenth Amendment will affect that judge's assessment of the legitimacy costs of judicial leadership on a given issue.

As a general matter, this third condition relies on an approach to judging and constitutional interpretation that can best be described as conservative—not a label normally attached to proponents of broad Section 5 power. Some of the boldest visions of Section 5 authority came from Supreme Court Justices who were insisting upon a more institutionally cautious path for the Court. Justices Frankfurter and Jackson were among the most reluctant members of the Court in *Brown*, yet they were also the most interested in considering the possible constitutional authority for congressional action to desegregate schools. Justice Black's sweeping reading of congressional powers under Section 5 was consistent with his uncompromising rejection of the liberal Justices' interpretation of the Fourteenth Amendment in the sit-in cases and *Harper*.[313] In building a commitment to a broad reading of Section 5, these "conservative" positions with regard to the role of the courts and constitutional interpretation intertwined with what was understood then and now as a "liberal" attitude toward congressional power—i.e., sweeping deference to congressional power generally, which was the constitutional default position in the wake of the New Deal constitutional revolution.

Might the conditions that allowed for the development of Section 5 power in the 1940s, 50s, and 60s return at some future point?[314] Nothing approaching the sense of joined purpose between the branches of government that characterized the civil rights era has been recreated for any

[313] Although evaluations of Black's judicial legacy rarely include his views on Section 5, he, perhaps more than any of his colleagues, embraced the idea that the enforcement provisions of the Reconstruction Amendments empowered Congress to address activity that would not necessarily be held unconstitutional by the courts.

[314] If the Court were to rethink its current Section 5 jurisprudence, it might involve a resurrection of *Morgan*'s broader, substantive rationale. Or, more realistically, it would involve a more indirect revitalization of the principle underlying *Morgan*, building on its narrower, remedial rationale. The Court could continue to accept *Boerne* and its dismissal of congressional authority to define constitutional rights while broadening its deference to Congress under *Boerne*'s malleable congruence-and-proportionality test. Such an approach could lead to a functional resurrection of a more collaborative approach to the congressional enforcement power without necessarily accepting the idea that Congress can act upon its own reading of Fourteenth Amendment rights.

subsequent rights-based social reform program.[315] If President Obama had been able to get Merrick Garland approved to take Justice Scalia's seat, or if the 2016 presidential election had turned out differently, we might be considering a reform agenda taking shape in the coming years revolving around protecting against discrimination based on some (currently) nonsuspect category, such as sexual orientation or transgender status. Instead, today and in the near future, the most realistic possibility for a rights-based agenda that has broad support in society as well as among the Justices on the Court would likely be an issue advanced by the political Right, with expanded protections for property or gun rights being the most likely candidates.[316]

But even if the stars were to align in support of some future social reform movement, there remains the problem of the third condition. The Court has come to embrace a much more robust conception of its own authority, a process accelerated and solidified by the bold achievements of the Warren Court and embraced by subsequent Courts.[317]

The story of Section 5 and *Brown* illuminates the early stages of this transformation toward judicial dominance over constitutional interpretation. The Justices' suggestion that Congress might be able to do what the NAACP wanted based on its Section 5 power reflected not only a broad view of Congress's enforcement power, but also suggested a chastened vision of the Court. The leading instigators of this Section 5 discussion were Justices Frankfurter and Jackson, both devotees of the principle of judicial restraint. For them, the possibility of congressional action was neither a threat to the Court nor a separation of powers concern, but rather a way in which the Court could protect its institutional legitimacy. Others were less occupied by this hypothetical, however, and in their reservations, one can see the emerging argument for judicial leadership (and against congressional leadership) in reshaping the Fourteenth Amendment. As attractive as these Section 5 school

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[315] A possible exception was the women's movement, which made significant breakthroughs in all three branches of the federal government in the 1970s and into the 1980s. *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006). But this movement did not produce any major Section 5 initiatives that would have placed pressure on existing Section 1 doctrine. By the time of *United States v. Morrison*, 529 U.S. 598 (2000), striking down the Violence Against Women Act of 1994, the Court clearly did not view itself as an ally in a shared cause of national reform on behalf of women's rights. Rather, it assumed the role of a guardian for "the Framers' carefully crafted balance of power between the States and the National Government," *id.* at 620, in the face of what a majority of the Court saw as an overreaching Congress.

