

## **History Lesson**

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The Civil Rights Act of 1964 is one of the great achievements of American law and, together with the Voting Rights Act of 1965, the crowning accomplishment of the civil rights movement of the 1950s and 1960s. The 1964 law prohibits discrimination on the basis of race, sex, national origin, and religion, at work and in schools, restaurants, businesses, and other establishments that are open to the public. It is the model for almost every civil rights law that followed and has probably done more to guarantee equal opportunity for Americans than any United States Supreme Court decision, including the ban on school segregation in the historic case of *Brown v. Board of Education*.

You would think that so basic a symbol of American liberty and equality must be within Congress's power to enact. Yet when Congress debated the act, the source of that power was by no means clear. Even today Congress's authority to pass civil rights laws remains a profound problem of constitutional law.

The Constitution's Fourteenth Amendment, ratified in 1868, fundamentally altered the balance of state and federal power. It prevented states from denying basic civil rights and gave Congress the power to enforce its guarantees of liberty and equality. But in the decades following Reconstruction after the Civil War, the Supreme Court became hostile to the rights of blacks and wary of congressional interference in states' affairs. The Court drastically limited Congress's civil rights power by narrowly interpreting the Fourteenth Amendment, striking down many Reconstruction-era civil rights laws, and looking the other way as southern state governments systematically oppressed blacks.

Generations later, in the wake of the civil rights movement of the 1950s and 1960s, the Supreme Court, led by Chief Justice Earl Warren, upheld the 1964 Civil Rights Act as constitutional -- but not because of Congress's power's to pass laws under the Fourteenth Amendment. Instead, the Court turned to the Constitution's Commerce Clause, which gives Congress power to regulate interstate commerce. Rather than treating the evils of discrimination as an affront to justice and equality -- and revisiting decisions it had made 80 years earlier -- the Court recast those evils as a barrier to the free flow of commerce. Picking up on this legal fiction, Congress has repeatedly invoked the Commerce Clause as the source of its power to pass laws broadening equality of opportunity and protecting workers from discrimination based on

pregnancy, age, and disability. The Commerce Clause has become the key vehicle both for regulating the American economy and for defending civil rights.

Now, however, a five-person conservative majority on the Supreme Court has begun to unravel the Warren Court's legal fiction. Chief Justice William Rehnquist, joined by Associate Justices Antonin Scalia, Clarence Thomas, Sandra Day O'Connor, and Anthony Kennedy, has embarked on a crusade to impose new constitutional limits on federal power, and the most important targets of Rehnquist and his colleagues have been civil rights laws.

In three recent major decisions, the Court has curbed Congress's power to pass new civil rights legislation under both the Commerce Clause as well as the Fourteenth Amendment. In the name of states' rights, the Court struck down a federal law that sought to remedy violence against women in *United States v. Morrison*, and it held that state employees cannot sue for damages when they suffer discrimination based on age and disability in *Kimel v. Florida Board of Regents* and in *Board of Trustees of the University of Alabama v. Garrett*.

These decisions are part of a revolution in constitutional law that runs counter to the country's deepest commitments to equality and liberty. *Morrison*, *Kimel*, and *Garrett* are bad law that throws roadblocks in the way of future civil rights protection. But they're also bad history, based on a form of amnesia: They were written by justices who seem to have forgotten the meaning of the nation's many struggles for equal citizenship, from Reconstruction to the fight for women's suffrage to the civil rights movement.

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When the Constitution was first debated, few people imagined that Congress would prove to be the basic guarantor of American liberties. In fact, the Bill of Rights was added in 1791 to limit Congress's power and prevent the new federal government from interfering in local affairs. Many members of the founding generation believed that a weaker central government would help secure republican liberty, by which they meant not simply individual freedom but also the preservation of the existing social order within the states, an order that included chattel slavery and limited the vote to white male property owners. Although Kentucky and Virginia protested vigorously against a federal law restricting political speech in 1798, for example, they raised no objection to the states restricting speech.

