CHAPTER THREE

Equality

In this chapter, we illustrate our interpretive approach with examples from the Supreme Court's jurisprudence of equality. We begin with *Brown,* then discuss the evolution of gender equality norms, and conclude with Congress and the Court's shared responsibility for enforcing civil rights.

BROWN

Perhaps no single decision better exemplifies an interpretive approach faithful to the Constitution's vision and values than *Brown v. Board of Education*.[1] For decades, *Brown* has stood as the most honored decision in the Supreme Court's jurisprudence. Today, no judicial nominee could win confirmation, and no legal theory could gain wide acceptance, without embracing the correctness and stature of *Brown.* Thus it is a telling contrast that *Brown* is an easy case from the standpoint of our interpretive approach, whereas *Brown* cannot be explained easily, if at all, under originalism or strict construction.

The unanimous *Brown* opinion authored by Chief Justice Earl Warren provides a rich account of constitutional interpretation and the meaning of equality as a constitutional value. What stands out in the Court's reading of the Fourteenth Amendment is its explicit rejection of originalism in favor of an interpretive approach sensitive to historical change and social context. Through *Brown,* we come to understand constitutional equality not as an abstract formula or a narrow idea limited by history, but as a moral principle that guides our public values and responds to the lived reality of contemporary social practices.

Chief Justice Warren began the opinion by noting that the *Brown* cases had been argued in the 1952 Term but then, at the Court's request, reargued in the 1953 Term to address "the circumstances surrounding the adoption of the Fourteenth Amendment in 1868" and, in particular, whether the Congress or the states ratifying the Fourteenth Amendment understood it to abolish segregation in public schools.[2] Although the ratification history was "exhaustively" examined by the parties, by the United States as amicus curiae, and by the Court's own investigation, the Court ultimately found the inquiry into original understanding to be "[a]t best . . . inconclusive."[3] Because public education in the North and South was rudimentary or nonexistent at the time, the Court explained, "it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."[4]

Chief Justice Warren went on to observe that, although *Plessy v. Ferguson* had upheld the doctrine of "separate but equal," the Court had never resolved the doctrine's applicability to public education. In clear and explicit terms, the Court explained that the answer to the issue presented must come not from an indeterminate quest for original understanding but from a reading of the Fourteenth Amendment that situates its guarantee of "equal protection of the laws" within a social context that had evolved considerably since its ratification:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[5]

This declaration of interpretive approach served as prologue to *Brown*'s familiar passage describing the contemporary significance of public education for each individual and for our democratic society.[6]

With this historical and social backdrop, the Court then analyzed the constitutionality of school segregation by reference to its actual consequences for black schoolchildren: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[7] The Court went on to quote the district court's

finding that segregation "is usually interpreted as denoting the inferiority of the negro group" and that the sense of inferiority redounds to the educational detriment of black children.[8]

Although the *Brown* opinion focused on the importance of education and the stigmatic harms that segregation imposed on black children, the significance of the decision went further. The Justices clearly understood *Brown* to rest not only on the educational harms of segregation but more broadly on the incompatibility of racial caste with the constitutional meaning of equality. For equality, if it means anything, must mean that it is untenable for "a whole race of people [to find] itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station."[9] Thus, in the ensuing years, the Court issued a series of unanimous judgments summarily invalidating segregation in public transportation and places of recreation on the authority of *Brown*.[10]

Brown may be faulted for not fully articulating how legalized segregation undermined the full and equal citizenship that the Fourteenth Amendment promised to former slaves and their descendants.[11] But this omission does not obscure its jurisprudential legacy. As an interpretive matter, *Brown* did what *Plessy* refused to do: the Court treated the social meaning of segregation as a relevant—indeed determinative—factor in appraising whether it fulfilled the Constitution's principle of equality. In upholding "separate but equal," *Plessy* artificially distinguished between legal and social equality. Under *Plessy,* so long as the law (in theory) guaranteed equal facilities, racial separation had no legal consequence because whatever stigma it caused was a matter of antecedent attitudes and affinities unstructured by law.[12] The Constitution, *Plessy* held, guaranteed legal but not social equality.

