

BAIT AND SWITCH: WHY *UNITED STATES V. MORRISON* IS WRONG ABOUT SECTION 5

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In United States v. Morrison, the Supreme Court announced the rule that the Section 5 power cannot be used to regulate private individuals. This is one of the most meaningful and, thus far, durable constraints that the Court has placed on federal power. It is the more surprising, then, that it turns out to be based on essentially nothing at all. The Morrison Court asserted that its rule was derived by—indeed, “controlled by”—precedent, but a closer reading of the Reconstruction-era decisions it cites shows that this is simply not the case. An independent evaluation of the rule against regulation of private individuals suggests that it cannot be defended on its own merits. Thus, the Article urges that Morrison be overruled.

INTRODUCTION	604
I. A SURVEY OF THE COURT’S WORK	608
A. Phases of Federalism	608
B. Faces of Federalism	613
C. Doctrinal Desiderata	616
II. <i>MORRISON</i>	621
A. The Background	621
B. <i>Morrison</i> at the Supreme Court	623
III. THE CIVIL RIGHTS ACT OF 1874 AND ITS FATE	626
A. Arguments in Congress	626
B. Arguments in the Court	629
C. The Decision	630
D. The Fate of State Neglect	635
IV. ASSESSING THE <i>CIVIL RIGHTS CASES</i> AND <i>MORRISON</i>	641
A. The <i>Civil Rights Cases</i>	641
B. <i>Morrison</i>	643
V. SECTION 5 LEGISLATION AND PRIVATE PARTIES RECONSIDERED	649
CONCLUSION	653

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INTRODUCTION

The Framers of our Constitution drew from many sources, and much of the governmental structure they created was familiar to the eighteenth century.¹ But the Framers had one great innovation: federalism.² They “split the atom of sovereignty,” in Justice Kennedy’s memorable phrasing, dividing power among two levels of government.³ These two levels would be distinct and different in some important ways (the federal government, for instance, has exclusive authority over foreign relations), but their authorities would also overlap.⁴ Each would compete for the affection and loyalties of the people; each would be able to offer some protection from the other.

It should be no surprise, then, that most of the great struggles of our constitutional history have linked themselves to federalism. Frequently, a pattern recurs in which a national-level majority captures the federal government while its opponents retain majority status in some states. The majority then seeks to enforce its views through the federal government while the minority resists in the name of states’ rights.

Casting the issue in these terms suggests that the national side will tend to prevail—after all, it has both majority and supremacy on its side.⁵ Indeed, that has been the pattern with respect to individual issues.⁶ Even with respect to the larger question of the balance of

¹ For a discussion of origins, see, for example, FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 227 (1985); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 3–5 (1996); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 80–81 (1992). For a discussion of the Constitution, see generally AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2006).

² See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *TEX. L. REV.* 1, 14 (2004) (describing federalism as “shattering the notion that political authority must remain undivided”).

³ *Term Limits*, 514 U.S. at 838.

⁴ For example, both state and federal governments can levy taxes. See, e.g., *McCulloch v. Maryland*, 17 U.S. (1 Wheat) 316, 425 (1819) (“That the power of taxation is . . . retained by the States; that it is not abridged by the grant of a similar power to the government of the Union . . . are truths which have never been denied.”).

⁵ The federal government does have some potentially countermajoritarian features. Due to the operation of the electoral college, a president can be elected despite losing the popular vote, and equal representation in the Senate dramatically inflates the political power of small states relative to their population. Generally, however, a political movement must command the support of a national majority in order to take the reins of power at the federal level. The supremacy of such a movement comes simply from the Supremacy Clause. See U.S. CONST. art. VI.

⁶ The most notable such issue is perhaps the civil rights struggle, where federal constitutional rights and antidiscrimination laws eventually overcame state-centered resistance. See, e.g., ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDA-*

power between the nation and the states, American constitutional history has been a steady series of victories for the nationalists. The ratification of the Constitution, replacing the looser, state-centric Articles of Confederation, was the first step. The Civil War, though in important ways a rupture and break in our constitutional system, was another: the Reconstruction Amendments restrained the states in new ways and correspondingly empowered the federal government.⁷ The Progressive-era Sixteenth and Seventeenth Amendments, though not aimed directly at state authority, shifted the balance substantially in favor of the federal government.⁸ The New Deal settlement ushered in expanded federal legislative power and a massive administrative state.⁹ The Warren Court affirmed broad congressional authority and enforced constitutional rights more aggressively against the states.¹⁰

But the story is not quite as uniform as the litany above might make it out to be. Our constitutional system divides power not just between the states and the federal government but also among the branches of the federal government, and those branches have different incentives with respect to federalism issues. Congress and the President, though they occasionally jockey against each other, are wielders of linked federal power: Congress makes laws, and the President enforces them.¹¹ What expands the power of one of these elected branches, vis-à-vis the states, usually empowers the other as well. Consequently, they have tended to be fairly consistent advocates

MENTAL RIGHTS 46 (2009) (“The civil rights movement presented yet another struggle about the meaning of federalism, and once again the forces of nationalization triumphed.”). There are also much more mundane issues, such as the question of whether a car rental agency can be held vicariously liable for injuries caused by rented vehicles, which end up settled by federal law despite contrary state preferences. See 49 U.S.C. § 30106 (2013). The only way in which the states’ rights side can prevail, typically, is by mustering enough popular support to recapture the federal government. For example, the Resolutions of some states against the Alien and Sedition Acts had no practical effect. What blunted the impact of those laws was Jefferson’s victory in the election of 1800 and his subsequent pardons of those imprisoned under the Acts. See JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 231 (1951). To put the point slightly differently, when those who have argued for states’ rights win on a particular issue, their victory frequently comes through national action, rather than a vindication of states’ rights.

⁷ See U.S. CONST. amends. XIII, XIV, XV.

⁸ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 300 (1998); Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1053 (1997) (noting that these amendments “represent the culmination of the Progressive Era’s nationalizing force”).

⁹ See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 1–2 (1950) (stating the New Deal created a “consolidated national power” that had to “guarantee economic security to all”).

¹⁰ See, e.g., Pamela Brandwein, *Dueling Histories: Charles Fairman and William Crosskey Reconstruct “Original Understanding”* 30 LAW & SOC’Y REV. 289, 291 (1996) (noting “nationalist and egalitarian” character of the Warren Court decisions).

¹¹ See U.S. CONST. art. II, § 3.

of broad federal power.¹² The Supreme Court, however, can expand its own authority at the expense of the other federal branches. One might expect it consequently to be less biased in favor of federal power—at least, federal legislative or executive power.¹³

Indeed, the Court's stance with respect to federalism has been notably different from that of the elected branches. When it comes to issues of the Court versus the states, there has been a general trend in favor of greater judicial and hence national power. In deciding equal protection questions, for instance, the Court has tended to enforce the views of a national majority against outlier states, striking down discriminatory practices when a national majority has come to view them as unjustified or oppressive.¹⁴ With respect to federal executive or legislative power, however, the Court's behavior has been much more mixed. The general pattern of expanding federal power obtains; the Court has not stopped the consolidation of power within the federal government. But it has also offered resistance, though episodically and without much notable or durable success.¹⁵

¹² When they deviate from this pattern, it is typically because of partisan effects. (The struggle between Congress and the President over Reconstruction, for instance, occurred because of the substitution of the Democrat Andrew Johnson for the Republican Abraham Lincoln.) See Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing the Two Impeachments*, 2 U. PA. J. CONST. L. 422, 430–39 (2000). The Framers assumed institutional loyalty—they assumed that individual officeholders would have some desire to protect or increase the powers of their offices. They did not foresee partisan loyalty, which can overwhelm institutional loyalty. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (Jackson, J., concurring) (“Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. . . . Party loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own . . .”). For elaboration of Jackson’s insight, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2349–56 (2006).

¹³ Justices are, of course, selected by the President and confirmed by the Senate, so the Court is staffed by the national government. All the same, institutional loyalty seems to have a strong effect on the Justices, perhaps as a consequence of life tenure. The Court is also less susceptible than the other branches to partisan capture. Because of life tenure, the Court’s membership turns over quite slowly, so a political movement must usually hold the presidency for a long time in order to change the balance of power on the Court. Put differently, the Court usually lags the elected branches; it reflects the views of the coalition that held power some years previously.

¹⁴ See, e.g., Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB. POL’Y 99, 102–03 (2011) (noting that the Equal Protection Clause has generally operated as an antifederalist rather than counter-majoritarian provision). More broadly, the Court has tended over time to increase its enforcement of constitutional restraints on states. A notable counterexample is the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–78 (1872), where the Court drastically narrowed the scope of the Privileges or Immunities Clause.

¹⁵ To put the point broadly, in the sweep of history, the Court has become more deferential to Congress and less deferential to states. This was especially true of the Warren Court, which combined a deferential New Deal-style stance on federal power with aggressive review of state action. See, e.g., *Daniel v. Paul*, 395 U.S. 298, 308 (1969) (affirming broad federal commerce power); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966)

Over the years, the Court has come up with several different doctrines that attempt to limit federal power. This Article will focus on one of them: the rule, announced in *United States v. Morrison*,¹⁶ that Congress's power to enforce the Fourteenth Amendment cannot be used to regulate private parties. This rule is successful in some ways—it has some of the characteristics that we should want doctrine to have.¹⁷ But it is also lacking in perhaps the most important characteristic: it cannot be justified by reference to the meaning or purpose of the constitutional provision it is supposed to implement.¹⁸ Worse, it was produced through a deceptive decision, a blatant misreading of precedent that effected a bait and switch on the advocates of congressional power.¹⁹

Or so I will argue. The first Part of this Article surveys the Court's work in the federalism arena. It identifies several doctrines the Court has created to limit federal power and protect state authority. It concludes that most of them are ineffectual for various reasons. The Section 5 limit announced in *Morrison*, unusually, is both meaningful and capable of consistent application by lower courts. It is thus, in some ways, a success.

The rest of the Article makes the case that, nonetheless, this rule is wrong and should be abandoned. Part II examines *Morrison*: the background to and nature of the federal legislation, the briefing, and the Court's decision. It sets out the story largely as the Court told it. Part III begins the critical look: it examines the Reconstruction-era federal civil rights legislation, and the Supreme Court decision invalidating it, on which *Morrison* relied. *Morrison*'s presentation of that story, I suggest, is exceedingly deceptive. Part IV compares the Court's action in the *Civil Rights Cases*, widely considered to be one of

(affirming broad Section 5 power); *Reynolds v. Sims*, 377 US 533, 568 (1964), (imposing "one person, one vote" rule). The Rehnquist Court moderated both positions, searching for limits to federal authority and granting more deference to states. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating parts of federal Violence Against Women Act); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 876 (1992) (announcing more deferential "undue burden" standard for review of abortion regulation). In cases in which an expansion of congressional power seems to threaten the Court's authority, most notably those dealing with Congress's power to enforce the Fourteenth Amendment, the Court has been more aggressive in its review of federal laws. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

¹⁶ 529 U.S. 598, 621 (2000).

¹⁷ By doctrine, I mean the tests that the Court creates to implement constitutional meaning. "No regulation of private parties under the Section 5 power" is a doctrinal rule; "no undue burden on the choice to obtain a previability abortion" is another. The text will offer some discussion of what factors might make a particular doctrinal rule desirable. See *infra* text accompanying notes 77–80. For further analysis, see generally KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* 22–47 (2006).

¹⁸ See *infra* Part V.

¹⁹ See *infra* Part IV.B.

its worst decisions, to *Morrison*, making the case that in many ways *Morrison* is substantially worse. And Part V concludes by asking whether, the misleading claims of *Morrison* aside, there are any good reasons to be offered in support of the rule that private parties are immune from Section 5 legislation.

I

A SURVEY OF THE COURT'S WORK

A. Phases of Federalism

As noted in the preceding section, federal power has expanded over our constitutional history. It has not done so continuously; instead, the expansion has come in bursts. Virtually without exception, each of those bursts has met at least an initial phase of judicial resistance.²⁰ The Civil War presented the starkest imaginable conflict between national and state power. It ended in a victory for the national side, and it was followed by constitutional amendments designed to enhance national power at the expense of the states. The Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth—offered a dramatically different vision of constitutional structure and the relation between the states and the federal government. No longer were the states the primary guarantors of liberty, relied on to counterbalance the threat of federal tyranny and left largely alone with respect to their treatment of their own citizens. That was the vision of the Revolution, and also of the Framing, but in the minds of the Reconstruction Congress, Gettysburg and Antietam were more vivid than Philadelphia and Bunker Hill. So the Fourteenth Amendment imposed new limits on the states and empowered Congress to enforce those limits.²¹ This second founding gave us the framework for most modern constitutional law, one vastly different from the founding model.²² As the Civil War was the starkest conflict between nation and states, so Reconstruction was the greatest expansion of federal power.

But the Supreme Court, I have noted, tends to lag political movements, and Reconstruction was no exception. During Reconstruction, the Court pushed back with a narrow reading of the Reconstruction

²⁰ See, e.g., *supra* note 15 and accompanying text.

²¹ See U.S. CONST. amend. XIV, § 5.

²² Ask nonlawyers for great or famous Supreme Court decisions, and they will (based on my experience polling first-year law students) almost always come up with cases in which the Court applied Fourteenth Amendment rights against the states, cases such as *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), *Roe v. Wade*, 410 U.S. 113, 164 (1973), *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (applying Fifth Amendment prophylactic rule to states), *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), or even *Bush v. Gore*, 531 U.S. 98, 105 (2000).

Amendments, most notably in the *Slaughter-House Cases*.²³ By the time later decisions, such as the *Civil Rights Cases*, came along, federal troops had been withdrawn from the South and Reconstruction abandoned.²⁴ The aftermath of Reconstruction was the rare battle that the advocates of states' rights won.

The failure of Reconstruction did not end the contest, however. The Progressive era brought two amendments, the Sixteenth and Seventeenth, that substantially weakened federalism. The Sixteenth, by authorizing the federal income tax, ensured that the federal government would be able to amass and spend—or threaten to withhold—vast amounts of money.²⁵ By ushering in a world in which substantial federal support for many state activities was the norm, the Sixteenth Amendment made the spending power a much more potent weapon against the states than it had been at the founding. Equally important, the Seventeenth Amendment removed perhaps the most significant structural protection for states' interests. Entrusting the selection of senators to state legislatures placed that choice in the hands of the one constituency that might plausibly be supposed to value state authority for its own sake.²⁶ Removing it meant that whatever powers the federal government had would henceforth be wielded with much less fear of displeasing state legislatures—much less concern, that is, over whether a particular issue might best be left to states.²⁷

²³ 83 U.S. 36, 77–78 (1873). As this Article will discuss in greater detail, the Court also struck down some federal antidiscrimination laws as exceeding Congress's power to enforce the Fourteenth Amendment. See *United States v. Harris*, 106 U.S. 629, 639 (1883); *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

²⁴ See, e.g., Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 570–71 (2013).

²⁵ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205 (1987) (addressing a federal threat to withhold tax dollars if states failed to adopt uniform drinking age).

²⁶ Post-Seventeenth Amendment rhetoric about the political safeguards of federalism must thus be taken with a grain of salt, particularly to the extent that it invokes the Framers' design. For example, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 & n.11 (1985) (arguing for lack of substantive Supreme Court federalism review on the grounds that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself”); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–47 (1954) (characterizing the Senate as “the forum of the states” and claiming that “Madison’s analysis has never lost its thrust” despite “the shift to popular election of the Senate”). Whether the party system that corrodes the horizontal separation of powers within the federal government can actually enhance the vertical separation of powers between the federal government and the states is an interesting question. See Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 269 (2000). For an excellent analysis, see Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010).