The Civil War changed all this. Given that several states had held blacks in slavery for generations, the states no longer seemed like the primary guarantors of liberty. Even after the Thirteenth

Amendment ended slavery in 1865, southern state governments denied blacks basic civil rights through the infamous Black Codes, which reduced blacks' economic opportunities to being sharecroppers and servants for whites and severely punished blacks for trying to leave their white employers. The Framers of the Fourteenth Amendment-- the so-called Radical Republicans-- concluded that the states had defaulted as protectors of civil liberties.

The Fourteenth Amendment reflected very different assumptions from those of the founding generation. From now on, the Congress, rather than the states, would be a central protector of basic rights, which the amendment called "the privileges or immunities of citizens of the United States." No state could abridge those privileges or immunities, or deny any person due process or the equal protection of the law. And to make sure that states did not violate people's constitutional rights, Congress gave itself the power to enforce the amendment through "appropriate legislation."

The Reconstruction Congress quickly used its new power. The Enforcement Acts of 1870 and 1871 banned state laws that denied blacks the right to vote, outlawed fraudulent voter registration practices, and authorized federal court supervision of suspicious elections. The Ku Klux Klan Act of 1871 prevented illegal intimidation of blacks where states were unwilling or unable to provide protection, making it a federal crime for private parties to conspire to violate civil rights. And the Civil Rights Act of 1875 guaranteed full and equal access to "inns, public conveyances and public places of amusement," anticipating by a century several of the provisions of the 1964 Civil Rights Act. The justification for this expanded federal power was genuinely new: For the first time, civil rights became a matter of national concern. Here at last, it seemed, was the source of Congressional power to pass federal civil rights legislation.

But forces of reaction challenged that view. Opponents of Reconstruction -- Northern Democrats and conservative Republicans -- disagreed with the Radical Republicans about the meaning of the Civil War, and hence about the scope of the new federal powers created by the Fourteenth Amendment. To them, the Civil War was about the illegality of secession, not the injustices of slavery or the failure of state governments to protect civil rights. Once slavery was abolished, and the Southern states were welcomed back into the Union, there was no need for federal interference in the states' internal operations.

In the 1873 *Slaughterhouse Cases* the Supreme Court adopted the Northern Democrat view, as University of Texas sociologist Pamela Brandwein explains.<sup>1</sup> Worried that the Fourteenth Amendment's privileges or immunities clause would give the federal government enormous new powers to supervise

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<sup>1</sup>Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* 27-49 (1999).

states, Justice Samuel Miller's majority opinion effectively wrote the clause out of existence. When voting irregularities left the presidential election of 1876 in dispute, white Northern and Southern politicians resolved the controversy with the Compromise of 1877, in which the federal government withdrew its troops from the South and ended Reconstruction. The Compromise handed southern state governments back to white "redeemers" who were determined to restore white supremacy through public power and private terror.

Redeemer governments used endless subterfuges to deny blacks equal opportunities while turning a blind eye to lynchings, intimidation, and violence. According to a new conventional wisdom, Reconstruction's attempt to foist racial equality on whites had gone too far, and the Civil War had not fundamentally changed the relationship between the states and the federal government.

The new racial and political conservatism soon dominated the Supreme Court. In the name of states' rights, the Court began to strike down the civil rights laws passed by the same Congress that had written the Fourteenth Amendment. In 1882, in *United States v. Harris*, the Court declared the criminal provisions of the Ku Klux Klan Act of 1871 unconstitutional. It refused to punish a white lynch mob in Tennessee on the ground that Congress could not reach private conspiracies under its Fourteenth Amendment powers. The next year, in the egregiously misnamed *Civil Rights Cases*, the Court struck down the last great achievement of the Reconstruction Congress, the Civil Rights Act of 1875. Justice Joseph P. Bradley argued that allowing Congress to protect blacks from private discrimination undermined state sovereignty and insulted states by assuming that they would not protect their black citizens. He dismissed the Civil Rights Act for making blacks "the special favorite of the laws."

