Richmond Public Interest Law Review

Volume 18 | Issue 4 Article 5

1-1-2015

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Recommended Citation

Jonathan K. Stubbs, *Modern Sappers and Miners: The Rehnquist and Roberts Courts and the Civil Rights Act of 1964*, 18 Rich. J.L. & Pub. Int. 461 (2014).
Available at: http://scholarship.richmond.edu/pilr/vol18/iss4/5

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MODERN "SAPPERS AND MINERS"♦: THE REHNQUIST AND ROBERTS COURTS AND THE CIVIL RIGHTS ACT OF 1964

Professor Jonathan K. Stubbs[*]

♦ Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *in* 12 THE WORKS OF THOMAS JEFFERSON, 176, 177 (Paul Leicester Ford ed., 1905) *available at* http://oll.libertyfund.org/titles/808.

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INTRODUCTION

This article argues that the Supreme Court of the United States is systematically destroying the principal jurisprudential foundations of the Civil Rights Act of 1964. Several recent Rehnquist and Roberts Courts decisions regarding the Commerce Clause reflect a judicial interpretive approach decried by Thomas Jefferson nearly two hundred years ago. In a Christmas letter to Thomas Ritchie, Jefferson contended that the prime threat to the fabric of the Constitution would not come from the Congress because: "Taxes and short elections will keep them right."[1] Rather Jefferson declared that:

> **The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric.** They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone. This will lay all things at their feet, and they are too well versed in English law to forget the maxim, "boni judicis est ampliare juris-dictionem." We shall see if they are bold enough to take the daring stride their five lawyers have lately taken.[2]

Jefferson's letter came in the aftermath of the Supreme Court's decision in *McCulloch v. Maryland,* which upheld Congress's authority to create a national bank based on what Jefferson perceived as a broad and erroneous interpretation of congressional power to enact legislation that was "necessary and proper."[3] Jefferson viewed the United States of America as a "confederated fabric" – essentially a union comprised of semi-autonomous state governments.[4] He feared a federal judiciary that did not appropriately respect the authority of state governments. A powerful federal government would have the authority to interfere with state and local practices and institutions – like slavery.

This article contends that the present Court's narrow interpretation of Congress' power pursuant to the Commerce Clause is a contemporary example of judicial erosion of the constitutional foundations protecting the rights of all Americans. The constitutional analysis employed by the Rehnquist and Roberts Courts particularly threatens the exercise of rights of those who have historically been oppressed because of skin color and gender.

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[1] *Id.*

[2] *Id.* (emphasis added)

[3] *See* McCulloch v. Maryland, 17 U.S. 316, 323–24 (1819).

[4] Letter from Thomas Jefferson to Thomas Ritchie, *supra* note 1, at 177.

The impetus for this assertion flows in part from the Supreme Court's recent decision in *National Federation of Independent Business v. Sebelius* (hereafter the ACA case).[5] In a five to four decision, the Court upheld the constitutionality of the individual mandate provision of the Affordable Care Act as a tax; but by an equally slim margin declared that the Constitution did not confer authority upon Congress to enact the mandate under the Commerce Clause.[6] This is potentially a significant development because the primary constitutional pillar of the Civil Rights Act is Congress' commerce power. In addressing non-discrimination in public accommodations, Title Two implicates the commerce power [7] as does Title Seven which proscribes employment discrimination.[8] If the limits of Congress' commerce power are narrowly confined, the legal foundations for these core provisions of the Act could be greatly compromised. Everyone in the United States could be affected because Titles Two and Seven protect individuals from discrimination on the basis of race, color, sex, religion and national origin.[9]

In these circumstances, one might reformulate Jefferson's fears in the following way. As illustrated by the ACA case, the Roberts Court is behaving like a "subtle corps of sappers and miners constantly working under ground to undermine the foundations" of human rights protections provided under the Civil Rights Act of 1964. "We shall see if they are bold enough to take the daring stride their five lawyers have lately taken."[10]

In support of this overall thesis, this article is organized as follows. To orient readers on what is at stake, Section I provides a brief overview of the substantive provisions of the Civil Rights Act of 1964. Section II considers reasons why the Act was premised on Congress' Commerce Clause authority rather than the enforcement power that the Constitution confers upon Congress under the Thirteenth and Fourteenth Amendments. Section III evaluates several recent Supreme Court decisions that give the Commerce Clause a restrictive interpretation. For illustrative purposes, this section explores the impact on Title Two of the Act. Finally, the article closes with a

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[5] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012).

[6] *Id.*

[7] 42 U.S.C. § 2000a(a) (2012) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.").

[8] § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

[9] *See* § 2000a(a); § 2000e-2(a).

[10] Letter from Thomas Jefferson to Thomas Ritchie, *supra* note 1, at 177.

few observations of the implications of the Roberts' Court jurisprudential approach in the ACA case.

I. A PRÉCIS OF WHAT THE CIVIL RIGHTS ACT OF 1964 ADDRESSES

When the Act was proposed, debate ensued regarding the proper constitutional basis for the Act. Some persons argued that the proper constitutional foundation for the Act was the Reconstruction Amendments – specifically the Thirteenth and Fourteenth Amendments of the Constitution.[11] Others contended that the Commerce Clause provided a more secure basis because of the Court's prior virtual asphyxiation of the Fourteenth Amendment.[12]

For reasons discussed in more detail in Section II, most proponents of the Act asserted that the primary – though not exclusive – foundation of the Act was the Commerce Clause.[13] On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act into law.[14]

As originally enacted, the Act was comprised of eleven titles. Title One of the Civil Rights Act enhanced access to the ballot for African Americans and other excluded groups by providing for use of a more uniform standard for determining who could vote in federal elections.[15] This provision helped to undercut notorious tactics of racist local voting registrars who were known to determine the eligibility of African Americans voters by asking questions like "Explain the Shipping Bill of the United States" whereas illiterate white voters might be asked "In Virginia, can white and colored children go to school together?"[16]

Title Two of the Act outlawed "discrimination or segregation on the grounds of race, color, religion or national origin" in "any place of public accommodation." [17] Title Two contributed to the demise of pervasive "white" and "colored" signs separating patrons of public accommodations

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[11] GERALD GUNTHER, CONSTITUTIONAL LAW 203 (10th ed. 1980) (Gunther argued strenuously that the Act should be premised on the Fourteenth Amendment as the "obviously most relevant source of national power.").

[12] The Equal Protection Clause was "[v]ritually strangled in its infancy" by the Court. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J., quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 381 (1949)).

[13] GUNTHER, supra note 11 at 198–203 (excerpt of Hearings Before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.)

[14] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *The Civil Rights Act of 1964*, CONSTITUTIONAL RIGHTS FOUND., http://www.crf-usa.org/black-history-month/the-civil-rights-act-of-1964 (last visited Apr. 6, 2015).

[15] 42 U.S.C. § 1971(a) (2012).

[16] THOMAS C. WALKER, THE HONEYPOD TREE: THE LIFE STORY OF THOMAS C. WALKER 177 (1958).

[17] 42 U.S.C. § 2000a(a) (2012).

like hotels and restaurants as well as fences dividing amusement parks and out-door theatres.

Title Three of the Civil Rights Act provided that where certain conditions have been met, the Attorney General may bring a federal law suit to protect an individual who claims a violation of her right to equal protection of the laws. Specifically, Congress required that the Attorney General must receive a written complaint signed by an individual alleging deprivation of equal protection of the laws because of race, color, religion, or national origin; and that such discrimination involved public facilities owned, operated, or managed by a state or subdivision of a state other than a public school or a public college.[18] Additionally, the Act mandated that the Attorney General must believe that the claimants have a meritorious basis for a lawsuit.[19] Moreover, the Act required the Attorney General to certify that claimants are unable to maintain appropriate legal proceedings for relief. In addition, the Attorney General had to certify that the suit would materially further the orderly process of desegregation in public facilities.[20] Title Four of the Act helped to undercut segregation in public educational institutions from primary through post-secondary levels. Among other things, Title Four authorized the Attorney General to bring civil suits to ensure equal protection of educational opportunities for individuals who the Attorney General certified had meritorious claims and who were unable to initiate and maintain civil actions to vindicate such claims.[21] The Act also required the Attorney General to certify that the suit would "materially further the orderly achievement of desegregation in public education."[22]

Title Five of the Civil Rights Act addresses procedures for the Civil Rights Commission, a statutory body the Civil Rights Act of 1957 created.[23] The Civil Rights Commission has the authority to investigate and make reports regarding claims of civil rights violations.[24] Under Title Five's "Rules of Procedure for [Civil Rights] Commission Hearings", any person who is compelled to appear before the Commission in person is entitled to have counsel to accompany and advise her.[25] Counsel may subject such a witness