²⁷ The theory that allowing state legislatures to select senators will tend to reserve federal power for cases in which it is needed is the following. State legislators want to be

The Progressives also encountered Supreme Court pushback; the Court of the Progressive era is what we commonly call the *Lochner* Court.²⁸ The pushback can be understood as largely a reaction to the Seventeenth Amendment. It did not explicitly take the form of trying to replace the political safeguard the amendment eliminated, nor of an inquiry whether federal action was needed to solve a particular problem. But it served a similar purpose. The main move that the *Lochner* Court made against federal authority was to strike down pretextual uses of it. In *Hammer v. Dagenhart*,²⁹ and again in *Bailey v. Drexel Furniture*,³⁰ the Court was willing to look beyond the form of a law and inquire into the motive behind it. If the Court found the motive improper, it would strike down even a law that regulated the shipment of goods across state lines—something surely within the literal terms of the commerce power.³¹ This pretext analysis was not entirely novel—Chief Justice Marshall actually endorsed it in the otherwise nationalist *McCulloch* decision³²—but it did respond to the main concern raised by the Seventeenth Amendment. Without state legislatures to ride herd on the Senate, Congress might start using federal power unnecessarily or for improper reasons. The *Lochner*-era Court attempted to step into that breach. Additionally, in a movement that would culminate in the clash over the New Deal, the Court attempted to articulate substantive limits on the federal commerce power in cases such as *United States v. E.C. Knight Co.* and *Carter v. Carter Coal Co.*³³

reelected, and so they want to be able to point to accomplishments, problems they have solved for their constituents. If the federal government takes away and itself solves problems that state legislatures could have handled on their own, state legislators will be displeased and select different senators. Giving senatorial selection to the people, however, eliminates this mechanism for choosing between state and federal regulation, since the people just want problems solved and probably care very little whether the solution comes from the state or federal government. For further discussion, see Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 Nw. U. L. Rev. 500, 535–36 (1997).

²⁸ This term refers to the Court that decided *Lochner v. New York*, 198 U.S. 45 (1905).

²⁹ 247 U.S. 251, 276–77 (1918).

³⁰ 259 U.S. 20, 43 (1922).

³¹ See, e.g., *Hammer*, 247 U.S. at 277–78 (Holmes, J. dissenting) (noting the statute at issue regulated “carriage of certain goods in interstate” commerce and was “clearly within the Congress’s constitutional power”).

³² *McCulloch v. Maryland*, 17 U.S. (1 Wheat) 316, 423 (1819) (stating that “should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land”).

³³ *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (holding that “[c]ommerce succeeds to manufacture, and is not a part of it”); *Carter v. Carter Coal Co.*, 298 U.S. 238, 307 (1936) (invalidating federal regulation that sought to regulate “local” activity which affected interstate commerce only “indirectly”); see also, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (holding that Congress could not regulate activities that affect interstate commerce indirectly).

Both these ventures failed. The doctrine that the Supreme Court would look into the minds of the legislature and reach conclusions about subjective intent that might void a formally valid law was difficult to implement, and the Court abandoned it.³⁴ Likewise, the question of whether a given activity's effect on interstate commerce was sufficiently "direct and material" to subject it to regulation turned out to be one that legislatures were much better at answering than courts.³⁵ The Seventeenth Amendment had certainly taken away one reason to trust Congress's judgment on matters of federalism, but the New Deal Court did not find sufficient reason to distrust it on economic issues, and it acquiesced.³⁶

The Civil Rights era featured another expansion of federal power. The reach of the federal government under the New Deal had been broad, but the purposes of New Deal legislation were generally plainly economic.³⁷ The federal antidiscrimination legislation enacted during the 1960s, by contrast, seemed to be aimed at racial discrimination primarily as a moral evil, rather than an economic problem.³⁸ Such legislation might have been justified as an exercise

³⁴ See, e.g., *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (stating that "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts").

³⁵ As Justice Robert Jackson put it in a letter to then-Circuit Judge Sherman Minton, "If we were to be brutally frank . . . I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. . . . When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge."

Letter from Robert H. Jackson to Sherman Minton 1–2 (Dec. 21, 1942), Box 125, Jackson MSS, LC.

³⁶ The precise reason for this is unclear, and it may certainly have had something to do with President Roosevelt's Court-packing threat. But it might also have been attributable to an appreciation, sharpened by the Great Depression, of the costs of judicial error should courts strike down necessary economic regulation and a judgment that, as Marshall argued in *McCulloch*, questions of the limits of federal power (rather than individual rights) did not present an urgent case for judicial supervision. See *McCulloch*, 17 U.S. at 401 (noting that judicial deference was appropriate for cases "in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted"). For discussions of the so-called "switch in time," see, for example, BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3–4 (1998); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 11 (2000).

³⁷ Even *United States v. Darby*, 312 U.S. 100, 115 (1941), which noted that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control," prefaced that observation with an explanation of how the Fair Labor Standards Act (FLSA) protected commerce. See *id.* at 109–10 (discussing the FLSA).

³⁸ See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964) (observing that "Congress was legislating against moral wrongs").

of Congress's power to enforce the Fourteenth Amendment,³⁹ but instead the Court upheld it under the Commerce Clause.⁴⁰ This blessing of pretextual Commerce Clause legislation might seem surprising, and out of keeping with the Court's normal practice of pushing back against new assertions of federal power. It may be explained by the somewhat unusual circumstances of the Civil Rights era. Atypically, the Court had taken a bold step in the name of racial equality in *Brown*, provoking a sharp backlash.⁴¹ It needed the support of the other branches of the federal government to enforce that decision (it needed, in fact, federal troops⁴²), and it is hard to imagine that the Court would strike down federal legislation supporting its own controversial decision.

The absence of a judicial pushback in the Civil Rights era might explain why the next stirrings of federalism came more or less on their own rather than in response to any obvious expansion of federal power.⁴³ Beginning in the 1970s and continuing to the present day, the so-called New Federalism has sought to set meaningful limits on federal authority.⁴⁴ Some of these efforts, like the Court's attempt to identify islands of state activity immune to federal regulation, have been explicitly abandoned.⁴⁵ Others, like the ban on Commerce Clause regulation of intrastate noneconomic activity, have been weak-

³⁹ See, e.g., *id.* at 279 (Douglas, J., concurring) (expressing a preference for upholding as Fourteenth Amendment enforcement legislation); *Daniel v. Paul*, 395 U.S. 298, 309 (1969) (Black, J., dissenting) ("I could and would agree with the Court's holding in this case had Congress in the 1964 Civil Rights Act based its power to bar racial discrimination at places of public accommodations upon § 5 of the Fourteenth Amendment."). Doing so would presumably have required the Court to overrule the *Civil Rights Cases*. The federal Department of Justice hinted at the possibility in its amicus brief, but the Court declined. See Brief of the United States as Amicus Curiae at 19–20, *Daniel v. Paul*, 395 U.S. 298 (1969), 1969 WL 136812 (describing the authority of the *Civil Rights Cases* as "eroded by later decisions").

⁴⁰ See, e.g., *Daniel*, 395 U.S. at 309; *Heart of Atlanta Motel*, 379 U.S. at 276–77.

⁴¹ See, e.g., Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1505–10 (2006) (describing the backlash against *Brown*).

⁴² See, e.g., Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 112–14 (1994) (describing federal military intervention in Little Rock, Arkansas).

⁴³ Viewing the New Federalism as a delayed pushback against the Civil Rights era might also explain why ostensibly federalist decisions look like what Jed Rubenfeld has called the anti-antidiscrimination agenda. See Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142–44 (2002). The Rehnquist Court was willing, as the Warren Court was not, to dissociate itself from federal promotion of equality. See also, e.g., J. Clay Smith, Jr., *Shifts of Federalism and Its Implications for Civil Rights*, 39 HOWARD L.J. 737, 745 (1996) (suggesting that *Lopez* might portend challenges to civil rights laws).

⁴⁴ For a survey of the Court's work, see, e.g., Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 49–50 (2005).

⁴⁵ See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833, 855–56 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

ened by exceptions and remain largely derelict.⁴⁶ Some more recent decisions retain the potential to have significant consequences, but their potential is for now only that.⁴⁷ For the most part, judicial pushback against expanding federal power has been a failure. The following section explores why this is so.

B. Faces of Federalism

Chronologically, what we see looking at the Court's ventures into federalism is that the Court tends to offer initial resistance to expansions of federal power but then eventually back down. The *Slaughter-House* decision still stands, but its significance may be relatively minor, as the Supreme Court eventually used the Due Process and Equal Protection Clauses to achieve most of the results that would have been appropriate under the Privileges or Immunities Clause.⁴⁸ The *Lochner*-era decisions limiting the federal commerce and taxing powers have been overruled, as have the similar New Deal-era ones.⁴⁹ Then-Justice Rehnquist's opening federalist salvo, the recognition of specially protected areas of state activity immune to federal regulation, was also overruled only nine years later.⁵⁰ More recent federalist

⁴⁶ The Supreme Court has allowed Congress to regulate intrastate noncommercial activity if such regulation is part of a larger scheme aimed at commercial activity. See *Gonzales v. Raich*, 545 U.S. 1, 26–33 (2005). It has also suggested that intrastate noncommercial activity can be reached by a statute with a jurisdictional hook that establishes an effect on commerce in each case to which it is applied. See *United States v. Lopez*, 514 U.S. 549, 561–62 (1995). Lower courts have shown no inclination to extend the *Morrison/Lopez* limits. See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 385 & n.85 (2000). And the refrain of the opponents of the Affordable Care Act that if the individual mandate was upheld, there would be no limits on federal power, suggests that *Morrison* and *Lopez*—which are, after all, limits on federal power—are not viewed as especially meaningful. For the refrain, see, e.g., Brief for State Respondents on the Minimum Coverage Provision at 27–28, *Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11–398), 2012 WL 392550.

⁴⁷ Recent decisions that could produce meaningful change include *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012), and *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

⁴⁸ See Kermit Roosevelt III, *What if Slaughter-House Had Been Decided Differently?*, 45 IND. L. REV. 61, 63 (2011). *Slaughter-House* was not without consequence, however. When the Equal Protection and Due Process Clauses were reinterpreted to assume the role that the Privileges or Immunities Clause was initially intended to play, their own initial purposes faded into the background. *Id.* at 70. In particular, equal enforcement of state laws has come to play a marginal role in equal protection jurisprudence, rather than the core role the Reconstruction Congress envisaged. See *id.* at 68. This shift has made the *Morrison* prohibition on regulating private parties via Section 5 seem more plausible than it should. See *id.* at 69–70, 76–77.

⁴⁹ See, e.g., *United States v. Darby*, 312 U.S. 100, 116 (1941) (overruling *Hammer*); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (abandoning pretext analysis for taxing power).

⁵⁰ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (overruling *Usery*).

decisions persist, but, as this section will discuss, most seem unlikely to bear fruit.

If we examine the doctrines in terms of their substantive impact, a complementary picture emerges: the rules that impose meaningful limits on federal power are precisely the ones that the Court ends up abandoning. With respect to the Commerce Clause, there have been several different eras of judicial pushback and acquiescence. In the *Lochner* era, and during its time resisting the New Deal, the Court created limits on the commerce power that were meaningful.⁵¹ Inquiring into Congress's motive, and restricting it to the regulation of activities that directly and substantially affected interstate commerce, curtailed federal authority in a significant way. But the Court lacked the political will or power to maintain those limits.

During the New Federalism, *Morrison* and *Lopez* announced that Congress could not use the commerce power to regulate intrastate noncommercial activity.⁵² But exceptions have emerged. Congress can reach such activity if doing so is necessary to effectuate a broader scheme that aims at commercial activity, and perhaps if it includes a jurisdictional hook ensuring a connection to interstate commerce in every case.⁵³ Lower courts have made no real effort to develop the *Morrison/Lopez* analysis, and the Supreme Court has not revisited the doctrine except to narrow it.⁵⁴

The 2012 decision about the Affordable Care Act, *National Federation of Independent Business v. Sebelius*, seems unlikely to mark a real change, dramatic though it was. Healthcare is unique, as the defenders of the Act argued,⁵⁵ and Congress is not likely to find a need to

⁵¹ See, e.g., *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 39 (1922) (citing *Hammer* as another limit on the Commerce Clause).

⁵² See *United States v. Morrison*, 529 U.S. 598, 626 (2000); *United States v. Lopez*, 514 U.S. 549, 566 (1995).

⁵³ See *Gonzales v. Raich*, 545 U.S. 1, 17–18 (2005) (describing comprehensive scheme exception). After *Lopez*, Congress reenacted the Gun-Free School Zones Act with a proviso limiting its application to guns that “ha[ve] moved in or that otherwise affect[] interstate or foreign commerce.” *United States v. Danks*, 221 F.3d 1037, 1038–39 (8th Cir. 1999) (per curiam) (quoting 18 U.S.C. § 922(q)(2)(A) (2006)). This version has survived lower court challenges. See, e.g., *id.*

⁵⁴ See, e.g., Jonathan H. Adler, *Is Morrison Dead?: Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 765, 777 (2005) (concluding that *Raich* repudiated *Lopez* and *Morrison*); Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 844 (2005) (“*Lopez* and *Morrison* have been largely confined to their facts.”); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 932 (2005) (expressing doubt that “a robust judicially-enforceable federalism has much future left” after *Raich*).

⁵⁵ See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2623 (2012) (Ginsburg, J., dissenting).

impose a similar mandate in the future. And even if it did, as *Sebelius* itself shows, it could do so through the taxing power.⁵⁶

With respect to the taxing and spending powers, the story is similar. The motive analysis that the Court promised, or threatened, during the *Lochner* era would have amounted to a meaningful limit.⁵⁷ But the cases that offered that limit have been overruled.⁵⁸ In its place we have the toothless test of *South Dakota v. Dole*,⁵⁹ and the nebulous shadows of *Sebelius*.⁶⁰ The limit suggested by *Sebelius* might turn out to be meaningful, but past history suggests that such unclear rules do not prove durable. (Meaningful limits on the spending power would be quite significant, however, since they would revitalize the anticommandeering doctrines announced in *New York v. United States*⁶¹ and *Printz v. United States*.⁶² The federal government may neither command the states to legislate, nor order state officials to enforce federal law, those cases hold.⁶³ Yet if *Dole* remains the law, the federal government need only threaten to withdraw marginally related federal funding to compel compliance.⁶⁴)

The Court's treatment of the Section 5 power, however, has been different. Here, the Court has been substantially more forceful, and more successful, in pushing back against Congress. In *City of Boerne v. Flores* and its progeny, the Court has required that congressional enforcement legislation be "congruen[t] and proportional[]" to the constitutional violation Congress seeks to deter or remedy.⁶⁵ And in *Morrison*, it ruled that the Section 5 power could not be used to regulate private parties.⁶⁶ These tests are not toothless; they have struck down some quite significant laws.⁶⁷ Moreover, they appear durable; the Court has given no signs of abandoning them. Almost alone

⁵⁶ See *id.* at 2593–600 (finding the taxing power to be the source of authority to impose the individual mandate).

⁵⁷ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 265 (1918).

⁵⁸ See *United States v. Darby*, 312 U.S. 100, 116 (1941) (overruling *Hammer*).

⁵⁹ 483 U.S. 203, 207–08 (1987).

⁶⁰ For perhaps the best analysis of the puzzle of conditional spending, see Mitchell Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1286–87 (2013).

⁶¹ 505 U.S. 144, 161–63 (1992).

⁶² 521 U.S. 898, 929–33 (1997).

⁶³ See *New York*, 505 U.S. at 161–63; *Printz*, 521 U.S. at 929–33.

⁶⁴ See 483 U.S. at 207–08.

⁶⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (discussing congruence and proportionality); see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372–74 (2001) (striking down portions of the ADA for failing to satisfy congruence and proportionality test); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83 (2000) (same for portions of the ADEA).

⁶⁶ *United States v. Morrison*, 529 U.S. 598, 621–22 (2000).

⁶⁷ *Morrison* struck down the civil rights remedy of the Violence Against Women Act (VAWA); *Garrett and Kimel*, the application of the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), respectively, to obtain money

among the sources of federal authority, then, the Section 5 power has been limited in a meaningful and lasting way.⁶⁸ The next section offers some thoughts as to why this might be.

C. Doctrinal Desiderata

One reason that the Court has generally backed away from its federalist interventions is that the Court tends not to fight a dominant political coalition for very long. The Court is harder than the elected branches for political movements to capture, but it is not invulnerable. Justices do not live forever, so a movement that holds the elected branches for long enough can eventually stock the Court with its supporters.⁶⁹ The nationalist side of the federal-state struggle typically has numbers on its side, and so it is not surprising that it tends to prevail in individual battles at the Court. Since winning these battles at least sometimes requires the expansion of federal power, it is also not surprising that the Court has tended to support that expansion over time.

But there are other, less political reasons why the federalist side has tended to lose. For one thing, the Constitution simply gives us very little in the way of explicit states' rights for the Court to protect. States are guaranteed equal representation in the Senate.⁷⁰ They are protected from dismemberment.⁷¹ Apart from that, the text of the Constitution largely supports the view that the safeguards of federalism are a matter of process, not result.⁷²

damages from state entities. See *Morrison*, 529 U.S. at 621–22; *Garrett*, 531 U.S. at 372–74; *Kimel*, 528 U.S. at 82–83.

