The Great Debate over the Civil Rights State

R. Shep Melnick
Thomas P. O’Neill. Jr. Professor of American Politics
Boston College

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Over the past two decades the Supreme Court has handed down a number of highly controversial civil rights decisions. In 2007, for example, the Court limited Seattle’s authority to promote integration by assigning students to schools on the basis of race. “The way to stop discrimination on the basis of race,” Chief Justice Roberts insisted, “is to stop discriminating on the basis of race.” Reading an impassioned dissent from the bench, Justice Breyer accused the five-member majority of taking a “radical” step that threatened to “break the promise” made by the Court in Brown v. Board of Education.1 Two years later the Court ruled in favor of white firefighters in their “reverse discrimination” suit against the city of New Haven, again by a margin of 5-4.2 In other cases the Court has placed limits on affirmative action in college admissions and in legislative redistricting.3 It has adopted a narrow view of who can file suit under the Americans with Disabilities Act (ADA), prevented federal judges from assessing money damages against state governments in suits brought under the Age Discrimination in Employment Act and some titles of the ADA, increased the burden of proof placed on women and racial minorities in “disparate impact” employment discrimination cases, and made it more difficult for plaintiffs to receive attorneys fees in civil rights cases.4 In 2000 the Court ruled that a section of the Violence Against Women Act exceeded Congress’s authority under the Fourteenth Amendment to combat gender-based discrimination.5 In 2009 the Court it hinted that the “preclearance” provision of the 1965 Voting Rights Act might similarly exceed congressional authority under the Fifteenth Amendment.6 Since most of these cases were decided by a vote of 5-4, the direction the Court takes in coming years depends in large part on retirements and subsequent appointments to the Court.

These decisions have frequently been decried by the leaders of civil rights organizations, legal scholars, and Democrats in Congress as “turning the clock back on civil rights.” Mark Tushnet of Harvard Law School claims that during the years of the Rehnquist Court, “For all practical purposes, concern over the status of African Americans in the law disappeared.”7 Former federal judge Leon Higginbotham denounced a key Rehnquist Court interpretation of the Voting Rights Act as “equivalent for the civil rights jurisprudence of our generation to what Plessy v. Ferguson and Dred Scott v. Sanford were for previous generations.”8 Jed Rubenfeld of Yale Law School charges that the Rehnquist Court’s civil rights decisions reflect an “anti-antidiscrimination agenda,” and that some members of that Court “are deeply but perhaps covertly hostile to antidiscrimination law.”9 On several of occasions Congress has responded by passing legislation reversing the Court’s interpretation of civil rights statutes, most notably when it enacted the controversial Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act of 2009, the first major piece of legislation signed by President Obama.

Defenders of the Rehnquist and Roberts Courts respond that far from opposing civil rights, the Supreme Court has returned to the “color-blind” understanding of equal protection that lay at the heart of Brown v. Board and the civil rights movement of the 1960s, that was embedded in the 1964 Civil Rights Act, and that garners the support of a large majority of Americans. According to Justice Clarence Thomas, “what was wrong in 1954”—namely the use of racial classifications in assigning students to public schools—“cannot be right today.” In the Seattle school case Justice Kennedy warned
that “To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.” Using racial classifications to distribute government benefits, Justice Scalia wrote in 1995, “is alien to the Constitution’s focus upon the individual.”

The Court is thus engaged in an extended debate not over whether civil rights should be protected, but what protecting civil rights should mean. The conflict between color-blind and color-conscious responses to the problem of discrimination, between those who argue that evidence of “disparate impact” should be enough to prove discrimination and those who demand evidence of intentional discrimination or “disparate treatment,” between what has become known in the legal literature as the “anti-classification” and “antisubordination” interpretations of the Civil War Amendments and civil rights laws permeates virtually all debates over civil rights, whether inside the Court or out. Each side tries not only to defend its understanding of civil rights, but to claim that its opponents have betrayed Brown v. Board and the civil rights movement of the 1960s.

Perhaps because this debate has become so fierce, whenever the Court has faced this issue directly, it has hedged its bets and vacillated. To the relief of its critics and consternation of its supporters, the Court has refused to prohibit the use of racial preferences in college and graduate school admissions. In Gratz and Grutter, the two University of Michigan affirmative action cases handed down in 2003, the Court held that admissions officers can take race into account so long as they do so in a “highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”

(This led Justice Souter to charge, probably correctly, that the Court has encouraged admissions offices to “hide the ball” and to engage in “deliberate obfuscation.”) In racial gerrymandering cases, the Court has ruled that redistricters can take race into account, but that race cannot be the “predominant” factor in drawing district lines. The resulting jurisprudence of the relative “bizarreness” of the shape of legislative districts recalls Justice Potter Stewart’s famous line on pornography: “I can’t define it, but I know it when I see it.”

In the Seattle school case mentioned above, the deciding fifth vote was cast by Justice Kennedy, who again tried to find a middle ground between the two more clearly enunciated positions staked out by Roberts and Breyer. These cases illustrate the crucial role played by the swing votes on the Rehnquist and Roberts Courts (Justices Kennedy and O’Connor), the unpredictable nature of the “split-the-difference” jurisprudence they often produced, and the extent to which the Court continues to waiver between two understandings of civil rights.

When one turns from these high visibility constitutional decisions to the more prosaic statutory, jurisdictional, and remedy-centered cases that dominate the Supreme Court’s civil rights docket (and, to an even larger extent, the case load of the federal judiciary as a whole), one finds a bit more consistency in the Court’s civil rights decisions over the past two decades. The Court usually decides about ten civil rights cases each term. The bulk of these cases—over three quarters—involve interpretation not of the Constitution, but of statutes such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Age Discrimination in Employment Act of 1967, Title IX of the Education Amendments of
1972, the Americans with Disabilities Act of 1990, and surviving provisions of laws passed during Reconstruction.\textsuperscript{14} Most revolve around seemingly technical or administrative matters such as who can file suit under these laws, whom they can sue, when they must sue, the burden of proof on the parties at each stages of litigation, the extent of deference owed to civil rights agencies, when courts can award monetary damages or issue injunctions, and when they can provide attorneys fees to the “prevailing” party. In recent years the Supreme Court has focused more on discrimination based on gender, age, and disability than on racial discrimination, often confronting the complex issue of the significant differences among these various forms of discrimination. Although one finds the familiar liberal-conservative voting alignment in about one quarter of the civil rights cases decided over the past twelve years, about one third were unanimous, and another quarter generated only one or two dissenting votes. This means that on many issues there has been enough agreement on the Court to allow it to send consistent signals to lower courts, federal and state officials, and private litigants.

Four recurrent themes of the Rehnquist and Roberts Courts frequently appear in its lower visibility civil rights decisions. The first is federalism. Since the late 1980s the Court has made a concerted effort to reduce the national government’s power to impose mandates on state and local governments. For example, it has established a rule of statutory interpretation that requires a “clear statement” from Congress before the Court will interfere with what it considers core state functions. The Court has expanded the states’ sovereign immunity, thus limiting private citizens’ ability to sue state governments for money damages. It has also expanded the immunity of state and local officials.\textsuperscript{15}

Second, the Court has frequently adopted a style of statutory interpretation known as “textualism.” “Textualism” focuses judges’ attention on the words of a statute and their ordinary meaning rather than on the law’s “broad remedial purposes,” its underlying “spirit,” its legislative history, past judicial interpretations, or the interpretation of it offered by administrative agencies.\textsuperscript{16} This has tended to pull the Court back to the color-blind understanding of discrimination that was embedded in some sections of the 1964 Civil Rights Act, and away from the color-conscious policies that developed during the 1970s.

A third theme of the Rehnquist-Roberts Court evident in its civil rights decisions is the desire to limit the jurisdiction of the federal courts. One of the most extensive examinations of this leitmotif appears in Andrew Siegel’s aptly titled law review article, “The Court against Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence.”\textsuperscript{17} Siegel finds that in area after area, an “anti-litigation spirit” has been “a powerful force shaping the court’s basal understanding of its institutional project.” While hostility to litigation is strongest among the court’s conservatives, it is “a phenomenon that implicated the entire Rehnquist Court.” The most important consequence of this “anti-litigation” spirit is reduced access to the federal courts in cases stretching from habeas corpus petitions to private suits enforcing conditions on federal grants, from tort suits against state and federal officials to the interpretation of arbitration clauses in private contracts. The most consequential of the Rehnquist Court’s federalism decisions had the effect of reducing private citizens’
opportunities and incentives for suing subnational governments in federal court. The Sandoval decision discussed below provides a vivid example of the Court’s “anti-litigation spirit.”