[18] 42 U.S.C. § 2000b(a) (2012).
[19] *Id.*
[20] *Id.*
[21] § 2000c-6(a).
[22] *Id.*
[23] Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.
[24] *Id.*
[25] *Id.*

to reasonable examination and to make objections on the record on behalf of the witness.[26]

Title Six expanded protection against race discrimination by forbidding any program receiving federal financial assistance from discriminating on the basis of race, color or national origin. For examples, colleges and universities who receive federal funds were confronted with the choice of admitting students on a non-racially discriminatory basis or losing such funds.[27]

In the workplace, Title Seven of the Act provided protections for equal employment opportunities. Such protections included prohibiting discrimination on the basis of race, color, religion, sex or national origin in employment hiring, promotion or firing decisions.[28] Thus Title Seven helped to open avenues for women and persons of color to obtain supervisory as well as other better paying positions that had historically been denied to them because of gender or race.[29] Title Seven also created the Equal Opportunity Commission (EEOC) whose functions include investigating and attempting to informally resolve complaints of unlawful employment practices. [30]

Title Eight of the Act required the Secretary of Commerce to provide data regarding the demographic profile of voters since 1960 in areas designated by the Civil Rights Commission.[31] Title Eight stated that no one was compelled to disclose information about his or her race.[32]

Title Nine allowed the Attorney General to intervene in any court case involving Fourteenth Amendment equal protection claims which the Attorney General deemed to be of public importance.[33] Among other things, Title Ten of the Act established a Community Relations Services led by a director appointed by the President for a term of four years with the advice and consent of the Senate.[34] The Community Relations Service was designed to "provide assistance to communities and persons therein and resolve disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or

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[26] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 249.
[27] *See* 42 U.S.C. § 2000d-1 (2012).
[28] § 2000e-2(a).
[29] *See* § 2000e.
[30] *See id.*
[31] § 2000f.
[32] *Id.*
[33] § 2000h-2.
[34] § 2000g.

which affect or may affect interstate commerce."[35] Furthermore, Title Ten provided that the officers and employees of the Community Relations Service must conduct their conciliation efforts without publicity and hold confidential "any information acquired in the regular performance of its duties upon the understanding that it would be so held."[36]

Title Eleven dealt with miscellaneous matters like "punishment for criminal contempt arising under title two, three, four, five, six, or seven."[37] Title Eleven limited punishment under the Civil Rights Act for criminal contempt citations to fines of not more than a thousand dollars or imprisonment of not more than six months.[38]

We now turn to Section II, which furnishes a brief review of American constitutional history regarding the protection of the human rights of people of color. This synopsis may illuminate why the Commerce Clause was chosen as the appropriate constitutional bulwark upon which to base the Act. Such a review may also facilitate understanding why the Court's restrictive interpretation of the Commerce Clause is so ominous.

II. A BRIEF HISTORY: HOW THE COMMERCE CLAUSE BECAME AN AMERICAN HUMAN RIGHTS GAP-FILLER[39]

A. Dred Scott

In the *Dred Scott* decision, Chief Justice Taney furnished a substantially accurate (though disconcerting) historical summary of the legal status of African Americans in much of the United States from colonial times to the advent of the Civil War. Chief Justice Taney stated:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics,

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[35] § 2000g-1.
[36] § 2000g-2.
[37] § 2000h.
[38] *Id.*
[39] This section is largely based upon an unpublished manuscript: Oliver W. Hill & Jonathan K. Stubbs, *Denial or Rebirth? Essays on Justice in America* (forthcoming 2015) (on file with University of Richmond Journal of Law and the Public Interest).

> which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[40]

Dred Scott granted legal approval to prevailing American social custom and practice: under the law African Americans had no rights and therefore could be beaten, raped, dismembered, and even murdered with impunity. Slavery legalized violence and deeply entrenched it as an unseemly American heritage.

Aside from sanctioning legal barbarism, the *Dred Scott* Court decided an explosive constitutional matter that was not before the Court. By a mere "side wind," the Court invalidated the Missouri Compromise and opened all of America's territories to slavery.[41] Even though the prospect of slavery overrunning the West threatened to split the Union, rather than demonstrating judicial restraint, the Court invaded Congress' authority to govern American territories. In doing so, the *Dred Scott* majority upset the Constitution's balance of power between the three governmental branches.[42]

Specifically, the Court could have recognized and respected Congress' role as a co-equal branch of government. As a legislative institution, Congress was attempting to forge a political compromise of a hotly disputed national issue – the expansion of slavery into western territories. Rather than upholding Congress' constitutional competence (and duty) to resolve national political disputes, the Court boldly sided with slaveholders and in doing so, stirred a political hornet's nest.[43]

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[40] Scott v. Sanford, 60 U.S. 393, 407 (1856).

[41] *See id.* at 452.

[42] *See generally* 2 JOHN ASHWORTH, SLAVERY, CAPITALISM, AND POLITICS IN THE ANTEBELLUM REPUBLIC: THE COMING OF THE AMERICAN CIVIL WAR, 1850–1861, at 321 (2007) ("In the 1850s there had been a violent attempt to extend slavery into Kansas and a spate of filibustering expeditions into Latin America, some of them with the covert or open support of prominent Democrats. Leading Democrats north and south had sought to obtain Cuba and in 1860 both wings of the democratic party had officially committed themselves to the acquisition of additional territory"); DAVID M. POTTER, THE IMPENDING CRISIS 1848–1861, at 396 (Don E. Fehrenbacher ed., 1976) (describing various attempts to get legislatures in southern states to re-implement the slave trade. "the state legislature in 1857-1859 rejected a series of attempts to bring the issue to a vote, as did the Texas legislature in 1857 . . . the high tide of the effort to secure legislation came in March 1858, when the Louisiana House of Representatives voted 46 to 21 to authorize the importation into Louisiana of 'twenty-five hundred free Africans' as apprentices"); DOUGLAS CHARLES STANGE, BRITISH UNITARIANS AGAINST AMERICAN SLAVERY 1833–1865, at 155 (1984) (stating that following the *Dred Scott* decision "[t]he Southern oligarchy controlled the entire machinery of the United States government. It had its eyes on Latin America and contemplated the formation of a 'vast Slave-Empire'").

[43] *See Scott*, 60 U.S. at 452. In response, Frederick Douglass, a leading human rights advocate and abolitionist argued that the Constitution had not used the term slave or slavery, and therefore should be construed to favor freedom rather than oppression. In a memorable address delivered on March 26, 1860, in

The *Dred Scott* Court essentially held that African Americans were non-human beings and helped to propel America towards the cataclysm of civil war.

A precarious military situation during the ensuing conflict impelled President Abraham Lincoln to take a decisive military measure: In the Emancipation Proclamation, President Lincoln declared that all persons held as slaves in areas of the nation that were "in rebellion" were "thenceforward, and forever free."[44] While important in undercutting the rebels' war efforts, Lincoln's emancipation proclamation was only effective in freeing slaves in portions of slaveholding areas which were fighting against the central government.[45]

As the War drew to a close, a significant legal issue haunted the United States: what was the status of the newly freed slaves? To resolve the legal status of the recently freed persons, on December 6, 1865, the United States adopted the Thirteenth Amendment to the Constitution.[46] In relevant part, the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States."[47]

Following the conclusion of the War, many former confederates regained power in southern state and local governments.[48] The ex-confederate led state governments recognized that the Thirteenth Amendment allowed them to impose involuntary servitude upon a duly convicted criminal.[49]

Glasgow, Scotland, Douglass described persons who favored a proslavery interpretation of the Constitution in these words: "They are in the habit of treating the Negro as an exception to general rules. When their own liberty is in question they will avail themselves of all rules of law which protect and defend their freedom; but when the black man's rights are in question they concede everything, admit everything for slavery, and put liberty to the proof. They reverse the common law usage, and presume the Negro a slave unless he can prove himself free. I, on the other hand, presume him free unless he is proved to be otherwise." FREDERICK DOUGLASS, SELECTED SPEECHES AND WRITINGS 380, 387 (Philip S. Foner ed. 1999).

[44] *The Emancipation Proclamation*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/ (last visited Mar. 20, 2015).

[45] PETER N. CARROLL & DAVID W. NOBLE, THE FREE AND THE UNFREE: A PROGRESSIVE HISTORY OF THE UNITED STATES 217 (3d rev. ed. 2001); 2 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE: 1789 THROUGH RECONSTRUCTION 435 (1972).