That vision informs much of the Court's jurisprudence from the 1880s onward. In the infamous 1896 decision *Plessy v. Ferguson*, which upheld Louisiana's segregation of railway carriages, the Supreme Court gave its blessing to Jim Crow by creating the doctrine of "separate but equal" facilities that would be used to justify segregation for decades. In 1903 in *Giles v. Harris*, the Supreme Court simply looked the other way when the State of Alabama disenfranchised its black citizenry, declaring that there was nothing it could do even if federal constitutional rights were openly violated.. Other southern states quickly got the message, and by World War I, the South was rigidly segregated and blacks were shut out of the political process. Few people today realize how important the *Civil Rights Cases* were in fomenting this tragedy. As Yale Law School Professor Akhil Amar has pointed out, if the Supreme Court had upheld Congress's power to protect civil rights in 1883, the state law that segregated railway carriages in *Plessy* would have been trumped by the 1875 Civil Rights Act, and so too would much of the Jim Crow legislation that swept the South in the early 20<sup>th</sup> century. By invoking the shibboleth of states' rights to limit congressional

power, the Supreme Court helped crush equal opportunity for blacks for generations.

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Ninety years after the ill-fated Civil Rights Act of 1875, the modern civil rights movement pressed for a bill to protect blacks from discrimination in housing, jobs, and public places. A lot had changed in the interim, including the meaning of the term "civil rights." Justice Bradley's view, widely shared in the late-19th century, was that people had civil rights only against the government. If the government tried to restrict your right to make contracts or own property because of your race, or failed to enforce laws to protect you, you could complain that your civil rights were violated. But a private person could not violate them by definition.

To the leaders of the 1960s civil rights movement, this view was bizarre. For them the most important abridgments of civil rights involved *private* acts of discrimination -- by employers who refused to hire blacks or restaurant owners who refused to serve them at lunch counters. Many of the movement's standard methods of protest -- like boycotts and sit-ins -- were aimed at private businesses, not the state.

In promoting the new civil rights bill, the Kennedy and Johnson administrations faced a quandary: The *Civil Rights Cases* and *Harris* seemed to foreclose using Congress's powers to enforce the Fourteenth Amendment to prevent private discrimination, and there was no guarantee that the Supreme Court would overturn those 80-year-old precedents. So they offered an additional theory of congressional power.

Thirty years earlier, the constitutional struggle over the New Deal established that the federal government had broad authority to regulate the national economy. Through its powers under the Constitution's Commerce Clause, Congress could enact laws about anything that used or traveled through the instruments of interstate commerce -- highways, trains, telephones, or mail -- and it could regulate anything that might substantially affect interstate commerce. In 1942, the Supreme Court held that Congress could even regulate wheat grown on a family farm for home consumption because, it reasoned, the cumulative effects of home-grown produce could affect the national market. After that, most constitutional scholars assumed that the federal government could regulate just about anything through its commerce power.

Thus, in December 1964, the Warren Court upheld the new Civil Rights Act as a valid regulation of interstate commerce. Congress, the Court ruled, could reasonably conclude that segregated restaurants and hotels used food shipped through interstate highways or railways, and that segregation discouraged blacks from spending money and from traveling interstate. The Warren Court has a reputation for bucking

the will of majorities. But as University of Texas law professor Lucas Powe, Jr. has persuasively argued, the Court was remarkably deferential to Congress and promoted the values of national majorities over regional majorities, particularly those in the South. Far from viewing the new Civil Rights Act with suspicion, Warren and his colleagues were eager to uphold it.

For months before the act passed, sit-in cases had been percolating up to the Supreme Court. Lower courts throughout the South were convicting protesters for trespassing on the property of segregated white businesses. Anxious not to derail the civil rights movement, the Court had reversed many convictions on technicalities, but thousands more cases were still active. Soon the Court would have to decide whether using state trespass laws to keep black protesters out of segregated facilities violated the provision of the Fourteenth Amendment that no state could deny equal protection of the laws. Yet if the Court ordered stores and restaurants to serve blacks, there was no guarantee that southern businessmen would comply.