Fourth, in a variety of subtle and often complicated ways, the Rehnquist and Roberts Courts have limited the remedies that can be employed by federal judges. According to Yale Law School’s Judith Resnik, the Court has been “reframing the power of federal judges by disabling their remedial capacities.” In a number of “ordinary” cases “that may not come trippingly off the constitutional scholar’s tongue,” the Rehnquist Court “instruct[ed] federal judges not to craft remedies without express congressional permission, and, when permission has been granted, to read it narrowly.” In addition to reducing federal judges’ authority to assess monetary damages against states and localities, the Court has made it easier for state officials and private parties to challenge structural injunctions that have been in place for many years. It has encouraged lower court judges to end their involvement in long running desegregation cases, and insisted that judicial remedies be closely related to the nature of the initial legal violation.

These mutually reinforcing judicial trends have led the Court’s critics to claim that the Supreme Court has been quietly killing civil rights laws by a thousand tiny cuts. One eminent and engaged law professor, Erwin Chemerinsky, wrote in 2006, “The extreme Right has managed to roll back civil rights,” but “the incremental nature of constitutional law has allowed the retrenchment of civil rights to go unrecognized” (except, apparently, by astute law school professors.) Pamela Karlan writes that there are “two ways a court might retrench on civil rights protections”: one is to “explicitly redefine an underlying right in narrow terms”; the alternative, “which is more insidious, is for the court to leave the formal right in place, but to constrict the remedial machinery.” Such “remedial abridgement,” she charges, “is a pervasive tool of the contemporary Supreme Court.”

Defenders of the Roberts and Rehnquist Courts reply that by constricting the federal judiciary’s “remedial machinery,” the Court has limited the opportunities for abuse of judicial authority, constrained the national government’s ability to impose “unfunded mandates” on subnational governments, prevented advocacy groups from using litigation to make public policy behind closed doors, and restored state government’s to their rightful place within our “compound” republic. Institutional arrangements that developed during the 1960s and 1970s, they charge, fundamentally altered not just the structure of our governing institutions, but also the meaning of civil rights, departing from the principles of the Civil War amendments and the civil rights laws of the 1960s.

In short, the contemporary Supreme Court is engaged in an extended debate not only over the meaning of civil rights, but over the complex institutional arrangements—both judicial and administrative—that have gradually evolved to interpret and enforce civil rights laws. Over the last half century the United States has developed an extensive regulatory apparatus to define what constitutes discrimination in a variety of contexts, to monitor compliance with the tens of thousands of public and private organizations subject to civil rights laws, and to punish those found guilty of discriminating on the basis of race, gender, disability, age, language, ethnicity, or religion. This is a very large
enterprise, one that governs the activities of nearly every employer, commercial establishment, government contractor, real estate agency, bank, public school, private educational institution, recipient of federal financial assistance, and unit of government at the local, state, and national level in the country. In fact, it constitutes one of the most ambitious regulatory efforts in American history, more extensive than any form of regulation undertaken during the New Deal, and roughly on a par with the health, safety, and environmental regulation that took shape in the 1970s. Originally aimed primarily at eliminating the racial caste system in the South, the civil rights state has subsequently added a wide variety of tasks, ranging from defining the special accommodations schools, employers, and transit systems must make for people with disabilities, to promoting women’s sports and bilingual education, to combating sexual harassment and protecting the jobs of older workers. The initial success of the effort to end racial segregation made the civil rights paradigm appealing to a wide array of groups seeking assistance from the federal government.

No doubt the term “civil rights state” will sound jarring and incongruous to many ears. Americans are conditioned to think of rights as protections against government, not guarantees or entitlements provided by government. One advantage of the term is that it drives home the undeniable but frequently overlooked fact that defining and enforcing nondiscrimination rights has required an unprecedented assertion of authority by the central government. The “Second Reconstruction” that followed passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 required the national government to overcome “massive resistance” and years of crafty evasion by state and local officials in the South, to counter the use of violence and intimidation by defenders of white supremacy, to confront deeply entrenched customs and mores, and to supervise the use of discretion by school officials, police officers, state court judges, election boards, and many other state and local officials who distribute government benefits and mete out punishments. Between 1964 and 1974 federal judges, administrators, and legislators accomplished a task that had exceeded the grasp of occupying troops during the first Reconstruction. The destruction of the Jim Crow system in the South was a remarkable feat—and a vivid reminder of the connection between the quest for equality and the assertion of authority by the central government.

Another advantage of the term “civil rights state” is that it helps us think systematically about the distinctive features of the institutions and policies we have created to combat discrimination. One of the most obvious, important, and unusual features of this regulatory regime is the prominent role of the courts. Although we have created a variety of administrative agencies to implement civil rights laws—the Equal Employment Opportunity Commission, the Civil Rights Division of the Department of Justice, the Labor Department’s Office of Federal Contract Compliance Programs, three fair housing agencies within the Department of Housing and Urban Development, and no fewer than thirty offices of civil rights within federal departments and agencies that distribute federal funds to subnational governments and private parties—federal courts play an particularly prominent role in both interpreting and enforcing these laws. This is in part because statutory and constitutional rights are so intertwined and in part because in recent decades
neither liberals nor conservatives in Congress have been willing to entrust the delicate job of defining civil rights to administrators.\textsuperscript{24}

If the structure of civil rights laws makes civil rights agencies highly dependent on the federal courts, the scope of the regulatory enterprise makes federal courts highly dependent on the assistance provided by administrative agencies. During the 1970s and 1980s a distinctive division of labor developed between federal courts and civil rights agencies that both expanded the scope of civil rights regulation and produced a surprisingly effective enforcement regime. In recent years that division of labor has been under attack in the Supreme Court. To get a better idea what is at stake in this battle over the structure of the civil rights state it will be useful to examine two Supreme Court cases, \textit{Lau v. Nichols}, decided in 1974 and \textit{Alexander v. Sandoval}, decided in 2001.

\textbf{From \textit{Lau} to \textit{Sandoval}: The Making and Reshaping of the Civil Rights State}

In \textit{Sandoval v. Alexander} all the issues mentioned above—“disparate-impact” analysis, federalism, the jurisdiction of the federal courts, “textualism,” and judicial remedies—converge. \textit{Sandoval} also illustrates the Rehnquist Court’s willingness to upend precedents first established in the 1960s and 1970s. In his sharply worded dissenting opinion in \textit{Sandoval}, Justice Stevens described the Court’s action as “unfounded in our precedent and hostile to decades of settled expectation.” On this point he clearly was correct. Twenty-seven years earlier the Burger Court had decided a nearly identical case in a much different manner. Contrasting \textit{Lau v. Nichols} with \textit{Sandoval} allows us to see how the Supreme Court helped to construct a key component of the civil rights state in the 1960s and 1970s, and why a majority on the Court sought to change those institutional arrangements decades later.

Understanding \textit{Lau} and \textit{Sandoval} requires a brief foray into the structure of Title VI of the Civil Rights Act of 1964. Hugh Davis Graham has described Title VI as “the great sleeper provision” of that statute.\textsuperscript{25} Its first section (§601) declares that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Its second section (§602) authorizes federal agencies to issue rules explaining how the prohibitions of Title VI apply to the particular programs they fund. It also authorizes them to effect compliance with Title VI “by the termination of or refusal to grant or to continue” financial assistance or “by other means authorized by law.”

Graham notes that although “almost no attention was paid to Title VI,” during the lengthy 1964 congressional debate, “it would become by far the most powerful weapon of them all.”\textsuperscript{26} That was in part because the amount of money distributed by the federal government skyrocketed after 1965, particularly aid to public schools. Once its potential was unlocked, Title VI was quickly “cloned” to cover gender discrimination in educational programs (Title IX), as well as discrimination on the basis of handicapped or age in any program receiving federal financial assistance (§504 of the 1974
Rehabilitation Act and the 1975 Age Discrimination Act). But enforcement of Title VI and its clones was never quite as simple or straightforward as its sponsors had assumed.

The Kennedy Administration presented the initial version of Title VI as an administrative alternative to the painfully slow and costly process of achieving desegregation through litigation. President Kennedy explained that “indirect discrimination, through the use of Federal funds, is just as invidious” as direct discrimination, “and it should not be necessary to resort to the court to prevent each individual violation.”27 The only changes made by the House and Senate were designed to limit the ability of federal agencies to terminate funding. As enacted by Congress, §602 took the unusual step of specifying that rules issued under Title VI shall not “become effective unless and until approved by the President.” It provided state and local governments with the right to a public hearing prior to termination of funds and judicial review after the fact. It required federal agencies to give Congress thirty days advance warning of terminations (thus giving members of Congress whose districts are affected time to pressure the agency to change its mind), and it specified that the termination of funds would apply only to the particular program found guilty of discrimination, not to the entire institution receiving funding.