[46] *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, OUR DOCUMENTS, http://www.ourdocuments.gov/print_friendly.php?page=&doc=40&title=13th+Amendment+to+the+U.S.+Constitution%3A+Abolition+of+Slavery+%281865%29 (last visited Apr. 7, 2015).

[47] U.S. CONST. amend. XIII, § 1.

[48] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1867, at 188 (1988). Back Story With The History Guys, 1865: United States of Uncertainty (broadcast April 24, 2015, available at http://backstoryradio.org/shows/eighteen-sixty-five/)

[49] U.S. CONST. amend. XIII, § 1.

The former confederates interpreted and applied the Amendment to virtually re-enslave former slaves who were convicted of crimes.[50]

For example, Southern legislatures passed broad and vague state vagrancy statutes which essentially made being unemployed a crime.[51] Accordingly, a jobless ex-slave could be convicted, imprisoned, placed on a chain gang and compelled to work for free on the local plantation at which he had been previously held captive.[52]

Likewise, the former Confederates enacted state laws commonly called "Black Codes,"[53] which (among other things) prohibited African Americans from sitting on juries, owning or leasing land, making contracts and working in lucrative trades. These statutes demonstrated that the ex-rebels continued to oppose equality for the former slaves, and remained determined to continue slavery to the maximum extent possible.[54]

During the fall of 1865, as southern states sought to regain representation in the Congress, the elections throughout the South allowed many persons like former confederate vice president Alexander Stephens to be elected to Congress and represent the southern states.[55]

Many sitting Congressmen were opposed to the election of former confederate civilian and military leaders to Congress, only a few months after the cessation of hostilities that had resulted in the deaths of a half million Americans. Seeking to safeguard basic human rights, Congress refused to seat the newly elected southern congressman.[56]

Instead, Congress passed corrective legislation: the Civil Rights Act of 1866.[57] The Act provided that American citizens of

> every race and color . . . shall have the same right [throughout the United States] to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws . . . for the security of person and property, as is enjoyed by white citizens.[58]

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[50] *See* FONER, *supra* note 48, at 199; RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT, at 27-29 (2004).
[51] FONER, *supra* note 48, at 199–200.
[52] *See* N. Gordon Carper, *Slavery Revisited: Peonage in the South*, 37 PHYLON 85, 85–86 (1976).
[53] FONER, *supra* note 48, at 199.
[54] *See* The Slaughter-House Cases, 83 U.S. 36, 70 (1872); FONER, *supra* note 48, at 199.
[55] FONER, *supra* note 48, at 196.
[56] FONER, *supra* note 48, at 239; Valelly, *supra* note 50 at 29.
[57] 14 Stat. 27, 27–30 (1866).
[58] 14 Stat. 27, 27 (1866).

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The Act basically said that all American citizens would have the same civil rights as white persons. President Andrew Johnson vetoed the bill, arguing that it constituted discrimination against whites and centralized too much power in the federal government.[59] Congress overrode the presidential veto.[60] However, enforcement of the Act was erratic and often inefficient.[61]

In the congressional elections of 1866, voters installed a majority of progressive, Republican congressmen.[62] These individuals continued the landmark legal change following the war, including the drafting of the Fourteenth Amendment.[63] When the United States ratified the Fourteenth Amendment in 1868, it conferred citizenship upon all people born or naturalized in the United States, including former slaves.[64] The Fourteenth Amendment overturned the *Dred Scott* decision, and recognized that former slaves had equal political and civil rights with other members of society; it created a legal foundation for a new civil society based on equality.

Both the Thirteenth and Fourteenth Amendments expressly authorized Congress to enforce each Amendment "by appropriate legislation."[65] Given the historical context in which these two Amendments were ratified why would The Civil Rights Act of 1964 not have been "appropriate legislation"? In fact the Act sought to eliminate racial segregation – a direct legal descendant of slavery. Had the Court properly interpreted the Constitution during the Nineteenth and Twentieth Centuries, Congress could have based the Act on the explicit constitutional texts of the Amendments. However, that is not the story that unfolded.

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[59] FONER, *supra* note 48, at 250; *see* Andrew Johnson, *Veto of the Civil Rights Act of 1866* (March 27, 1866) in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 405–06 (James D. Richardson ed., 1897).
[60] FONER, *supra* note 48, at 250–51.
[61] FONER, *supra* note 48, at 455.
[62] FONER, *supra* note 48, at 267, 270–71.
[63] FONER, *supra* note 48, at 251–52.
[64] U.S. CONST. amend. XIV, § 1.
[65] U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 5.

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B. Undermining the New Birth of Freedom[66]

The Slaughterhouse Cases[67] presented the first major constitutional test of the scope of the Thirteenth and Fourteenth Amendments. The Slaughterhouse Cases involved a Louisiana statute creating a monopoly for the slaughter of animals in Orleans Parish, Louisiana.[68] Local butchers challenged the statute on the basis (among other things) that under the Fourteenth Amendment, the state law infringed their "privileges or immunities" to pursue their chosen vocation.[69] The Supreme Court spurned their claims.

Beginning with an historical analysis of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the Supreme Court said:

> [N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[70]

By stating that the Constitution safeguarded the rights of African Americans, the Court took a giant step forward compared to *Dred Scott,* which had said that African Americans had no rights that whites were bound to respect.

Even though the Fourteenth Amendment made the former slaves citizens of the national government, the *Slaughterhouse* Court contended that the rights of citizens at the national level were extremely limited. For example, national citizenship rights encompassed the right to petition the government to change its policies, to have the assistance of the national government if the citizen were in trouble on the high seas or with a foreign government and to move freely from one state to another.[71]

In contrast to the puny national citizenship rights, the *Slaughterhouse* Court said that the states controlled most meaningful rights of citizenship,

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[66] *See* President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863). "It is rather for us to be here dedicated to the great task remaining before us -- that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion -- that we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth." *Id.*

[67] The Slaughter-House Cases, 83 U.S. 36 (1872).

[68] *Id.* at 38.

[69] *Id.* at 43–44.

[70] *Id.* at 71.

[71] *Id.* at 79–80.

including: making contracts, owning property and serving on juries. These were all primarily matters under state supervision. Quoting *Corfield v. Coryell*, the *Slaughterhouse* decision described the rights (or "privileges and immunities") of state citizenship as being: "comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."[72]

In the *Slaughterhouse* decision, the Court firmly rejected the obvious meaning of the Amendment: specifically, that the Constitution gave Congress broad power to protect the former slaves from oppressive state action. The majority asked:

> Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?[73]

A reasonable answer to the Court's question would have been, "yes, of course!" State law created slavery, perpetuated the accumulation of material wealth and political power derived from slave labor, undermined and almost permanently destroyed national unity and attempted to recreate slavery through Black codes. The privileges or immunities provision of the Fourteenth Amendment aimed to protect former slaves by ensuring that as citizens of the United States they would also have the same human rights as white citizens in the State in which they lived. Thus, the Fourteenth Amendment limited the ability of the states to oppress the former slaves. Stated another way, the Amendment authorized Congress to protect human rights by enacting appropriate legislation, especially where the State failed to act or where the State became an instrument of majority tyranny.

The majority's miserly interpretation of human rights under the Fourteenth Amendment conferred the primary protection of the human rights of African Americans upon state governments, which were often dominated by unrepentant former rebels. Basically, the Court placed the foxes firmly in control of the chicken coop…

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[72] *The Slaughter-House Cases*, 83 U.S. at 76.
[73] *Id.* at 77.

The dissenters in *Slaughterhouse* recognized the Court's flawed analysis and said:

> A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State…They do not derive their existence from its [the state's] legislation, and cannot be destroyed by its power.[74]

Moreover, the dissenters pointed out that:

> The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage... But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.[75]

The dissent's position would not only have furnished powerful protection for former slaves but also it would have strengthened protection for the rights of all working people (including the butchers in the *Slaughterhouse Cases*). Such individuals would have been better able to freely pursue their vocations.

