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Julius Chambers

NAACP Legal Defense and Educational Fund, Inc.

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PROTECTION OF CIVIL RIGHTS: A CONSTITUTIONAL MANDATE FOR THE FEDERAL GOVERNMENT

*Julius Chambers**

FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-*BROWN* SOUTH. By *Michal Belknap*. Athens: University of Georgia Press. 1987. Pp. xv, 387. \$35.

[T]he Southern states have made their policy clear. States' rights, they say in effect, include the right to abrogate power when it involves distasteful responsibilities, even to the Constitution of the United States, its amendments, and its judicial interpretation. So the power and the responsibility return by default to the federal government. It is up to all branches of the central government to accept the challenge.

Martin Luther King, Jr., 1958.¹

With these words, Martin Luther King, Jr. implored the federal government to safeguard the constitutional rights of its citizenry. Since the Reconstruction era, Whites had lynched, murdered, and terrorized Blacks in order to maintain a system of racial segregation and domination. King believed aggressive federal leadership was necessary to protect the black population against further violation of its civil rights and to overcome the often violent forms of resistance to change in the South.²

In *Federal Law and Southern Order*, Michal Belknap suggests contrary conclusions. Belknap argues first that federal intervention in the 1960s played but a minor part in the cessation of anti-civil rights terror. He specifically discounts the impact of United States Justice Department prosecutions in the *Price*³ and *Guest*⁴ cases and the passage

* Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. B.A. 1958, North Carolina College; M.A. (History) 1959, University of Michigan; J.D. 1962, University of North Carolina; LL.M. 1963, Columbia University. — Ed.

Special thanks to Marianne Engelman for her contribution.

1. M.L. KING, *STRIDE TOWARD FREEDOM* 198 (1958).

2. *Id.*

3. *United States v. Price*, 383 U.S. 787 (1966). Deputy Sheriff Cecil Price and seventeen others were indicted under a federal criminal statute for willfully denying three civil rights workers their right to due process under the fourteenth amendment. James Chaney, Michael Schwerner, and Andrew Goodman had been traveling from Meridian to Philadelphia, Mississippi, when they were stopped, assaulted, and brutally killed. Subsequent to the Supreme Court decision in the case, which found sufficient state involvement to justify conviction under 18 U.S.C. § 242 (1964), defendants were found guilty and received sentences of three to ten years.

4. *United States v. Guest*, 383 U.S. 745 (1966). Two klansmen accused of murdering black

of the Civil Rights Act of 1968.⁵ Instead, Belknap attributes decreased racial violence to restraints imposed by Southern political culture. "Fearful of a breakdown of law and order in their communities," Belknap writes, "southerners had themselves assumed responsibility for controlling and punishing racist violence" (p. 229). In making these arguments, Belknap underrates the federal government's vital role in securing civil rights in the South.⁶ The national government's retreat from civil rights enforcement following Reconstruction and relinquishment of responsibility to state and local officials led to lawlessness, lynching, and the entrenchment of segregation.⁷ Only when the federal judiciary, Congress, and the Justice Department began to actively protect civil rights was progress made in combatting racial violence and discrimination.⁸

Belknap further contends that constitutionally required principles of federalism precluded the national government from effective civil rights enforcement. Despite calls throughout the 1950s and early

educator Lemuel Penn were prosecuted under federal civil rights law after they were acquitted in state court. The Supreme Court reversed a district court dismissal of charges of conspiracy to interfere with the exercise of a right secured by the Constitution or laws of the United States. As Belknap indicates, the *Price* and *Guest* decisions removed all doubt about whether the Justice Department possessed the legal authority to prosecute perpetrators of anti-civil rights violence. P. 183.

Belknap credits the Supreme Court decisions in *Price* and *Guest* with clarifying the potential powers of the national government, but devalues the significance of these legal developments to progress in the South. Belknap offered a similar argument in an earlier article, *The Legal Legacy of Lemuel Penn*, 25 HOWARD L.J. 467 (1982). According to Belknap, Penn's death led to a federal apparatus better equipped to handle civil rights violations. Belknap argued, however, that increased federal capabilities were anachronistic by the late 1960s because changes in Southern attitudes largely eliminated the need for national involvement. For an opposing view of the importance of *Price* and *Guest*, see M. BERRY, BLACK RESISTANCE/WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 200-04 (1971).