[316] *See* William D. Araiza, *Arming the Second Amendment—and Enforcing the Fourteenth*, 74 WASH. & LEE L. REV. 1801 (2017) (suggesting possible federal legislation aimed at protecting Second Amendment rights that might be passed under Section 5).

[317] *See, e.g.*, Karlan, *supra* note 1.

desegregation musings were to Justices Frankfurter and Jackson, the discussion worried the civil rights lawyers. They feared that this suggestion could form the basis of a rationale for the Court *not* to act—to declare the whole issue a nonjusticiable political question and wait for Congress to deal with the issue (as Professor Paul Freund later suggested the Justices could have done).[318] In response, those calling on the Justices to strike down segregated schools went out of their way to emphasize the essential role of the Supreme Court in defining constitutional rights. Their goal was to keep pressure on the Court to act.[319] In this way, calls for judicial responsibility easily slid into assertions of judicial interpretive supremacy. In defending *Brown*, the Court and its allies challenged the idea of extrajudicial constitutionalism.

The difficulty of embracing judicial leadership while not sliding into embracing judicial interpretive supremacy is further demonstrated in the debate over the public accommodations provision of the 1964 Civil Rights Act. The bold responsibility the Supreme Court adopted for protecting civil rights in *Brown* actually seemed to hinder congressional efforts at constitutional interpretation in this debate. The looming shadow of Court doctrine constrained congressional consideration of a Section 5 basis for the statute and steered discussion to the commerce power, which proved a functional, if less than intuitive, foundation for such transformative civil rights policy. In the end, legislative efforts to reconsider the scope of the Fourteenth Amendment remained largely deferential to the Court's state action doctrine. Due to the Southern campaign of Massive Resistance—which was premised on a refutation of the authority of the Supreme Court—acceptance of the supremacy of the Court's interpretation of the Constitution had become a critical fault line for the Civil Rights Movement.[320] For those interested in expanding civil rights for African Americans, it was not a time for bold proclamations of legislative interpretive autonomy, even if expressed in support of the civil rights cause.

For better and for worse, the constitutional order today, with the Supreme Court as the self-proclaimed—and largely unchallenged—ultimate expositor of constitutional meaning at its center, is far different from the Congress-centered world of Reconstruction; and it is quite different from the constitutional order in the 1940s and 1950s, when the Section 5 power was

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[318] Freund, *supra* note 103, at 351.

[319] *See* Christopher W. Schmidt, *"Freedom Comes Only from the Law": The Debate over Law's Capacity and the Making of* Brown v. Board of Education, 2008 UTAH L. REV. 1493, 1531–37.

[320] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (refuting Southern resistance to *Brown* by asserting that "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" is "a permanent and indispensable feature of our constitutional system").

reconsidered and revitalized. Even if the first two conditions I identify above were again met, the third condition might be lost to history.

CONCLUSION

For those today who hope to encourage a less Supreme Court-centric constitutionalism, the history of Section 5 recounted in this Article provides an attractive alternative conception of the respective role of Congress and the Court in giving meaning to Fourteenth Amendment rights. The prevailing assumption of those who advocated for a broad Section 5 power in the pre-*Morgan* decades was that the Court and Congress would work together in giving meaning to the "majestic generalities"[321] of Section 1 of the Fourteenth Amendment, and that this cooperative approach would serve the institutional needs of each. This approach incorporated the lessons of the New Deal, when an overreaching Court threatened to undermine its own legitimacy by standing in the way of needed reform. It contained a healthy dose of institutional conservatism regarding the limits of judicial power on contentious issues such as civil rights. And it also incorporated certain assumptions, often buried but occasionally peeking through the surface, of the value of the democratic process as not just a threat to individual rights, but also a source for the elaboration and protection of these rights.

We today may want to accept *Boerne*'s rejection of *Morgan*. There are valid reasons for doing so. But if we choose this path, it should not be based on the dismissive judgment that *Morgan* stands for something logically incoherent, aberrational, or naïve. That decision was consistent with prevalent assumptions of its time. The *Boerne* model is certainly not inevitable or compelled by historical experience. The history behind *Morgan* shows an alternative, a path debated and defined but never implemented. A better appreciation of this alternative, as this Article has sought to provide, should allow us to better assess the values reflected in our current Section 5 doctrine, and to better consider where we might go in the future.

[321] Fay v. New York, 332 U.S. 261, 282 (1947).