On the same day as the *Slaughterhouse* decision butchered the Privileges or Immunities Clause, in *Bradwell v. Illinois*, the Court added insult to injury: The Court denied women the right to practice law. In *Bradwell*, Myra Bradwell, a woman living in Illinois, passed the Illinois bar exam with high honors and was qualified to practice law. [76] The Illinois Supreme Court denied Bradwell admission to the state bar.[77] Bradwell sued alleging that her privileges or immunities of citizenship included the freedom to practice law

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[74] *Id.* at 95–96.
[75] *Id.* at 96.
[76] Bradwell v. Illinois, 83 U.S. 130, 130 (1873). *See generally* DAWN BRADLEY BERRY, THE 50 MOST INFLUENTIAL WOMEN IN AMERICAN LAW 25 (1996); JANE M. FRIEDMAN, AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL (1993); JILL NORGREN, REBELS AT THE BAR: THE FASCINATING, FORGOTTEN STORIES OF AMERICA'S FIRST WOMEN LAWYERS 26–43 (2013).
[77] *Bradwell*, 83 U.S. at 131.

and that the state of Illinois violated her rights under the Fourteenth Amendment.[78]

The Court rejected Bradwell's argument and held that the Privileges or Immunities Clause did not encompass a woman's right to practice law.[79] The *Slaughterhouse* Court's narrow reading of privileges or immunities made it easier for the Court in *Bradwell* to rebuff the argument that practicing law was a privilege or immunity (right or liberty) of citizenship. The Court seemed convinced that the freedom of choosing a vocation was not at the core of American citizenship. To the extent that citizenship was relevant to practicing law, the Court concluded that individual states could decide the appropriate qualifications for admission to the state's bar.[80] The practical result: the United States Supreme Court upheld the Illinois court's decision to exclude Bradwell from the legal profession because she was a woman.

The *Bradwell* case exemplified a legal and social structure that obstructed women's entry into the legal profession. Indeed, from 1789-2008, every American president appointed males to more than seventy percent (70%) of federal judgeships.[81] Prior to 2008, every president appointed white males to a majority of such judgeships. President Barack Obama has appointed women to over forty per cent of federal judgeships.[82] Women of all colors and men of color comprise the majority of Obama's judicial appointees.[83]

Following a brief period of relative calm, throughout the mid and late 1870s, white southern political, civic and religious leaders boldly proclaimed their continuing dedication to restoring "white supremacy."[84] Thus, for instance, between 1873 and 1877, in Mississippi, Louisiana, Alabama, Georgia and both Carolinas, "Home Rule" or "Redeemer" governments came to power facilitated by whips, bullets and stuffed ballot boxes.[85] These governments opposed the exercise by African Americans of rights like vot-

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[78] *Id.* at 133.
[79] *Id.* at 139.
[80] *Id.*
[81] Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments, 1789-2015*, 26 BERKELEY LA RAZA L. J. (forthcoming 2016); Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. L. REV. 1197, 1203-07 (2010).
[82] Neil Eggleston, *Judicial Nominations: Accomplishments and the Work That Lies Ahead* (Dec. 17, 2014, 3:39PM), https://www.whitehouse.gov/blog/2014/12/17/judicial-nominations-accomplishments-and-work-lies-ahead.
[83] *Id.*
[84] Michael Perman. *Struggle for Mastery: Disfranchisement in the South, 1888-1908*, 107 THE AMERICAN HISTORICAL REVIEW 885, 885–86 (June 2002); *White Supremacy and Terrorism,* PBS, http://www.pbs.org/tpt/slavery-by-another-name/themes/white-supremacy/ (last visited April 27, 2015).
[85] FONER, *supra* note 48, at 587–88.

ing, property ownership, and holding jobs other than manual labor.[86] Many whites viewed it as a threat for African Americans to enjoy the fruits of their own labor as entrepreneurs. For example, after he, his wife and children had been beaten by Ku Klux Klansmen, one African American man in Florida, who was trying to purchase a parcel of land for his family, was told that the Klan did not "allow damned niggers to live on land of their own".[87]

Realizing that something needed to be done, the Republican Congress passed the Civil Rights Act of 1875 to safeguard human rights, especially those of former slaves.[88] The Act was comprehensive and sought to limit discrimination against African Americans in public accommodations as well as other spheres of American life.

In relevant part, Section 1 of the Act read as follows:

> [A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[89]

Section 2 of the Act made it a misdemeanor criminal offense to deprive a person of the rights secured under Section 1.[90]

The Act was immediately challenged in federal court. Two cases involved the denial of hotel accommodations to persons of color,[91] discrimination in theatres sparked two other cases,[92] and a final case encompassed

[86] *Unit 7 The Reconstruction Era, 1865-1877*, N.J. STATE LIBRARY, http://www.njstatelib.org/research_library/new_jersey_resources/digital_collection/unit_7_reconstruction_era/ (last visited Mar. 25, 2015).

[87] FONER, supra note 48, at 429.

[88] *Landmark Legislation: Civil Rights Act of 1875*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm.

[89] The Civil Rights Cases, 109 U.S. 3, 9 (1883).

[90] "[A]ny person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: Provided, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any State: And provided further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution." *Id.*

[91] *Id.* at 4.

[92] *Id.*

the refusal of a train conductor to allow an African American woman to sit in the ladies car of a train.[93] Because she was travelling with a young white man the conductor surmised that she was a woman of questionable morals, though in fact it turned out that the man with whom she was traveling was her spouse.[94]

By an eight to one vote, the Supreme Court struck down Sections 1 and 2 of the 1875 Act.[95] Writing for the majority, Justice Bradley argued that the Fourteenth Amendment applied solely to racially discriminatory state action.[96] For example, the majority asserted that the Act outlawed the Black Codes passed following the Civil War to reduce the freed slaves to a condition indistinguishable from slavery.[97] For the majority, the Fourteenth Amendment's authorized Congress to:

> [N]ullif[y] and make[] void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.[98]

The Court contended that the Amendment gave Congress the authority "To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it."[99]

The Court viewed racial discrimination practiced by private individuals as falling outside the scope of Fourteenth Amendment protection. Thus, the Court asserted:

> [S]o in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.[100]

The Court rejected the argument that Congress could preemptively pass legislation to prevent private individuals from engaging in racial discrimi-

[93] *Id.* at 4–5.
[94] *The Civil Rights Cases*, 109 U.S. at 5.
[95] *Id.* at 26.
[96] *Id.* at 24–25.
[97] FONER, *supra* note 48, at 195–205.
[98] *The Civil Rights Cases*, 109 U.S. at 11.
[99] *Id.* at 10–11.
[100] *Id.* at 13.

nation. The Court perceived the exercise of such governmental power to be reserved to the States under the Tenth Amendment.[101] The Court offered the following interpretation of the Fourteenth Amendment's effect:

> That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question ... is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.[102]

As to the Thirteenth Amendment, the majority contended that Congress did have the authority to pass direct and general legislation to ensure that slavery ceased to exist in the United States.[103] However, the Court perceived racial discrimination practiced by individuals as not a badge or incident of slavery. Accordingly, Congress could not prohibit racist acts by private individuals. The majority rejected the argument that the Thirteenth Amendment authorized Congress to enact the Civil Rights Act of 1875, stating:

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. 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. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it. [104]

The majority acknowledged that areas existed in which Congress had

> [D]irect and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes. . . In these cases Congress has power to pass laws for regulating

[101] *Id.* at 14–15.
[102] *Id.* at 18–19.
[103] *The Civil Rights Cases*, 109 U.S. at 20–21
[104] *Id.* at 24–25.

> the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof.[105]

In sum, the Court interpreted both the Thirteenth and Fourteenth Amendments of the Constitution so that white persons who owned businesses open to the general public could practice racial discrimination at will.

In a thoughtful, detailed and compelling dissent, Justice Harlan argued that the Thirteenth Amendment conferred power upon Congress to pass legislation outlawing discrimination by private individuals. Harlan argued that race discrimination by individuals was at the core of the institution of slavery.[106] Harlan declared that:

> [S]ince . . . [slavery] rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, because of their race, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State. [107]

Harlan stated that private business owners acted in a quasi-public capacity when they operated railroads, theatres, inns and other commercial enterprises opened to the general public.[108] Accordingly, such individuals were sufficiently clothed with public authority to be amenable to the Constitution's prohibition against badges or incidents of slavery like racial discrimination.

Harlan said both the Thirteenth and Fourteenth Amendments applied. The Fourteenth Amendment applied because a privilege or immunity of citizenship was "exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same state.[109]

The two Amendments overlapped to some degree, but for Harlan, that presented no constitutional problem. Harlan noted that in the Slaughterhouse Cases the Court had acknowledged that following the Civil War the southern state legislatures had passed laws which

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[105] *Id.* at 18.
[106] *Id.* at 36–37 (Harlan, J., dissenting).
[107] *The Civil Rights Cases*, 109 U.S. at 36.
[108] *Id.* at 40–41.
[109] *Id.* at 48.