In marked contrast to Title VII of the 1964 Act, which authorized only private enforcement suits, there was no discussion of private enforcement of Title VI. This is not surprising given the purpose of this section of the act, namely to empower federal agencies to pursue an administrative alternative to litigation. Since it was already unconstitutional for state and local governments to discriminate on the basis of race or for the federal government to support such activity, suits by aggrieved private individuals were already available—just too cumbersome to be effective. This explains why the “private right of action” issue which loomed so large in subsequent litigation received no mention from a Congress that was highly attentive to the role of the courts in other sections of the Civil Rights Act.

Over the next five years HEW guidelines under Title VI played a major role in the rapid desegregation of southern schools.28 In a series of important desegregation cases the Fifth Circuit looked to guidelines issued by the Office of Civil Rights (OCR) within the Department of Health, Education, and Welfare “to rescue school desegregation from the bog in which it has been trapped for years.”29 (They were called “guidelines” rather than regulations because OCR had never dared to ask for presidential approval. This was the first of several OCR efforts to skirt the constraints contained in §602.) HEW was not a formal party to these desegregation cases, most of which had been brought by the Department of Justice and the NAACP, who charged that southern school districts had failed to comply with the constitutional mandates of Brown v. Board. But the Fifth Circuit, which had jurisdiction over most of the South, announced that it would give “great weight” to HEW’s guidelines in future litigation, and it borrowed heavily from those guidelines in constructing a model decree which it expected district court judges throughout the circuit to use in the hundreds of cases they confronted. According to Judge Wisdom, “HEW Guidelines offer, for the first time, the prospect that the transition from a de jure segregated dual system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner.”30
With the federal courts relying so heavily on its rules and with the Department of Justice and the NAACP pursuing an aggressive litigational campaign, OCR did not need to resort to the funding cut-off that had originally seemed to constitute the heart of Title VI. It had not taken long for civil rights offices in HEW and elsewhere to discover that terminating funding of state and local programs was a hazardous undertaking. When HEW threatened to cut off funds to Chicago schools in 1965, it incurred the wrath of Lyndon Johnson. In his detailed description of the early days of HEW’s implementation of Title VI, Gary Orfield explains that “although the guidelines purported to establish Federal minimum standards, it was rapidly becoming clear that the Federal government was not prepared to support these standards with enforcement actions.” The Department of Justice, Orfield reports, viewed the funding cutoff as “a sledge-hammer not a scalpel” and “became increasingly interested in enforcing title VI through lawsuits rather than termination of federal aid.”

Pressure to avoid cutoffs came as much from inside funding agencies as from the president and the Department of Justice. In a 1996 report critical of federal agencies’ lax enforcement of Title VI, the United States Commission on Civil Rights identified a central dilemma federal funding agencies face: “Although funding termination may serve as an effective deterrent to recipients, it may lead the victim of discrimination without a remedy. Funding termination may eliminate the benefits sought by the victim.” Funding cut-offs also threaten to damage relations between the federal agency and those state and local officials with whom they work on a regular basis -- not to mention antagonizing members of Congress upon whom administrators rely for appropriations. If unilateral administrative sanctions looked like an attractive alternative to litigation in 1964, litigation looked like an attractive alternative to administrative action almost immediately thereafter.

In 1970, just as the busing issue was beginning to roil Congress and the courts, ambitious and idealistic lawyers in the Office of Civil Rights decided to tackle another controversial issue, bilingual educational. OCR announced that a school's failure to provide special programs to aid students who do not speaking English as their first language constituted discrimination on the basis of “national origin” and thus a violation of Title VI. Encouraged by White House officials eager to court Hispanic voters, it wrote extensive guidelines explaining the new federal mandate. According to OCR, failure to provide bilingual education constitutes discrimination because “inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district.” Districts with more than 5% non-English speakers “must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.” Schools could not assign non-English speakers to special education classes or employ placement tests without the consent of advisory committees “at least 50% of whom are members of the minority group.” HEW Secretary Elliot Richardson told Congress that the OCR regulations would require “total institutional reposturing (including culturally sensitizing teachers, instructional materials and educational approaches) in order to incorporate, affirmatively recognize and value the cultural environment of ethnic minority children so that the development of positive self-concept can be accelerated.”
OCR’s aggressive stance on bilingual education did not extend to efforts to compel school districts to comply with its new regulations. In fact, it makes little effort even to determine how many of the nearly one thousand school districts subject to the regulations had instituted acceptable practices. Four years after it issued its regulations, OCR had reviewed the performance of only 4% of these districts. It found half the districts it reviewed out of compliance, but only once did it take even the first step in the long process of terminating federal funds. Deluged with many competing obligations and under attack from both the Nixon White House and civil rights groups, OCR was in no position to carry out the revolution in bilingual education that it had announced with such great fanfare.  

In 1974 the Supreme Court not only upheld HEW’s bilingual education rules as a valid exercise of its authority to prohibit discrimination on the basis of “national origin,” but also indicated that federal courts could enforce these rules through lawsuits instituted by private parties.  *Lau v. Nichols* had been brought by Legal Services attorneys in San Francisco on behalf of Chinese-American students. They asked the court to order San Francisco schools to comply with HEW rules. The lower courts refused, holding that neither the Constitution nor Title VI imposes such affirmative duties on schools districts. But the Supreme Court disagreed. Given a green light by the Court, HEW undertook another round of regulation writing, producing guidelines appropriately known as the “Lau remedies.” OCR repeatedly rejected school districts’ proposals to rely on intensive English instruction, insisting that the schools institute bilingual programs. Federal courts in New York and New Mexico ordered school districts with large number of Hispanic students to comply with these federal demands.  

Justice Douglas’s brief majority opinion in *Lau* upheld the OCR guidelines with scarcely any discussion of the language of Title VI or the implications of the decision for relations between federal agencies and local school districts. Justice Stewart’s more searching concurrence (which Justices Burger and Blackmun joined) noted that although the San Francisco school district had not “affirmatively or intentionally contributed to this [language] inadequacy,” it had “failed to act in the face of changing social and linguistic patterns.” “It is not entirely clear,” Stewart conceded, that the prohibition on “national origin” discrimination contained in §601 itself requires the school system to add new programs: “The crucial question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of §601.” Stewart found that these regulations were “reasonably related to the purpose of the enabling legislation.” Department rules, the Supreme Court had often held, are “entitled to great weight.”  

Douglas, in contrast, implied that Title VI itself might incorporate such a disparate-impact test. Neither Stewart nor Douglas explicitly addressed the question of whether Title VI contained a private right of action. By ruling on the case rather than dismissing it for lack of jurisdiction, they indicated that the answer to the question was “yes.”  

*Lau v. Nichols* thus gave HEW broad authority to interpret “discrimination” and committed the federal judiciary to enforcing HEW’s rules. This had implications that went well beyond bilingual education: HEW could now establish affirmative action requirements for school assignment, college admission, and employment. Private citizens, civil rights groups, and Legal Services attorneys could then seek injunctions and damages against recipients of federal
funds who failed to comply. In effect this meant that Title VI had been transformed from an administrative enforcement mechanism for protecting constitutional rights into a judicial mechanism for enforcing administrative rules defining a wide variety of forms of discrimination, many of which went far beyond anything the courts or Congress had found in the Constitution or its amendments.

This transformation came about incrementally and nearly imperceptibly. First the lower courts relied on HEW’s Title VI guidelines to aid them in their assault on practices that were clearly unconstitutional, i.e. de jure school segregation. Then the Supreme Court used private rights of action under Title VI to address state and local policies that might be unconstitutional under a very broad reading of the equal protection clause (Lau v. Nichols) Eventually judges recognized private rights of action to enforce administrative rules that had no constitutional basis whatever (for example, requiring accessible transportation for the disabled). Together federal judges and administrators were creating an elaborate common law governing the behavior of subnational governments with virtually no direction from Congress.