⁶⁸ The Eleventh Amendment is another restriction on federal power, and it is one that the Court has been relatively willing to enforce. But it operates in a quite limited sphere; it matters only with respect to the award of money damages to individuals. That is not insignificant, but not necessarily a threat to federal aims: if it deems the issue important enough, the federal government can always bring suit in its own name. Current Eleventh Amendment doctrine creates some odd anomalies. For instance, an individual can recover damages from California in the courts and under the law of coequal sovereign Nevada, but not in the courts and under the law of the hierarchically superior federal sovereign. See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496–99 (2003). But in terms of the larger federal-state balance, it is a pinprick.

⁶⁹ This phenomenon is generally taken to be the basis for then-Justice Rehnquist's prediction in *Garcia* that the dissent's view would someday enjoy majority support. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1486 n.3 (1994) (describing Rehnquist's dissent as "lacking only a footnote attaching an actuarial table to indicate how soon the Court could expect to lose its older, liberal members"). Even without replacement, Justices may change in office in ways that bring them more in line with dominant political and constitutional opinion.

⁷⁰ U.S. CONST. art. V.

⁷¹ See *id.* art. IV, § 3.

⁷² See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985). Undeniably, the Seventeenth Amendment has undermined that structure. The hard question is what, if anything, judges should do in response. See *Morrison*, 529 U.S. at 652 (Souter, J., dissenting) (arguing that "[t]he Seventeenth Amendment may indeed have lessened the

The lack of clear text to enforce makes things harder, though the Court's sovereign immunity jurisprudence shows that it is not an insuperable barrier.⁷³ More serious is the problem that decisions about the appropriate balance between state and federal power tend to be political. Ideally, the federal government would be able to act when a federal solution is needed and able to hold back when a matter can be left to the states.⁷⁴ But what this requires is a Congress with very broad powers and also a sense of self-restraint and a respect for state autonomy. The Court can give us the first of these, but not the second, and it has not tried to. (In the wake of *Lopez*, which offered a prime example of an unnecessary federal law in the Gun-Free School Zones Act, some scholars suggested process-based restraints as a way to improve congressional decisionmaking.⁷⁵ The Court never took up the suggestion.) Selection of senators by state legislatures might have, but the Seventeenth Amendment took that away. In consequence, the Court is left trying to create rules that will reach the results that a wise and state-respecting Congress would have. But it seems quite unlikely that any rules will do so, at least any judicially administrable rules that are recognizable as legal doctrine.⁷⁶

Successful doctrine must meet at least two distinct requirements.⁷⁷ First, it must work. It must reach results that are consistent with constitutional meaning or at least that further the purpose of

enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power").

⁷³ See, e.g., *Alden v. Maine*, 527 U.S. 706, 728 (1999) ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself").

⁷⁴ It would act, as the Constitutional Convention voted it should, when "the States are separately incompetent." See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131–32 (Max Farrand ed., rev. ed. 1966). The "separately incompetent" language went to the Committee on Detail, which changed it to the enumeration of Article I, Section 8. See Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1340 (1934).

⁷⁵ See, e.g., Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 697 (1996); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 207–14 (1995).

⁷⁶ Allowing Congress to legislate for the general interests of the union and when the states are separately incompetent comes close, and this wording of legislative power was actually voted on by the Convention. See Stern, *supra* note 74, at 1340. But the judgment this calls for lies much more within congressional than judicial competence, so having courts second-guess the legislative judgment will be awkward at best. For general discussions of the collective action theory, see Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937 (2013).

⁷⁷ For a discussion of doctrine creation, see generally ROOSEVELT, *supra* note 17, at 22–36.

constitutional provisions.⁷⁸ To do this, it must choose the right questions to ask, and it must also allocate those questions to the decisionmaker most likely to get them right.⁷⁹ Second, it must be workable. It must provide guidance to lower courts and government officials; it must be clear, predictable, and easy to apply.⁸⁰

Crafting federalism doctrine that fits both these desiderata turns out to be quite hard. Doctrine that constrains in a meaningful way often turns on questions falling within legislative rather than judicial competence. That was the case with most of the *Lochner*-era limits, and the *Usery* creation of islands of state sovereignty as well.⁸¹ On such

⁷⁸ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), for instance, departs dramatically from constitutional meaning (the Constitution plainly does not contain the *Miranda* warning), but it does so in a way that furthers the purpose of the underlying provision. See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (arguing that prophylactic rules are central and necessary to constitutional law).

⁷⁹ Suppose, for instance, that a core purpose of the commerce power is to allow Congress to protect and promote interstate commerce. Whether a given activity substantially affects interstate commerce is an appropriate question for doctrine to ask, then, since the regulation of such an activity will plausibly be an "appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *United States v. Darby*, 312 U.S. 100, 118 (1941). But that is a question that Congress is much better at answering than the Court, and it is thus equally important to doctrinal legitimacy that the question be committed initially to Congress, with deferential judicial review. See *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) ("The fact of such a substantial effect is not an issue for the courts in the first instance, . . . but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."). The abandonment of the *Lochner*-era due process jurisprudence, I have argued, was driven by very similar analysis on the issue of the public interest. See Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 989–91 (2006). The Court has maintained consistently that legislation must serve the public interest, but it has moved from the view that judges can identify the public interest to the view that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). For yet another example, consider the progress from *Plessy to Brown*. Both those decisions ask whether a particular classification is oppressive or invidious; what changes is that *Plessy's* belief that this is a question on which deference is appropriate is replaced by *Brown's* more suspicious perspective. See Kermit Roosevelt III, *Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved*, 52 ST. LOUIS U. L. J. 1191, 1202–04 (2008). I have argued elsewhere at greater length that the issue of judicial activism is best understood in terms of the appropriate level of deference given by the Court to the constitutional conclusions of other actors. See ROOSEVELT, *supra* note 17, at 37–47.

⁸⁰ See generally, e.g., Richard A. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (discussing the relationship between constitutional norms, meaning, doctrine, and the desire for judicially manageable standards).

⁸¹ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), and expressing doubt "that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty").

issues, deference to the legislature is the natural stance, but deferential application robs the rules of their practical significance.⁸²

Conversely, limits that judges are good at enforcing frequently do not impose meaningful and nonarbitrary constraints. The *Morrison/Lopez* carve-out may be a manageable rule (though defining the limits of economic activity is a challenge⁸³), but it now looks largely symbolic.⁸⁴ The *New York/Printz* rules are clear but also easy to circumvent via the spending power.⁸⁵ As far as the commerce, taxing, and spending powers are concerned, doctrine that truly constrains tends not to last.⁸⁶ This is, I suggest, because the relevant questions are more within legislative than judicial competence, and meaningful judicial supervision usually comes to be seen as unjustified.

Yet as noted before, Section 5 is an exception. The Court has been more aggressive, and more successful, in limiting the Section 5 power. There is an obvious reason for this: rather than turning on economic analysis, Section 5 questions frequently involve constitutional interpretation. This different focus explains greater judicial assertiveness in two distinct but related ways. First, while the Supreme Court typically views itself as less competent than Congress to decide complicated economic issues, it views itself as substantially better, and uniquely authorized, to interpret the Constitution.⁸⁷ Second, while the Court may not care very much about preserving state authority for its own sake, it certainly does care about preserving its own authority.⁸⁸ A deferential approach to Section 5 legislation can seem to cede

⁸² Likewise, understanding the commerce power as allowing Congress to regulate any activity that substantially affects interstate commerce, at least if it does so for a commercial purpose, is plausible. See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1693–99 (2006). But Congress’s superiority in determining the existence of substantial effects pushes the Court toward a deferential “rational basis” standard for reviewing the congressional determination, which leads to a near-total lack of judicially enforceable limits.

⁸³ See generally Allen Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason* in *United States v. Morrison*, 18 CONST. COMMENT. 563, 566–70 (2001) (discussing potential definitions of “economic activity”).

⁸⁴ See Adler, *supra* note 54, at 765, 777; Merrill, *supra* note 54, at 844; Reynolds & Denning, *supra* note 54, at 932.

⁸⁵ See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 104–05 (1999).

⁸⁶ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (overruling *Usery*).

⁸⁷ See generally Larry Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) (“The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the *only* institution empowered to speak with authority when it comes to the meaning of the Constitution.”).

⁸⁸ A hallmark of the Rehnquist Court’s ostensibly federalist decisions was that on closer inspection, many seemed to be driven by a concern for judicial supremacy. See Kermit Roosevelt III, *Wrong, But Not Too Right*, LEGAL AFFAIRS, Mar.–Apr. 2005, at 37 (arguing that “[f]ederalism has been hijacked by judicial supremacy”), available at http://www.legalaffairs.org/issues/March-April-2005/feature_roosevelt_marapr05.msp. Indeed, the re-

interpretive power to Congress, which the Court is generally disinclined to do.

With the Section 5 power, the Court has created two significant rules, the *Boerne* congruence and proportionality test, and the *Morrison* ban on regulation of private parties.⁸⁹ Congruence and proportionality asks whether, in light of the existing evidence of state violations of constitutional requirements, the federal enforcement legislation goes too far beyond those requirements.⁹⁰ In my view, this is perfectly sound doctrine, with one important caveat. When the Court compares enforcement legislation to the requirements of the Constitution it should look at the Constitution, rather than the rules the Court has created to enforce it. It should compare enforcement legislation to meaning, rather than doctrine.⁹¹

The *Morrison* limit, on the other hand, should be rejected at the first opportunity. Other scholars have suggested that it is wrong about the meaning or the original understanding of Section 5 or that it erroneously ignores the Citizenship Clause of Section 1 of the Fourteenth Amendment.⁹² I am sympathetic to these arguments, and I will revisit some of them briefly in later sections. But *Morrison* does not present its rule as derived from a first-impression analysis of Section 5. It relies instead on the *Civil Rights Cases*, and my main aim in this Article is to show how deceptive and baseless that claim is.⁹³

peated assertion that the commerce power must have limits because an enumeration presupposes something not enumerated, *see, e.g.*, *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000), shows just this concern. The Court is not satisfied with the idea that there are some things Congress would never do—raise the minimum wage to \$1000 per hour, for instance, or require every citizen to purchase broccoli; it demands that there be some things the Court would stop Congress from doing. That is, it is not concerned with the kinds of limits that the political process might create; it considers only judicially enforceable limits to be real.

⁸⁹ *See Morrison*, 529 U.S. at 620–22; *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

⁹⁰ *See Boerne*, 521 U.S. at 519–20.

⁹¹ *See* Roosevelt, *supra* note 82, at 1680–83.

⁹² *See, e.g.*, Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 104–06 (2000); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1833–37 (2010).

⁹³ In the immediate aftermath of *Morrison*, some academic commentary questioned its use of precedent. *See, e.g.*, Evan Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1361–64 (2000); Samuel Estreicher & Margaret H. Lemos, *The Section Five Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 145–50. But those discussions seem not to have stuck. There was also an attempt to read *Morrison* as simply applying *Boerne's* congruence and proportionality test, rather than announcing a bright-line rule against regulating private parties via Section 5. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L. J. 441, 445 (2000). This reading has been largely abandoned. It is now relatively common to describe the *Civil Rights Cases* as *Morrison* portrayed them, and most recent analyses of the Section 5 power spend little time questioning that description. *See, e.g.*, Michael Zimmer, *Wal-Mart v. Dukes: Taking the Protection out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 416 n.28 (2012) (stating that “the Rehnquist

II

MORRISON

A. The Background

Starting in 1991, Congress held several years of hearings on the problem of violence against women. Testimony from victims, law professors, and various participants in state justice systems, as well as task force reports on gender bias from twenty-one states,⁹⁴ suggested to Congress that certain violations of state law—most notably, violence against women by people they knew—were not receiving proper redress. Some state laws discriminated based on gender, and even gender-neutral laws were enforced unequally.⁹⁵ In consequence, in the words of a House Report,⁹⁶ “bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled.”⁹⁷

To solve this problem, Congress created a federal civil cause of action for people who were the victims of gender-motivated violence.⁹⁸ Rather than the generic state tort claims that had proved ineffectual, the civil rights remedy was aimed precisely at gender-motivated violence.⁹⁹ The specific targeting of such conduct, Congress hoped, would eliminate the tendency of finders of fact to discount acquaintance violence as not a “real” offense, to make them see it, in the words of then-Senator Joseph Biden, as “a crime, not a quarrel.”¹⁰⁰

Court [in *Morrison*] reaffirmed the holding of the *Civil Rights Cases* that Congress lacks power under § 5 of the Fourteenth Amendment to reach private action”); Mehrdad Payandah, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 *BYU J. PUB. L.* 87, 126 (“[I]n 1883 the Supreme Court held in the *Civil Rights Cases* that Congress had no authority to enact laws against private discrimination under the . . . Fourteenth Amendment.”); Mark D. Rosen, *From Exclusivity to Concurrence*, 94 *MINN. L. REV.* 1051, 1111 n.316 (2010) (describing *Morrison* as “reaffirming *Civil Rights Cases*’ holding that Congress’s Section Five powers extend only to state action, not to ‘private persons’”); Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 *HARV. C.R.-C.L. L. REV.* 481, 482 (2006) (describing Reconstruction cases as holding “that Congress did not have the power to restrict the discriminatory behavior of private actors”).

⁹⁴ See *Morrison*, 529 U.S. at 629–30 & nn.3–7 (Souter, J., dissenting).

⁹⁵ See *id.* at 620.

⁹⁶ See generally Victoria F. Nourse, *Where Violence and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 *Wis. WOMEN’S L.J.* 1, 9–12 (1996) (describing findings from Senate hearings).

⁹⁷ H.R. CONF. REP. NO. 103–711, at 385 (1994).

⁹⁸ 42 U.S.C. § 13981(c) (1994).

⁹⁹ See *Morrison*, 529 U.S. at 653–54 (Souter, J., dissenting) (“The Act accordingly offers a federal civil rights remedy aimed exactly at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces.”)

¹⁰⁰ See Joseph R. Biden, *Domestic Violence: A Crime, Not a Quarrel*, *TRIAL*, at 59 (June 1993).

Equally important, the federal cause of action allowed victims to file suit in federal court, rather than in the state justice systems that the task force reports had found to be pervasively biased.¹⁰¹

The facts of *Morrison* are of the sort frequently offered to support the need for the civil rights remedy.¹⁰² Christy Brzonkala, a freshman at Virginia Tech, filed a complaint under the school's Sexual Assault Policy against two varsity football players, Antonio Morrison and James Crawford, alleging that they had raped her.¹⁰³ During the school's hearing, Morrison admitted that Brzonkala had twice told him "no" but that he had engaged in sexual contact with her anyway.¹⁰⁴ The school found Morrison guilty of sexual assault and suspended him for two semesters.¹⁰⁵ Without explanation, it later changed the offense description to "using abusive language."¹⁰⁶ On appeal, the two-semester suspension was deemed "excessive" and set aside.¹⁰⁷ Upon learning that Morrison would be returning to school, Brzonkala dropped out.¹⁰⁸ Crawford did not confess. The school found the evidence against him insufficient, and he received no punishment.¹⁰⁹ Neither man was ever charged by state authorities.

Brzonkala later sued Morrison and Crawford in federal court, seeking damages under the Violence Against Women Act's civil rights remedy.¹¹⁰ The district court struck down the civil rights remedy as going beyond the powers of Congress under either the Commerce Clause or Section 5 of the Fourteenth Amendment.¹¹¹ A panel of the Fourth Circuit reversed that decision, upholding the statute, but upon rehearing en banc, the full Fourth Circuit also found the civil rights remedy unconstitutional.¹¹² Congress could not use the Commerce Clause to regulate intrastate noncommercial activity, the Fourth Circuit held, and it could not use Section 5 to regulate private parties.¹¹³

¹⁰¹ See *Morrison*, 529 U.S. at 653 (Souter, J., dissenting) ("It was against this record of failure at the state level that the Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence.").

¹⁰² The following description is drawn from the Supreme Court's account. See *Morrison*, 529 U.S. at 602-03.

¹⁰³ See *id.* at 603.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 603-04.

¹⁰⁹ *Id.* at 603.

¹¹⁰ *Id.* at 604.

¹¹¹ *Id.*

¹¹² *Id.* at 604-05.

¹¹³ See *Brzonkala v. Va. Polytechnic Inst.*, 169 F.3d 820, 889 (4th Cir. 1999).