In addition, Belknap's assessment of the *Price* and *Guest* decisions conflicts with his central theme, that those who argued that constitutional principles of federalism limited the authority of the national government to intervene in the South have been vindicated. Belknap fails to resolve this contradiction. For a more complete discussion of the tension between Belknap's argument for the vindication of restricted federal authority and his uncritical treatment of the articulation and exercise of federal power to enforce civil rights, see *infra* note 18.

5. Pub. L. No. 90-284, Title I, § 101(a), 82 Stat. 73 (1968) (codified as amended at 18 U.S.C. § 245) (criminal statute that prohibited any individual, whether acting under authority of law or not, from interfering with the exercise of the right to vote or the right to participate in activities administered by the United States government).

6. This review does not intend to address fully the impact of internal, cultural constraints on the transformation of race relations. Nevertheless, Belknap's argument that white southerners themselves curtailed violence out of concern for law and order is not persuasive. Belknap's discussion provides no account for why law and order concerns emerged in the mid-1960s and had not prevented racial violence at earlier times. Without explanation, he downplays the influence of federal intervention, the civil rights movement, and the pressure of national attention. Pp. 229-51. National pressure and even force were necessary to achieve state acceptance of civil rights enforcement responsibilities, as well as citizen respect for and compliance with the pronouncements of the United States Supreme Court in the area of race relations.

7. See generally M. BERRY, *supra* note 4, at 103-73.

8. For a discussion of the progress made in civil rights enforcement in the twentieth century, see *infra* notes 60-66 and accompanying text.

1960s for federal protection by leaders such as Dr. King, and despite explicit refusals by state authorities to comply with constitutional guarantees of equal protection,⁹ federal officials were reluctant to act. The national government, writes Belknap, was paralyzed by the belief that under federalist precepts law enforcement responsibility rested with the states.¹⁰ Although he criticizes successive administrations for using federalism as an excuse for passivity (p. 250), Belknap fails to assess the extent of the government's power to intervene and the degree to which principles of state sovereignty or autonomy limited the exercise of federal prerogatives. Belknap asserts that decreases in overt forms of racial hostility in the South vindicated the view held by Justice Department officials that the federal government could not, and should not, try to substitute for the failure of local law enforcement to safeguard civil rights (pp. ix, 250-51). Belknap thus suggests that the national government's immobility in the face of flagrant civil rights violations and state abdication of enforcement responsibility was ultimately justified.

Yet quite the opposite is true. The Constitution imposes on the federal government the obligation to ensure that the civil rights of all citizens are protected. The government's failure to act contravened this constitutional charge. The first section of this review will address the nature of the federal government's constitutional mandate to protect civil rights, focusing on its development during Reconstruction; the second section will recount how well that mandate has been fulfilled.

A. *The Federal Mandate to Protect Civil Rights*

Belknap treats federalism, the division of power between national and state government, as a static, rigid concept, ignoring its constitutional evolution since the eighteenth century. Without discussion of either competing conceptions of federal-state relations, or their historical development, Belknap effectively adopts a narrow, if vague, definition of federalism in general consonance with the views expressed by Burke Marshall during his tenure at the Justice Department. "There is no substitute under the federal system for the failure of local law

9. The state legislatures of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Virginia passed resolutions formally repudiating the Supreme Court's decisions relating to segregation and declaring their intention not to abide by desegregation orders. See 1 RACE RELATIONS L. REP. 437-47, 591, 753, 948 (1956); see also *Cooper v. Aaron*, 358 U.S. 1 (1958).

10. Pp. 39, 73-76, 105. For an account that contrasts with Belknap's sympathetic description of the Justice Department's dilemma, see M. BERRY, *supra* note 4, at 237. Berry dismisses the claim that principles of federalism truly constrained government officials, noting that by 1965, it "became clear that the problem had not really been a constitutional one after all; the Constitution had merely been interpreted to support the disinclination of whites to regard blacks as persons."

enforcement responsibility," Marshall wrote in 1964.¹¹ According to Belknap, Marshall's federalism not only required deference to state and local law enforcement, but deprived the national government of the powers needed to protect citizens in the face of Southern inaction (pp. 73-75). Federalism thus constituted an inflexible limit upon the powers of the national government, denying the executive branch the ability to safeguard the exercise of constitutional rights in the 1950s and 1960s. At best, federalism afforded aggrieved parties the opportunity for case-by-case vindication in federal court (pp. 74-77).