> [I]mposed upon the color race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; forbade them to appear in the towns in any other character than menial servants; required them to reside on and cultivate the soil, without the right to purchase or own it; excluded them from many occupations of gain; and denied them the privilege of giving testimony in the courts where a white man was a party.[110]

Harlan argued that such laws were badges or incidents of slavery which the Thirteenth Amendment could reach even before the Fourteenth Amendment was ratified.

Harlan pointed out that in *Prigg v. Pennsylvania* the Court had created an implied right of self-help to allow a slaveholder to seize a person whom the slaveholder asserted was a slave even in the absence of legislation recognizing such a (slaveholder) right.[111] The *Prigg* Court's manufactured slaveholder recapture power trumped contrary state law requiring some degree of due process before a person of color could be spirited from the jurisdiction and confined until death in bondage.[112] Accordingly, Harlan argued that:

> [T]he national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws… whereby the master could seize and recover his fugitive slave, were legitimate exercises of an implied power to protect and enforce a right recognized by the Constitution, why shall the hands of Congress be tied, so that -- under an express power … it may not, by means of direct legislation, bring the whole power of this nation to bear upon States and their officers, and upon such individuals and corporations exercising public functions as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land?[113]

Hammering his points, Harlan asserted:

> [I] t is for Congress, not the judiciary, to say that legislation is appropriate -- that is -- best adapted to the end to be attained. The judiciary may not, with safety to our institutions, enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a co-ordinate department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government.[114]

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[110] *Id.* at 37 (citing The Slaughter-House Cases, 83 U.S. 36 (1872)).
[111] *The Civil Rights Cases*, 109 U.S. at 28–29.
[112] Prigg v. Pennsylvania, 41 U.S. 539, 671–72 (1842).
[113] *The Civil Rights Cases*, 109 U.S. at 52–53 (Harlan, J., dissenting).
[114] *Id.* at 51.

"The sound construction of the Constitution," said Chief Justice Marshall,

> must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[115]

In concluding his argument, Harlan said that racial segregation in public places was unlawful.[116] Harlan pointed out that on a daily basis, in the Supreme Court itself, the general public observed Court proceedings on a non-segregated basis.

> Scarcely a day passes without our seeing in this court-room citizens of the white and black races sitting side by side, watching the progress of our business. It would never occur to any one that the presence of a colored citizen in a court-house, or court-room, was an invasion of the social rights of white persons who may frequent such places. And yet, such a suggestion would be quite as sound in law … as is the suggestion that the claim of a colored citizen to use, upon the same terms as is permitted to white citizens, the accommodations of public highways, or public inns, or places of public amusement, established under the license of the law, is an invasion of the social rights of the white race.[117]

Unfortunately, the majority's miserly interpretation of the scope of Congressional authority under the Fourteenth Amendment became embedded in American constitutional law with disastrous consequences. Perhaps the most notable example of such erroneous Supreme Court decisions was *Plessy v. Ferguson*.[118]

On the crest of the tide to reverse the national progress made during Reconstruction, the United States Supreme Court announced its decision in *Plessy v. Ferguson*. Homer Plessy, an African American who according to court records was seven-eighths white and looked like a white person, was arrested for riding in the whites only section in a Louisiana railway car.[119] At least one account of Plessy's arrest states that Plessy identified himself

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[115] *Id.* at 51 (quoting McCulloch v. Maryland, 17 U.S. 316 (1819)).
[116] *Id.* at 59.
[117] *Id.* at 60.
[118] Plessy v. Ferguson, 163 U.S. 537, 546 (1896).
[119] *Id.* at 538.

by saying to the streetcar conductor: "I have to tell you that, according to Louisiana law, I am a colored man."[120]

Plessy filed suit challenging the local segregation statutes.[121] In an eight to one decision the United States Supreme Court ruled against him.[122] The Court held that the state's statutes were *not unreasonable*.[123] The Court said that if the segregation statutes discriminated in a demeaning manner, the problem was primarily in the minds of African Americans who chose to look at the statutes in that way. The majority stated:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[124]

Based on this tortured logic, the Court ruled that the segregation statutes did not violate the Fourteenth Amendment equal protection clause.

In dissent, Justice Harlan argued that the real impact of the segregation statutes was that African Americans were perceived as being so debased and inferior that they were not free to associate with white citizens:

> Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[125]

In addition to discrimination against African-Americans in jury selection, public accommodations, voting, and education, white individuals attempted to intimidate African Americans who were exercising their rights to work and contract. For example, in *Hodges v. United States*, a mob of white men in Arkansas marched on a sawmill and drove six African Americans men off their jobs, thereby preventing the African Americans from exercising

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[120] HARVEY FIRESIDE, SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM 1 (2004).
[121] *Plessy*, 163 U.S. at 538.
[122] *Id.* at 548–49.
[123] *Id.* at 550–51 (emphasis added).
[124] *Id.* at 551.
[125] *Id.* at 560 (Harlan, J., dissenting).

their right to contract with other individuals for gainful employment.[126] The assailants were convicted under federal statutes protecting African Americans from terrorist activities by groups like the Ku Klux Klan and the Knights of the White Camellias.[127]

On appeal to the United States Supreme Court, the majority of the Court reversed the lower court's convictions.[128] The Court stated that the Fourteenth Amendment only applies to discriminatory state action.[129] According to the majority, the mob behavior was not state action: the mob was a group of individuals who violated the rights of African Americans.[130]

Turning to the African Americans workers' argument under the Thirteenth Amendment, the Court stated that the Thirteenth Amendment simply abolished slavery.[131] According to the Court, the Amendment was not intended to prohibit the type of racially based crimes which defendants committed in the *Hodges* case. Relying on this reasoning, the Court held that the trial court did not have the authority to convict the white assailants under the civil rights statutes.[132]

In a strong dissent, Justice Harlan argued that the Thirteenth and Fourteenth Amendments applied to the situation. The Fourteenth Amendment applied because it protected African Americans from being assaulted because of their color.[133] Congress could pass legislation to remedy such hate crimes.[134] In addition, Justice Harlan argued that under the Thirteenth Amendment, one of the incidents of slavery was that African Americans were unable to contract.[135] Accordingly, Congress could legislate to prevent

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[126] Hodges v. United States, 203 U.S. 1, 3–4 (1906).

[127] The Knights of the White Camellia has recently been described as follows: "The Knights of the White Camellia, a Texas Klan group led by Charles Lee, along with the Texas chapter of Thom Robb's Knights of the KKK, has been linked to a number of incidents of racial intimidation and harassment in Vidor, Texas. These incidents, which occurred in 1992 and 1993, involved efforts to prevent the desegregation of an all-white federally assisted housing project in Vidor. Among the reported acts of intimidation was the threat to blow up a housing unit to prevent its integration; residents of the project additionally alleged that the White Camellia Knights carried automatic weapons on a bus they drove through the housing complex and that one Klan member offered white children $50 to beat up African-American children. The Texas Commission on Human Rights has brought a civil suit against both Klan groups in response to these incidents." *Anti-Semitism in the United States: Hate Groups*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/anti-semitism/KKK.html (last visited April 27, 2015).

[128] *Hodges*, 203 U.S. at 20.

[129] *Id.* at 14.

[130] *Id.*

[131] *Id.* at 16.

[132] *Id.* at 19–20.

[133] *Hodges*, 203 U.S at 28 (Harlan, J., dissenting).

[134] *Id.* at 30.

[135] *Id.* at 38.

private individuals from interfering with African Americans' contract rights.[136] Harlan contended that the vigilantes had forced the African Americans to violate their employment contracts merely because the African Americans were African Americans.[137]

The Court's decisions in cases like *The Civil Rights Cases, Plessy*, and *Hodges*, all undercut African Americans' attempts to exercise their civil rights. These and similar Supreme Court decisions demonstrated at least one thing: regarding the rights of African Americans, instead of its motto of "Equal justice under law," the Court had effectively posted a large sign: "Do not disturb!"

C. An Early Twentieth Century Fight for Freedom

Confronted with these daunting constitutional obstacles, twentieth-century human rights advocates, like Charles Hamilton-Houston, the Vice Dean of the Howard University School of Law, decided to embark on a systematic campaign to destroy segregation. In the early 1930s, Houston modified a proposal by Harvard Law Professor Nathan Margold calling for an ambitious litigation strategy attacking segregation throughout the south.[138] Houston instead chose to initially challenge segregation within the bounds of the existing law by making local officials live up to the holding that *Plessy* dictated--not only separateness, but also equality. Houston argued that the white governmental officials would recognize that the public could not afford to maintain equal dual school systems.[139] Houston assumed that such officials would then make the rational decision to desegregate.