This was not the end of the story. In the 1970s private rights of action under Title VI and Title IX were usually brought by civil rights organizations. Not only were these cases too expensive for most private individuals to pursue, but prospective injunctive relief promised few benefits for those initially aggrieved. The 1976 Civil Rights Attorneys Fees Awards Act made suits under Title VI and Title IX somewhat more attractive by allowing judges to award fees and costs to the “prevailing parties.” An even more important spur to litigation eventually came from the Supreme Court: it authorized federal judges to award monetary damages to plaintiffs in Title VI and Title IX cases. This change, too, came incrementally. The Court first permitted the award of back pay in a splintered, garbled decision on racial discrimination by the New York City Police Department. Over a decade later the Court announced that federal courts can require public schools to pay damages to student who have been subjected to sexual harassment by teachers. Soon thereafter it ruled that a student could sue a school district for monetary damages when it fails to take adequate steps to prevent sexual harassment by a fellow student. In each case the Court placed substantial weight on sexual harassment guidelines issued by the Department of Education's Office of Civil Rights, which, it argued, had afforded schools clear notice of what was expected of recipient of federal funding. The combination of attorneys’ fees and monetary damages significantly increased incentives for private parties to file suits under Titles VI and IX. Eventually a private bar developed to litigate these cases. This had the effect not just of increasing the number of cases filed, but of augmenting the political support for this enforcement mechanism.

In 2001 the Supreme Court threw all this into doubt when by a 5-4 vote it announced its decision in Sandoval v. Alexander. The immediate issue was the validity of an Alabama regulation requiring all drivers’ exams to be conducted in English. The Alabama Department of Public Safety had established this rule in response to a 1990 amendment to the state constitution that established English as the "official language" of Alabama. This English-only rule conflicted with regulations promulgated by the US Departments of Justice and Transportation under Title VI. According to these rules, failure to offer drivers’ exams in the test-takers’ native-language constitutes discrimination on the basis of “national origin.” True to form, federal officials did not move to terminate federal
funds. Instead, private citizens initiated a class action suit to force the state to offer drivers tests in languages other than English.

Given the similarity between these Title VI regulations and the ones upheld twenty-seven years earlier in *Lau v. Nichols*, this seemed like an easy case. No one could deny that Alabama's failure to offer exams in Spanish had a "disparate impact" on those born outside the United States. Yet the Supreme Court refused to order the state to revise its policy. Justice Scalia's majority opinion launched an indirect attack on two sets of Court doctrines to which he had long objected: "disparate impact" analysis under civil rights statutes; and judicial creation of "implied private rights of action" to enforce federal mandates. Scalia maintained that the Equal Protection clause and the 1964 Civil Rights Act forbid only intentional discrimination. He also insisted that federal court normally cannot hear private enforcement suits unless Congress has explicitly authorized them. This is especially important, he argued, in cases against state and local governments. On both these issues the Court had for years been wildly inconsistent. 39

In his *Sandoval* opinion Justice Scalia claimed that while the Court had frequently recognized a private right of action to enforce the commands of Title VI itself, it had never explicitly recognized a private right of action to enforce agency rules that sweep more broadly than the text of Title VI. *Lau v. Nichols*, he pointed out, did not squarely faced this issue. It is "beyond dispute," he asserted, that Title VI’s ban on discrimination in federally funded programs "prohibits only intentional discrimination." Consequently, the disparate-impact regulations issued by the two federal departments "proscribed activities" that are "permissible" under §601.

Surprisingly, Scalia did not strike down the agencies’ disparate-impact rules. Since Alabama had not challenged the regulations themselves, the Court was forced (or perhaps allowed) to "assume for the purposes of deciding this case that the . . . regulations prescribing activities that having disparate impact on the basis of race are valid.” They just are not enforceable in court. In other words, the private right of action the Court had previously read into Title VI does not extend to agency regulations of such dubious lineage. Nor can federal agencies create private rights of action by fiat. In typically colorful language, Scalia wrote, “It is most certainly incorrect to say that the language of a regulation can conjure up a private right of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself."

The Court’s decision in *Sandoval* thus left open the possibility that the Department of Transportation could try to enforce its regulations by terminating federal funds for Alabama. Such an action would eventually be subject to judicial review, which would place the status of those federal regulations squarely before the Court. But, as Justice Scalia almost certainly knew, it was highly unlikely that any federal agency would take such a provocative action. Federal agencies had become comfortable with the division of labor that quietly evolved in the 1960s and 1970s: they could write regulations explaining the meaning of federal nondiscrimination mandates, and rely on federal judges to provide the enforcement muscle. Now they would be forced to invest their own political capital in such enforcement efforts.
Justice Stevens’s dissenting opinion offered a spirited defense of the "integrated remedial scheme" that federal courts and agencies have developed over the preceding three decades to achieve "the anti-discrimination ideals" announced in the 1964 Civil Rights Act. According to Stevens, Title VI grants federal agencies “the power to issue broad prophylactic rules aimed at realizing the vision laid out in [Title VI] even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited.” §602 delegates to these agencies the job of making “the complex determination of what sorts of disparate impacts upon minorities constitute sufficiently significant social problems” to “warrant altering the practices of the federal grantee.” Judicial enforcement of these administrative rules furthers the congressional purpose of providing “individual citizens effective protection against those [discriminatory] practices.” This combination of agency rulemaking and judicial enforcement, Stevens claimed, “reflects a reasonable--indeed inspired--model for attacking the often-intractable problem of racial and ethnic discrimination.” When an expert agency offers its “considered judgment” that a recipient of federal funds has contributed to a “significant social problem that might be remedied or least ameliorated, by the application of a broad prophylactic rule,” the federal judiciary should come to its assistance.

Stevens argued that §601 and §602 attack two different faces of racial and ethnic discrimination. §601 “supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races).” This was the most obvious target of Title VI. §602 addresses an equally serious problem:

> With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine whether there is a need for stronger measures. Such an approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.\(^{40}\)

Our understanding of “discrimination,” Stevens implies in this revealing passage, should not remain “static”—that is, be limited by the words or intentions of those who wrote the 1964 Act—but should “progress” in response to judges’ and administrators’ “evaluation of social circumstances.” Such a “nuanced assessment of complex social realities” is likely to indicate the “need for stronger measures.”

Despite the Court’s decision in Sandoval, it is too early to write the obituary for Steven’s “inspired model” of court-agency cooperation for expanding the reach of Title VI. In several instances the Rehnquist Court stoked controversy by adopting a narrow reading of civil rights statutes, only to reverse direction a few years later.\(^{41}\) It is also possible that a Democratic Congress could amend the relevant statutes to explicitly authorize private damage suits to enforce agency rules under Titles VI and IX. When Democrats controlled Congress in the 1980s and 1990s they repeatedly reversed Supreme Court decisions.
restricting civil rights litigants’ access to the federal courts. They did the same when they retook control of Congress in 2006.42 The civil rights state has been shaped by repeated exchanges among all three branches of government.

*Lau v. Nichols* and *Alexander v. Sandoval* illustrate both the ways in which the Supreme Court has shaped the institutions of the civil rights state, and the connection between these institutional issues and the more familiar debate over the meaning of discrimination. In *Lau* and subsequent cases the Court quietly and incrementally created a regulatory structure designed to root out a wide variety of forms of inequality. In *Sandoval*, the Court threw a monkey wrench into this regulatory mechanism because it ran counter to the understanding of discrimination that a majority of the justices found embedded in the 1964 Civil Rights Act. What might at first glance look like a boring ruling on the arcane issues of implied private rights of action and the degree of deference due to administrative agencies turns out to be an important skirmish in the lengthy battle to define the civil rights state.

**Competing Visions of the Civil Rights State**

In *Sandoval* the institutional arrangements Justice Stevens lauds as an “inspired model for attacking the often-intractable problem of racial and ethnic discrimination” are criticized by Justice Scalia as central components of an “ancient regime” that has become a political anachronism and deserves to be dismantled. This is a pretty good indication that the justices harbor competing visions of the civil rights state. In this final portion of the paper I will try to flesh out these competing visions, which I label Egalitarian Nationalism and Reconstructed Federalism. I will argue that these rival understandings of the scope and structure of the civil rights state did not suddenly appear in the 1990s, but have their roots in a debate that stretches back to the early 1960s, when the Supreme Court first started to grapple in a serious way with the institutional mechanisms for enforcing civil rights. In the former camp one finds not just members of the liberal bloc of the Rehnquist and Roberts Court—especially Justices Stevens, Breyer, and Ginsburg—but those members of the Warren Court who played a key role in constructing and defending the emerging civil rights state, most notably Justices Brennan, Douglas, Goldberg, Fortas, and Marshall and Chief Justice Warren. Reconstructed Federalists include a number of current and recent members of the Court—especially Chief Justices Rehnquist and Roberts and Justices Scalia, Thomas, and (sometimes, at least) Kennedy and O’Connor—as well dissenting voices from the Warren and Burger Courts, particularly the second Justices Harlan, Hugo Black, Potter Stewart, and Lewis Powell.43