The 1964 Civil Rights Act took political pressure off the Court by putting the authority of a democratically-elected Congress behind the civil rights movement. As Robert Post of Boalt Hall and Reva Siegel of Yale Law School have pointed out, the new Civil Rights Act made Congress the Court's partner in articulating guarantees of equality. The 1964 Act let the Court interpret the Fourteenth Amendment's prohibition on illegal state action more narrowly, secure in the belief that Congress could reach private discrimination through the new Act and through subsequent legislation.

Thus, when the new civil rights law arrived on the Court's doorstep, the Act-- and the Commerce Clause theory of congressional power-- was a godsend. The Court didn't have to overturn the 80-year-old precedents of the *Civil Rights Cases* and *United States v. Harris*. Instead, the Warren Court treated Congress's commerce power as a civil rights power: Congress had the power to keep the channels of interstate commerce clear of racial discrimination.

Without directly confronting and overturning the racist *Civil Rights Cases*, the Warren Court effectively performed an end-run around them. All Congress had to do to pass civil rights legislation was distort reality, by arguing that it wanted to prohibit discrimination because denying people their civil rights would harm commerce. In succeeding years, the Congress passed laws that banned discrimination based on race, sex, religion, pregnancy, age, and disability, in areas ranging from education to housing to employment. As a result of the civil rights movement and Congress's response to it, it began to seem obvious to most Americans that equality, like the economy, was a subject of national concern.

The Warren Court's solution was clever, but it was a lawyer's trick and a stopgap measure. The ploy worked only as long as everyone recognized that the lesson of the civil rights movement was that

Congress could protect the civil rights of Americans against public and private discrimination, and that the old constitutional vision of the Compromise of 1877 was rejected if not explicitly overruled. As soon as people forgot that lesson, or refused to acknowledge it, Congress's power to pass new civil rights laws would be on shaky ground.

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Chief Justice William Rehnquist is the leader of the conservative majority on today's Supreme Court. Throughout his career on the court, which began in 1971, Rehnquist has been deeply skeptical of liberal civil rights claims, and he has long pushed for a "federalist" shift of power from Congress back to the states. When Clarence Thomas replaced Thurgood Marshall on the Supreme Court in 1991, few people understood that Thomas' most important role would be as the crucial fifth vote for a revolution in federal-state relations. In the decade since his appointment, Thomas, Rehnquist, Scalia, Kennedy, and O'Connor have struck down federal law after federal law in the name of states' rights. Among the most important casualties of this new conservative judicial activism have been federal civil rights laws.

In 1994, after years of hearings, Congress passed the Violence Against Women Act, which created a civil rights remedy that gives women who have been assaulted because they are women a right to sue their attackers in federal court. Congress passed VAWA because it found that state criminal and civil justice systems failed to take violence against women as seriously as other violent crimes. Attorneys General from 38 states urged Congress to enact VAWA, arguing that "the current system for dealing with violence against women is inadequate."

In 2000, however, the five conservative justices struck down VAWA's civil rights remedy in *United States v. Morrison*. Chief Justice Rehnquist ruled that Congress lacked the authority to pass VAWA under the Commerce Clause. The New Deal, he argued, had been about regulating the economy, and violence against women was not an economic activity, no matter how great an economic effect it might have. He brushed aside Congress's findings that gender-motivated violence deters women from traveling from state to state, discourages them from taking jobs or doing business across state lines, diminishes national productivity, and increases medical costs. For Rehnquist, the cumulative impact of inherently "noneconomic" activities could not justify federal law-making. Otherwise, he reasoned, Congress could regulate all violent crime, as well as family law, "since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."