B. *Morrison* at the Supreme Court

At the Supreme Court level, much of the argument was devoted to the Commerce Clause,¹¹⁴ which is not the main focus of this Article. Indeed, my claim is that despite the attention it received, the Commerce Clause issue is less important. The intrastate noncommercial carve-out we associate with *Morrison* means little in practice. *Morrison*'s treatment of Section 5, by contrast, is important: as I will argue later, prohibiting the use of Section 5 to regulate private parties cuts the heart out of Congress's power to enforce the Equal Protection Clause.¹¹⁵ If states fail to enforce their laws to protect certain groups, federal legislation offering alternative remedies is the most appropriate, and perhaps the only, means by which Congress can respond.

This theory of Section 5, what scholars have called the "state neglect" theory,¹¹⁶ was the argument offered by the United States in the *Morrison* briefing.¹¹⁷ The theory has two parts. First, there is what I will call the "duty to protect" element. This asserts that a state's failure to enforce its laws for the benefit of some group—a failure to protect them equally—is a violation of the Equal Protection Clause.¹¹⁸ In the case of VAWA Congress had received evidence and made findings that such constitutional violations were occurring: state judicial systems were failing to offer equal protection to female victims of gender-motivated violence.¹¹⁹ Section 5 authorized it to enact an "appro-

¹¹⁴ See *Morrison*, 529 U.S. at 607–19 (rejecting Commerce Clause as basis for VAWA).

¹¹⁵ See discussion *infra* Part III.D.

¹¹⁶ See Pamela Brandwein, *The Civil Rights Cases and the Lost Language of State Neglect*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 275, 275–76 (Ronald Kahn & Ken I. Kersch, eds., 2006).

¹¹⁷ See Brief for the United States at 36–45, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99–5 and 99–29), 1999 WL 1037259.

¹¹⁸ As I will describe more fully *infra* Part IV, this component of the state neglect theory has been universally accepted throughout American legal history, though it has frequently been viewed as a peripheral part of equal protection. See generally Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008) (arguing that history proves "duty-to-protect" rather than "improper classification" is the proper rationale behind the Equal Protection Clause) [hereinafter Green, *History*]; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219 (2009) (arguing postratification history proves "duty-to-protect" rather than "improper classification" is the proper rationale behind the Equal Protection Clause) [hereinafter Green, *Application*].

¹¹⁹ See, e.g., H.R. CONF. REP. NO. 103–711, at 385 (1994); S. REP. NO. 103–138, at 38, 41–42, 44–47 (1993); S. REP. NO. 102–197, at 39, 44–49 (1991). James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, wrote in a statement that "standard State tort remedies have not been sufficient in this area because they are not tailored to remedy gender-motivated violence." *Crimes of Violence Motivated by Gender: Hearing Before the H. Subcomm. on Civ. & Const. Rights*, 103d Cong. 96 (1993) (statement of James P. Turner). "[C]ollectively," the Senate concluded in 1993, "these reports

priate” enforcement measure to deter or remedy that violation.¹²⁰ The second part of the state neglect theory, what I will call the “direct regulation” element, is the assertion that regulation of private parties (rather than state actors) may be an appropriate measure.

What other choice was there? Congress could, in theory, have targeted the state officials whose conduct violated the constitution: it could have enacted a law requiring police, prosecutors, judges, and juries to handle cases without gender bias, and perhaps giving victims of such bias a cause of action for damages. Such an approach would have obvious and severe drawbacks. It would be an enormous intrusion on state administration of justice—an essential state function if ever there was one. It would run into traditional principles of immunity for most participants in the justice system.¹²¹ And it would inevitably encounter substantial difficulties of proof in particular cases. Bias works in subtle ways; who can say why a jury failed to convict or a prosecutor declined to bring charges?

Fortunately, Congress had another option. It could try to remedy the deficiency in the state laws and institutions by allowing victims access to federal law and federal courts. This would not interfere with the conduct of any state official, and it would not require intrusive scrutiny of state judicial systems and futile attempts to demonstrate bias in particular cases. In much the same way as federal diversity jurisdiction simply offers a neutral alternative to potentially biased state courts, a federal civil rights remedy would give alternatives to plaintiffs who did not believe they could receive fair treatment in the state system.

Which of these remedies was more appropriate? There is no real choice; the first option is all but unimaginable. No one could seriously suggest holding state prosecutors, judges, or jurors liable. If there was to be a remedy for the violation Congress identified, it had to be of the second sort.¹²² That was what Congress chose, and that was what the Court considered in *Morrison*.

provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.” S. REP. NO. 103–138, at 49.

¹²⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (describing enforcement legislation as that which “deters or remedies constitutional violations”).

¹²¹ See generally *Imbler v. Pachtman*, 424 U.S. 409, 417–29 (1976) (discussing such immunities); *O’Shea v. Littleton*, 414 U.S. 488, 500 (1974) (directing federal courts to abstain from hearing suits aimed at “controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials”); see also *Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir. 2006) (holding that abstention was required where the relief sought would be overly “intrusive in the administration of the New York court system”).

¹²² If there was a choice, Congress would be entitled to make its own judgment among the alternatives with *McCulloch*-type latitude. See Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 115 & n.15 (2013).

The *Morrison* Court did not deny the existence of a constitutional violation.¹²³ It accepted the idea that biased underenforcement of facially neutral laws could violate the Equal Protection Clause, the duty to protect element of state neglect.¹²⁴ Nor did it dispute the impracticality of a remedy that ran against state officials, or the efficacy of one that ran against private parties. Nonetheless, it rejected the direct regulation element of the state neglect theory, pointing to a bright-line rule that the Section 5 power could not be used against private parties.¹²⁵ The Court extracted this rule largely from the *Civil Rights Cases*.¹²⁶

Looking back to the *Civil Rights Cases* required no great leap of imagination. As *Morrison* described them, the facts of the *Civil Rights Cases* offered an almost perfect parallel. Congress perceived a problem: African Americans were being excluded from places of public accommodation like hotels and restaurants.¹²⁷ This was in part a failure of state law but more a failure of enforcement. Most state laws guaranteed equal access to places of public accommodation, but these laws were not enforced on behalf of African Americans. States were violating their duty to protect. *Morrison* quoted future president and then-Representative James Garfield:

[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.¹²⁸

How to remedy this failure of equal protection? The 43rd Congress faced the same choice that the 103rd would, and it reached the same conclusion. “We cannot,” said Senator Frelinghuysen, “deal with the states or with their officials to compel proper legislation and its enforcement; we can only deal with the offenders who violate the privileges and immunities of citizens of the United States.”¹²⁹ The way to do that, he went on, was to provide that “the injured party should have an original action in our Federal courts”¹³⁰ And so, just as the

¹²³ See *United States v. Morrison*, 529 U.S. 598, 619–20 (noting “voluminous congressional record” supporting congressional finding of constitutional violations).

¹²⁴ See *id.*

¹²⁵ *Id.* at 621.

¹²⁶ See *id.* at 620–23 (discussing “longstanding limitation” derived from the *Civil Rights Cases* and *United States v. Harris*).

¹²⁷ See *id.* at 623.

¹²⁸ CONG. GLOBE, 42d Cong., 1st Sess., App. 153 (1871) (statement of Rep. Garfield).

¹²⁹ 2 CONG. REC. 3454 (Apr. 29, 1874) (remarks of Sen. Frelinghuysen). Frelinghuysen here is probably referring to privileges and immunities under state law, following Justice Field’s theory of Fourteenth Amendment Privileges or Immunities. See Roosevelt, *supra* note 48, at 67–68 (explaining Field’s theory).

¹³⁰ 2 CONG. REC. 3454.

Violence Against Women Act would, the Civil Rights Act of 1875 employed direct regulation: it gave individuals who were denied equal access a cause of action in federal court against the offending private parties.¹³¹

In the *Civil Rights Cases*, the Supreme Court struck down that provision as exceeding Congress's power to enforce the Fourteenth Amendment.¹³² Its decision to do so was entitled to great respect, *Morrison* noted.

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.¹³³

If a Court so intimately familiar with the Fourteenth Amendment could strike down a civil rights remedy so precisely parallel to that challenged in *Morrison*, then the *Morrison* Court could hardly be faulted for following its example. Christy Brzonkala's case was "controlled by" those Reconstruction-era decisions.¹³⁴

Or so the *Morrison* opinion would have you think. In fact, almost everything in *Morrison*'s presentation of the *Civil Rights Cases* is misleading, from its description of Congress's rationale to its assessment of the Court's historical vantage point. The *Civil Rights Cases* should not be presented as good examples of the Court's work. If examined closely, as the next Part will do, they have serious flaws. They are not, however, as bad as *Morrison*.

III

THE CIVIL RIGHTS ACT OF 1874 AND ITS FATE

A. Arguments in Congress

Morrison's description of the background to the Civil Rights Act of 1875 is reasonably accurate. It is true, as *Morrison* notes, that members of the 43rd Congress expressed concern over the failure of state officials to enforce their public accommodation laws in favor of racial minorities.¹³⁵ Like the 103rd Congress, they heard testimony about the injuries individuals suffered and their inability to get redress

¹³¹ See *Morrison*, 529 U.S. at 624–25 (describing similar purposes of Civil Rights Act of 1875 and VAWA).

¹³² *Id.* at 627.

¹³³ *Id.* at 622.

¹³⁴ See *id.* at 602.

¹³⁵ See *id.* at 625 (citing statement of Rep. Garfield).

under state law.¹³⁶ They described this as a failure of equal protection, a constitutional violation authorizing a remedy under the enforcement power.¹³⁷ And like the 103rd Congress, they opted to remedy this failure of equal protection by creating a federal claim against the private parties who violated victims' state law rights.¹³⁸ Both elements of the state neglect theory that *Morrison* rejected can indeed be found, at least in germinal form, in the statements of the backers of the Civil Rights Act.

What about its opponents? *Morrison* does not quote statements from those who spoke against the Civil Rights Act. In part this may be because most of their arguments would not be useful to a modern court confronting a similar question. The most frequent constitutional objection to the Civil Rights Act was the rather general complaint that it intruded into areas of traditional state sovereignty. It "overleaps the ramparts of the Constitution," said Representative Harris of Virginia, "and at once enters the arena of the States and takes from them subjects on which they alone could legislate."¹³⁹ That complaint cannot easily be translated into Supreme Court doctrine. At best, it is an appeal to the idea of inviolable areas of state sovereignty, which the Court pursued for nine years following *Usery* but abandoned in *Garcia*.¹⁴⁰

Another strand of argument was that the Act impermissibly sought to create social, rather than civil, equality.¹⁴¹ This appeals to

¹³⁶ See, e.g., 2 CONG. REC. 1874 (Dec. 19, 1873) (statement of Rep. Lawrence) (describing the case of William Smith, "expelled from a railroad-car in one of the Southern States for no reason except his color, and . . . unable as yet to get any redress").

¹³⁷ See, e.g., 2 CONG. REC. 414 (Jan. 6, 1874) (statement of Rep. Lawrence) (noting the centrality of "the idea that if a State omits or neglects to secure the enforcement of equal rights, that it 'denies' the equal protection of the laws within the meaning of the fourteenth amendment"); *id.* (noting that "[t]he power to secure equal civil rights by 'appropriate legislation' is an express power; and Congress, therefore, is the exclusive judge of the proper means to employ" (citing *McCulloch*)); 3 CONG. REC. 940 (Feb. 3, 1875) (statement of Sen. Butler) (noting that "there are portions of the country where there is not any law [that] can be enforced in favor of a colored man"); *id.* ("we put the case in the United States courts where the man is likely to get justice"). For further development of the "state neglect" concept, see Brandwein, *supra* note 116, at 275–76.

¹³⁸ See 2 CONG. REC. 3454 (Apr. 29, 1874) (remarks of Sen. Frelinghuysen) ("As to the civil remedies . . . as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights.").

¹³⁹ See, e.g., 2 CONG. REC. 376 (Jan. 5, 1874) (statement of Rep. Harris).

¹⁴⁰ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

¹⁴¹ 2 CONG. REC. 379 (Jan. 5, 1874) (statement of Rep. Stephens) ("[T]here is a vast difference between civil rights proper and some of those social rights claimed by this bill.").

the distinction between civil, social, and political rights. But that distinction, though present in some Reconstruction-era Supreme Court decisions, was neither particularly clear nor particularly stable.¹⁴² In any event, it would not be available to a modern court, since the distinction has faded from our jurisprudence.

Some of the opponents' arguments are frankly counterproductive from the modern perspective. Representative Harris went on to urge that members of Congress were "bound to respect [the] prejudice . . . that the colored man was inferior to the white."¹⁴³ Representative Ransier of South Carolina, one of a handful of African Americans in the 43rd Congress, interjected, "I deny that."¹⁴⁴ Harris responded, "I do not allow you to interrupt me. Sit down; I am talking to white men; I am talking to gentlemen."¹⁴⁵ The *Morrison* majority did not, presumably, wish to invoke this strand of the opponents' thinking.

The opponents did, however, also offer a theory much like the one the *Morrison* Court adopted, denying the direct regulation element of the state neglect theory. Congress's enforcement power, the opponents argued, was drastically limited. It could respond to state violations of the Fourteenth Amendment only by giving courts the opportunity to pronounce them void. "The proper remedies," Representative Stephens argued, were "nothing but the judgments of courts . . . declaring any State act in violation of the prohibitions to be null and of no effect"¹⁴⁶ Probably, on this theory, Congress could not even regulate state actors. Certainly it could not impose obligations on private parties.

In the Houses of Congress, then, the debate over the Civil Rights Act contained both the theory that the United States would offer in defense of the Violence Against Women Act's civil rights remedy and

¹⁴² See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 128, 156–57 (1999). The Act's supporters emphatically denied the charge, which suggests the indeterminacy of the taxonomy. See 2 CONG. REC. 427 (Jan. 6, 1874) (statement of Rep. Stowell) (stating that "[t]here is no question of social equality in this bill").

¹⁴³ 2 CONG. REC. 377 (Jan. 5, 1874) (statement of Rep. Harris).

¹⁴⁴ *Id.* at 377 (statement of Rep. Ransier).

¹⁴⁵ *Id.* at 377 (statement of Rep. Harris).

¹⁴⁶ *Id.* at 380 (statement of Rep. Stephens). See also 2 CONG. REC. 4162–63 (May 22, 1874) (statement of Sen. Kelly) (arguing that the enforcement power "was simply giving the authority to Congress to make a case and present it so that it might be taken to the highest court of the United States by appeal from the State courts if there should be any attempt to enforce any obnoxious law of a State"). Stephens, it is worth noting, served as Vice President of the Confederacy and is perhaps best known for delivering the "Corner Stone Speech," in which he described the Confederate government as founded "upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race is his natural and normal condition." Alexander H. Stephens, *The Corner Stone Speech* (Mar. 21, 1861), available at <https://web.archive.org/web/20130822142313/http://teachingamericanhistory.org/library/document/cornerstone-speech/>.

the theory that Morrison would use to reject it. But what about the Supreme Court? There, interestingly, the story of the Civil Rights Act took a quite different turn.

B. Arguments in the Court

The *Civil Rights Cases* consolidated five different cases featuring the Civil Rights Act of 1875. Four were prosecutions against individuals for denying access to inns or theaters.¹⁴⁷ One was a suit by a husband and wife against a railroad for denying the wife a seat in the ladies' car.¹⁴⁸ The main issue in all of them, as the Court noted, was the constitutionality of the Act.¹⁴⁹

Some of the cases reached the Supreme Court in October Term 1879, and Attorney General Charles Devens submitted a brief for the United States.¹⁵⁰ But the cases were delayed for rebriefing, and Solicitor General S.F. Phillips submitted another brief for the United States in October Term 1882.¹⁵¹

Neither of these briefs presented either element of the state neglect theory. The Devens brief is a surprisingly lackluster affair. It opens with a brief allusion to the Commerce Clause, noting that inns are "essential instrumentalities of commerce . . . which it was the province of the United States to regulate even prior to the recent amendments to the Constitution."¹⁵² The argument that follows is unfocused even by the standards of nineteenth-century briefing and consists largely of quotation and paraphrase of the congressional debates.¹⁵³ Its main theme is that businesses conducted pursuant to a

¹⁴⁷ The Civil Rights Cases, 109 U.S. 3, 4 (1883).

¹⁴⁸ *Id.* at 4–5.

¹⁴⁹ *Id.* at 8–9.

¹⁵⁰ Brief for the United States at 21, The Civil Rights Cases, 109 U.S. 3 (1883) (Nos. 1, 2, 4) [hereinafter Devens Brief].

¹⁵¹ Brief for the United States at 25, The Civil Rights Cases, 109 U.S. 3 (1883) (Nos. 1, 2, 3, 204) [hereinafter Phillips Brief].