An early example of Houston's strategy was *Missouri ex rel. Gaines v. Canada*.[140] In *Gaines*, a Negro student, Lloyd Gaines, was denied admission to the all-white University of Missouri Law School.[141] Speaking for a divided Court, Chief Justice Hughes stated, "it was as an individual that he was entitled to the equal protection of the laws, and the State was bound to

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[136] *Id.* at 27–29.
[137] *Id.* at 23–24.
[138] Leland B. Ware, *Setting the Stage for* Brown*: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950*, 52 MERCER L. REV. 631, 634–35, 639–42 (2001). GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 116-17 (1983).
[139] *See id.* Ware, *supra* note 138 at 642; McNeil, *supra* note 138 at 117..
[140] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
[141] *Id.* at 342–44.

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furnish him within its borders facilities for legal education substantially equal to those . . . afforded for persons of the white race."[142]

Gaines was the first major NAACP litigation victory at the Supreme Court level.[143] After the case was decided, the plaintiff, Lloyd Gaines, mysteriously disappeared and was never seen again.[144] While foul play was never confirmed or denied, it was strongly suspected.[145]

In the arena of labor law in the early 1940's, the Supreme Court decided the cases of *Steele v. Louisiana and Nashville Railroads* and *Tunstall v. Brotherhood of Locomotive Firemen and Engineers.*[146] These cases involved the white railroad unions which called themselves Brotherhoods and which (in an unbrotherly manner) denied membership to African Americans.[147] Under the relevant railroad labor legislation, the Brotherhoods were allowed to be the bargaining agent for the railway workers.[148] *Steele* and *Tunstall* held that the Brotherhoods had to fairly represent non-member African Americans.[149]

As World War II concluded, it became clear that the separate but equal litigation was resulting in newer inferior school facilities for African Americans. For example, some schools had one room used for cafeteria and gymnasium, or one room used for cafeteria, gymnasium, and the auditorium.[150]

While progress at the secondary school level was discouraging, the NAACP won victories in *Sipuel v. Oklahoma* and *McLaurin v. Board of Regents of Oklahoma*. Those cases established the right of African Americans at the graduate level to participate more fully in the educational process.[151]

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[142] *Id.* at 351.

[143] *See* Ware, *supra* note 138, at 658.

[144] Ware, *supra* note 138, at 658.

[145] Robert C. Downs, Harry D. Pener & Steven D. Gilley, *A Partial History of UMKC School of Law: The "Minority Report"*, 68 UMKC L. REV. 511, 522–23 n.66 (2000).

[146] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Tunstall v. Bhd. of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944).

[147] *Steele*, 323 U.S. at 194; *Tunstall*, 323 U.S. at 211–12.

[148] *Steele*, 323 U.S. at 194–95; *Tunstall*, 323 U.S. at 211–12.

[149] *Steele*, 323 U.S. at 204; *Tunstall*, 323 U.S. at 212–13.

[150] *See, e.g.,* Jennifer Drummond, *African-American High School's Legacy Lives On*, CHESTERFIELD OBSERVER (Feb. 27, 2008), http://www.chesterfieldobserver.com/news/2008-02-27/news/025.html.; OLIVER W. HILL, THE BIG BANG, BROWN V. BOARD OF EDUCATION AND BEYOND: THE AUTOBIOGRAPHY OF OLIVER W. HILL, SR., 155-56 (2000).

[151] *See generally* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1946).

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The battle for equality under the law had wide ranging implications because racial discrimination was deeply entrenched in America's social infrastructure through laws which appeared neutral but masked rank segregation. So, for instance, many veterans took advantage of the G.I. Bill to seek further academic and vocational training. For black GIs who had risked their lives to "make the world safe for democracy", the doors of segregated colleges and universities throughout many states remained shut to them.[152] Those same doors swung open widely to welcome returning white GIs.[153] Unlike his African American comrades in arms the GI Bill allowed white service persons like former President George H.W. Bush to attend any college in the United States.[154]

In this way, the national government subsidized a national racial quota system which gave institutions of higher learning tax payer money to set aside slots for white World War II and Korean War GIs while refusing to allow blacks to compete for places in such institutions.[155] Even in elite schools which were nominally opened to black GIs, unofficial quotas kept the population of black students (as well as those of other outcasts, like Jews) at token levels.[156]

At the Supreme Court level, the mid-twentieth century witnessed significant change. In *Sweatt v. Painter*, to avoid admitting Heman Sweatt, a qualified African American to the University of Texas Law School, the state of

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[152] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 256–58 (1976).

[153] *Id.*; F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 WM. & MARY BILL OF RTS. J. 273, 286 n. 72 (2000); Anthony M. Platt, *The Rise and Fall of Affirmative Action*, 11 NOTRE DAME J. L. ETHICS & PUB. POL'Y 67, 69 (1997); John A. Powell & Marguerite L. Spencer, *Remaking the Urban University for the Urban Student: Talking About Race*, 30 CONN. L. REV. 1247, 1262 (1998).

[154] *See* SUZANNE METLLER, SCHOLARS STRATEGY NETWORK, HOW THE G.I. BILL BUILT THE MIDDLE CLASS AND ENHANCED DEMOCRACY 2 (2012); Megan Slack, *By the Numbers: 3*, THE WHITE HOUSE BLOG (Apr. 27, 2012, 3:34 PM), https://www.whitehouse.gov/blog/2012/04/27/numbers-3; *see also* sources cited *supra* note 153. Similarly, the late Chief Justice William Rehnquist benefited from the veterans affirmative action program. *See e.g.*, DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST: THE EARLY YEARS 13–14 (1987); WILLIAM H. REHNQUIST, THE SUPREME COURT 3–4 (2001). For a revealing behind-the-scenes perspective of the Rehnquist nomination to the Supreme Court, see JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT (2001). *See also* Serviceman's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284, 287–90.

[155] Jonathan K. Stubbs, *Why America Still Needs Affirmative Action*, VA. LAWYER, Oct. 2008, at 20.

[156] For discussion of the invidious nature of group based quotas, particularly as applied to Jews, see generally Grutter v. Bollinger, 288 F. 3d 732, 793–94 (6th Cir. 2002) (Boggs, J., dissenting); Karen Sacks, *How Did Jews Become White Folks* in CRITICAL WHITE STUDIES 395–401 (Richard Delgado & Jean Stefancic, eds. 1997); Marcia Graham Synott, *Anti-Semitism and American Universities: Did Quotas Follow the Jews* in ANTI-SEMITISM IN AMERICAN HISTORY 233–71 (David A. Gerber, ed. 1986).

Texas created a law school just for plaintiff.[157] The school consisted of a few rooms in the basement of a storefront building, a sparse library and three part time instructors.[158] Writing for the Court, Chief Justice Vinson accepted the plaintiff's argument regarding the makeshift law school and the criteria for a good law school:

> Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the state. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree, those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, tradition and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.[159]

After *Sweatt*, the Court appeared poised to overturn segregation per se. In June 1950, less than a month after the Court decided Sweatt, at its annual convention, the NAACP decided to challenge segregation head on.[160] Four cases were filed in relatively short order, culminating in the decision in *Brown*.

In 1954, in *Brown v. Board of Education,* the Supreme Court ruled that legally required racial segregation of public schools was unconstitutional because such segregation deprived students of color of equal educational opportunities.[161] The Court unanimously held that the segregated schools were inherently unequal.[162] The rationale which outlawed segregation in Brown was extended to a number of other areas, and laid the foundation to further dismantle American apartheid.

In these historical circumstances, as the Civil Rights Act of 1964 was moving through Congress, an important issue was whether to push the

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[157] *See* Sweatt v. Painter, 339 U.S. 629 (1950).

[158] CHARLES ZELDEN, THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION 56 (2013); JACK GREENBERG, BROWN V. BOARD OF EDUCATION: WITNESS TO A LANDMARK DECISION, 22 (2004).

[159] 339 U.S. at 633–34.

[160] Smithsonian National Museum of American History, Separate is Not Equal: Brown v. Board of Education, http://americanhistory.si.edu/brown/history/3-organized/turning-point.html (last visited April 27, 2015).

[161] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[162] *Id.*

Court to revisit and substantially narrow or overrule the 1883 decision in The Civil Rights Cases or to try a different route.

Rather than tackle The Civil Rights Cases and its progeny, the Commerce Clause seemed an easier path.