By contrast, *Brown* understood the Constitution to guarantee equality not as an abstract formalism, but as a lived experience in social context. The lived experience can be framed narrowly (e.g., the educational harms to black schoolchildren) or broadly (e.g., the systemic subordination of blacks in a regime of racial caste). But the overarching point is that the patent illegality of segregation depends on a principle of constitutional equality concerned with law's reason and logic as well as with its social consequences and social meanings. The Court in *Brown* recognized that merely formal equality is not genuine equality at all. Once the constitutional meaning of equality is understood this way, *Brown* is—as it should be—an easy case.

Why, then, has the correctness of *Brown* been the subject of so much hand-wringing in some legal circles? The short answer is that *Brown* is a difficult case under interpretive theories that disavow the relevance of contemporary social understandings to the application of the Constitution's general principles. To justify *Brown,* originalism must posit that the federal and state legislators who ratified the Fourteenth Amendment understood it to abolish segregated schools. Given the widespread practice of school segregation in the states and the paucity of evidence that the enacting Congress believed the Amendment would radically transform public schooling, it is no wonder that the unanimous Court in *Brown* found the original intent "[*a*]*t best* . . . inconclusive."[13] Indeed, for over half a century, a scholarly consensus across the ideological spectrum has recognized that *Brown* cannot be explained on originalist grounds.[14] Even the most ambitious and labored effort to reconcile *Brown* with originalism[15] comes up short for reasons lucidly elaborated by one of the nation's leading civil rights historians.[16]

In recent years, some have read *Brown* to stand for the neutral principle that the Constitution requires government to be colorblind. Last Term, four Justices, led by Chief Justice John Roberts, asserted that the violation in *Brown* was that "schoolchildren were told where they could and could not go to school based on the color of their skin" and that the Constitution requires "'admission to the public schools on a nonracial basis.'"[17] But the superficial neutrality of this phrasing paints a false portrait of history by implying that segregation imposed equal burdens on blacks and whites alike. As Justice Stevens observed, "it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools."[18] Neither history nor common sense supports Chief Justice Roberts's conclusion that "assign[ing] black and white students to *different* schools in order to *segregate* them" presents the same constitutional evil as "assign[ing] black and white students to the *same* school in order to *integrate* them."[19]

Moreover, in what sense is colorblindness "neutral" when its foreseeable result is, as it is in many communities, the assignment of schoolchildren to racially separate and unequal schools? The same criticism applies to another entailment of so-called neutral principles—the intent doctrine of *Washington v. Davis*—which provides a safe harbor for policies that, while not demonstrably motivated by race, show deliberate indifference to the racial inequalities they produce.[20] The lesson of *Plessy,* revealed in *Brown,* is that "the seduction

of 'neutral principles' must be tempered by an honest accounting of relevant social facts."[21] In other words, the constitutional meaning of equality cannot be forged in a vacuum of legal formalism.

In sum, the authority of *Brown* lies in the Court's candid recognition that the true test of constitutional equality must be the lived experience of the American people. Justice Breyer put it well when he described "the hope and promise of *Brown*" this way:

> For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For Brown held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.[22]

GENDER EQUALITY

The evolution of constitutional protection against gender discrimination likewise demonstrates how contemporary social understandings legitimately influence the task of interpreting the principles stated in the Constitution's text. For more than a generation, the nation has recognized the equal citizenship of men and women as a core constitutional value. This is true even though our well-accepted norms of gender equality were not widely shared when the nation ratified the Fourteenth Amendment or even the Nineteenth Amendment. Fidelity to the Constitution's commitment to equality, informed by our society's increasingly egalitarian perspectives on the roles and capabilities of women and men, legitimizes modern gender equality jurisprudence.

Although suffragists during the nineteenth century actively fought for the abolition of slavery, their own claim to equal citizenship was not part of the original understanding of the Fourteenth Amendment. The text of Section 1 applies to "citizens" and "persons" regardless of gender, but the Framers did

not expect the Fourteenth Amendment's guarantees to apply to women. In particular, the amendment was not intended to disturb common-law coverture rules that merged a woman's legal identity into those of her husband upon marriage and effectively disabled women from owning property, making contracts, or keeping their own wages if they were permitted to work.