Belknap's account of federalist principles explicitly relies on what he considers to be the contemporary understanding during the 1960s (pp. xi-xii). Indeed, in the early 1960s, Burke Marshall accepted a conception of the federalist system bereft of the flexibility accorded it by Reconstruction, a conception forged in 1787 and resurrected in the service of the nation's retreat from civil rights protection after 1876.¹² Belknap fails to mention, however, that Marshall's restrictive idea of federal power was itself controversial. Marshall's contemporary opposition included not only activists who expected the national government to intervene to protect civil rights for reasons of morality, without due regard for the structure of government, but also those with more expansive views of federalism.¹³

As Belknap deftly describes, Marshall's account of the constitutional dilemma facing the Justice Department in the 1960s set federalist constraints against the need for adequate protection of civil rights.¹⁴ Marshall believed that the division of powers required by the Constitution compelled the national government to rely on state and local authorities to enforce the law. For the record, however, Marshall did express frustration with the Justice Department's remedial approach, which was limited to the slow and costly process of litigation.¹⁵ He felt new legislation was a necessary prerequisite to more

11. P. ix (quoting letter from Burke Marshall to Professor Russell H. Barrett, January 3, 1964).

12. See B. MARSHALL, *FEDERALISM AND CIVIL RIGHTS* (1964) [hereinafter B. MARSHALL]; Marshall, *Federal Protection of Negro Voting Rights*, 27 *LAW & CONTEMP. PROBS.* 455 (1962); Marshall, *The Protest Movement and the Law*, 51 *VA. L. REV.* 785 (1965).

13. See Wasserstrom, *Book Review*, 33 *U. CHI. L. REV.* 406, 410 (1966) (reviewing B. MARSHALL, *supra* note 12) ("The limitations [Marshall] imposes on federalism are in several respects unnecessary. And it is this that makes his book so troublesome . . ."); Comment, *Theories of Federalism and Civil Rights*, 75 *YALE L.J.* 1007, 1008 (1966) ("[F]ederalism is a more complex mechanism. . . . So understood, the objectives of federalism support intervention in today's deep South.").

14. P. 75; see also B. MARSHALL, *supra* note 12, at 81 ("Those who say that civil rights issues cut into the fabric of federalism are correct."). Belknap argues further that President Kennedy shared Marshall's conviction that federalism precluded government action: "When confronted with demands for remedial action to correct the inadequacies of southern law enforcement, the White House readily pleaded that 'the role of the Federal Government in our constitutional system . . . is limited.'" Pp. 173-74.

15. B. MARSHALL, *supra* note 12, at 34-38. Belknap's presentation of Marshall's point of view deemphasizes Marshall's anguish and contrasts sharply with the sentiments expressed in

extensive executive action. Yet, although Marshall conceded that some measure of enhanced federal civil rights responsibility was constitutionally permissible and that Congress was vested with the authority to enact appropriate legislation, he remained deeply disturbed by the federalism problems he considered inherent to federal intervention.¹⁶ While Marshall did not elucidate the outer boundaries of congressional power, he indicated that legislative authority was limited and that additional steps taken by the Justice Department to enforce new civil rights laws would conflict with federalist principles.¹⁷

Belknap, following Marshall, thus assumes that constitutional principles of federalism obliged the federal government to restrain from acting more forcefully to protect civil rights.¹⁸ This construction denies federalism its rich texture and flexibility and contravenes its constitutional history. The national government was not powerless to prevent the pervasive racial violence and discrimination suffered during the 1960s. To the contrary, the three branches of the federal government had both the authority and a constitutional mandate to protect the civil rights of its citizenry.¹⁹

The Reconstruction amendments²⁰ to the Constitution revolutionized federalist precepts that had been established at the nation's found-

Marshall's book. Belknap describes Marshall's commitment to restrictive notions of federalism as paramount. In the short run, reliance on southern institutions often meant exposing persons involved in the civil rights movement to attack, writes Belknap, "but Marshall believed their plight was the result of a temporary breakdown in southern law enforcement which would last for only a few years." P. 74. In fact, the problem was not so easily resolved for Marshall.

16. B. MARSHALL, *supra* note 12, at 39-40, 81, 83-84.

17. Pp. 126-27; *see also* B. MARSHALL, *supra* note 12, at 34-37, 72-75, 81-82.

18. While Belknap's understanding of the nature of federalism is similar to Marshall's, Belknap's book, as well as his earlier article, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s*, 33 EMORY L.J. 93 (1984), attempt to evaluate the suitability of the federalist structure to the problem posed by Southern violence. Without exploring alternative interpretations of federalist theory, Belknap at times criticizes Justice Department officials for using federalism as an excuse for inaction. P. 250. Belknap fails to resolve the tension between this implicit approval of the exercise of federal power to enforce civil rights and his endorsement of nonintervention as a constitutional principle.