Nor did the Fourteenth Amendment give Congress the power to enact VAWA. In *Morrison*, a

woman sued two men she said had raped her in a college dorm room. She argued that Congress could pass VAWA to enforce the Fourteenth Amendment because states had failed to provide women equal protection from violent assaults. But Rehnquist argued that even if VAWA made up for the failures of public officials, it was aimed at private actors. Pointing to the *Civil Rights Cases* and *United States v. Harris*, Rehnquist claimed that the act was beyond Congress's authority.

That same year, in *Kimel v. Florida Board of Regents*, the same five justices held that Congress could not hold states liable for damages when they discriminated against elderly employees. The next year, in *Board of Trustees of the University of Alabama v. Garrett*, the same justices held that states could not be sued for damages when they discriminated against disabled workers. In both cases, the Court recognized that because employment indisputably is an economic activity, Congress could use its commerce power to pass the underlying laws. But the Court argued that the Commerce Clause did not give Congress the authority to undermine the sovereignty and dignity of states by forcing state governments to pay damages when they violated workers' federal rights. The principle of state sovereignty -- which the Court said was guaranteed by the Constitution's Eleventh Amendment -- trumped the federal power to regulate the economy, at least with respect to the remedies that Congress could provide. The Court recognized that legislation enacted under the Fourteenth Amendment could override the states' immunity -- but it argued that the amendment didn't give Congress the power to pass laws addressing age or disability discrimination.

The court offered a complicated argument to support this last claim. Generally speaking, when the government makes distinctions based on race or gender, the Court scrutinizes these decisions closely. But when the government discriminates based on other criteria, like age or disability, the Court asks only whether the decision was wholly arbitrary or irrational. In *Kimel* and *Garrett*, the majority argued that states might rationally decide to discriminate against their older and disabled employees to save money, for example. In effect, it held that federal laws that bar discrimination based on age and disability don't really enforce any civil rights guaranteed by the Fourteenth Amendment. These laws are just regulations of interstate commerce, so states can't be forced to pay damages when they violate them.. *Kimel* and *Garrett* have this curious effect: The court insists that the Age Discrimination in Employment Act and the Americans with Disabilities Act are fully constitutional statutes and create federal rights that fully bind state governments. But if a citizen proves that state fired her because of her age or her disability, she can't make the state pay her for that loss, even though the state has clearly violated federal law.

Many things are controversial about *Morrison*, *Kimel*, and *Garrett*, but perhaps the most important is their reinterpretation of the nation's history. Take *Morrison's* ringing endorsement of the *Civil Rights*

*Cases* and *United States v. Harris*. The authority of these decisions, Rehnquist insisted, "stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time" because each justice "obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment." What Rehnquist didn't mention was that by the 1880s, the justices reflected not the vision of the Radical Republicans who wrote the Fourteenth Amendment, but the Compromise of 1877, which sold blacks out.

Next, consider *Morrison's* claim that the federal government should stay out of family law because that's traditionally a local concern left to the states. That story ignores a century or more of federal regulation of the family through welfare policies, pension laws, criminal penalties to enforce child support judgments, and continuous attempts to promote "family values," as Judith Resnik of Yale Law School and Jill Hasday of the University of Chicago have noted.<sup>2</sup>

In fact, Reva Siegel has shown that the "families are local" argument is a direct descendant of states' right arguments used to oppose equal rights for women, and in particular the right to vote.<sup>3</sup> For most of the nation's history, the states treated women as dependent members of a household ruled by their husbands or fathers, with virtually no contract or property rights of their own. Siegel explains that the "tradition of federal deference to state law grew up at least in part to maintain the status order that state law enforced." Respecting local authority in family matters meant respecting men's rights to control women through the guise of protecting them. That's why the 80 year long struggle for women's suffrage that produced the Nineteenth Amendment was continually opposed by states's rights advocates. Opponents of women's suffrage argued that a federal right to vote would undermine "local self government," disrupt family harmony and allow the feds to interfere in the privacy of men's homes. In fact, when women finally won the right to vote in 1920, opponents were so afraid that women's equality would undermine local authority that they tried unsuccessfully to get the Supreme Court to declare the Nineteenth Amendment unconstitutional because it violated states' rights.