The deepest disagreement between the Egalitarian Nationalists and the Reconstructed Federalists is that the former believe that the civil rights revolution of the 1960s marked a fundamental shift in the constitutional order—the beginning of a sustained national effort to attack inequalities of many kinds. For them the attack on the racial caste system in the South was just the first step in a progressively expanding campaign by the federal government to create a more equal society. Old limits on the authority of the national government—particularly those based on traditional understandings of federalism—were now obsolete.
Reconstructed Federalists, in contrast, view the federal courts’ unprecedented assertion of their own authority during the civil rights struggles of the 1960s and the equally unprecedented expansion of congressional authority not as the beginning of a wholesale attack on inequality, but as a long overdue response to the unique problem of state-sponsored racial segregation. The national government was finally completing the job of Reconstruction. The “central purpose of the Fourteenth Amendment,” Justice White wrote in a 1964 decision, “was to eliminate racial discrimination emanating from official sources in the state.” For Reconstructed Federalist, in the U.S. the problem of race is sui generis; slavery and the racial caste system that soon replaced it together constituted America’s original sin. The extraordinary powers the Civil War amendments confer on Congress and the courts to address the problem of race should not be extended to other problems, which can more readily be handled under the normal rules of politics and government. In a recent opinion Justice Scalia argued that a broad reading of congressional power under §5 of the Fourteenth Amendment “was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored.” State-sanctioned racial discrimination, he emphasized, is “distinctively violative of the principal purpose of the Fourteenth Amendment.” The Fourteenth Amendment “is so clearly” a provision to protect African-Americans from the type of systematic discrimination and exclusion that characterized the South after the Civil War that “a strong case would be necessary for its application to any other” group or circumstance.

For Egalitarian Nationalists, in contrast, state-sponsored racial discrimination is just the tip of a very large iceberg. “Equal protection of the law” implies not just equal treatment by government, but, in Justice Goldberg’s phrase, “the right to be treated as equal members of the community.” As he put it in Bell v. Maryland, “The Thirteenth, Fourteenth and Fifteenth Amendments do not permit Negroes to be considered as second-class citizens in any aspect of our public life.” For Goldberg this meant applying the prohibitions of the Civil War amendments to private citizens as well as those engaged in “state action.” Moreover, the Fourteenth Amendment should be read to protect not just African-American, but a wide variety of “discrete and insular minorities”—and even one majority, namely, women. It encompasses “fundamental rights” such as education, voting, access to the courts, and the right to travel that cannot be abridged either by government or by private actors. More subtly but just as importantly, Egalitarian Nationalists insist that judges have an obligation to peer behind legal formalities in order to understand the economic, political and social realities that limit disadvantaged groups’ use of formal rights. They should use whatever constitutional or statutory resource they can muster to eliminate customs and practices—whether not they are connected to state action—that inhibit the march of equality.

The ambitious and constantly expanding agenda of the Egalitarian Nationalists requires an energetic, forceful national government. For them, the combination of the Civil War Amendments, the New Deal, and the civil rights revolution of the 1960s not only repudiated the extreme “states’ rights” arguments used to defend Jim Crow, but eliminated all limits on federal regulation of state governments and all limits on the
federal government’s authority to regulate private citizens. As Justice Brennan explained in a 1966 case, so long as Congress is acting to expand Fourteenth and Fifteenth Amendment rights—by which he meant to promote equality—the Court should not impose any limits on its authority.46 For Brennan and other Egalitarian Nationalists, the Civil War amendments created a “rights ratchet” which allowed each branch of the national government to build on the egalitarian efforts of the other.

During the heyday of the Warren Court, Justices Harlan, Stewart, and Black almost always joined the Egalitarian Nationalists in taking an aggressive stance on school desegregation and acknowledging congressional authority to enact the seminal civil rights statutes of the 1960s.47 Properly interpreted, Reconstructed Federalists argue, the Civil War amendments gave Congress and the courts sufficient authority to destroy the Jim Crow system. But they do not, in the words of Justice Hugo Black, “strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.”48 They should not, Justice Harlan wrote, be interpreted to require “the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority.”49 More specifically, the Fifteenth Amendment’s prohibition on racial discrimination in elections does not otherwise alter “the established rule of law that the franchise is essentially a matter of state concern.” When Congress tried to use its authority under the Civil War amendments to grant the franchise to 18 year olds, Harlan strenuously objected: “From the standpoint of the bedrock of the constitutional structure of this Nation, these cases bring us to a crossroad that is marked with a formidable “Stop” sign.”50 In a similar vein, Justice Stewart—in this instance writing for the majority—refused to interpret a broadly worded Reconstruction statute “to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the criminal law.”51 More recently the Rehnquist Court has refused to interpret §5 of the Fourteenth Amendment to allow Congress to abrogate the states’ Eleventh Amendment sovereign immunity in order to combat age discrimination. In marked contrast to the Civil Rights Act and the Voting Rights Act, Justice O’Connor wrote in 2000, congressional extension of the Age Discrimination in Employment Act to state governments was an “unwarranted response to a perhaps inconsequential problem.”52 For Reconstructed Federalists, the Civil War amendments empowered Congress to attack systematic racial discrimination, not to alter the distribution of power between the states and the national government merely on a political whim.

Since the 1960s Reconstructed Federalists have frequently found themselves trying to place “Stop” signs in the path of the Egalitarian Nationalists. But they often disagreed among themselves about where to place those signs. They have tended to respond on an ad hoc basis to the arguments put forth by the Egalitarian Nationalists, who have provided a long list of ways the Court could promote equality. Sometimes Reconstructed Federalists won; but usually they lost. Theirs has been a rearguard action. Over the past two decades their success has increased somewhat for two reasons: Congress has enacted more laws regulating state and local governments on matters other than race; and
Republican presidents have appointed more Reconstructed Federalists to the bench. So far, though, their efforts to limit the power of Congress remain rather meager. Three Voting Rights Act cases, two from 1966 and one from 1970, provide a good illustration of Egalitarian Nationalism and Reconstructed Federalism in action. In *South Carolina v. Katzenbach*, the Supreme Court upheld all the major provisions of the 1965. The decision was close to unanimous; even Justice Black, the lone dissenter, agreed “with substantially all the court's opinion.” Chief Justice Warren’s opinion for the Court emphasized that the Act’s “uncommon exercise of congressional power” was a legislative response to “unique circumstances,” namely, an “insidious and pervasive evil which had been perpetuated in certain parts of our country through an unremitting and ingenious defiance of the Constitution.” The Act’s admittedly heavy-handed preclearance requirement was appropriate in light of the undeniable fact that the southern states had “resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.” According to Warren, “the Court has recognized that *exceptional* circumstances can justify legislative measures *not otherwise appropriate*.” He emphasized that Congress had built a “voluminous legislative history” supporting its unusually aggressive assertion of federal authority.

Three months later in *Katzenbach v. Morgan* the Court upheld a little noted provision in the 1965 Act added on the Senate floor by Robert Kennedy. It provides that no one who had completed the sixth grade in a Puerto Rican school can be denied the right to vote because of inability to read or write English. No legislative record explained the rationale for this provision, which was expected to have little effect outside New York City. Justice Brennan’s majority opinion did not claim that New York had violated the Fifteenth Amendment. Rather he argued that Congress could use its power under the Fourteenth Amendments to reach actions by the state that are not themselves unconstitutional. Extending the franchise to Spanish speaking graduates of Puerto Rican schools “may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government” in areas other than voting. Congress, in other words, could mandate changes in voting laws as a means to achieve the broader goal of a fair distribution of public resources. It is Congress’s prerogative to “assess and weigh the various conflicting considerations,” including “the risk or pervasiveness of the discrimination in government services.”

Four years later in *Oregon v. Mitchell*, Justice Brennan argued (this time unsuccessfully) that Congress also had authority to require states to extend the franchise to those over 18 year old. For him whether or not the states’ age restrictions violate the Constitution was not the issue: the enforcement section of the Fourteenth Amendment “empowers Congress to make its own determination on the matter.” Brennan quickly dismissed the argument that such a federal mandate “intrudes upon a domain reserved to the States” asserting, “It is no longer open to question that the Fourteenth Amendment applies to this, as to all other, exercise of state power.” “When state and federal claims come into conflict,” Brennan emphasized, “the primacy of federal power requires that the federal finding of fact control.” For Brennan and the three other Egalitarian Nationalists who
joined him in *Oregon v. Mitchell*, the Civil War amendments allow Congress to define the extent of its own power, and in the process erased all previously recognized state prerogatives.