Although never precisely elucidated, Belknap's federalism thus seems to allow for some greater level of legislative, and consequent executive, action than the federalist theory which he attributes to Marshall. Belknap concedes that the Constitution allocates to the federal government a measure of power to create remedies for civil rights violations. P. 250. However, he fails to delineate the outer boundaries of this constitutional authority. Furthermore, his uncritical treatment of congressional civil rights legislation and actions finally taken by the Justice Department suggests an implicit recognition that the federal government is empowered to protect the rights of its citizenry under the Constitution.

In contrast, Belknap maintains throughout the book that responsibility for the protection of civil rights rests with state and local authorities. Without resolving the underlying contradiction in his argument, Belknap claims that, in retrospect, the Justice Department's narrow construction of the federal government's powers and reliance on state and local authorities for civil rights enforcement were vindicated.

19. For a discussion of responsibilities imposed by Reconstruction amendments, *see infra* notes 25-52 and accompanying text.

20. U.S. CONST. amends. XIII, XIV, and XV.

ing. The dramatic events of 1860 through 1876, including the secession of the Southern states, the battles and dislocations of the Civil War, the demise of slavery, the Emancipation Proclamation, and Presidential and Radical Reconstruction, forever changed the constitutional landscape of the United States. During Reconstruction, the American people, led by the Republican Party, transcended the day-to-day discourse of normal politics and participated in a historic moment of reconstituting the nation's fundamental principles.²¹ The thirteenth and fourteenth amendments to the Constitution created a national citizenry, defined the rights of citizenship, and authorized the national government to protect those rights.²² The American people thus constitutionally²³ transformed the structure of federalism.²⁴

The framers²⁵ of the Reconstruction amendments meant to vest in the federal government the authority necessary to secure civil rights

21. See generally E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988) (exceptionally comprehensive history of the Reconstruction era).

For a discussion of the process undertaken during Reconstruction of legitimate Constitutional creation, in which the American people spoke on matters of basic principle in a particularly authoritative way, see Ackerman, *Discovering the Constitution*, 93 *YALE L.J.* 1013, 1049 (1983).

22. A large body of literature addresses the nature and meaning of the Reconstruction Amendments. See, e.g., J. TENBROEK, *EQUAL UNDER LAW* (1965) (informed by abolitionist concepts, the framing of the Reconstruction Amendments incorporated national citizenship, substantive rights, and national responsibility for the protection of federal rights); H. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 424-29*, 436, 449 (1973). Recent historical work affords new insight into the breadth of post-war constitutional change. See, e.g., R. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985) (appreciation for national civil rights enforcement authority under the thirteenth and fourteenth amendments commonly shared by members of judiciary); Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 *N.Y.U. L. REV.* 863 (1986) [hereinafter Kaczorowski, *Revolutionary Constitutionalism*] (framers believed in primacy of national citizenship and vested primary authority for securing civil rights in Congress); E. FONER, *supra* note 21, at 258-59 (discussing implications of the fourteenth amendment). But see Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 *HOUS. L. REV.* 221 (1987).

23. U.S. CONST. art. V.

24. See J. TENBROEK, *supra* note 22, at 239 (describing fourteenth amendment as effecting "a revolution in federalism by nationalizing the natural or civil rights of men or citizens"); H. HYMAN, *supra* note 22, at 467 (Reconstruction worked "profound alterations in nation-state relationships"); H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 386 (1982) (fourteenth amendment was "a basic alteration in our federal system") (quoting the Supreme Court in *Mitchum v. Foster*, 407 U.S. 225, 238 (1972)). But see Maltz, *supra* note 22.

25. This discussion of the intentions and beliefs of the framers does not constitute an endorsement of theories of judicial interpretation based on "original intent." Nevertheless, careful study of the Reconstruction era is crucial to full appreciation for the development and complexity of federalism. Returning to the historical record for information on Reconstruction is unusually important because, as Thurgood Marshall wrote in 1954, history rewrote and distorted the script of Reconstruction. See Marshall, *Segregation and Desegregation*, in *II THE VOICE OF BLACK AMERICA* 252 (P. Foner ed. 1975).