We should read the Fourteenth Amendment's guarantee of equality-- and Congress's power to enforce it-- in light of the long struggle for women's suffrage. When Congress passes a law like VAWA, which is designed to secure equal citizenship for women, the last thing the Supreme Court should do is strike it down for interfering with traditional local control over domestic relations. As our nation's ideas

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<sup>2</sup>Judith Resnik, *Categorical Federalism*, Yale Law Journal (2001); Jill Hasday, *Federalism and the Family Reconsidered*, UCLA L. Rev. (2000).

<sup>3</sup>Reva B. Siegel, *As She the People*,@Harv. L. Rev. (Feb. 2002).

about equal citizenship change, so too must our notions about federal power to protect civil rights.

Probably the most curious feature of the Court's version of American history is its omission of the civil rights movement itself. Reading *Morrison*, *Kimel*, and *Garrett*, one would think that the movement had no impact on Americans' understanding of their Constitution. But a reasonable interpretation of the civil rights movement is that civil rights and civil equality are distinctively federal concerns. The struggle over the Civil Rights Act of 1964 established that the federal government has full authority to pass civil rights legislation to secure rights of equal citizenship for all Americans. The Rehnquist majority rejects this view. To them, the Civil Rights Act of 1964 was just another piece of economic legislation. And even though a central target of the civil rights movement was private discrimination, the Rehnquist Court insists that Congress has no inherent civil rights power to reach private conduct. According to the conservative majority, the civil rights struggles of the 1960s' left untouched the narrow, racist views of the 1880s.

Also striking is the Rehnquist Court's unwillingness to accept Congress as a partner. The Warren Court happily let Congress protect civil rights more broadly than it would, because Congress could better make fine-tuned judgments. Equally important, by letting Congress the lead in identifying which civil rights protections were necessary, the Warren Court could learn from social movements and take into account evolving popular understandings of equality. The Civil Rights Act of 1964 addressed women's rights, for example, well before the Court did in the 1970s. The Rehnquist Court also rejects this approach. It's entirely irrelevant that a popular consensus has grown in favor of civil rights for the elderly or the disabled, or that a democratically elected body like Congress has responded to changing social norms. Instead, the Court must jealously guard its status as the last (and only) authority on the meaning of the Constitution. To the extent that the evolving views of Congress and the public move beyond the Court's own, they must be clipped back.

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The Rehnquist majority insists that its version of federalism preserves individual liberty. The idea is that less federal regulation frees people from overweening federal bureaucrats and gives the states more room to experiment. But the argument falls apart when you look at how the doctrines work in practice. Because *Morrison* reaffirms the New Deal principle that Congress can reach any "economic" behavior and any activity that makes use of the Internet, phones, mail, railways, or highways, the majority doesn't protect much from potential federal interference. And what it does protect isn't worth defending. *Morrison* protects the freedom to assault women from federal interference. Because some states allow criminal prosecutions

for rape within marriage only in limited circumstances, punish it less severely than other forms of rape, or bar civil actions for marital rape, in those states *Morrison's* holding that Congress can't legislate to protect women helps safeguard the liberty of (mostly) husbands to rape their wives. In addition, because many hate crimes don't involve economic activity, they may now be beyond federal control. So the court's new federalism doctrines also help preserve the liberty of people to assault or kill others because of their race, religion or ethnicity. This is the sort of liberty that gives federalism a bad name.

The biggest problem with the Rehnquist majority's federalism is the liberties that it overlooks. Protecting women from assault and of racial and ethnic minorities from hate crimes helps preserve *their* liberty, not to mention their equality. This is the great lesson of the Civil War and Reconstruction: To be genuinely free, blacks needed not only an end to slavery, but also equal protection from criminal assaults and lynchings. The Ku Klux Klan Act may have limited the liberty of racist vigilantes, but it gave blacks freedom from fear.