Moreover, Section 2 of the Fourteenth Amendment indicates that the Framers assumed the continued validity of state laws limiting the right to vote to men. In apportioning representatives among states by population, Section 2 reduces the apportionment of any state that denies the franchise to any noncriminal "male" citizen. By contrast, state denial of the franchise to women resulted in no corresponding reduction in the apportionment of representatives. The unmistakable premise of Section 2—that states may lawfully disenfranchise women—was affirmed by a unanimous Supreme Court in 1875.[23]

Other decisions confirm that few members of the Framing generation understood the Fourteenth Amendment to apply to gender discrimination. In *Bradwell v. Illinois,* the Court affirmed an Illinois Supreme Court decision denying Myra Bradwell admission to the bar, rejecting her claim that the privileges and immunities of national citizenship include the right to practice law.[24] *Bradwell* was decided at the same time as the *Slaughter-House Cases,* which held that federal privileges and immunities do not encompass the right to pursue an occupation.[25] Although four Justices dissented from the holding in *Slaughter-House,* three of them nonetheless voted against Bradwell's claim for reasons stated by Justice Bradley:

> It certainly cannot be affirmed, as an historical fact, that [the right to pursue employment] has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[26]

Justice Bradley affirmed the vitality of common-law coverture rules and went on to treat the circumstances of unmarried women as "exceptions to

the general rule," explaining that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."[27] Two decades later, in *Ex parte Lockwood,* a unanimous Court, citing *Bradwell,* reaffirmed that states may exclude women from the practice of law.[28]

In 1920, the Nineteenth Amendment finally extended the franchise to women, fifty years after it had been extended to black Americans. But the amendment was not understood to work a broad change in women's legal status or to embody a general principle against sex discrimination. Many state courts continued to uphold laws barring women from serving as jurors,[29] and even as late as 1961, the U.S. Supreme Court upheld a state law exempting women from jury service on the ground that the "woman is still regarded as the center of home and family life."[30]

Moreover, as women entered the paid workforce in increasing numbers during the early twentieth century, states enacted legislation setting maximum hours and minimum wages for women only. Although these laws made it possible for many low-income mothers to participate in the labor market, they also tended to perpetuate stereotypes concerning gender roles and differences. In *Muller v. Oregon,* for example, the Supreme Court pointed to "the inherent difference between the two sexes" and, in particular, a woman's "physical structure and a proper discharge of her maternal functions" in sustaining a women-only maximum hours law.[31]

In *West Coast Hotel v. Parrish,* the Court upheld a women-only minimum wage law as a reasonable response to "the fact that [women] are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances."[184] But the Court in subsequent cases failed to develop a coherent doctrine distinguishing beneficial protective legislation from discriminatory laws based on gender stereotypes. In *Goesaert v. Cleary,* the Court upheld a Michigan law prohibiting a woman from bartending unless she was the wife or daughter of a bar's male owner, reasoning that "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems" that may be minimized with "the oversight assured through ownership of a bar by a barmaid's husband or father."[33] After *Goesaert,* numerous state courts invoking traditional gender roles upheld ordinances that

prohibited the sale of liquor to women or limited women's employment in bars and taverns.[34]

Remarkably, "[f]or the first century of the Fourteenth Amendment's life, no court interpreted the Constitution to prohibit state action favoring men over women."[35] It was not until 1971, in *Reed v. Reed,* that the Supreme Court for the first time invalidated a gender classification under the Equal Protection Clause.[36] Although spare in its reasoning, *Reed* inaugurated a line of precedents that closely scrutinized gender stereotypes and struck down laws treating men and women unequally. As a result, "the American constitution now has something very much like a constitutional ban on sex discrimination—not because of the original understanding of its text but because of new judicial interpretations."[37]

The modern transformation of gender equal protection doctrine shows how judicial interpretation of the Constitution can legitimately incorporate evolving social understandings. *Reed* and subsequent cases were decided against the backdrop of a social movement that powerfully challenged traditional gender roles and stereotypes.[38] Throughout the late 1960s and 1970s, popular mobilization behind the cause of gender equality sought not only to eliminate overtly discriminatory practices but also to remake the social organization of the family and to eradicate structural barriers to women's full participation in economic and political life. Through sustained advocacy and public debate, the women's movement called into question the social and legal structures that perpetuated the gendered divide between breadwinning and homemaking and the unequal citizenship that division entailed.