To Justices Harlan, Black, and Stewart and some of the Republican appointees who soon joined them on the Supreme Court, such a complete transformation of American federalism was neither mandated by the Civil War Amendments nor required by the fight against racial discrimination. Harlan insisted that “any analysis of this problem must begin established rule of law that the franchise is essentially a matter of state concern.”

In such areas “a state statute that passes constitutional muster under the judicial standards of rationality should not be permitted to be set at naught by a mere contrary congressional pronouncement unsupported by a legislative record justifying that conclusion.” To hold otherwise, he warned, "seems to me tantamount to allowing the Fourteenth Amendment to swallow the State’s constitutionally ordained primary authority in this field.” This threatened the entire structure of federalism, “For if Congress by what, as here, amounts to mere *ipse dixit* can set that otherwise permissible requirement partially at naught, I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.” On this point, no doubt, Justice Brennan would have agreed. For Egalitarian Nationalists the Court’s Voting Rights Act decisions established the power of Congress to enact any “prophylactic” legislation it considered appropriate. For Reconstructed Federalist those decisions represented the Court’s recognition of an extraordinary but well justified exception that should not be allowed to destroy the ordinary rules of American federalism.

Federalism is only the most obvious difference between Egalitarian Nationalists and Reconstructed Federalists (thus their names). In the remainder of this paper I will very briefly describe six other areas of disagreement.

**State action and the realm of privacy.** During the 1960s no civil rights issue generated more Supreme Court decisions, stirred more passions, provoked more scholarly analysis, and created more confusion than the definition of “state action” under the Civil War amendments. Both the Fourteenth and Fifteenth Amendments are addressed specifically to the actions of state governments. “As late as 1960,” Archibald Cox has noted, “no constitutional principle seemed better settled than that the Fourteenth Amendment does not reach private action.” This constituted a major problem for those who hoped to use litigation to attack segregation at southern lunch counters, bus stations, hotels, and other “public accommodations.” Before Congress make such segregation illegal in 1964, the Court was moving steadily toward an interpretation of “state action” broad enough to cover almost all commercial establishments. Not only was the Court determined to destroy this component of the Jim Crow system even if a filibuster had succeeded in killing the 1964 Civil Rights Act, but the justices were obviously reluctant to allow civil rights demonstrators to be convicted of trespass or disorderly conduct because they had refused to leave segregated facilities.

The Egalitarian Nationalists on the Warren Court presented a number of rationales for applying the prohibitions of the Fourteenth and Fifteenth Amendments to private citizens.
According to Justice Goldberg, the practice of denying “the constitutional right of Negroes to access to places of public accommodations” serves only to “perpetuate a caste system in the United States.” A few years later, Justice Brennan argued that “state action” included not just laws or actions of public officials, but “customs and usages” prevalent in a particular state. “A custom can have the effect or force of law,” he wrote, “even where it is not backed by the force of the State.” Consequently, “constitutional rights can be “violated by widespread habitual practices or conventions regarded as prescribing norms for conduct, and supported by common consent, or official or unofficial community sanctions.”

In another set of cases the Court found that when states take actions that allow private citizens to engage in racial discrimination they are guilty of “encouraging” such private discrimination and thus become a “partner” in an unconstitutional practice. In a similar fashion the Court held that Reconstruction-era statutes requiring states to grant all people the same property and contract rights “as white people” also prohibits private parties from refusing to sell property to or enter into contracts with African Americans. Through its interpretation of the Civil War Amendments and of federal statutes both old and new, the Court created a strong presumption that any form of racial discrimination by private parties is illegal.

Reconstructed Federalists expressed misgivings about such broad assertions of governmental authority over private citizens. In the 1960s Justices Harlan and Black took the lead in arguing that the “state action” requirement was not just an artifact of the wording of the Fourteenth and Fifteenth Amendments, but a consequence of liberal democracy’s distinction between the public and private realms. In a 1963 sit-in case Harlan explained his reluctance to expand state action in order to end practices he abhorred. “This limitation on the scope of the prohibitions of the Fourteenth Amendment,” he argued, “serves several vital functions in our system.” Underlying the debate over the definition of “state action” lies a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, and even unjust in his personal relations are things all entitled to a large measure of protection from government interference. This liberty would be overwritten, in the name of equality, if the strictures of the amendment were applied to governmental and private actions without distinction.

Harlan warned that the Court’s expansion of “state action” “jeopardizes the existence of denominationally restricted schools while making every college entrance rejection letter a potential Fourteenth Amendment question.” Justice Black linked the “state action” limitation with a cause dear to his heart: protection of civil liberties. In a particularly contentious 1964 sit-in case he argued, “It would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law’s protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace.” Citing the brief submitted by Solicitor General Cox, Black warned that too broad a reading of “state action” and federal statutes threatens the “freedom for private choice in social, business and professional
associations” required for the “preservation of a free and pluralistic society would seem to require substantial.” “Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind.”

The drive to use constitutional arguments and unilateral judicial action to attack discrimination by non-government actors significantly weakened when Congress passed the 1964 Civil Rights Act and the 1968 Fair Housing Act. Since Congress could justify this regulation of the private sector by relying on its nearly unlimited post-New Deal power under the commerce clause, the question of where to draw the line between “state action” and purely private behavior no longer took center stage. But it did not disappear. It kept returning, for example, when states tried to rescind civil rights protections, and when private groups claim that civil rights laws violate their First Amendment rights of association.

Most importantly, the issue of where to draw the line between public and is central to many statutory interpretation cases, particularly those involving two vaguely worded sections of Reconstruction-era laws, §1981 and §1982. In these statutory cases the Court often confronts the issue, How clearly must Congress express its intent to outlaw various forms of private behavior? When it comes to racial discrimination, the Court’s has implicitly reversed the ordinary assumption that private conduct is permitted unless specifically prohibited; it has created a strong presumption that racially discriminatory private action is “contrary to public policy.” In virtually all these cases, Egalitarian Nationalists have taken the position that the demands of equality trump claims of privacy, and Reconstructed Federalists have usually agreed. The Court has shown little tolerance for the argument that private citizens have a right to act on the basis of racial prejudice. But outside the area of race, presumptions about who is covered by nondiscrimination statutes are more contested. Egalitarian Nationalists have argued that the provisions of all nondiscrimination statutes should be read in light of their “broad remedial purposes.” Reconstructed Federalists have often read the same statutes to place fewer regulatory demands on private actors. This has been the source of many sharp disagreements on the Rehnquist and Roberts Courts, and several successful efforts by Congress to overturn Court interpretations of civil rights statutes.

Moving beyond race. By the mid-1960s the Supreme Court had established its well known doctrine that race is a “suspect classification,” that use of suspect classifications by government is “subject to the most rigid scrutiny” by the courts, and that suspect classifications can be upheld only if essential for achieving some “overriding statutory purpose.” On this there has been little disagreement on the Court. Soon thereafter, though, Egalitarian Nationalists and Reconstructed Federalists divided on whether laws that disadvantaged other groups are also subject to such “strict scrutiny.” For example, in Levy v. Louisiana and Glona v. American Guarantee, the Court found unconstitutional state laws that distinguish between the legal rights of “legitimate” and “illegitimate” children, that is, those born in- and out-of-wedlock. Justice Douglas made the surprising claim that the Court had always “been extremely sensitive when it comes to basic civil rights, and have not hesitated to strike down an invidious classification even though it has history and tradition on its side.” Justice Harlan dismissed these two decisions as
“constitutional curiosities” imposed by “brute force” rather than constitutional argument. But the “curiosities” kept coming. In 1971 the Burger Court announced that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.” More significant were Burger Court rulings that established gender as a “semi-suspect” classification subject to “heightened” judicial scrutiny. Over the next thirty-five years many state and federal laws failed to survive this “intermediate” form of judicial review.

Since the early 1970s the expansion of legal protections for non-racial groups has largely come through the enactment and interpretation of statutes rather than through constitutional interpretation. For example, the Education for All Handicapped Children Act of 1975 and the Americans with Disabilities Act of 1990 provided legal protections for the disabled that extended far beyond anything contemplated by the Court in constitutional cases. Much the same can be said for legislation establishing the rights of women. As a result, the debate over whether non-racial groups are covered by the Fourteenth Amendment has been replaced by the even trickier issue of the extent to which the racial discrimination paradigm can be applied to discrimination on the basis of gender, disability, language, or age. Egalitarian Nationalists have usually argued that these forms of discrimination are just as serious a problem as racial discrimination, and therefore that the ADA or Title IX or §504 deserve the broad interpretation—including liberal recognition of private rights of action—the Court has given to the Civil Rights Act and the Voting Rights Act. Reconstructed Federalists have been inclined to argue that the Court’s expansive reading of Civil Rights Act and the Voting Rights Act reflects the special constitutional status of racial discrimination, and consequently should not be a model for interpreting legislation on non-racial topics.