The Rehnquist majority doesn't seem genuinely interested in using federalism to free people from federal regulation -- to do that, it would have to dismantle much more of the constitutional edifice of the New Deal. Rather, it seems primarily interested in making a symbolic gesture about limited federal power in order to rein in federal civil rights laws. The majority's rhetoric displays an almost mindless faith that striking *any* blow against federal power necessarily makes citizens freer. But how do *Kimel* and *Garrett* *increase* individual liberty by holding that states don't have to pay damages when they violate people's rights? The only liberty these cases protect is the liberty of states to violate people's federal civil rights with impunity.

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How can Americans free themselves from the doctrinal mess that the Rehnquist Court has created? The best solution is the simplest and the one most rooted in American history. The Civil War, Reconstruction, and the movements for women's suffrage and civil rights have made clear that safeguarding civil rights is central to the work of the national government. Congress's power to pass civil rights laws should come, as the Reconstruction Congress intended, from its powers under the Fourteenth Amendment. It is long past time that we recognized that Congress has full authority to enact legislation guaranteeing equal citizenship. When Congress passes such laws, courts should not have to pretend that they are economic regulation. And when Congress applies these civil rights laws to the states, states should not be allowed to violate them.

The opening line of the Fourteenth Amendment, the Citizenship Clause, proclaims that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."<sup>4</sup> The Citizenship Clause was designed to overrule the Supreme Court's 1857 *Dred Scott* decision, which held that blacks could not be citizens and "had no rights which the white man was bound to respect."<sup>5</sup> It establishes a principle of equal citizenship, prohibiting the creation of first- and second-class citizens. Congress's power to enforce the Fourteenth Amendment includes the power to enforce this clause, and in particular, to pass all legislation that it reasonably believes promotes the goals of equal citizenship.

The Citizenship Clause, like the Thirteenth Amendment's ban on slavery, says nothing about state action, and therefore it applies to private actors as well. The civil rights movement taught us that private discrimination in buses and coffee shops can deny equal citizenship as much as Jim Crow laws, and there should be no doubt that Congress has the authority to prevent both forms of discrimination. Nor is congressional power under the Citizenship Clause limited to redressing discrimination based on race or gender. Just as the reach of Congress's commerce power has grown over the years in response to our developing economy, the reach of its civil rights power should grow as our nation comes to terms with different kinds of prejudice and inequality.

Perhaps most important, when Congress promotes equal citizenship, it should not be limited to enforcing rights that judges have already recognized. Lawmakers may proactively decide which laws are most needed, just as they may decide how best to promote the free flow of commerce. Understanding what it means to be a free and equal citizen in a democracy is an ongoing project, in which legislatures and popular understandings have as much of a role to play as do courts. Indeed, Congress gave itself the power to enforce the Fourteenth Amendment because it understood that courts are not always the most enlightened actors in the American political system. The Supreme Court may fall victim to hubris, as it did in the *Dred Scott* case. It may fail to listen to the demands of social movements pressing for equality. And it may take too limited a view of the rights that Americans possess and fail to protect those rights when they are needed most.

When Congress passes a law that it claims will promote equal citizenship, courts should ask only whether that conclusion is reasonable. Put to this test, *Morrison*, *Kimel*, and *Garrett* become easy cases: Protecting women from violence clearly helps guarantee their equal citizenship; so does allowing state

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<sup>4</sup> U.S. Const. Amendment XIV, sec. 1, cl. 1.

<sup>5</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1856).

employees to win damages when they prove discrimination based on age or disability.

At bottom, the dispute over Congress's power to protect civil rights is a dispute about the meaning of America, about the lessons of our history and about the values that we are committed to as a people. We must decide, in short, if we want to be the country of the *Civil Rights Cases* or the country of the civil rights movement. If we remember who we are and where we have come from, that question should not be difficult to decide.