The claims of the women's movement found tangible expression in a raft of federal legislation. Not only did Congress include "sex" among the prohibited bases of employment discrimination under Title VII of the Civil Rights Act of 1964,[39] it also invoked its power under Section 5 of the Fourteenth Amendment to extend that prohibition to state employers in 1972[40] even though the Supreme Court at that point had never found sex discrimination in employment to be unconstitutional. In the same session, Congress banned sex discrimination in federally funded educational programs[41] and in a host of other federally supported programs.[42] In addition, Congress passed the Equal Rights Amendment on March 22, 1972, and sent it to the states for ratification.

The constitutional significance of this intense period of popular mobilization and lawmaking was not lost on the Court. In 1973, a four-Justice plurality

in *Frontiero v. Richardson* identified gender as a suspect classification under the Equal Protection Clause.[43] In an opinion by Justice Brennan, the plurality observed that "over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications," citing Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Equal Rights Amendment as examples.[44] "Thus," the plurality said, "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."[45]

Frontiero invalidated federal statutes that imposed more onerous requirements on husbands than on wives for claiming housing and medical benefits as dependents of uniformed servicemembers. In reaching this judgment, the plurality reviewed the nation's history of discrimination against women and observed that the "practical effect" of policies "rationalized by an attitude of 'romantic paternalism' " was to "put women, not on a pedestal, but in a cage."[46] Despite improvements in recent decades, "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[47] Statutory gender classifications deserve heightened scrutiny under the Equal Protection Clause, the plurality explained, because "the sex characteristic frequently bears no relation to ability to perform or contribute to society."[48]

After *Frontiero,* a solid Court majority began to invalidate a wide range of policies premised on overbroad or outdated sex stereotypes. In *Weinberger v. Weisenfeld,* the Court struck down a statute entitling a widowed mother, but not a widowed father, to Social Security benefits based on the earnings of the deceased spouse.[49] The Court faulted the policy for its "archaic and overbroad generalization . . . that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support."[50] In *Stanton v. Stanton,* the Court voided a state law requiring parents to provide support until age 21 for boys, but only until age 18 for girls, because it reflected "old notions" that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[51]

In *Craig v. Boren,* the Court struck down a statute prohibiting the sale of non-intoxicating beer to boys under the age of 21 and to girls under the age of 18, explaining that "the gender-based difference [was not] substantially

related to achievement of the statutory objective" in promoting traffic safety.[52] In *Mississippi University for Women v. Hogan,* the Court held that a state nursing school may not limit enrollment to women because such an "admissions policy lends credibility to the old view that women, not men, should become nurses."[53] And in *United States v. Virginia,* the Court invalidated the exclusion of women from the Virginia Military Institute on the ground that gender "classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[54]

Through these and other cases, the Court has transformed constitutional doctrine on gender equality from a deferential approach premised on "inherent" differences between men and women to a modern rule of careful and rigorous skepticism. Today, gender classifications must have a "direct, substantial relationship" to an "important" state objective so that they reflect "reasoned analysis rather than . . . the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[55] "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[56] The application of heightened scrutiny to gender classifications is now a firmly settled principle of constitutional law.[57]

Heightened scrutiny has not uniformly led to invalidation of gender distinctions. The Court has upheld sex-based classifications that remedy prior discrimination against women in economic or employment opportunity[58] or that arguably reflect "real" differences between men and women.[59] The line between protective and paternalistic legislation, or between "real" and socially constructed differences between the sexes, can be difficult to discern because the distinctions are dynamic and informed by society's changing attitudes and perceptions. The Court's jurisprudence properly recognizes the role of evolving social understandings in shaping a responsive constitutional doctrine of gender equality. The expression of those understandings through federal legislation, in particular, can have considerable constitutional significance, as the plurality acknowledged in *Frontiero*[60] and as the Court more recently confirmed in *Nevada Department of Human Resources v. Hibbs*.[61]

In sum, our modern doctrine of gender equality has not resulted from adherence to the Framers' original understanding of how the Fourteenth Amendment's commitment to equality applies to gender discrimination. Nor did the doctrinal transformation occur through a formal process of

constitutional amendment; although Congress passed the ERA in 1972, it was not ratified by the states. Instead, in a series of decisions over several decades, the Court managed to integrate contemporary understandings of gender equality into Fourteenth Amendment doctrine, producing results virtually equivalent to what the ERA would have accomplished.[62] The widespread acceptance of the Court's gender equality jurisprudence in our legal and public culture attests to the legitimacy of interpreting the Constitution in the context of contemporary understandings. This interpretive approach is central to the process by which the Constitution's broad principles are given practical meaning and, from generation to generation, made our own.