¹⁵² Devens Brief, *supra* note 150, at 9.

¹⁵³ In the course of one such passage, paraphrasing Senator Frelinghuysen's remarks, the brief offers an explanation as to why direct regulation of private parties is an appropriate remedy: "We cannot proceed against or deal with the States to procure needed legislation; nor compel action by the grand juries of a State. We must necessarily prosecute directly those offenders who deny, on account of race or color, that equality which the Constitution guarantees." *Id.* at 11. This point is part of the state neglect theory, but it omits the crucial explanation of what constitutional violation (state failure to enforce its laws equally) is being remedied. *Cf.* 2 CONG. REC. 3454 (Apr. 29, 1874) (remarks of Sen. Frelinghuysen).

And now, Mr. President, what is the remedy? How is the United States, how are we, to protect the privileges of citizens of the United States in the States? We cannot deal with the States or with their officials to compel proper legislation and its enforcement; we can only deal with the offenders who violate the privileges and immunities of citizens of the United States.

license from the state are “quasi public in [their] nature” and therefore susceptible to regulation under Section 5.¹⁵⁴ In modern terms, the claim is that businesses operating under state license, or at least common carriers with such licenses, are state actors. The brief closes with five solid pages of congressional remarks and an oddly anticlimactic final sentence: “It is thought unnecessary to try to add anything to what was said in support of the law in question.”¹⁵⁵

The Phillips brief offers a more doctrinally focused presentation but essentially the same substance. The defendants, it argues, “did not act in a capacity exclusively private, but in one devoted to a *public use, and so affected with a public [State] interest.*”¹⁵⁶ “It is submitted,” the brief continues, “that if State law appropriates inns to public use, then innkeepers, being persons invested with the duty of distributing this use, possess to a certain extent the character of public officers, *i.e.*, officers or agents of the State.”¹⁵⁷

Nor is a word about duty to protect or regulation of private parties to be found in the opponents’ briefs.¹⁵⁸ None of the individual defendants participated at the Supreme Court level, and the railroad, which did submit a brief, focused its argument on the contention that the conductor had refused to seat the wife because he believed her to be a prostitute.¹⁵⁹ The state neglect theory was simply never presented to the Supreme Court.

C. The Decision

Since the state neglect theory was not present in the briefs, it should not be surprising that it did not feature in the Court’s decision, either. The Court engaged, or at least rejected, the argument that the government did offer, that innkeepers and similar common

¹⁵⁴ Devens Brief, *supra* note 150, at 9.

¹⁵⁵ *Id.* at 21.

¹⁵⁶ Phillips Brief, *supra* note 151, at 19 (alteration in original). Again, parts of the state neglect theory may be found implicit in the brief. In summarizing the state of the law, the brief notes that “[t]he fourteenth amendment expresses prohibitions (and consequently implies corresponding positive immunities), limiting *state action only*, including in such action, however, action by all State agencies,—executive, legislative, and judicial,—of whatsoever degree.” *Id.* at 15. It also asserts that “the legislature, in dealing about *institutions, or action forbidden to States*, can forbid any action by private persons *which may reasonably be apprehended as tending to such institution or action.*” *Id.* at 19. The brief does not, however, identify a failure to enforce public accommodation laws as a constitutional violation warranting a remedy.

¹⁵⁷ *Id.* at 19.

¹⁵⁸ *See, e.g.*, Brief for Memphis & Charleston Railroad Co. at 2–5, *The Civil Rights Cases*, 109 U.S. 3 (1883) (No. 28) (arguing only that the Act did not apply to the defendant’s conduct).

¹⁵⁹ *See id.* at 2.

carriers should be deemed agents of the State.¹⁶⁰ If they were not state actors, then, as the Court noted, there was nothing in the text of the Civil Rights Act that made any mention of state action.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences [sic], and shall be prosecuted and punished by proceedings in the courts of the United States.¹⁶¹

The problem with the Act, in short, was the one that Senator Thurman had suggested during the debate. “There is not one single sentence in the whole bill which is leveled against any law made or enforced by a State.”¹⁶² As far as the majority knew (or so it said), state laws entitled all persons to equal access, and state officers enforced those laws.¹⁶³ There was no violation of the Fourteenth Amendment in response to which Congress could deploy its Section 5 enforcement power.¹⁶⁴

Justice Harlan, in dissent, offered several different theories as to why the Civil Rights Act fell within congressional enforcement power. He argued that the precedent of *Prigg v. Pennsylvania* and the prewar passage of the Fugitive Slave Acts, which regulated private parties, showed that Congress could reach individuals when legislating to

¹⁶⁰ The Court’s opinion clearly indicates that common carriers are not state actors, but it does not explain why the government (and Justice Harlan’s dissent) are wrong. See *The Civil Rights Cases*, 109 U.S. 3, 24–25 (1883).

¹⁶¹ *Id.* at 14.

¹⁶² 2 CONG. REC. 4085 (May 20, 1874) (statement of Sen. Thurman).

¹⁶³ See *The Civil Rights Cases*, 109 U.S. at 25 (“Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.”). This was less true than the majority supposed, as the congressional debates showed. See *supra* text accompanying notes 135–36.

¹⁶⁴ See *The Civil Rights Cases*, 109 U.S. at 14 (noting the law made “no reference whatever to any . . . violation of the Fourteenth Amendment on the part of the States”). *United States v. Harris*, 106 U.S. 629, 639 (1883), likewise turns on the failure of Congress to identify any constitutional violation to which it was responding.

The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; . . . when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, *recognize and protect the rights of all persons*, the amendment imposes no duty and confers no power upon Congress. . . .

As, therefore, the section of the law under consideration is directed *exclusively* against the action of private persons, *without reference* to the laws of the State *or their administration* by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment.

Harris, 106 U.S. at 639–40 (emphasis added).

protect constitutional rights.¹⁶⁵ He characterized discrimination in places of public accommodation as one of the badges and incidents of slavery, which Congress could eradicate under the Thirteenth Amendment.¹⁶⁶ Turning to the Fourteenth Amendment, he pointed out that the Citizenship Clause of Section 1 had no state action requirement.¹⁶⁷ And he endorsed the government's claim that common carriers were state actors.¹⁶⁸ He did not, however, make any mention of the state neglect theory.¹⁶⁹

The majority's failure to mention the state neglect theory of course does not amount to rejection of it, and indeed there are several passages in the majority opinion that seem consistent with the theory and certainly at least the duty to protect element. Justice Bradley faults the Act for applying "equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment"¹⁷⁰—suggesting that a failure of enforcement might trigger congressional authority.¹⁷¹ And state neglect features more prom-

¹⁶⁵ See *The Civil Rights Cases*, 109 U.S. at 28–30 (Harlan, J., dissenting).

¹⁶⁶ See *id.* at 35–40.

¹⁶⁷ See *id.* at 46–47.

¹⁶⁸ See *id.* at 58–59.

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation.

Id. This argument proceeds by taking the public/private line the Court had drawn to distinguish private enterprises from those "affected with a public interest" and hence subject to greater regulation, see *Munn v. Illinois*, 94 U.S. 113, 130 (1877), and using it to set the boundaries of state action.

¹⁶⁹ The closest he comes is a passage suggesting that Congress has the latitude to regulate private parties if it deems such a remedy necessary, i.e., endorsing what I have called the direct regulation element.

Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress appropriate and entirely sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say that legislation is appropriate—that is—best adapted to the end to be attained.

The Civil Rights Cases, 109 U.S. at 51 (Harlan, J., dissenting).

¹⁷⁰ *Id.* at 14 (majority opinion).

¹⁷¹ Other passages are equally suggestive. Justice Bradley defines enforcement as the power to enact "appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous," *id.* at 11—a definition that would seem to include the provision of an alternate forum and cause of action as a means to render innocuous a state's failure to enforce its own laws in its own courts. And he distinguishes private from state action on the grounds that:

The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State,

inently in other Reconstruction-era legal materials, including an opinion by Justice Bradley on circuit in *United States v. Cruikshank*.

When the right of citizens of the United States to vote is denied or abridged by a state on account of their race, color, or previous condition of servitude, either by withholding the right itself *or the remedies which are given to other citizens to enforce it*, then, undoubtedly, congress has the power to pass laws *to directly enforce the right and punish individuals for its violation*, because that would be the only appropriate and efficient mode of enforcing the amendment. Congress cannot, with any propriety, or to any good purpose, pass laws forbidding the state legislature to deny or abridge the right, nor declaring void any state legislation adopted for that end. The prohibition is already in the constitutional amendment, and laws in violation of it are absolutely void by virtue of that prohibition. So far as relates to rendering null and void the obnoxious law, it is done already; but that does not help the person entitled to vote. By the supposition the state law gives him no remedy and no redress. It is clear, therefore, that *the only practical way in which congress can enforce the amendment is by itself giving a remedy and giving redress*.¹⁷²

United States v. Harris is the other case on which *Morrison* relied for its rule of private party immunity to Section 5 legislation.¹⁷³ I have noted already that *Harris* enunciates no such rule; like the *Civil Rights Cases*, it simply affirms the necessity of some constitutional violation as a trigger for congressional enforcement power.¹⁷⁴ Coincidentally, just as Justice Bradley, the author of the *Civil Rights Cases*, gave a lengthy statement of the state neglect theory on circuit, so too did Justice Wood, the author of *Harris*. In *United States v. Hall*,¹⁷⁵ he wrote:

From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the funda-

or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.

Id. at 17.

Here, too, the implication seems to be that a state failure to vindicate the rights would amount to sanctioning their invasion and constitute state action triggering the enforcement power.

¹⁷² *United States v. Cruikshank*, 25 F. Cas. 707, 713 (C.C.D. La. 1874) (No. 14,896), *aff'd*, 92 U.S. 542 (1875) (emphasis added). It is worth noting that Justice Bradley applied a different analysis to enforcement of the Fourteenth and Fifteenth Amendments, on the grounds that the Fifteenth created a new right while the Fourteenth merely guaranteed preexisting rights. See PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 98–101 (2011). That allowed him to conclude, as he did later in the opinion, that Congress could act to enforce the Fifteenth Amendment voting right even without a showing of state violation. See *id.* at 100. The quoted portion of his analysis of the Fifteenth Amendment, however, should apply equally to the Fourteenth, as it concerns the proper form of enforcement legislation if states *do* violate the Amendment.

¹⁷³ See *United States v. Morrison*, 528 U.S. 598, 621 (2000).

¹⁷⁴ See *supra* note 164.

¹⁷⁵ 26 F. Cas. 79, 81–82 (C.C.S.D. Ala. 1871) (No. 15,282). Wood was a circuit judge at the time; he was elevated to the Supreme Court by President Hayes in 1880.

mental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. The extent to which congress shall exercise this power must depend on its discretion in view of the circumstances of each case. If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must be remembered that it is for the purpose of protecting federal rights, and these must be protected even though it interfere with state laws or the administration of state laws.¹⁷⁶

In sum, the state neglect theory was not at issue in the *Civil Rights Cases*. It can be pieced together from the congressional debates, but it was not a main theme. There are scattered statements that seem consistent with it in the government's briefs, but it was never offered as a coherent argument. And neither the majority nor the dissent discussed it explicitly. The idea that the *Civil Rights Cases* announced a bright-line rule against regulating private parties under the Section 5 power is entirely mistaken: to the extent that the *Civil Rights Cases* shed any light on state neglect, they support it. So too, much more strongly, do earlier circuit opinions by the authors of the *Civil Rights Cases* and *Harris*. State neglect was a live theory of congressional power—though perhaps not the most prominent one—in the legal community during, and even shortly after, Reconstruction.¹⁷⁷ The next section explores its subsequent fate.¹⁷⁸

¹⁷⁶ *Id.* at 81–82; see also *United States v. Given*, 25 F. Cas. 1324, 1328 (C.C.D. Del. 1873) (No. 15,210) (Strong, J., on circuit) (“It is . . . an exploded heresy that the national government cannot reach all individuals in the states.”).

¹⁷⁷ See Brandwein, *supra* note 116, at 287–302 (discussing post-Reconstruction congressional debates and Supreme Court cases mentioning the state neglect theory).

¹⁷⁸ Pamela Brandwein, in a series of articles and a 2011 book, explores the state neglect concept during Reconstruction and thereafter. See BRANDWEIN, *supra* note 172; Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the “State Action” Cases of the Waite*

D. The Fate of State Neglect

The state neglect theory, I have said, has two elements. First is the duty to protect: the idea that the Equal Protection Clause obliges states to enforce their laws for the benefit of all persons equally. The second element is direct regulation: the thesis that if a state violates its duty to protect, direct regulation of private parties may be an appropriate enforcement measure.

These two elements are connected in the following way. Direct regulation might seem *prima facie* implausible. If private parties cannot violate the Equal Protection Clause, how can Congress claim to “enforce” it by regulating them? But as we have seen, it is the only remotely plausible means of remedying a state’s violation of its duty to protect. If direct regulation is not allowed, there can be no enforcement at all. If the duty to protect is seen as central to the Equal Protection Clause, a total lack of enforcement is intolerable, and direct regulation, as the only option, must be appropriate. If, on the other hand, the duty to protect is seen as peripheral to equal protection, a complete inability to enforce might be accepted, and the rejection of direct regulation gains plausibility. Thus, as the duty to protect comes to be seen as less central to the Equal Protection Clause, direct regulation likewise loses appeal.

This migration from center to periphery is exactly what happened to the duty to protect.¹⁷⁹ It was never rejected—indeed, whenever it addressed the question, the Supreme Court affirmed that a selective failure of enforcement would violate the Equal Protection Clause.¹⁸⁰ But the clause itself progressively came to be seen as concerned more with classification than with failure to protect. As Christopher Green observes, the pattern can be seen clearly in a series of opinions by Justice Field: in each, he begins with a nod toward the duty to protect but then shifts focus to an anticlassification perspective.¹⁸¹ And nowadays, of course, our high-profile equal protection cases—think *Brown*, *Loving*, *Grutter*, *Parents Involved*, and so on—are all

Court, 41 LAW & SOC’Y REV. 343, 350–65 (2007) [hereinafter Brandwein, *Abandonment*]; Brandwein, *supra* note 116; Brandwein, *supra* note 10. She does an excellent job of finding it within Reconstruction-era judicial opinions and legal thought. She does not, however, seem to appreciate the extent to which it persisted in the 1960s and the central role it played in the *Morrison* litigation. See *infra* note 204 and accompanying text.

¹⁷⁹ See generally Green, *Application*, *supra* note 118, at 278–91 (describing the Court’s shift from a “duty-to-protect” to anticlassification jurisprudential scheme).

¹⁸⁰ See, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989).

¹⁸¹ See Green, *Application*, *supra* note 118, at 285–88 (describing Field’s opinions in *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); *R.R. Tax Cases*, 13 F. 722, 733 (C.C. Cal. 1882), *error dismissed sub nom. San Mateo Cnty. v. S. Pac. Ry. Co.*, 116 U.S. 138 (1885); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C. Cal. 1879) (No. 6,546); *In re Ah Fong*, 1 F. Cas. 213, 218 (C.C. Cal. 1874) (No. 102)).

about the permissibility of different kinds of classifications.¹⁸² Correlatively, as I have said, direct regulation of private parties came to seem a less plausible method of enforcement under Section 5.

Why did this happen? There are several different explanations, each of which paints the Court in a different light.¹⁸³ None of them is likely the sole and exclusive truth; each probably played a role. First, the view that is least flattering to the Court: anticlassification might have been the easy way out.¹⁸⁴ Implementing the duty to protect is demanding for courts and intrusive against states. It requires a court to consider equality issues from a substantive and practical perspective, to consider private action and the state's response, and, if it is to grant a remedy, to order officials to act. Striking down classifications, by contrast, requires courts to consider equality in only a formal and legal sense, to look only at state laws or official action, and only to forbid certain acts as a remedy. It is entirely consistent with a regime in which an entrenched caste system persists through private action and state acquiescence. Substituting anticlassification for the duty to protect allowed the Court to claim victory in cases like *Strauder*¹⁸⁵ while simultaneously participating in the general retreat from Reconstruction.¹⁸⁶

Second, more charitably, it could be that the Court was trying to preserve what seemed most valuable. The importance of establishing an anticlassification rule—or more precisely, a rule against invidious classifications¹⁸⁷—might have driven the Court to stress that aspect of equal protection at the expense of the duty to protect. (On this theory, blame for the eclipse of the duty to protect lies with the

¹⁸² *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 709–11 (2007) (addressing classification based on race); *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003) (same); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (same); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1953) (same).