Neither do the words that follow create a complete portrait of the Reconstruction amendments. They are, instead, intended to outline the constitutional transformation of federalism.

and to provide federal remedies when those rights were denied.²⁶ Debated during the final months of the Civil War, the thirteenth amendment was intended to give constitutional sanction to the new arrangement of power between the federal government and the states. Critics of the amendment claimed that it was an unprecedented, unwarranted extension of national power.²⁷ Opponents further complained that the amendment would authorize federal intrusion both to prevent the reemergence of physical bondage and to advance the rights of the freedmen.²⁸ Indeed, advocates believed that the amendment would empower the federal government to guarantee not only the abolition of slavery but also the privileges and liberties of freedom.²⁹

The historical record shows that contemporaneous interpretations of the thirteenth amendment assumed that the constitutional change would authorize federal protection of civil rights. Before the thirteenth amendment was ratified, Congress considered a civil rights bill designed to nullify discriminatory laws and regulations.³⁰ Senator John Sherman of Ohio, a proponent of the bill, counselled his colleagues to postpone passage until the ratification of the thirteenth amendment.³¹ Whereas congressional power to enforce civil rights was uncertain in 1865, the framers believed that the adoption of the thirteenth amendment would provide authority for the legislation. Referring to the pending amendment, Sherman explained, "Here is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation."³² Senator Lyman Trumbull of Ohio, who had managed the thirteenth amendment in the Senate, concurred. According to Trumbull, the thirteenth amendment authorized federal protection of the rights essential to freedom.³³

The thirteenth amendment encompassed more than the authoriza-

26. For detailed discussions of which rights were to be protected, see Jacobus tenBroek's seminal work, *EQUAL UNDER LAW*, *supra* note 22; Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 *CONST. COMMENTARY* 235, 275-77 (1984). *But see* Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 22, at 867 n.12.

27. *See* J. TENBROEK, *supra* note 22, at 160-62.

28. *Id.* at 162.

29. *Id.* at 162-73; *see also* H. HYMAN, *supra* note 22, at 429; H. HYMAN & W. WIECEK, *supra* note 24, at 402-03.

30. *See* CONG. GLOBE, 39th Cong., 1st Sess., at 39 (1865).

31. Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 22, at 895.

32. CONG. GLOBE, 39th Cong., 1st Sess., at 41 (1865).

33. *Id.* at 43. According to Trumbull, the rights essential to freedom included freedom of movement, the right to acquire and hold property, and the right to make and enforce contracts.

Proponent James Harlan, a senator from Iowa, believed that the amendment also authorized the federal government to protect against discriminatory restrictions on family relations, freedom of speech, and the right to a fair hearing in criminal proceedings. Thus while the thirteenth amendment was clearly intended to abolish the incidents of slavery, the outer contours of the rights to be protected were subject to a range of opinion. *See, e.g.*, E. FONER, *supra* note 21, at 66-67.

tion of federal protection of civil rights. It accorded all citizens an affirmative guarantee of liberty. Congressional Republicans, generally, interpreted the thirteenth amendment's guarantee to include the rights to life, liberty, and property.³⁴ Senator Trumbull invoked the authority granted by the thirteenth amendment in support of the subsequent civil rights bill he introduced into the Senate. Trumbull's bill, which was to become the Civil Rights Act of 1866, attempted to fulfill the promise of the new amendment.³⁵ The constitutional prohibition against slavery and involuntary servitude, Trumbull explained, "declared that all persons in the United States should be free. This measure intended to give effect to that declaration and secure to all persons within the United States practical freedom."³⁶

The Civil Rights Act of 1866 reflected the profound change in federalism wrought by the Civil War and constitutionalized by the thirteenth amendment.³⁷ Congress attempted to outlaw the many forms of subjugation and discrimination, public and private.³⁸ Section one of the Act granted particular rights independent of state law. In addition, the Act circumscribed the states' rights to settle property, con-

34. See CONG. GLOBE, 39th Cong., 1st Sess., at 1780-81; see also Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 22, at 898-99 n.156.

35. The belief that the Civil Rights Bill was authorized by the thirteenth amendment was almost universal among influential Republicans. See E. FONER, *supra* note 21, at 244-45.

36. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

37. See Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 22, at 898-99.

38. The Supreme Court recently heard arguments on whether the Civil Rights Act of 1866 was intended to bar private acts of discrimination. See *Patterson v. McLean Credit Union*, No. 87-107 (U.S. argued Oct. 12, 1988). Until recently, the Civil Rights Act's prohibition on private racial discrimination had long been treated as settled law. In 1968, the Court held in *Jones v. Alfred H. Mayer Co.* that section 1 of the Act was designed "to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein — including the right to purchase or lease property." 392 U.S. 409, 436 (1968); see also *Runyon v. McCrary*, 427 U.S. 160 (1976). The legislative history of the Civil Rights Act of 1866 makes clear that Congress aimed to prohibit racially discriminatory actions by both public and private parties. In its effort to identify the problems that faced the freedman, Congress relied upon information from the Schurz Report, the hearings of the Joint Committee on Reconstruction, and letters and petitions. Congress repeatedly heard testimony about the abuses suffered by the freedmen at the hands of private persons. Carl Schurz, for example, reported on the often violent efforts by private citizens to re-enslave, coerce, and intimidate the freedmen. See Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi, and Louisiana, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess., at 17, 19-20 (1865). Testimony before the Joint Committee demonstrated, in addition to the discriminatory administration of state criminal laws, the need for the Freedmen's Bureau to assure fair private employment contracts and for Union troops to prevent violations by private individuals of the property rights of those loyal to the Union. See Report of the Joint Comm. on Reconstruction, 39th Cong., 1st Sess., at xvii (1866). The Civil Rights Act was the embodiment of the congressional response to these reports, and was a call for federal action. The Republicans attempted to bar the effective reinstatement of a system of oppression, whether or not the perpetrators used the official machinery of the state. See Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272, 285-93 (1969). But see Maltz, *supra* note 22, at 221 (an act regulating private relations would have been inconsistent with the political conditions in 1866, which included a common desire to minimize the presence of the federal government); Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966).

tract, and some criminal disputes when such arrangements contravened statutory stricture.³⁹ Congress enumerated the rights of freedom and created a cause of action in federal court for their enforcement.⁴⁰ Thus, the Civil Rights Act of 1866 is evidence of the revolutionary nature of the thirteenth amendment. As this implementing legislation makes clear, the framers believed the amendment would sanction a dramatic change in federal-state relations.⁴¹ As Trumbull said in December 1865, "I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land"⁴²

Fearing a repeal of the Civil Rights Act, or an attack on its constitutionality,⁴³ congressional Republicans sought to reaffirm explicitly the grant of authority to the federal government and the guarantee of liberty to all citizens.⁴⁴ The fourteenth amendment was designed to make certain the constitutionality of the Civil Rights Act, regardless of pre-war federalism and doctrines of states' rights. When Congress acted on the fourteenth amendment, it intended to address the overwhelming need for federal protection of the freedmen's rights. The mandate of the fourteenth amendment was clear: citizens were entitled to equality before the law and the national government was charged with civil rights enforcement.⁴⁵

The fourteenth amendment inscribed into the Constitution the post-war transformation of federalism. Republicans translated into constitutional law a conception of national citizenship which included rights the states could not abridge.⁴⁶ Henceforth, the states were required to respect the fundamental rights of all citizens,⁴⁷ provide due process,⁴⁸ and accord the equal protection of the laws. The fourteenth

39. See H. HYMAN, *supra* note 22, at 449 (the novelty of Reconstruction was "in the admission of a national role in intrastate rights protections").

40. Section three of the Act, 14 U.S. Stat. 27 (1866), conferred jurisdiction on the federal courts to enforce section one rights.

41. See generally E. FONER, *supra* note 21, at 244-45.

42. CONG. GLOBE, 39th Cong., 1st Sess., at 77 (1866). For a fuller discussion of the congressional debates over the legislation intended to implement the thirteenth amendment, see J. TENBROEK, *supra* note 22, at 174-97.

43. The framers of the fourteenth amendment were concerned that courts would restrictively interpret the thirteenth amendment to include only the abolition of slavery, eliminating authorization for the protection necessary to give meaning to freedom. See Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 22, at 910.

44. See J. TENBROEK, *supra* note 22, at 201; Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 22, at 910-11; E. FONER, *supra* note 21, at 253, 257.

45. See E. FONER, *supra* note 21, at 256-57.

46. See *id.* at 258; see also J. TENBROEK, *supra* note 22, at 94-115 (development of paramount national citizenship in abolitionist theory).

47. For a discussion of which rights the framers believed were fundamental to citizenship, see Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 22, at 913-37; J. TENBROEK, *supra* note 22, at 201-39.