CONGRESSIONAL ENFORCEMENT POWER AND THE EVOLVING SCOPE OF CIVIL RIGHTS

Although we typically look to the courts to interpret the Constitution, we have seen that the courts often interpret the Constitution by looking to the widely held understandings of constitutional principle reflected in our legal and public culture. The absorption of democratically articulated norms into constitutional law is not only an aspect of sound judicial practice. It is also an explicit feature of our constitutional design.

The Thirteenth, Fourteenth, and Fifteenth Amendments include enforcement clauses that authorize Congress "to enforce . . . by appropriate legislation" the substantive guarantees of those amendments. The provisions mark the first instances in the constitutional text where enforcement authority is expressly assigned to Congress. While the Framers of the Reconstruction Amendments did not intend to preclude judicial enforcement, it is unsurprising that they placed "their primary faith . . . in Congress"[63] since their generation had witnessed the debacle of *Dred Scott.* As a historical matter, it turns out the Framers were prescient in their design. When judicial interpretation of Congress's enforcement powers has embraced the democratic implementation of constitutional rights, the nation has made progress toward greater liberty and equality. By contrast, when courts have restricted Congress's enforcement powers, the result has been to stifle democratic understandings and to impede the progress of civil rights.

The latter dynamic characterized the immediate decades after the Civil War, when the scope of legislative enforcement power was a frequent source

of conflict between Congress and the Supreme Court. Congress passed the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871 to protect the new constitutional rights of black citizens. These laws criminalized conduct that interfered with the right to vote, the right to serve on a jury, or the enjoyment of the privileges of citizenship and the equal protection of the laws. In a series of decisions, the Court held that the statutes exceeded Congress's enforcement power because they applied to conduct beyond overt racial discrimination[64] or because they applied to private conduct and not state action.[65] Further, after Congress passed the Civil Rights Act of 1875 banning racial discrimination in public accommodations, the Court struck it down because it covered private acts of discrimination and applied to conduct that, in the Court's view, did not amount to "badges and incidents of slavery."[66]

These decisions reflected the Court's narrow view of the substantive guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments. But they also reflected the Court's disregard for the interpretive judgments of Congress, a co-equal branch of government expressly authorized by the Constitution to enforce those guarantees. The Reconstruction Congress understood that racial discrimination in voting could take ostensibly race-neutral forms, such as poll taxes and literacy tests. It also understood that black citizens were denied the privileges of citizenship and equal protection of the laws when state inaction or passivity facilitated private acts of violence by the Ku Klux Klan and others. Yet the Court ignored these constitutional judgments by Congress.

These congressional judgments were clearly sensible. The Civil Rights Act of 1875, for example, was readily understood as legislation to enforce the Fourteenth Amendment guarantee of citizenship for black Americans. As Justice Harlan observed in his dissent in the *Civil Rights Cases,* the Citizenship Clause "is of a distinctly affirmative character" and is not merely a prohibition on the states. Thus, Harlan reasoned, Congress may enforce the citizenship guarantee through "legislation of a primary direct character" and not merely through legislation targeting state action.[67] By limiting Congress's enforcement authority, the Court in these early cases stunted the implementation of constitutional civil rights and paved the way for Jim Crow.

Congress's enforcement power lay dormant for decades until the civil rights movement breathed new life into the Reconstruction Amendments in the wake of *Brown. Brown,* of course, was a judicial triumph. But the implementation of *Brown* occurred through a mutually reinforcing dynamic of

judicial and legislative activity that reflected the equality claims of a powerful popular movement.[68] In this period, as in the first Reconstruction, Congress used its enforcement power to play a leading role in defining the substantive contours of the Constitution's equality guarantees. This time the Supreme Court was willing to acknowledge Congress's role in interpreting constitutional principles in contemporary contexts.