¹⁸³ See generally BRANDWEIN, *supra* note 172, at 168–70 (offering different possible explanations for the decision in the *Civil Rights Cases*).

¹⁸⁴ See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1475 (2004) (describing the Court's varied use of anticlassification since *Brown* to mask other constitutional concerns).

¹⁸⁵ See *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879).

¹⁸⁶ See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 14 (1883) (striking down Civil Rights Act of 1875 despite widespread racial discrimination); *United States v. Harris*, 106 U.S. 629, 639 (1883) (same for Civil Rights Act of 1871).

¹⁸⁷ From its earliest cases, and consistently thereafter, the Court announced that the Equal Protection Clause did not forbid all classifications, nor all classifications based on certain characteristics such as race, but rather all invidious classifications. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) (“Statutes create many classifications which do not deny equal protection; it is only ‘invidious discrimination’ which offends the Constitution.”); *Barbier v. Connolly*, 113 U.S. 27, 30–32 (1885) (upholding legislation after finding “no invidious discrimination”). A more elaborate description of the forbidden classifications can be found in *Strauder*, 100 U.S. at 306, 308 (focusing on “dislike,” “jealousy,” and attempts to attach a “brand” of “inferiority”).

Slaughter-House Cases, which read the anticlassification rule out of the Privileges or Immunities Clause, forcing Equal Protection to shoulder the load.¹⁸⁸)

Last, regardless of how committed the Court was to racial equality, expanding federal commerce power made direct regulation under Section 5 less necessary.¹⁸⁹ After the New Deal, the commerce power seemed essentially boundless, and the theory of state neglect was not needed to enable the federal government to regulate private discrimination in places of public accommodation.

That may seem obvious in retrospect, and indeed, when the Civil Rights Act of 1964 was challenged, the government relied solely on the Commerce Clause for justification.¹⁹⁰ But that strategic choice was not a foregone conclusion, and in the years before the Act was passed, lawyers and judges grappled with the state action doctrine and the role of state neglect.¹⁹¹

In the early 1960s, the Supreme Court was confronted with a series of sit-in cases.¹⁹² African Americans protesting segregation went to privately owned segregated restaurants or lunch counters, requesting service and refusing to leave. Arrested under state trespass statutes, they challenged their convictions on equal protection grounds.¹⁹³

These equal protection theories faced a state action hurdle. The state certainly acts when it makes or enforces a trespass law, but it acts in a race-neutral way: it allows property owners to exclude others for

¹⁸⁸ See Green, *Application*, *supra* note 118, at 222; Roosevelt, *supra* note 48, at 71–73. Indeed, it is notable that Justice Field, whose early opinions show the shift from the duty to protect to anticlassification, is the *Slaughter-House* dissenter who argued for an anticlassification reading of Privileges or Immunities. See *The Slaughter-House Cases*, 83 U.S. 36, 118 (1873) (Field, J., dissenting). His evident belief in the importance of an anticlassification norm may explain his efforts to inject it into the Equal Protection Clause, even at the expense of the duty to protect.

¹⁸⁹ See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964).

¹⁹⁰ See Brief for the United States at 15, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), 1964 WL 95342 (noting that “the government has proceeded throughout this litigation upon the theory that the constitutionality of Title II . . . may be sustained under the commerce clause without reference to the additional power conferred by Section 5 of the Fourteenth Amendment”).

¹⁹¹ In arguing that state neglect remained a viable theory in the minds of judges and scholars throughout the twentieth century, I differ from Brandwein, who describes it as a lost theory in need of recovery. See BRANDWEIN, *supra* note 172, at 240–44. The difference matters for the assessment of *Morrison*. If Brandwein is right, the *Morrison* Court can hardly be faulted for not dredging up a concept that everyone else had forgotten, though recovering it might, in Brandwein’s words, “provide a rejoinder” to *Morrison*. *Id.* at 243. If, on the other hand, the concept was well known and explicitly presented to the *Morrison* Court (as I will show it was), matters appear somewhat different.

¹⁹² See Brad Ervin, Note, *Result or Reason: The Supreme Court and the Sit-In Cases*, 93 VA. L. REV. 181, 182–85 (2007).

¹⁹³ For discussion of the sit-in cases, see generally *id.*; Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 272–82 (1991).

any reason, and it enforces the right to exclude at the request of all comers. Consequently, finding a constitutional violation required some modification to the standard state action analysis.¹⁹⁴

Every one of the Justices to hear the sit-in cases appears to have wanted to reverse the demonstrators' convictions, but not every Justice was willing to extend the state action theory to cover the case in which a private party invokes a neutral law for a race-based reason.¹⁹⁵ Justice Douglas, writing at first only for himself but later gaining additional votes, wanted to follow Justice Harlan's dissent in the *Civil Rights Cases* to rule that the proprietors of places of public accommodation could be deemed state actors.¹⁹⁶

State neglect offered a more moderate path to a similar result. In *Bell v. Maryland*,¹⁹⁷ Justice Goldberg wrote a concurring opinion offering this theory.¹⁹⁸ He presented it as consistent with the *Civil Rights Cases*, noting that Bradley had relied on the fact that all states "so far as we are aware" had and enforced common carrier laws.¹⁹⁹ "This assumption," he continued, "whatever its validity at the time of the 1883 decision, has proved to be unfounded."²⁰⁰ In consequence, he believed, states were violating the Equal Protection Clause—in his view and also in Bradley's.

A State applying its statutory or common law to deny rather than protect the right of access to public accommodations has clearly made the assumption of the opinion in the *Civil Rights Cases* inapplicable and has, as the author of that opinion would himself have recognized, denied the constitutionally intended equal protection.²⁰¹

Goldberg's opinion was joined by Chief Justice Warren, giving state neglect two votes at the Supreme Court level.²⁰² That is not a majority, to be sure, but it certainly indicates that the theory was alive and taken seriously at the highest level of the judiciary.

Scholars were likewise engaged. One month after *Bell* was decided, the *Yale Law Journal* published an article by Laurent Frantz entitled "Congressional Power to Enforce the Fourteenth Amendment

¹⁹⁴ See Ervin, *supra* note 192, at 186 (noting the Justices in the sit-in cases considered "leaning toward a 'broad' interpretation of state action").

¹⁹⁵ See *id.*

¹⁹⁶ See *Garner v. Louisiana*, 368 U.S. 157, 177, 181–83 (1961) (Douglas, J., concurring).
¹⁹⁷ 378 U.S. 226 (1964).

¹⁹⁸ *Id.* at 286–318 (Goldberg, J., concurring).

¹⁹⁹ *Id.* at 306–07.

²⁰⁰ *Id.* at 307.

²⁰¹ *Id.* at 308–09.

²⁰² See *id.* at 286. Justice Douglas did not join the state neglect part of Goldberg's concurrence; he wanted to go farther and hold that no state action was needed. See *Garner*, 368 U.S. at 181–83. Justice Brennan wrote the majority opinion in *Bell*, which avoided the constitutional question. See *Bell*, 378 U.S. at 227.

Against Private Acts.”²⁰³ Frantz offered a comprehensive statement of the state neglect theory, arguing, as Goldberg had, that this was consistent with Justice Bradley’s views in the *Civil Rights Cases*.²⁰⁴ Other academic publications likewise articulated the concept of state neglect and attributed it to Bradley.²⁰⁵

However, as noted, the federal government did not press this argument before the Supreme Court. It argued that the provisions of the Civil Rights Act of 1964 outlawing racial discrimination in places of public accommodation could be sustained under the commerce power.²⁰⁶ The Supreme Court accepted that claim, and its willingness to uphold antidiscrimination legislation on Commerce Clause grounds made the Section 5 justification seem unnecessary.²⁰⁷

For decades after the Civil Rights–era litigation, the Supreme Court did not strike down a single law as exceeding Congress’s power

²⁰³ 73 YALE L.J. 1353 (1964).

²⁰⁴ See *id.* at 1377–81. Brandwein, consistent with her theory that state neglect was forgotten in the twentieth century, describes Frantz’s exposition of state neglect as “skeletal” and the article itself as “underappreciated.” See Brandwein, *Abandonment*, *supra* note 178, at 346 n.5. Both these judgments are subjective, but the conclusions seem odd. Frantz sets out the theory in five-point form in his opening section—as elaborate a presentation as I have ever seen—and then spends thirty-four journal pages supporting the various elements with close analysis of the Reconstruction cases. See Frantz, *supra* note 203, at 1359–84. This analysis includes an extended quotation from Justice Bradley’s circuit opinion in *Cruikshank*. See *id.* at 1367–68. Oddly, eleven pages after her dismissal of Frantz, Brandwein quotes the same passage and comments, “I have never seen this passage quoted in the Reconstruction legal literature” Brandwein, *Abandonment*, *supra* note 178, at 357. As for the appreciation, Frantz was cited in two major Supreme Court Section 5 cases: *United States v. Guest*, 383 U.S. 745, 783 n.7 (1966) (Brennan, J., concurring), and *Katzenbach v. McClung*, 384 U.S. 641, 648 n.7 (1966), as well as twelve other federal court decisions, one of which quoted him extensively and concluded, “On the basis of the current, and I believe more accurate, construction of the Fourteenth Amendment, I hold that Congress had the power under § 5 of the Fourteenth Amendment to reach purely private acts of racial discrimination” *Pennsylvania v. Local Union No. 542*, 347 F. Supp. 268, 293–94 (E.D. Pa. 1972) (Higginbotham, J.). And, as the text describes, Frantz’s article formed the basis for the government’s Section 5 argument in *Morrison*. See *infra* text accompanying notes 213–14.

²⁰⁵ See, e.g., John Silard, *A Constitutional Forecast: Demise of the “State Action” Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 857 (1966) (“Careful reading of the 1883 decision [in the *Civil Rights Cases*], especially its repeated dictum references to the different issues which would arise should states *fail to protect* the Negro, discloses that its narrow holding was a justifiable application of the equal protection norm.” (citation omitted)).

²⁰⁶ See Brief for the United States at 15, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), 1964 WL 95342.

²⁰⁷ Justice Douglas did write separately in *Heart of Atlanta* to urge a Section 5 rationale. See *Heart of Atlanta Motel*, 379 U.S. at 280 (Douglas, J., concurring) (“I would prefer to rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment”). As in the sit-in cases, he wanted to adopt Justice Harlan’s dissent in the *Civil Rights Cases* and extend the category of state actors to include places of public accommodation. *Id.*

under the Commerce Clause.²⁰⁸ Courts, including the Supreme Court, did accept the duty to protect reading of equal protection.²⁰⁹ But with the federal commerce power apparently plenary, there was no need to think about the implications of this reading for Section 5.

Then came *Lopez*. In 1995, for the first time in sixty years, the Court found that a law had gone beyond the limits of the commerce power.²¹⁰ Intrastate noncommercial activity, it suggested, could not be regulated under the Commerce Clause, at least not without a strong showing of an effect on interstate commerce.²¹¹ The Violence Against Women Act's civil rights remedy now clearly looked vulnerable, for it was regulating just such activity. Congress had, of course, amassed a substantial record to show the effects of gender-motivated violence on interstate commerce, and the government devoted much of its briefing to the Commerce Clause argument.²¹² But that argument was far from a clear winner and so the Section 5 rationale was again in play.

Before both the Fourth Circuit and the Supreme Court, the United States and Christy Brzonkala offered the state neglect theory. At the court of appeals level, the government's brief relied on Frantz so heavily that the majority opinion rebuked them, in a scathing footnote, for "cit[ing] this journal article twice as often as it cites the Supreme Court's decision in the *Civil Rights Cases*."²¹³ Apparently chastened, they did not cite Frantz in their Supreme Court brief, but the theory was the same. The *Civil Rights Cases*, the government claimed, dealt with a situation where no constitutional violation had been identified—not the quite different case of congressional re-

²⁰⁸ See, e.g., David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 888 (2009) (noting that *Lopez* marked "the first time in sixty years" that the Court had struck down a statute as exceeding the commerce power).

²⁰⁹ See, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("Discrimination in providing protection against private violence could of course violate the equal protection clause of the Fourteenth Amendment."). Academics also offered this theory in the years leading up to *Morrison*, frequently attributing it to Bradley and the *Civil Rights Cases*. See, e.g., Michael G. Collins, *Justice Bradley's Civil Rights Odyssey Revisited*, 70 TUL. L. REV. 1979, 1997 n.98 (1996) (listing such articles).

²¹⁰ See Strauss, *supra* note 208, at 888.

²¹¹ See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (noting that intrastate activity may be commercial activity within Congress's Commerce Clause power, but the instant regulation reached noncommercial activity).

²¹² See Brief for the United States at 20–32, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99–5 and 99–29); see also *id.* at 5–11 (discussing Congress's findings).

²¹³ Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 880 n.30 (4th Cir. 1999). The court took special exception, apparently, to Frantz's description of his reading of the *Civil Rights Cases* as "subtle" and "complex," since it singled out that passage for mockery. See *id.*

sponse to an identified violation.²¹⁴ When a violation did exist, regulation of private parties might be an appropriate remedy.²¹⁵

Morrison, of course, rejected this theory. The Court's hands were tied by precedent, Rehnquist suggested. *Morrison* was "controlled by" the *Civil Rights Cases* and their bright-line rule against regulating private parties.²¹⁶

The preceding sections have shown that this reading of the *Civil Rights Cases* is incorrect. They have shown something more, too—they have shown that its incorrectness was pointed out repeatedly through the twentieth century and quite explicitly to the *Morrison* Court. State neglect was not a lost theory in need of recovery; it was a perfectly vital theory that was killed by *Morrison*.²¹⁷ If we are looking for the wrong turn in our Section 5 jurisprudence, what we need to reappraise is not so much the *Civil Rights Cases* or their twentieth-century reception as *Morrison*. The following Part undertakes that reappraisal. It compares the Court's performance in the *Civil Rights Cases* to its performance in *Morrison*, making the case that the latter is significantly worse.

IV

ASSESSING THE *CIVIL RIGHTS CASES* AND *MORRISON*

A. The *Civil Rights Cases*

There is a general view that the *Civil Rights Cases* were not the Court's finest hour. Their constitutional constructions "reflected the prejudices of their time," writes Jack Balkin, and it is difficult to look back on parts of Justice Bradley's opinion without "the same sense of shock and embarrassment that we associate with the language of *Plessy v. Ferguson*."²¹⁸

It is certainly true that parts of the decision are offensive, and that as a whole, it did not advance racial equality.²¹⁹ And it is also true that

²¹⁴ See Brief for the United States at 46–48, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99–5 and 99–29), 1999 WL 1037259; Reply Brief for the United States at 14–16, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99–5 and 99–29), 1999 WL 1276924.

²¹⁵ See Reply Brief for the United States at 9–10, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99–5 and 99–29) (noting that, in response to "a documented state failure to address a national problem," the Act "enables victims of gender-motivated violence to seek damages and other relief against their assailants").

²¹⁶ See *Morrison*, 529 U.S. at 602.

²¹⁷ At least, the direct regulation element was killed. Even *Morrison* accepts the duty to protect element. See *id.* at 619–20.

²¹⁸ Balkin, *supra* note 92, at 1834; see also, e.g., Ugarte, *supra* note 93, at 484 ("A close examination of the decision in the *Civil Rights Cases*, together with the social and political history surrounding it, shows that the case should be of no greater moral authority than *Dred Scott* or *Plessy*." (citations omitted)).

²¹⁹ The most cringe-inducing lines are Bradley's statement that blacks at some point must "cease[] to be the special favorite of the laws." The *Civil Rights Cases*, 109 U.S. 3, 25 (1883). But they should not surprise us; this is what opponents of equality movements

the decision fit well with the Compromise of 1877.²²⁰ Federal troops withdrew from the southern states, and the federal judiciary likewise reduced its oversight. The Court removed the constraints of federal antidiscrimination law from private actors.²²¹

On the other hand, if we limit our focus to what the Court actually said about the Constitution and the enforcement power, the *Civil Rights Cases* do not look especially bad. The decision relies on three propositions: that proprietors of places of public accommodation are private actors; that private action, by itself, cannot violate the Fourteenth Amendment; and that Congress cannot use its enforcement power in the absence of an actual or threatened constitutional violation.²²² Each of these is solidly within the mainstream of modern constitutional thought.