48. The Supreme Court has held that the fourteenth amendment due process clause incorporates most of the Bill of Rights. For recent additions to the debate over incorporation, see Curtis,

amendment made the branches of the federal government directly responsible for ensuring, protecting, and vindicating the civil rights guaranteed to individuals. The enabling clause conferred upon Congress the authority to enforce the rights secured.⁴⁹ As Representative John A. Bingham of Ohio succinctly declared, "the powers of the States have been limited and the powers of Congress extended."⁵⁰ Yet this provision constituted more than mere authorization. It was a mandate to enforce the amendment. While voluntary compliance by states and private actors was to be encouraged, and was to some extent expected, the framers deemed federal protection necessary to give real meaning to the amendment's guarantees.⁵¹ An 1874 speech by John Mercer Langston made manifest expectations raised by guarantees of federal protection: "I would justify the claim of the colored American to complete equality of rights and privileges upon well considered and accepted principles of law," Langston said. The Reconstruction amendments to the Constitution, he continued, "are national utterances which not only recognize, but sustain and perpetuate our freedom and rights."⁵²

B. *Fulfillment of the Mandate*

One century ago, in the waning days of Reconstruction, Frederick Douglass denounced the federal government for abandoning its obligation to protect the rights of federal citizenship.⁵³ He assailed the claim that constitutional limitations on the powers of the federal government required abdication of the responsibility to enforce civil rights to the states. If the general government had the power to grant citizenship and the ability to extend the franchise, Douglass argued, it also had the right to protect that citizenship and to safeguard the exercise of that franchise. Douglass declared: "If it has this right, and refuses to

The Fourteenth Amendment and the Bill of Rights, 14 CONN. L. REV. 237 (1982) (argument for incorporation); Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1 (1983).

49. U.S. CONST. amend. XIV, § 5; see *Katzenbach v. Morgan*, 384 U.S. 641, 648, 650 (1966) (quoting *Ex parte Virginia* 100 U.S. 339, 345-46 (1880)).

50. Quoted in E. FONER, *supra* note 21, at 258.

51. See E. FONER, *supra* note 21, at 259.

52. Langston, *Equality Before the Law*, in 1 THE VOICE OF BLACK AMERICA, *supra* note 25, at 442, 446. The fifteenth amendment was the third constitutional change during Reconstruction intended to empower the federal government to sweep away the system of involuntary servitude and its vestiges. Approved by Congress in 1869 and ratified one year later, the fifteenth amendment prohibited federal and state government entities from denying any citizen the right to vote on account of race. Once again, Congress was explicitly authorized to enact implementing legislation. U.S. CONST. amend. XV, § 2. With the addition of the fifteenth amendment, the Constitution guaranteed that no person would be denied registration or turned away from the ballot box because of racial discrimination. The founders pledged that this promise would be enforced by the instrumentalities of the federal government.

53. Douglass, *I Denounce the So-Called Emancipation as a Stupendous Fraud*, in 1 THE VOICE OF BLACK AMERICA, *supra* note 25, at 562.

exercise it, it is a traitor to the citizen. If it has not this right, it is destitute of the fundamental quality of a government. . . ."⁵⁴ Nevertheless, the narrow construction of federalism adopted in the aftermath of Reconstruction and maintained well into the twentieth century denied the federal government the powers necessary to protect basic civil rights.⁵⁵

Efforts to remove racial discrimination and interwoven problems of caste from American life have often been thwarted. The collapse of Reconstruction in 1876 gave rise to decades of racial violence, segregation, and unrestrained discrimination. During this period, state and local authorities not only sanctioned but also engaged in the use of force for purposes of racial control.⁵⁶ Congress and successive administrations ignored pleas for enforcement of constitutional guarantees.⁵⁷ Beginning with the *Slaughter-House Cases*,⁵⁸ the Supreme Court nullified or effectively curtailed many of the civil rights the Reconstruction Republicans thought they had secured.⁵⁹ For many years the federal

54. *Id.*

55. For an account of the post-Reconstruction abandonment of civil rights, see R. LOGAN, *THE BETRAYAL OF THE NEGRO* 195-241 (1965).

The Supreme Court restricted legislative jurisdiction over and judicial protection of civil rights by adopting narrow positions in each of two interpretive debates: (1) Answering the questions *which rights* the fourteenth amendment protected, the Court held in the *Slaughter-House Cases* that only those rights owing their existence to the federal government were in the purview of the amendment; 83 U.S. (16 Wall.) 36 (1872); (2) Attempting to define *the reach* of federal protection under the fourteenth amendment, the Court imposed a state action requirement for the application of fourteenth amendment protection; *The Civil Rights Cases*, 109 U.S. 3 (1883). For discussion of new evidence that the framers of the Reconstruction amendments intended to grant Congress authority to protect fundamental rights regardless of the source of the infringement, see Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 22, at 869. For support of the state action theory, see Avins, *Federal Power to Punish Individual Crimes Under the Fourteenth Amendment: The Original Understanding*, 43 *NOTRE DAME LAW* 317 (1968).