A leading example is the Voting Rights Act of 1965 (VRA), "[a]n Act to enforce the fifteenth amendment to the Constitution of the United States."[69] Congress passed the VRA against a backdrop of judicial decisions that had upheld poll taxes and literacy tests in some instances as permissible voting requirements.[70] The Act established a nationwide prohibition on the use of literacy tests in order "[t]o assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color," as provided by the Fifteenth Amendment.[71] The Act also declared that "the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting" and authorized the U.S. Attorney General to challenge poll taxes in federal court.[72] Further, Section 5 of the VRA required certain states and political subdivisions to seek preclearance from the Attorney General or a federal district court before enacting any change in voting qualifications, prerequisites, standards, practices, or procedures.

In several decisions, the Supreme Court validated Congress's role under the enforcement clauses in defining the scope of constitutional guarantees. In *Katzenbach v. Morgan,* a suit challenging one provision of the VRA ban on literacy tests, the Court rejected the view that Congress's powers under Section 5 of the Fourteenth Amendment are limited to proscribing conduct that a court would find unconstitutional. "A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."[73] Upholding the VRA ban on literacy tests, the Court explained that the Framers chose the phrase "appropriate legislation" in Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment in order "to grant to Congress . . . the same broad powers expressed in the Necessary and Proper Clause" as interpreted by *McCulloch v. Maryland*.[74]

The Court likewise upheld the preclearance requirements of the VRA in *South Carolina v. Katzenbach,* explaining:

> Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.[75]

Moreover, one year after Congress passed the VRA, the Court finally declared the poll tax unconstitutional, overruling prior precedent.[76]

Yet the Court during this period declined to revisit other precedents that limited Congress's enforcement power—in particular, the *Civil Rights Cases.* When faced with identifying the source of Congress's authority to ban racial discrimination in public accommodations in the Civil Rights Act of 1964, the Court looked to the Commerce Clause instead of the Fourteenth Amendment.[77] As a result, the Civil Rights Act of 1964 is treated, somewhat anomalously, as merely economic legislation from the perspective of constitutional doctrine, even as it is widely understood in our legal and public culture as the crowning legislative achievement that made the principle of *Brown* "more firmly law."[78]

In areas beyond race, Congress has also exercised its enforcement power to broaden the scope of civil rights. In 1972, Congress made the prohibition on sex discrimination in employment applicable to the states[79] and banned sex discrimination in federally funded educational programs[80]—five years before the Supreme Court held that sex discrimination warrants heightened scrutiny under the Equal Protection Clause.[81] Congress also passed the Pregnancy Discrimination Act (PDA) in 1978, declaring pregnancy discrimination to be discrimination on the basis of sex.[82] As applied to the states, the PDA is Section 5 legislation expressing Congress's interpretation of the constitutional principle of gender equality. Further, Congress passed the Family and Medical Leave Act (FMLA) in 1993 and the Violence Against Women Act (VAWA) in 1994 to enforce the Constitution's protections against sex discrimination.[83]

Congress also established protections against age discrimination in the Age Discrimination in Employment Act (ADEA) of 1967 and extended the

anti-discrimination requirements to state employers in 1974.[84] Moreover, in 1990, Congress overwhelmingly passed the bipartisan Americans with Disabilities Act (ADA), banning discrimination against people with disabilities and requiring reasonable accommodations in wide-ranging areas of civic life, including public services and public employment.[85] Through the ADA, Congress established a new baseline for measuring equality of opportunity for persons with disabilities.

In recent years, however, the Supreme Court has again sought to circumscribe Congress's enforcement power in several ways. First, the Court has limited Congress to enforcing constitutional rights only as those rights have been interpreted by the Court.[86] Second, it has sometimes insisted on a detailed legislative record of state constitutional violations as a predicate for enforcement legislation.[87] Third, it has required "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"[88]—a tailoring requirement more stringent than the deferential *McCulloch* standard approved in *Katzenbach v. Morgan*.