The arguments on which the Court relied are not particularly surprising or outré. There are, of course, arguments in favor of the Civil Rights Act that it did not consider. State neglect is one of these, but it would have been surprising for Justice Bradley to consider a theory that neither the government nor Justice Harlan's dissent presented. Harlan did offer other arguments, rooted, for instance, in *Prigg v. Pennsylvania* and the Citizenship Clause, which Justice Bradley did not engage.²²³ But by failing to reject them, he allowed them to survive to fight another day. By 1883, Reconstruction—and indeed, the Civil Rights Act itself—were beyond the ability of the Court to save.²²⁴ The most charitable reading of the *Civil Rights Cases* would suggest that the Court bowed to political realities in striking down the Act while doing as little damage as it could to constitutional doctrine.²²⁵ That may be excessively generous, but it is fairly clear that the Court did not go out of its way to cut back on the federal enforcement power. It did not

always say, and they always look outrageous in retrospect if they lose. Opponents of antidiscrimination protection for gays and lesbians, for example, consistently argue that they are opposing “special rights.” See generally Samuel A. Marcossan, *The “Special Rights” Canard in the Debate over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 137 (1995) (exploring the concept of “special rights”).

²²⁰ See, e.g., C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877–1913*, at 216 (1971) (describing the *Civil Rights Cases* as the “juristic fulfillment of the Compromise of 1877”). Brandwein offers a more sympathetic reading. See BRANDWEIN, *supra* note 172, at 169–70.

²²¹ See Ugarte, *supra* note 93, at 483–84.

²²² See *The Civil Rights Cases*, 109 U.S. at 13–14, 24.

²²³ See, e.g., *id.* at 50 (using *Prigg* to argue Congress may “enforce and protect any right derived from or created by the national Constitution”).

²²⁴ See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 556 (1988) (noting that the Civil Rights Act was viewed as a “dead letter” even before the *Civil Rights Cases*).

²²⁵ Brandwein suggests this view at times. See BRANDWEIN, *supra* note 172, at 169 (arguing that Bradley “kept the concept [of state neglect] available . . . without putting the Court out in front of the political branches and thus without risking the Court’s influence”).

brazenly misrepresent prior cases. And it did not get out ahead of the political branches in pushing an anti-antidiscrimination agenda.

The *Morrison* Court, by contrast, did all of those things.

B. *Morrison*

Morrison has not been the subject of such widespread denunciation as the *Civil Rights Cases*. But let us try to consider Chief Justice Rehnquist's majority opinion comprehensively. First, the opinion is clearly driven by an intent to push back against Section 5 enforcement authority. Having announced the bright-line rule against using Section 5 to regulate private parties, *Morrison* could have stopped. Instead—unlike Justice Bradley's opinion—it went on to suggest other limits on the enforcement power.²²⁶ The civil rights remedy was suspect, it noted, because “it applies uniformly throughout the Nation.”²²⁷

Second, *Morrison*'s presentation of the *Civil Rights Cases* is nothing short of bizarre. It is one thing to read Bradley's opinion carelessly and to assume that the principle that the Fourteenth Amendment binds only state actors implies that the enforcement power is likewise limited. Some people seem to have done that—at least, it is relatively common to describe this reading as “conventional.”²²⁸ It is another to persist in that reading when the state neglect theory has been presented, as it was in the *Morrison* litigation.

Still, one might imaginably misread some of Bradley's language and fasten on that as decisively rejecting the state neglect theory. But *Morrison* did not do even this. Evidently accepting that the language of the opinion did not foreclose state neglect, it turned to the legislative history of the Act. The 39th Congress thought in terms of state neglect, *Morrison* argued, and so the Court must have rejected it²²⁹—never mind that the government did not make the argument; never

²²⁶ United States v. Morrison, 529 U.S. 598, 625–27 (2000).

²²⁷ *Id.* at 626. The principle that uniform laws are suspect could form the basis for another bait and switch, given that the Roberts Court has recently discovered a “fundamental principle of equal sovereignty” that renders suspect nonuniform enforcement legislation. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013) (quoting *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

²²⁸ It is actually surprisingly difficult to find pre-*Morrison* statements of this reading. Pamela Brandwein and Michael Collins both describe it as conventional. See BRANDWEIN, *supra* note 172, at 161 (describing the “conventional view” of the *Civil Rights Cases*, without citing examples); COLLINS, *supra* note 209, at 1997 & n.98 (describing the “conventional wisdom” surrounding the *Civil Rights Cases* while noting counterexamples). Both of them, however, also believe it is mistaken and, perhaps out of charity, neither identifies a specific example of the mistake. See BRANDWEIN, *supra* note 172, at 161 (noting there is an “obstacle” to the conventional view); COLLINS, *supra* note 209, at 2000–01 (arguing Justice Bradley continued to “endorse broad constructions of federal power, even when state ‘laws’ were not the sticking point” (citations omitted)).

²²⁹ See *Morrison*, 529 U.S. at 624–25.

mind that Bradley did not mention it; never mind that Bradley wrote repeatedly of a complete absence of state action in any form.

This is a very curious way of reading precedent. *Morrison* takes an issue that was not before the Court, about which no party or Justice said anything, and claims that the Court has (somehow) decided it because of scattered statements in the legislative history. The resort to legislative history suggests quite strongly that the *Morrison* majority did not believe the opinion itself resolved the issue. Is such a reach legitimate—can a later Court fairly read the *Civil Rights Cases* to reject a theory neither argued in the briefs nor mentioned in the opinion?

Interestingly, *Morrison* itself answers this question. Just before its unusual analysis of the *Civil Rights Cases*, *Morrison* considers *United States v. Guest*,²³⁰ which the government suggested had accepted the idea that the enforcement power could reach private parties.²³¹ In *Guest*, the Court upheld the prosecution of private individuals accused of conspiring to deprive African Americans of various Fourteenth Amendment rights.²³² The state action requirement, the majority held, was satisfied by the fact that the conspiracy was intended to work in part by causing state police to arrest African Americans based on false reports of criminal acts.²³³

That being so, the *Guest* majority wrote, the case “require[d] no determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause.”²³⁴ Two separate three-Justice concurrences went further, however. Justice Clark, joined by Justices Black and Fortas, wrote without further explanation 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.”²³⁵ Justice Brennan, joined by Chief Justice Warren and Justice Douglas, offered more explanation but the same conclusion: Congress could punish conspiracies to interfere with constitutional rights “without regard to whether state officers participated in the alleged conspiracy.”²³⁶

Guest thus gives us six votes (what Brennan called “[a] majority of the members of the Court”)²³⁷ for the proposition that Congress can use Section 5 to regulate individuals in the absence of state action.

²³⁰ 383 U.S. 745 (1966).

²³¹ Brief for the United States at 47 n.28, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5 and 99-29) (citing *Guest*, 383 U.S. at 762 (Clark, J., concurring)).

²³² See *Guest*, 383 U.S. at 759–60 & n.17.

²³³ See *id.* at 756–57.

²³⁴ *Id.* at 756.

²³⁵ *Id.* at 762 (Clark, J., concurring).

²³⁶ *Id.* at 777 (Brennan, J., concurring in part and dissenting in part).

²³⁷ *Id.* at 782.

That proposition, if accepted, would overrule the *Civil Rights Cases*.²³⁸ What kind of precedential weight should those six votes receive?

None, said *Morrison*. Justice Harlan, in a separate opinion in *Guest*, declared it at “the very least, extraordinary,” that the three Justices in the Clark block would “cursorily pronounc[e] themselves on . . . far-reaching constitutional questions deliberately not reached.”²³⁹ *Morrison* endorsed the Harlan opinion (which got one vote). It quoted this passage and then referred contemptuously to Justices who “saw fit to opine on matters not before the Court.”²⁴⁰ What is more, *Morrison* pointed out, three of the Justices who stated that they believed Section 5 could reach private parties gave no explanation for that view.²⁴¹ “[I]t would take more,” *Morrison* concluded, “than the naked dicta contained in Justice Clark’s opinion, when added to Justice Brennan’s opinion, to cast any doubt upon the enduring vitality of the *Civil Rights Cases* and *Harris*.”²⁴² A later Court cannot add up votes from concurrences to produce a majority; it should discount unreasoned dicta.

But of course these scruples should apply just as strongly to *Morrison*’s use of the *Civil Rights Cases*. A later Court should not, presumably, comb legislative history to find theories purportedly rejected by an opinion that never mentions them and then take that as a bedrock precedent. To quote *Morrison* again, “[t]his is simply not the way that reasoned constitutional adjudication proceeds.”²⁴³

Morrison’s reading of the *Civil Rights Cases* is peculiar then—it is improper according to criteria it announces immediately beforehand. Its characterization of the decision as carrying particular weight be-

²³⁸ Of course, as this Article has shown, overruling the *Civil Rights Cases* was not necessary to uphold VAWA’s civil rights remedy. *Guest* also gives us a unanimous Court for the proposition that private parties are not immune from Section 5 legislation if there is an allegation of state action as well as private action. See *id.* at 757 (majority opinion); *id.* at 761–62 (Clark, J. concurring) (joined by Justices Black and Fortas); *id.* at 762–63 (Harlan, J., concurring in part and dissenting in part); *id.* at 781–82 (Brennan, J., concurring in part and dissenting in part) (joined by the Chief Justice and Justice Douglas). Taking *Morrison* to establish such an immunity, then, is almost certainly wrong, although *Morrison* encourages that reading. See *United States v. Morrison*, 529 U.S. 598, 626 (2000) (faulting the civil rights remedy for being “directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias”). The statute upheld in *Guest* was likewise directed at individuals. See *Guest*, 383 U.S. at 747. Perhaps the best reconciliation of *Guest* and *Morrison* is to suppose that an allegation of state action is now a required jurisdictional hook for Section 5 regulation of private parties, in the same way that an effect on interstate commerce is a jurisdictional hook for regulation of intrastate noncommercial activity under the Commerce Clause.

²³⁹ *Guest*, 383 U.S. at 762 n.1 (Harlan, J., concurring in part and dissenting in part).

²⁴⁰ *Morrison*, 529 U.S. at 623.

²⁴¹ *Id.* at 624 (noting “the three Justices joining Justice Clark’s opinion . . . gave no explanation whatever for their similar view”).

²⁴² *Id.*

²⁴³ *Id.*

cause of its historical vantage point is odd as well. By 1883, Redemption had superseded Reconstruction.²⁴⁴ The Supreme Court at that point was ratifying the Compromise of 1877, or at best engaging in damage control.²⁴⁵ To get a sense of what judges thought closer in time to the Fourteenth Amendment, one might look instead to the circuit opinions of Bradley and Woods, both of which explicitly endorse state neglect as a justification for regulating private parties.²⁴⁶

Last, there was no pressure on the Court to go along in the national abandonment of a politically weak group. The Violence Against Women Act was not passed by a lame-duck Congress, as the Civil Rights Act of 1875 was.²⁴⁷ Nor was it forced upon resistant states. The National Association of Attorneys General supported VAWA unanimously; Attorneys General from thirty-eight states urged Congress specifically to enact the civil rights remedy; and when VAWA was challenged in Court, states came to its defense.²⁴⁸ Thirty-six states and Puerto Rico filed briefs in support of the United States and Christy Brzonkala; only one state (Alabama) took the other side.²⁴⁹ In striking down the Civil Rights Remedy, the Court was not acquiescing to a political reality it could not change; it was asserting itself against the political branches, pushing what Jed Rubenfeld has called the anti-antidiscrimination agenda.²⁵⁰

Thinking in terms of anti-antidiscrimination helps to make sense of *Morrison*. The New Federalism, I have suggested, can be seen as a delayed pushback against the expansion of federal power that accompanied the Civil Rights Movement,²⁵¹ so it is not surprising that anti-discrimination laws provide part of the setting of that pushback. Nor is it surprising to find Redemption-era cases cited approvingly. Part of the New Federalism is an attempt to minimize Reconstruction, which

²⁴⁴ See Ugarte, *supra* note 93, at 483 (“By 1883, the Supreme Court had taken a series of actions effectively ending Reconstruction.”).

²⁴⁵ See Frantz, *supra* note 203, at 1361–62 (“In 1876 the structure of Reconstruction was already crumbling and its impending defeat was evident. In 1883 its defeat was a fact which the North had accepted and acquiesced in for six years.”); Amar, *supra* note 92, at 107 (noting “the irony when Rehnquist describes post-Redemption cases seeking to undo Reconstruction as rendered ‘[s]hortly after the Fourteenth Amendment’”).

²⁴⁶ See *supra* text accompanying notes 172–76.

²⁴⁷ See Nourse, *supra* note 96, at 27 (noting the “substantial support” behind VAWA in May 1993); Strauss, *supra* note 208, at 891 (noting the Civil Rights Act was passed by a lame-duck Congress).

²⁴⁸ See *United States v. Morrison*, 529 U.S. 598, 653–54 (2000) (Souter, J., dissenting).

²⁴⁹ *Id.* at 654.

²⁵⁰ See Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L. J. 1141, 1142–43 (2002).

²⁵¹ See *supra* text accompanying note 43.

can be done either by elevating the founding, as classic originalism does,²⁵² or by elevating Redemption.²⁵³

There is nothing wrong, of course, with an attempt to foreground some historical periods and background others. Our Constitution must be understood in light of all its history, and differences in emphasis are inevitable.²⁵⁴ Still, the interaction between *Morrison* and the *Civil Rights Cases* is unfortunate.

In the *Civil Rights Cases*, recall, Justice Bradley faulted Congress for failing to identify any state action that could violate the Constitution.²⁵⁵ In the absence of a constitutional violation, enforcement legislation was impermissible. The flip side of this principle was an implicit offer: if Congress produced evidence of a violation, it could respond with appropriate enforcement measures.

Of course, Congress had at least some such evidence in 1875; it had evidence that state laws could not be enforced for the benefit of African Americans.²⁵⁶ Bradley said nothing about this. He might simply have been unaware, since neither the government nor the dissent raised the point, or he might have refrained from mentioning it in order to preserve the theory of state neglect for the future.²⁵⁷ But whatever the case, when the government accepted the implicit offer, *Morrison* converted Bradley's silence into something more sinister.

²⁵² See Kermit Roosevelt III, *Reconstruction and Resistance*, 91 TEX. L. REV. 121, 141–42 (2012) (describing classic originalism as “the legal theory of the Second Redemption”). This theme is present in *Morrison* as well. The enforcement power must be limited, Rehnquist wrote, lest the Fourteenth Amendment “obliterate[e] the Framers’ carefully crafted balance of power between the States and the National Government.” *Morrison*, 529 U.S. at 620. This echoes one of the most absurd lines of the *Slaughter-House Cases*, where Miller counsels against reading the Fourteenth Amendment to “radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.” The *Slaughter-House Cases*, 83 U.S. 36, 78 (1872). In each case, appealing to Framing understandings is a poor way to interpret Reconstruction Amendments. The Framers did have a particular balance of power in mind—they hoped, for instance, that state militias might fight off a tyrannical federal government. The Reconstruction Congress had quite a different view of that prospect, and the Reconstruction Amendments are designed precisely to alter the Framing balance, to expand federal authority and restrain the states.

²⁵³ See Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 83 (2011) (noting the “revival of this *Plessy* vision in later opinions by Rehnquist himself when he cites, with approval, the *Civil Rights Cases* of 1883 in his Violence Against Women Act opinion in *United States v. Morrison*”). In many ways, the New Federalism, and originalism more broadly, can be understood as a Second Redemption reaction to the Second Reconstruction of the Warren Court. See Roosevelt, *supra* note 252, at 141–42.

²⁵⁴ See generally Barry Friedman, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998) (arguing historical analysis is essential to understanding the Constitution).

²⁵⁵ See The *Civil Rights Cases*, 109 U.S. 3, 12–13 (1883).

²⁵⁶ See Statement of Rep. Garfield, *supra* note 128, at 153.

²⁵⁷ See *supra* note 225 and accompanying text. A point against this reading of Bradley's opinion is that Justice Harlan's dissent, which seems to be making an honest effort to muster the strongest arguments in favor of the Civil Rights Act, does not mention state neglect either.

The same evidence was available in 1875, *Morrison* said, and the government lost then, so it must lose again in 2000.²⁵⁸ The implicit offer was never available; the requirement was abruptly changed to something else.

That is what, in the consumer marketplace, would be called a bait and switch. As constitutional law, it is objectionable for two reasons. First, it is unfair to Congress. Legislators, building on the work of scholars, devised an approach to the problem of gender bias in state justice systems that they had every reason to think would be acceptable under the Court's precedents. The Court then struck it down on the basis of a limitation that had never before existed, with no explanation beyond a transparently false appeal to precedent.