D. The Commerce Clause Path

Since the late 1930s, the Court had taken an extremely deferential approach to reviewing Congress's decisions based on the Commerce Clause. For example, in *United States v. Darby*, the Court upheld the authority of Congress to enact provisions of the Fair Labor Standards Act which prohibited the interstate shipment of goods produced by employees whose wages and hours failed to conform to the requirements of the Act.[163] Citing *Gibbons v. Ogden*, the *Darby* Court reaffirmed that Congress had power over commerce that was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."[164] Accordingly, Congress had the authority to outlaw a Georgia manufacturer's use of interstate commerce to sell lumber products produced by employees in violation of minimum wage and hour standards.

Similarly, in *Wickard v. Filburn*, the Court sustained congressional legislation which provided that a penalty could be imposed on wheat farmers who exceeded their individual quotas for the production of wheat even if the excess wheat was being raised for the farmer's personal consumption rather than for interstate sale.[165] The Court upheld a penalty of $117.11 against a farmer who raised two hundred and thirty nine bushels more than his allotment.[166] The Court stated "[t]hat the appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[167]

In identifying the constitutional bedrock underlying the Civil Rights Act of 1964, the Court's expansive interpretation of Congress's Commerce Clause power offered a convivial constitutional foundation for the Civil Rights Act of 1964. In contrast, in The Civil Rights Cases, the Court had strait-jacketed the Thirteenth and Fourteenth Amendments. In this histori-

[163] 312 U.S. 100, 115 (1941).
[164] *Id.* at 114 (quoting Gibbons v. Ogden, 22 U.S. 1, 196 (1824)).
[165] 317 U.S. 111, 124 (1942).
[166] *Id.* at 114–15
[167] *Id.* at 127–28.

cal context, the proponents of the Act choice of the commerce clause as the primary constitutional foundation proved propitious. Shortly after the legislation was enacted, in two cases decided on the same day the Court unanimously sustained the Act largely based on Congress' commerce clause power.

In *Heart of Atlanta Motel v. United States*, the hotel practiced racial discrimination by refusing to rent rooms to African Americans and sought to continue its racist practices.[168] The hotel filed a declaratory judgment action asking that the Court hold that Title Two of the Act exceeded Congress authority under the Commerce Clause.[169]

The Court unanimously rejected the hotel's argument and upheld Title Two of the Act based on Congress' commerce power.[170] The Court said that the decision in the Civil Rights Cases was inapposite because the Civil Rights Act of 1875 "broadly proscribed discrimination in 'inns, public conveyances on land or water, theaters, and other places of public amusement,' without limiting the categories of affected businesses to those impinging upon interstate commerce.'"[171] The *Heart of Atlanta* Court also emphasized that in *The Civil Rights Cases* neither the federal government nor the Court focused on the Commerce Clause.

In contrast, the Civil Rights Act of 1964 relied on the commerce power and was based on a record that was "filled with testimony of obstructions and restraints resulting from the discriminations found to be existing."[172] In upholding Title Two of the 1964 Act, the Court pointed out that even assuming that the activities of the hotel were "local," "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[173]

Likewise in *Katzenbach v. McClung*, the Court upheld Title Two against the claim of a family owned barbecue restaurant which wished to continue its policy of racial discrimination. The Court said:

> [T]he volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But as our late Brother Jackson said … in Wickard… "That appellee's own contribution to the demand for wheat may be trivial by it-

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[168] 379 U.S. 241, 243 (1964).
[169] *Id.* at 242–43.
[170] *Id.* at 243.
[171] *Id.* at 250.
[172] *Id.* at 252.
[173] *Heart of Atlanta Motel*, 379 U.S. at 258 (quoting United States v. Women's Sportswear Mfg. Ass'n., 336 U.S. 460, 464 (1949)).

> self is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.[174]

Accordingly, the Court concluded that Congress had Commerce Clause authority to enact the legislation.

Moreover, the Court stated that under the Necessary and Proper Clause, Congress has authority to enact legislation that affected local activities where those local activities impacted interstate commerce. The *McClung* Court put matters this way:

> Much is said about a restaurant business being local but "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."[175] The activities that are beyond the reach of Congress are "those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[176]

In sum, the *McClung* Court stated: "This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago."[177]

More recent Supreme Court cases suggest that a current majority of the Court may not share the *McClung* Court's perspective on the scope of Congress' commerce power.

III. A RESTRICTIVE INTERPRETATION OF THE COMMERCE CLAUSE: A TROUBLING TRIO

Three notable relatively recent Supreme Court cases that have curbed Congress' commerce authority are *United States v. Lopez*,[178] *United States v. Morrison*[179] and the *ACA case*.[180]

Lopez involved a twelfth grade student who was arrested for carrying a concealed revolver and bullets to school.[181] He was subsequently convicted under the Gun Free Zones Act which made it a federal crime to knowingly

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[174] Katzenbach v. McClung, 379 U.S. 294, 300–01 (1964).
[175] *Id.* at 302 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).
[176] *Id.* (quoting Gibbons v. Ogden, 22 U.S. 1, 195 (1824)).
[177] *Id.*
[178] 514 U.S. 549 (1995).
[179] 529 U.S. 598 (2000).
[180] 132 S. Ct. 2566 (2012).
[181] *Lopez*, 514 U.S. at 551.

possess a firearm in a school zone.[182] The Court of Appeals for the Fifth Circuit reversed the conviction,[183] and the Supreme Court upheld the Fifth Circuit's decision.

Writing for a narrow majority, Chief Justice Rehnquist asserted that the Court's Commerce Clause jurisprudence had established that Congress' power was limited to regulating three broad categories. First, Congress could manage "the use of the channels of interstate commerce."[184] Second, Congress had authority over the "instrumentalities of commerce."[185] Finally, Congress could control "activities having a substantial relation to interstate commerce."[186]

The Court held that the Gun Free Zones Act was not a regulation of activities substantially related to interstate commerce. The Court contended that:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[187]

One might ask why is it not a legislative function to decide which statute (like section 922(q) is (or is not) "essential" to achieve the legislature's goals? In fact, in his Civil Rights Cases dissent, Justice Harlan made essentially the same point:

> The judiciary may not, with safety to our institutions, enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a co-ordinate department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government .[188]

Be that as it may, the *Lopez* Court concluded that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate

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[182] *Id.*
[183] *Id.* at 552.
[184] *Id.* at 558.
[185] *Id.*
[186] United States v. Lopez, 514 U.S. 549, 558–59 (1995).
[187] *Id.* at 561.
[188] 109 U.S. at 51.

commerce."[189] The Court expressed fear that the national government was seeking to assert a general police power inconsistent with state sovereignty under the Tenth Amendment.[190]

In dissent, Justice Breyer argued that a rational basis existed for Congress' enactment of the legislation, and that the Court should defer to Congress' judgment.[191] Specifically the dissenters asserted that a factual basis existed for Congress to believe that gun violence in schools adversely affected education.[192] "Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as human problem."[193] In short, Congress had sufficient reason to pass the legislation, and the Court should have sustained rather than overruled the legislature on a matter of public policy.

In *United States v. Morrison*, the Court struck down Section 13981 of the Violence Against Women Act,[194] which provided a civil remedy for victims of gender based violence.[195] The Court held that the Constitution did not authorize Congress to pass such legislation either under Section 5 of the Fourteenth Amendment or under Congress' commerce power.[196] Relying upon its reasoning in *Lopez*, the *Morrison* Court said:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.[197]

Even though Congress made extensive findings regarding the impact of gender violence on victims, the Court asserted that it, not Congress, was the final arbiter of whether the particular activity substantially affects interstate commerce.[198] The Court " reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's

[189] *Id.* at 567.
[190] *Id.* at 564.
[191] *Lopez*, 514 U.S. at 618–19 (Breyer, J., dissenting).
[192] *Id.*
[193] *Id.* at 620.
[194] United States v. Morrison, 529 U.S. 598, 601–02 (2000).
[195] *Id.*
[196] *Id.* at 619, 627.
[197] *Id.* at 613 (citations omitted).
[198] *Id.* at 614.

aggregate effect on interstate commerce."[199] The Court reasserted its fear that Congress was attempting to create an unconstitutional national police power which would destroy state sovereignty over many matters which traditionally fall within the state police power.[200]

The *Morrison* Court also held that Section Five of the Fourteenth Amendment did not save the gender based violence statute because Section Five applied to state action rather than that of individuals. [201] The Court endorsed The Civil Rights Cases' narrow interpretation of the scope of the Fourteenth Amendment.