In recent years one of the most controversial constitutional issues before the Court has been the extent of Congress’s authority to impose non-racial anti-discrimination mandates on state and local governments. Egalitarian Nationalists on the Rehnquist and Roberts Courts have argued that under precedents established in the 1960s, Congress has extremely broad discretion under the enforcement clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments to attack discrimination based on disability, age, gender, or nearly any other behavior it considers arbitrary, unfair, or based on outmoded stereotypes. This includes the authority to abrogate state’s Eleventh Amendment immunity from suits brought by private citizens. Other members of the Rehnquist Court—sometimes a majority—have tried to place some limits on Congress’s power to regulate action by state and local governments that the Court does not find constitutionally suspect. In several 5-4 decisions they have put the onus on Congress to demonstrate that legislation enacted under the enforcement clauses of the Civil War amendments is “congruent and proportional” to the constitutional harm it seeks to remedy. The old battle over the extent to which the Fourteenth Amendment extends beyond race continues in a new, more convoluted guise.

**Looking behind legal formalities.** The most subtle—and perhaps the most important—difference between Egalitarian Nationalists and Reconstructed Federalists is the extent to which they believe judges should look behind legal formalities to assess underlying
economic, political, and social realities. Especially during the civil rights crisis of the 1960s, Egalitarian Nationalists argued strenuously that federal courts must carefully examine the social context of the cases before them to determine whether members of disadvantaged groups have actually been able to take advantage of their new legal rights and opportunities. As Justice Brennan wrote in a controversial 1966 case, “a basic corollary” of the command to provide equal access to government facilities is “the right of a citizen to use this facility without discrimination on the basis of race.” If opposition from private citizens (in this case violent intimidation by white supremacists) prevents such “equal utilization of state facilities,” then a constitutional right has been violated, and the federal government has a responsibility to punish the perpetrator—whether or not they had conspired with state officials. Similarly, when the appearance of equal access to the ballot, to education, or to employment coexists with the reality of “disparate” electoral, educational, or employment outcomes, the national government has an affirmative duty to ensure that this is not a consequence of past discrimination or subtle prejudice and stereotyping.

In his detailed examination of civil rights litigation before 1964, Michael Klarman has pointed out that the defenders of the Jim Crow system gave judges many reasons to look behind legal formalities. After all, “separate but equal” was a fraud, and everyone knew it. So were literacy tests. As Klarman puts it,

> Constitutional interpretation that is limited to form and is unwilling to delve into substance is vulnerable to nullification by determined resistance. Southern whites were so creative and persistent that they almost completely eliminated black suffrage despite the existence of a constitutional amendment that forbids disenfranchisement based on race. Much of this disenfranchisement resulted from extralegal methods—force and fraud. But some of it simply took advantage of the evasive opportunities afforded by constitutional formalism. So long as the justices refused to inquire into legislative motive or to closely examine the discriminatory exercise of administrative discretion, southern whites were able to disenfranchise blacks without violating the Constitutions.

This was especially true of the long battle over school desegregation. For over a decade after Brown southern school officials used tokenism, intimidation, discretionary “pupil placement laws,” and other administrative stratagems to delay desegregation. Finally the Fifth Circuit and the Supreme Court demanded plans that “would work and work now”—which meant plans that would produce a readily measurable racial balance in each school under court order. What matters, the judges finally said, is not what gyrations school officials go through to assign students to schools, but how many children of each race sit in each classroom.

This readily understandable impatience with legal formalities and determination to discover “what works” had a number of important implications. For one thing, it drove federal courts to rely on those who could claim to capture this underlying reality—which usually meant either social science experts or trial judges who had heard extensive evidence and immersed themselves in “the totality of circumstances.” It also meant that
the focus in civil rights cases subtly shifted away from identifiable individuals to groups: the “realities” courts usually took into account were aggregate trends on the educational achievement, electoral success, and employment opportunities of blacks and whites, men and women, the old and the young, the disabled and the able-bodied. Moreover, the most obvious way to gauge whether “rights on the books” have been converted into “rights in action” is to examine the relative proportions of disadvantaged groups in schools, job categories, and electoral office. In short, moving beyond legal formalism almost always means moving toward some form of disparate impact analysis and race- or gender-conscious remedies.

Reconstructed Federalists such as Harlan, Black, and Stewart at first acquiesced to this shift, which seemed to be a prerequisite for any substantial change in southern education or employment. Gradually, though, Reconstructed Federalists came to object to what they saw as the growing gap between the Court’s practices on the one hand and the words of the 1964 Civil Rights Act on the other. They also argued that the Court’s use of disparate-impact analysis conflicts with the principle “at the heart of the Constitution’s guarantee of equal protection,” namely “the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class.” Reconstructed Federalists’ understanding of a “color-blind Constitution” has frequently gone hand-in-hand with a distrust of social science analysis. In the Seattle school desegregation case Justice Thomas wrote, “If our history has taught us anything, it has taught us to beware of elites bearing racial theories.”

Morris Abrams, one of the veterans of the civil rights movement who became a staunch defender of the “color-blind” understanding of the Fourteenth Amendment and nondiscrimination laws, once described this recurrent conflict as one between “fair shakers” and “social engineers.” The former do not aspire to eliminate all vestiges of past discrimination, but adopt the more modest goal of making sure that members of disadvantaged groups receive a “fair shake” from employers, college admissions officers, and public school. Their opposite number, the “social engineers,” he argues, are guilty of hubris and engage in heavy-handed intervention into complex social arrangements they do not understand. To the Egalitarian Nationalists, the Reconstructed Federalists are guilty of “ignoring reality.” To Reconstructed Federalists, Egalitarian Nationalists are guilty of intrusive, counter-productive “social engineering.” Underlying this debate are not just different understandings of the causes of inequality, but different assessments of the capacity and the dangers of centralized government regulation.

The role and capacity of the federal judiciary. No debate among the members of the American Supreme Court is more familiar and predictable than that over “judicial activism” and “judicial restraint.” In general Egalitarian Nationalists have championed judicial activism, Reconstructed Federalists judicial restraint. But that is not uniformly the case. On a number of occasions the former have deferred to congressional expansion of nondiscrimination rights, and the latter have sought to limit congressional authority in order to protect what they consider the constitutional prerogatives of states.
The two camps frequently disagree on three other, somewhat less familiar sets of issues relating to the power and role of the federal courts. The first, as suggested above, is the capacity of the courts to understand such complex issues as the causes of housing segregation, the determinants of the racial gap in educational achievement, or the prevalence and consequences of sexual harassment in the workplace, or to know how to fashion remedies that will ameliorate rather than exacerbate the problem. This debate was squarely joined by Abram Chayes and Donald Horowitz in the 1970s, and lies behind many of the disagreements between the Egalitarian Nationalists and Reconstituted Federalists on jurisdictional and remedial issues.\textsuperscript{81}

The second involves what is often called judicial “comity,” which means federal court respect for state courts. As Richard Fallon has shown, federal judges have long disagreed on how much deference they should show to the judgments of state courts. According to the “Federalist Model,” Fallon writes, “Absent clear evidence to the contrary, federal judges should assume that state courts are as fair and competent as federal courts in the enforcement of federal constitutional norms and should craft doctrines of judge-made law accordingly.”\textsuperscript{82} According to the “Nationalist Model,” in contrast, “The Constitution contemplates a special role for the federal judiciary, different in kind from that assigned to state courts, in ensuring the supremacy of national authority.” Consequently, according to the Nationalist model, “Absent clear evidence to the contrary, federal judges should assume that federal courts are likely to be more prompt and effective than state courts in protecting federal constitutional rights.” During the 1960s, the recalcitrance, sabotage, and rank insubordination of southern courts created an unprecedented crisis of comity. In response the federal courts took extraordinary steps to expand the jurisdiction of federal courts and to increase their supervision of state courts.\textsuperscript{83} A good example is \textit{Dombrowski v. Pfister},\textsuperscript{84} where the Supreme Court allowed the lower courts to enjoin ongoing state criminal proceedings that had been used to harass civil rights workers. Often Reconstructed Federalists joined these decisions. But once the crisis in the south had receded, they sought to return to the status quo ante. The Egalitarian Nationalists, in contrast, argued that the behavior of southern judges demonstrated that state courts are inherently unreliable and must be subject to close federal supervision. This is one area of the law in which Reconstructed Federalists had considerable success in the 1970s.