Second, the Bradley-Rehnquist shuffle shortchanges an important period of our constitutional history. Redemption did follow Reconstruction, and there are Supreme Court decisions from that era that embody a particular view of race relations and the federal-state balance of power. To the extent they have not been overruled, they are still good law. But there was a Second Reconstruction that came after Redemption, which overruled some of those decisions and limited others.²⁵⁹ (The separate-but-equal principle, for instance, was rejected.²⁶⁰) What about private party immunity from Section 5 enforcement legislation? That was not a principle that the Redemption-era cases ever announced. But if they had announced it, it is a pretty safe bet that the Warren Court would have rejected it. *Guest*, which accepts the prosecution of a group of only private individuals, implicitly does just that; indeed, it shows that six votes existed for the far stronger holding that such prosecutions could go forward in the absence of state action entirely.²⁶¹ So the bait and switch is unfair to other actors as well. It is unfair to the Warren Court and the social and political movements that accompanied it to pretend that this principle existed in the first Redemption and survived the Second Reconstruction, when it did neither of those things.²⁶²

What does all this mean? We do not need to recover the concept of state neglect.²⁶³ It never left. What we need to do is realize that

²⁵⁸ See *United States v. Morrison*, 529 U.S. 598, 624–27 (2000).

²⁵⁹ C. Vann Woodward, *The Political Legacy of Reconstruction*, 26 J. NEGRO EDUC. 231, 240 (1957) (describing the Second Reconstruction).

²⁶⁰ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1953).

²⁶¹ See *supra* note 237 and accompanying text.

²⁶² How to reconcile different eras of constitutional understanding is a complicated topic, which Bruce Ackerman has explored under the name of intergenerational synthesis. See Bruce Ackerman, *I WE THE PEOPLE: FOUNDATIONS* 140–62 (1991) (describing concept). My point here is only that attributing to the past principles that were not announced then and would not have survived had they been is not a good way to go about it.

²⁶³ Brandwein's argument in favor of the need of recovery persistently understates the extent to which the concept of state neglect exists in current law. For instance, she argues

Morrison's rule of private party immunity is made up from whole cloth. It is not supported by the *Civil Rights Cases*. But that does not mean it is wrong, only that we should consider it on its own merits. The next Part does that.

V

SECTION 5 LEGISLATION AND PRIVATE PARTIES RECONSIDERED

Earlier, I noted that successful doctrine must meet several requirements.²⁶⁴ Private party immunity from Section 5 legislation meets some of them. It is a clear rule, easy for courts to enforce and nonjudicial actors to understand. It also imposes a real and meaningful limit on Congress. But there remains the most fundamental question: is it doing something sensible in terms of implementing the relevant constitutional provision?²⁶⁵

that “recovery of the state neglect concept . . . open[s] up for the first time” the possibility of a constitutional claim for victims of domestic violence “if it could be established that the police provided less protection to victims of domestic violence compared to other kinds of violence.” BRANDWEIN, *supra* note 172, at 243. That claim exists and has been recognized by courts and commentators. See, e.g., *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988) (“Although there is no general constitutional right to police protection, the state may not discriminate in providing such protection.”). The hurdle for such a claim is that discrimination between domestic and stranger violence is not considered sex discrimination and will get rational basis review. See *Watson*, 857 F.2d at 696–97 (treating domestic-violence discrimination separately from sex discrimination). This is a problem of disparate impact doctrine, not a failure to recognize state neglect as a constitutional violation. See generally Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L. J. 788 (1986) (arguing for equal protection claim because a no-arrest policy in domestic violence disputes results in sex discrimination). Indeed, as far as sex discrimination in enforcement goes, *Morrison* itself accepts the theory that selective failure to protect violates equal protection. See 529 U.S. at 619–20.

Other scholars have also linked the state neglect concept to Bradley's opinion in the *Civil Rights Cases*. See, e.g., Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 62 (1990) (arguing for “pure protection” understanding of equal protection on the grounds that “as Justice Bradley suggested in the *Civil Rights Cases*, a southern state's refusal to grant a common law cause of action to black travelers to protect them against southern white innkeepers' refusals of service would constitute a violation of the equal protection clause” (citations omitted)). Perhaps most strikingly, the Supreme Court explicitly endorsed the state neglect concept in 1989, in *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989) (“The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”). Brandwein discusses *DeShaney* but does not mention this footnote. See BRANDWEIN, *supra* note 172, at 242–43.

²⁶⁴ See *supra* notes 77–80 and accompanying text.

²⁶⁵ This is not asking whether the doctrine gets cases right in terms of the meaning of the Constitution. That might be a desirable feature, but sometimes prophylactic doctrine is a good choice too. See generally ROOSEVELT, *supra* note 17, at 22–47 (discussing doctrine creation); Strauss, *supra* note 78 (arguing that prophylactic rules are central and necessary to constitutional law).

The point of Section 5 is relatively clear: it is to allow Congress to legislate in order to make the guarantees of the Fourteenth Amendment more effective than they would otherwise be.²⁶⁶ Good implementing doctrine will allow Congress to do this: it will not create a situation where some violations of the Amendment cannot be addressed, especially if those violations are important ones.

At the same time, implementing doctrine should set limits on the enforcement power. There are three main reasons why such limits are desirable. First, excessively broad enforcement power threatens individual liberty.²⁶⁷ Second, it threatens the balance of power between the states and the federal government.²⁶⁸ And last, it threatens separation of powers within the federal government: excessive enforcement authority could allow Congress to effectively determine the meaning of the Fourteenth Amendment.²⁶⁹

The question, then, is whether banning Section 5 regulation of private parties does a good job in terms of preserving congressional authority to address important violations while at the same time restraining that authority so as to protect the values of liberty, federalism, and separation of powers. Analysis will show that it really does none of these things well.

The concern about individual liberty is easy to formulate. Individuals, by themselves, cannot violate the Constitution. Why should Congress have the power to regulate them? Why should these individuals be subject to federal authority through no fault of their own but rather because of what someone else—some state actor—has done?

The image of individuals minding their own business, doing nothing that triggers congressional power, only to be swept willy-nilly into the maw of federal regulation, is a potent one, at least for today's Court. Justice Roberts invoked it in the healthcare case to argue that the individual mandate could not be sustained under the Commerce

²⁶⁶ U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

²⁶⁷ See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936(1982) (“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”).

²⁶⁸ See *United States v. Morrison*, 529 U.S. 598, 620 (2000) (claiming that limitations on the Section 5 power “are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government”). As noted earlier, the Reconstruction Amendments were intended precisely to alter the Framers’ carefully crafted balance, so *Morrison* looks to the wrong standard. Still, the desire to find some limit is sensible.

²⁶⁹ See *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (stating that “Congress does not enforce a constitutional right by changing what the right is”). Again, this is not to endorse the *Boerne* approach to Section 5, which makes a fundamental error by asking whether enforcement legislation goes too far beyond the Court’s doctrine, rather than the Constitution’s meaning. See Roosevelt, *supra* note 82, at 1680–83.

Clause.²⁷⁰ But this image fits Section 5 regulation much less well. In the state neglect scenario, the regulated individual is not someone minding his own business. He is violating state law. He is engaging in conduct that the state-level majority recognizes as wrongful and punishes when it is committed against them. There is no reasonable claim that his conduct should not be regulated.

But perhaps it should be regulated by the states rather than the federal government? Of course it should be regulated by the states—that is what the Constitution demands.²⁷¹ But that state regulation is not forthcoming. The question is what should or may happen when the best solution is unobtainable. And the answer that federal regulation may fill the void does not strike me as especially problematic.²⁷² The demand for regulation is federal in nature, after all—it comes from the federal Constitution. That this federal demand should be satisfied through federal legislation is not incongruous.²⁷³

Nor is there much of a case to be made that allowing Section 5 regulation of private parties threatens the balance of state and federal powers. Section 5 in general, and its use in cases of state neglect in particular, are probably less threatening to federalism values than other congressional powers. There is a built-in check on their exercise: Congress must show that states are not fulfilling their constitutional obligations before it can act. There is thus no danger—as there is with the Commerce Clause—that Congress will usurp state authority over fields that could as well or better be left to the states.²⁷⁴ Those

²⁷⁰ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012) (rejecting the idea that Congress could “reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it” as compared to “those who by some preexisting activity bring themselves within the sphere of federal regulation”).

²⁷¹ See U.S. CONST. amend. X; 132 S. Ct. at 2578 (“The States thus can and do perform many of the vital functions of modern government—punishing street crime . . .”).

²⁷² In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819), John Marshall indicated that a decision about the limits of federal power (what he called an adjustment of “the respective powers of those who are equally the representatives of the people”) called for less aggressive judicial review than one that implicated individual rights, “the great principles of liberty.” *Id.* at 401. With its deference to federal authority but more searching review of state legislation that burdens political outsiders, *McCulloch* quite strikingly anticipates the general stance of the Warren Court. See *id.* at 431 (rejecting the argument that Maryland could be trusted not to abuse the power to tax the Bank of the United States).

²⁷³ Indeed, the accountability principle that has become part of our federalism might suggest a preference for federal legislation. State laws enacted at federal command are undesirable because they blur lines of accountability, but the same is true of state laws enacted or enforced at the command of the Constitution. Substituting federal legislation at least demonstrates that the duty being enforced is federal in nature. See *New York v. United States*, 505 U.S. 144, 168–69 (1992) (discussing accountability problems with federal commandeering of state legislatures).

²⁷⁴ See *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (“It is beyond peradventure that federal power over commerce is ‘superior to that of the States to provide for the welfare or necessi-

are areas of state autonomy whose preservation has real value. When, on the other hand, states are not capable of adequate regulation, or when they refuse to do so in violation of their constitutional obligations, federalization is an appropriate response.

Finally, a categorical ban on regulation of private parties does very little to preserve the Court's interpretive authority. I do think it makes sense to give the Court the last word on the meaning of the Constitution, though I do not think that this principle leads to the *Boerne* doctrine.²⁷⁵ But allowing Congress to regulate private parties, when that is an appropriate means to deter or remedy constitutional violations by states, does not amount to giving it authority to change the meaning of the Fourteenth Amendment.

What benefits does the limit bring? Very few. It seems to be essentially a line that is convenient to draw, even if it is unrelated to the purpose of the underlying provision. That is not very good constitutional doctrine, though it is of a piece with much of the New Federalism. With respect to the Commerce Clause, for instance, *Morrison* and *Lopez* tell us that intrastate noncommercial activity cannot be regulated, even though it might harm interstate commerce or have spillover effects that create collective action problems.²⁷⁶ *Sebelius* likewise tells us that "inactivity" cannot be regulated, even if it substantially affects interstate commerce (and even if the "inactive" people, in the aggregate, engage in \$43 billion worth of economic activity that, as a result of their "inactivity," others must pay for).²⁷⁷ These are examples of what I would call doctrine that is not asking the right questions: if the purpose of the commerce power is to allow Congress to protect commerce, or to regulate when the states are separately incompetent, doctrine that blocks congressional action in such cases because of formalistic distinctions between commercial and

ties of their inhabitants,' however legitimate or dire those necessities may be.") (citations omitted).

²⁷⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (rejecting idea that "Congress could define its own powers by altering the Fourteenth Amendment's meaning").

²⁷⁶ See *United States v. Morrison*, 529 U.S. 598, 656–57 (2000) (Breyer, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 559–60 (1995).

²⁷⁷ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2611 (2012) (Ginsburg, J., concurring in part and dissenting in part) (stating dollar value of healthcare provided without compensation to uninsured patients who failed to pay). From one perspective, *Sebelius* and *Morrison* are very similar in the structure of their arguments. In both cases, a proper subject of regulation exists: discriminatory state actors who are violating individual rights, and insurance companies (commercial actors) who are now being told to issue coverage without regard to preexisting conditions. The question in each case is whether Congress can regulate someone else, someone not subject to regulation because of anything they have done themselves, in order to make the regulation of the proper subject effective. The answer the Court gives in both cases is no, because such regulation is not proper. But why not? *Sebelius* has an answer—these are people who did nothing to subject themselves to federal authority. But whether that answer is persuasive or not, it is not available in *Morrison*, and the Court did not try to provide an alternative.

noncommercial activity, or activity and inactivity, is probably drawing the wrong lines.²⁷⁸

Such limits are tolerable if, like the Commerce Clause carve-outs, they have little practical effect. Congress can still probably reach most intrastate noncommercial activity by using a comprehensive regulatory scheme or including a jurisdictional hook. It is unlikely to find much need to require “inactive” individuals to purchase commercial products.²⁷⁹ Moreover, if it did, it could accomplish the same result through the taxing power.²⁸⁰

Forbidding Section 5 regulation of private parties, however, has real effects. Without the ability to regulate individuals, Congress has no realistic means of remedying state neglect. If, as I and others have suggested, state neglect was actually at the heart of the original understanding of the Equal Protection Clause, this is a significant cost.²⁸¹

CONCLUSION

The Court’s decision in the *Civil Rights Cases* is frequently criticized, but closer inspection reveals that it is not as bad as the reflexive revulsion of many assessments suggests. The state action doctrine it

²⁷⁸ Sometimes, of course, administrability will be a very important concern and will justify a substantial gap between doctrine and meaning. With *Miranda*, for instance, the Court found itself poorly positioned to decide whether a confession was voluntary (the relevant question as far as meaning is concerned), and so it substituted a bright-line prophylactic requirement (the *Miranda* warning) for the totality of the circumstances test it had been using. See Roosevelt, *supra* note 82, at 1671–72. Importantly, however, once police adjusted their behavior in light of this prophylactic rule and administered the warnings, cases tended to come out consistent with constitutional meaning—postwarning confessions tended to be voluntary. See generally Strauss, *supra* note 78 (arguing that prophylactic rules help achieve constitutional results). Similar adjustment with the Commerce Clause carve-outs is harder, though perhaps the jurisdictional hook is an equivalent.

²⁷⁹ When the federal government wanted to bail out the automakers, for instance, it did not require every American to purchase a car. It simply gave the corporations taxpayer money. See, e.g., Maurice E. Stucke, *Reconsidering Competition*, 81 Miss. L.J. 107, 108 (2011) (describing bailouts).

²⁸⁰ The existence of taxing power authority was the basis on which Chief Justice Roberts upheld the individual mandate in *Sebelius*, see 132 S. Ct. at 2600, but there is a different way in which the taxing power permits compelled purchases: the government can simply direct tax revenues to businesses and require them to provide products in exchange. It could have, for instance, effectively required everyone to buy a GM car by providing the bailout it did and requiring GM in return to “give” everyone a “free” car.

²⁸¹ How significant depends on whether private parties are actually supposed to be *immune* from Section 5 regulation, or whether something like a jurisdictional hook demonstrating state neglect in individual cases would allow remedies against individuals. Immunity seems flatly inconsistent with *Guest*, so the possibility of a jurisdictional hook remains open. See *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966). Something like the VAWA civil rights remedy could be offered to any victim of gender-motivated violence who had sought state redress and been denied because of unconstitutional bias. Proving bias in particular cases is hard, though, and such a hook would effectively operate as an exhaustion requirement with respect to state-law remedies. This version of the remedy would place so heavy a burden on plaintiffs that it would probably be almost entirely ineffectual.

sets out is now generally accepted as a limit on the scope of the Constitution in general and the Fourteenth Amendment in particular.

There is, however, no reason to suppose that the limits of the enforcement power precisely track those of the Amendment. The *Civil Rights Cases* say nothing about this second issue. The fact that individuals cannot violate the Amendment does not necessarily mean that they cannot be regulated via the enforcement power in appropriate cases. That principle comes from *Morrison*, and from *Morrison* alone.

Purporting to rely on precedent, *Morrison* offers no argument in favor of this rule. Further investigation suggests that it is undesirable as a matter of first impression. Section 5 legislation will naturally take two different forms. If the state violates the Fourteenth Amendment by its explicit acts—if it openly denies that certain individuals are entitled to equal rights—then enforcement legislation should forbid those state acts and allow remedies against the state. But if the violation takes the form of a *sub rosa* selective refusal to honor or enforce rights purportedly granted under state law, direct remedies against the state are impractical. Providing federal rights as an alternative to the state rights that have proved ineffective is a perfectly reasonable enforcement measure. The alternative is to let these sorts of equal protection violations go unremedied. Since they go to the heart of the original understanding of equal protection, that is a bad choice. Nothing but *Morrison* stands in the way of accepting such enforcement legislation, and *Morrison* stands on nothing at all. It should be rejected at the first opportunity.