Employing these tests, the Court has invalidated the application of significant civil rights legislation to the states. In 1997, the Court held that Congress exceeded its Section 5 power when it enacted the Religious Freedom Restoration Act, a statute designed to increase protection for religious liberty in response to a prior decision by the Court weakening such protection under the Free Exercise Clause.[89] In 2000, the Court held that Congress lacked power under Section 5 to establish a damages remedy under the ADEA for state employees because the statute "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional" by a court applying rational basis review.[90] Also in 2000, the Court held that a provision of VAWA authorizing victims of gender-motivated violence to sue their assailants in federal court is not proper Section 5 legislation because it sought to remedy state inaction rather than state action.[91] And in 2001, the Court invalidated the ADA's provision for civil damages against state employers who fail to provide reasonable accommodation for persons with disabilities, reasoning that Congress had not demonstrated a "pattern of unconstitutional discrimination" by the states and that "the accommodation duty far exceeds what is constitutionally required" by judicially established equal protection standards.[92]

In these cases, the Court failed to recognize the distinctive institutional capacities for fact-finding, remedial innovation, and policy judgment that

Congress brings to the task of enforcing constitutional rights. In particular, Congress, as a politically accountable body, does not operate under the institutional limitations that counsel restraint when unelected courts interpret the Constitution. When the Court insists that legislative enforcement of constitutional rights conform to judicial standards for enforcing those rights, the Court effectively treats Congress as if it were a lower federal court instead of a co-equal branch of government with its own democratically legitimate interpretive authority. Further, as Michael McConnell has explained,

> the Court's conclusion that judicial interpretations of the provisions of the Amendment are the exclusive touchstone for congressional enforcement power finds no support in the history of the Fourteenth Amendment. Members of Congress felt they had a responsibility to read and to interpret the Constitution for themselves, and they expected that their judgments regarding the reach of the Constitution would be given the same presumption of correctness that any other legislative determinations were given in the ordinary course of judicial review. This did not mean that Congress had plenary power to decide what rights should be given federal protection; Congress was limited to enforcing preexisting constitutional rights. But in determining what those preexisting constitutional rights are, Congress would engage in independent interpretation.
>
> Section Five was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution.[93]

In short, the Reconstruction Amendments envision that Congress and the judiciary would each bring its own institutional capacities and perspectives to bear on enforcing constitutional rights. The Court's recent Section 5 cases depart from this understanding.

In 2003, the Court appeared to modulate its Section 5 doctrine in *Nevada Department of Human Resources v. Hibbs*.[94] In an opinion by Chief Justice Rehnquist, the Court upheld the FMLA guarantee of twelve weeks of unpaid care-giving leave as valid Section 5 legislation to combat gender discrimination in the provision of leave by state employers. Although gender-neutral administration of leave benefits, including a state policy of providing no leave at all, would presumably pass muster under the Court's equal protection jurisprudence, Chief Justice Rehnquist observed that such an alternative "would not have achieved Congress' remedial object. . . . Where '[t]wo-thirds of the

nonprofessional caregivers for older, chronically ill, or disabled persons are working women,' and state practices continue to reinforce the stereotype of women as caregivers, [a gender-neutral no-leave policy] would exclude far more women than men from the workplace."[95]

Hibbs thus suggests that sex-based disparate impact in public employment, while not actionable under judicially articulated equal protection standards,[96] nevertheless constitutes a legitimate target of constitutional concern for Congress. Indeed, Congress has long treated disparate impact as an actionable basis for claiming employment discrimination, including discrimination by state employers, under Title VII of the Civil Rights Act of 1964. *Hibbs* demonstrates how remedial statutes such as Title VII and the FMLA give practical shape, beyond the contours of judicial doctrine, to the constitutional guarantee of equality.

In sum, the enforcement clauses, properly understood, serve as structural devices that enable the practical meaning of constitutional principles to evolve through a dynamic interplay of judicial and popular understandings. Because the Reconstruction-era Framers did not presume to know what citizenship, equality, and liberty would entail from one generation to the next, the Thirteenth, Fourteenth, and Fifteenth Amendments expressly provide for the enforcement of those fundamental guarantees through a continual process of doctrinal and democratic articulation. When this structural design has operated as intended, it has strengthened the core of civil rights protections that we enjoy today. But when the design has been perverted by an overreaching Court, the result has been to retard the progress of civil rights and to suppress democratic understandings of constitutional principle.