Writing for himself and three other Justices, Justice Souter dissented. Souter claimed that Congress had made sufficient findings of the economic impact of domestic violence to sustain the Act under its Commerce Clause jurisprudence.[202] His dissent pointed out that the evidence supporting the gender based violence act was more voluminous than that which was used to sustain the Civil Rights Act of 1964.[203] Souter's dissent did not address The Civil Rights Cases.

More recently, in the ACA case, the Court ruled that Congress had power under the Taxing and Spending Clause of the Constitution to pass the individual mandate provision of the Affordable Care Act.[204] The individual mandate required certain classes of individuals to purchase health insurance with prescribed features or pay a penalty.[205]

Nevertheless, a bare majority of the Court also asserted that the Commerce Clause of the Constitution did not confer upon Congress the authority to enact the individual mandate legislation. Writing for himself, Chief Justice Roberts noted that the Court has interpreted the Commerce Clause as giving Congress wide latitude in enacting legislation to regulate interstate commerce:

> [I]it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce."… Congress's power, moreover, is not limited to regulation of an activity that by

[199] *Morrison*, 529 U.S. at 617.
[200] *Id.* at 615.
[201] *Id.* at 621 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).
[202] *Id.* at 628–38 (Souter, J., dissenting).
[203] *Id.* at 635–36.
[204] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2573–74 (2012).
[205] *Id.*

> itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.[206]

However, having established the wide swath of congressional authority under the Commerce Clause, Roberts contended that the Court had nevertheless confined the boundaries of that authority to cases in which Congress was attempting to regulate the activities of individuals. "As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.' It is nearly impossible to avoid the word when quoting them."[207]

The Chief Justice then concluded that Congress lacked the authority to establish the individual mandate because the Chief Justice perceived the individual mandate as a congressional "command" that individuals engage in commercial activity – specifically, that they buy health insurance policies.[208]

To support his argument, the Chief Justice cited and distinguished *Wickard v. Filburn*. Roberts described *Wickard* as a case in which the wheat farmers were engaged in commercial activity (farming) and therefore, Congress could regulate that activity as part of a broad national policy.[209] The Chief Justice contended that Congress was claiming a power to "command that those not buying wheat do so…[as well as to] command that those not buying health insurance do so."[210]

In contrast, in the *Sebelius* decision, Roberts claimed that individuals who had not purchased health insurance had refrained from commercial activity and were therefore "doing nothing"[211]. Roberts argued that the government could not compel private individuals who were uninvolved in commerce to become commercially active. He opined:

> [M]ost of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to "regulate the uninsured as a class." … Our precedents recognize Congress's power to regulate "class[es] of activities," … not classes of individuals, apart from any activity in which they are engaged.[212]

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[206] *Id.* at 2585–86.
[207] *Id.* at 2587.
[208] *Id.*
[209] *Sebelius*, 132 S. Ct. at 2587.
[210] *Id.* at 2588.
[211] *Id.* at 2589.
[212] *Id.* at 2590.

Since, those who had not chosen to obtain insurance coverage were according to Roberts not involved in activity, Congress could not compel them to become commercial actors.[213]

> People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures, joined with the similar failures of others, can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.[214]

However, Roberts went on to find that the individual mandate was a tax within the scope of Congress' taxing and spending authority.[215] On that basis, he along with Justices Ginsburg, Breyer, Sotomayor and Kagan voted to sustain the individual mandate.[216] Writing for the Court, Roberts held that: "The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."[217]

In a joint opinion, Justices Scalia, Kennedy, Thomas and Alito dissented from the Court's decision that the individual mandate was constitutional because it was a tax. The dissenters pointed out that the statute described the mandate as a penalty, and that the Court had established that a tax and a penalty are not synonymous.[218]

> Our cases establish a clear line between a tax and a penalty: "[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act." ... In a few cases, this Court has held that a "tax" imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held--never--that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that any exaction imposed for violation of the law is an exercise of Congress' taxing power--even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act "adopt[s] the criteria of wrongdoing" and then imposes a monetary penalty as the "principal consequence on those who transgress its standard," it creates a regulatory penalty, not a tax.[219]

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[213] *Id.* at 2589.
[214] *Sebelius*, 132 S. Ct. at 2589.
[215] *Id.* at 2600.
[216] *Id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part).
[217] *Id.* at 2600 (majority opinion).
[218] *Id.* at 2651 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).
[219] *Sebelius*, 132 S. Ct. at 2651–52.

However, regarding the boundaries of Congress' authority under the Commerce Clause, the dissenters were in substantial agreement with Chief Justice Roberts. The dissenters said that:

> [I]f that provision [the individual mandate] regulates anything, it is the failure to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure--that abstention from commerce--is not "Commerce." To be sure, purchasing insurance is "Commerce"; but one does not regulate commerce that does not exist by compelling its existence.[220]

Rather ominously, the joint dissenters described *Wickard v. Filburn* in the following language: "The striking case of *Wickard* v. *Filburn*, held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence."[221] Calling *Wickard* an extreme case is hardly a ringing endorsement affirming its continuing validity.

Indeed Chief Justice Roberts uses similar language when he depicts *Wickard* as one in which the commerce power "has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock."[222] By pointing out that the production of wheat for personal consumption seems to be a local matter, Roberts (not too subtly) indicated his skepticism regarding the *Wickard* decision's conclusion that such individual activity was sufficient to fall within Congress' commerce power. Roberts' opinion suggests that, like the dissenters, he views *Wickard* as a borderline case:

> *Wickard* has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," ...but the Government's theory in his case would go much further. Under *Wickard* it is within Congress's power to regulate the market for wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may

[220] *Id.* at 2644.
[221] *Id.* at 2643 (citations omitted).
[222] *Sebelius*, 132 S. Ct. at 2578–79 (majority opinion) (citations omitted).

> be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.[223]

The Chief Justice affirmed the substance of the dissent's commerce clause argument by saying: "The commerce power thus does not authorize the mandate. Accord ... (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting)."[224] In short, it seems that five justices now agree on a much more restrictive reading of the commerce clause than had previously been true.

In a thought provoking dissenting opinion, Justice Ginsburg, argued that the contentions of the Chief Justice and Justices Scalia, Kennedy, Thomas and Alito joint opinion radically departed from the Court's prior Commerce Clause analysis. Ginsburg stated that:

> Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce."... Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation.[225]

Applying those criteria to the ACA case lead Justice Ginsburg to conclude that "[T]hese principles ... require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce."[226]

Ginsburg agreed with the Chief Justice's holding that Congress had power to mandate that individuals buy health insurance under Congress' power to levy taxes. Nevertheless, Ginsburg found it puzzling that the Chief Justice would attempt to impose significant restrictions on Congress commerce power. "Why should The Chief Justice strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our everdeveloping modern economy?"[227] In other words, why write a long judicial essay on the Commerce Clause when your analysis of that Clause is not necessary to decide the case? As Justice Ginsburg noted, "I see no reason to undertake a Commerce Clause analysis that is not outcome determinative."[228]

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[223] *Id.* at 2588.
[224] *Id.* (citations omitted).
[225] *Sebelius*, 132 S. Ct. at 2616 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part).
[226] *Id.* at 2617.
[227] *Id.* at 2629.
[228] *Id.* at 2629 n.12.

Justice Ginsburg's question may be restated: "In attempting to tie Congress' hands under the Commerce Clause, what are the other five Justices up to?" That question is briefly explored in the concluding section which follows.

CONCLUSION: PRELIMINARY PARANOIA?

From the standpoint of the protection of human rights under the Constitution, one must ask the question, just what does the narrow reading of the Commerce Clause in cases like *Lopez*, *Morrison* and the ACA case mean? After all, Title Two and Title Seven of the Civil Rights Act of 1964 are largely based on Congress plenary power to regulate commerce. The Court has previously repeated that Congress has broad commerce power. Now one wonders. In the first Title II cases (*Heart of Atlanta Hotel* and *McClung*), the Court unanimously upheld the Civil Rights Act based on the Commerce Clause. After the Rehnquist and Roberts Courts manhandling of Congress' commerce power, how far are these two seminal Title II cases unscathed?

One could be forgiven for the fleeting thought that the Roberts Court is erecting a devastating constitutional mine field to obliterate the Civil Rights Act of 1964 which protects all persons in the United States from invidious discrimination on the basis of race, color, sex, religion or national origin. Or put another way, the Court's *Sebelius* decision reflects a kind of termite jurisprudential approach. The Court is hollowing the substance of constitutional protections into an empty shell by erroneous interpretations of the spirit and letter of our guardian of liberty: the Constitution.