The third judicial power issue involves statutory interpretation. Egalitarian Nationalists have championed “dynamic” statutory interpretation that allows judges not just to ignore some of the inconvenient provisions of the Civil Rights Act of 1964, but also (to quote Justice Stevens’ dissent in \textit{Sandoval}) “build into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.” Old laws, they argue, must be updated to recognize new problems. Reconstructed Federalists, in contrast, have often embraced “textualism.” Judges, they argue, should give as much weight to the constraints placed on government actors by statutes as on the “broad remedial purposes” of those laws. If Congress wants to loosen these constraints or to expand the reach of statutes to reach new problems, then so be it. But that, they argue, is a job for legislators, not judges.
Do these competing views on the role of the federal judiciary drive their interpretation of civil rights statutes, or do their positions on civil rights drive their understanding of the role of federal judges? In the United States the issues of civil rights and judicial power are so closely connected that becomes a chicken-and-egg question. The interlocking nature of these institutional and policy-based issues is one reason why it is useful to think of them in terms of the “civil rights state.”

**Temporary or permanent?** Reconstructed Federalists view the national government’s battle against the Jim Crow as an extraordinary departure from the ordinary norms of American politics. Consequently they have sometimes suggested that the need for those extraordinary measures should be reassessing in light of changed circumstances. That was the theme of Chief Justice Robert’s opinion in a 2009 Voting Rights Act case. When the Court approved the original Voting Rights Act, Roberts argued, “we concluded that the problems Congress faced when it passed the act were so dire that exceptional conditions could justify legislative measures not otherwise appropriate.”

“In part due to the success of that legislation,” Roberts claimed, “we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not address today.” If the Court had in fact addressed that question, it seems likely that Roberts’ answer would have been “yes.”

This is not the only circumstance in which Reconstructed Federalists have argued for time limits on civil rights remedies. In the early 1970s Justices Harlan and Black convinced the Court to relax its supervision of state judges. More recently, the Supreme Court has pushed lower court judges to terminate long-standing desegregation orders, and t has made it easier for state officials to require reconsideration of civil rights consent decrees. Justice O’Connor ended her defense of the University of Michigan Law School’s affirmative action program by noting, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

Of course, the Voting Act of 1965 was originally considered a temporary measure, parts of which would expire within five years. They have been repeatedly extended, and are now slated to expire in 2032.

For Egalitarian Nationalists, the de facto permanence of such measures is justified both by the deep-seated causes of inequality and by the fact that old statutes can frequently be used to address new problems. For example, when the Voting Act was originally enacted, no one expected it to be used to require states to draw “majority-minority districts.” But that has now become the law’s major purpose. To repeal or to strike down the law would encourage backsliding, and thus “turn the clock back on civil rights.”

**Conclusion**

This paper has put forth three propositions. The first is that the Supreme Court often leaves its biggest imprint on civil rights policy not in high visibility constitutional rulings, but in a large number of small adjustments in the “remedial machinery” that turns abstract rights into binding norms. The second is that such judicial action must be placed in the context of the broader civil rights state, an extensive regulatory regime constructed
by legislators and administrators as well as judges. Federal courts play a prominent role in this civil rights state, providing it with unexpected strength. At the heart of the “strong state” lies an unusual division of labor between federal courts and agencies, the "integrated remedial scheme" that according to Justice Stevens constitutes an “inspired model” for “attacking the often-intractable problem of racial and ethnic discrimination.” Third, the struggle over civil rights within the Supreme Court is best understood as an extended debate between contending visions of the civil rights state, which in turn are based on much different understandings of the place of the civil rights revolution of the 1960s in the evolution of American government and politics. Examination of what at first might seem to be technical and arcane details can thus help us see the bigger picture of the civil rights debate.
ENDNOTES


6 Northwest Austin Municipal Utility District Number One v. Holder 557 U.S. --- (2009)


10 515 US 200 at 239 (1995)

11 Grutter v. Bollinger , at –

12 These racial gerrymandering cases are described in Tinsley Yarbrough, Race and Redistricting: The Shaw-Cromartie Cases (Kansas, 2002).


14 I have taken these figures from my 2009 APSA paper, “The Supreme Court and the Civil Rights State.”


16 A good example is Ledbetter v. Goodyear Tire and Rubber 550 U.S. – (2007) In her dissenting opinion, Justice Ginsburg complained that “this is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose.” She encouraged Congress to revise the law to make its intention clear—which it did.


18 Melnick, “Deregulating the States.”


“Disarming the Private Attorney General,” 2003 University of Illinois Law Review 183 at 185


This process is described in detail in Orfield, The Reconstruction of Southern Education. Beryl Radin, Implementation, Change, and the Federal Bureaucracy, and Halpern, On the Limits of the Law, ch. 3.

United States v. Jefferson County Board of Education 372 F.2d 836 (5th Cir., 1966) at--

U.S. v. Jefferson County, at 852 and 856. The other important cases were US v. Jefferson County Board of Education 380 385 (1967 (en banc), Singleton v. Jackson Municipal Separate School District 348 F.2d 869 (5th Cir., 1966). Halpern provides an excellent discussion of these cases, pp. 50-80.

Orfield, Reconstruction of Southern Education, p. 117.


Quoted in Davies, p. 1421.


His opinion included the controversial assertion that “discrimination is barred which has that effect even though no purposeful design is present.” Lau v. Nichols 414 U.S. 563 (1974) at 568. It is not clear whether Douglas is referring to the guidelines or to Title VI itself. His underlying assumption is that Title VI authorizes OCR to do whatever it deems necessary to uproot unfairness in education.

At 570-71.


One could add the names of prominent legal scholars to each list. For example, no one presented the position of Egalitarian Nationalism more clearly than Yale Law Professor Owen Fiss, His article, “The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Decade after Brown v. Board of Education,” 41 University of Chicago Law Review 742 (1974) offers a unusually clear picture of Egalitarian Nationalism in the 1970s. Similarly, some of the most important statements of the alternative point of view came from Alexander Bickel, Philip Kurland, and (more ambiguously) Archibald Cox.

McLaughlin v. Florida 379 U.S. 184 (1964) at --


Oregon v. Mitchell, 285


South Carolina v. Katzenbach, 383 US 301 (1966), at --, Justice Black objected to preclearance, which “so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless” and approaches dangerously near to wiping the States out as useful and effective units in the government of this country.”


Katzenbach v. Morgan, 847; Oregon v. Mitchell, 325-30. Writing for a precarious five-member majority in Oregon v. Mitchell, Justice Black claimed, “Above all else, the framers of the Civil War Amendments intended to deny the States the power to discriminate against persons on account of their race. While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discrimination other than those on account of race, it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people.” In his separate opinion in Oregon v. Mitchell, Justice Stewart argued that the Court’s 1966 Voting Rights Act decisions constitutes, “the furthest possible legitimate reach” of congressional power. Where there is no such overwhelming evidence of “invidious discrimination against any discrete and insular minority,” Congress cannot exercise such extraordinary power over the states.

The Warren Court, p. 27


Bell v. Maryland, 378 US 226 (1964) at -- He and Justice Douglas repeated this claim a few months later when they voted to uphold Congress’s power to enact Title II in Heart of Atlanta v. US  379 US 241 (1964)


In addition to the cases cited in notes 61, 62, and 63, see US v. Bob Jones University 461 U.S. 574 (1983). Justice Burger argued that while the Civil Rights Act does not prohibit private schools from engaging in racial discrimination and the Internal Revenue Code does not explicitly bar schools that practice racial discrimination from being considered charitable institutions, “Whatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy.”

Evans v. Newton, 382 US 296 (1966) at --.

Bell v. Maryland, [pp. 856 and 859 of Lawyers Edition]


Bob Jones University v. US 461 U.S. 574 at --
Whether encouraging “diversity in education” or compensating for previous discrimination constitutes such an “overriding purpose,” of course, has been highly controversial.


Graham v. Richardson, 403 US 365 at 371-2 (Blackmun). In McDonald v. Board of Election Commissioners  Chief Justice Warren wrote “a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race., two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.” 394 U. S. 802 (1960) at 807. On disability see Cleburne v. Cleburne Living Center 473 U.S. 432 (1985).


For example, Kimel v. Florida Board of Regents (2000); and Board of Regents v. Garrett (2001)


Klarman, From Jim Crow to Civil Rights, p. 457


Chief Justice Roberts in Parents Involved, slip opinion at 22. He was quoting from several previous opinions. This theme has been repeated in similar phrases in many Court decisions.


380 U.S. 479 (1965)

Northwest Austin Municipal Utility District Number One v. Holder 557 U.S. --- (2009), slip opinion at 4, internal punctuation omitted.


Grutter v. Bollinger at --