56. In the opening pages of the book, Belknap recounts the horrible history of post-Reconstruction racial violence and government complicity. Pp. 1-26.

57. See generally R. LOGAN, *supra* note 55, at 23-105; M. BERRY, *supra* note 4, at 103-37.

Even during the nadir of federal enforcement, advocates of civil rights looked with hope and expectation to the promise of federal protection. Calling for federal remedies for lynching in 1909, Ida Wells-Barnett stated, "Let us undertake the work of making the 'law of the land' effective and supreme upon every foot of American soil — a shield to the innocent; and to the guilty, punishment swift and sure." Wells-Barnett, *Lynching, Our National Crime*, in *2 THE VOICE OF BLACK AMERICA*, *supra* note 25, at 71, 75.

58. 83 U.S. (16 Wall.) 36 (1873).

59. See, e.g., *United States v. Reese*, 92 U.S. 214 (1876) (invalidating §§ 3 and 4 of the Civil Rights Enforcement Act of 1876); *United States v. Cruikshank*, 92 U.S. 542 (1876) (restricting reach of § 6 of Civil Rights Enforcement Act of 1870); *Hall v. DeCuir*, 95 U.S. 485 (1878) (invalidating Louisiana anti-discrimination statute); *United States v. Harris*, 106 U.S. 629 (1882) (striking down penalties imposed by Ku Klux Klan Act of 1871); *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating §§ 1 and 2 of the Civil Rights Act of 1875); *Gibson v. Mississippi*, 162 U.S. 565 (1896) (limiting protection against discriminatory exclusion from jury service); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding "separate but equal" public facilities); *Williams v. Mississippi*, 170 U.S. 213 (1898) (jury service); *Cummings v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (refusal to reconsider *Plessy*). See generally H. HYMAN & W. WIECEK, *supra* note 24, at 474-78, 487-89, 495-97, 500-06; R. KACZOROWSKI, *supra* note 22, at 143-59; R. LOGAN, *supra* note 55, at 105-25.

government forsook its obligation to enforce constitutional rights. The government's failure to exercise the authority conferred by the Reconstruction amendments contributed to the growth and entrenchment of segregation, discrimination, and inequality, and permitted unrestrained racial violence.

In the 1930s, the all-out assault on segregation and racial discrimination began.⁶⁰ Increased legal pressure, acts of civil disobedience, and a changing national climate provided the impetus for federal action.⁶¹ Civil rights organizations and individuals, working through the courts and participating in political demonstrations, began to break down barriers to the free exercise of the franchise, fair employment, and the desegregation of educational and other institutions. In *Brown v. Board of Education*,⁶² the Supreme Court declared segregated schools unconstitutional under the fourteenth amendment, thereby heralding a new era of constitutional interpretation. *Brown* indicated the Court's willingness to recognize and enforce the constitutional guarantees of the fourteenth amendment. Regrettably, Justice Department officials in the aftermath of *Brown* relied on local law enforcement for the protection of constitutional rights even when it was clear that local authorities would fail to demand compliance.⁶³ The policy of patient trust in local institutions was not ultimately vindicated. Racial violence in the South — bombings, murders, and acts of arson intended to prevent the exercise of constitutional rights — was tragic evidence of the injuries suffered by the practice of noninterven-

60. For a narrative of the development of the legal attack on Jim Crow, see R. KLUGER, *SIMPLE JUSTICE* (1976).

61. See M. BERRY, *supra* note 4, at 175-239.

62. 347 U.S. 483 (1954).

63. Judicial recognition of constitutional guarantees placed ultimate responsibility for civil rights enforcement with the three branches of the federal government. As Belknap describes, however, the Justice Department in the Eisenhower administration failed to fulfill its enforcement obligation, even resisting intervention when state and local authorities openly defied federal court orders. Pp. 26-40. Justice Department officials claimed they lacked authority to become more involved in civil rights enforcement and to combat anti-civil rights violence. Civil rights legislation, officials said, was necessary to empower the executive department to protect constitutional rights. Pp. 40-44. Nevertheless, after *Brown*, the executive branch of the federal government, charged with the responsibility to carry out the law of the land, was once again obliged to protect rights guaranteed during Reconstruction and now recognized by the Court.

In 1964 Burke Marshall finally acknowledged that state repudiation of and resistance to federal court orders necessitated federal enforcement activities. In *Federalism and Civil Rights*, Marshall recounted the historical development of the caste system in the South in the aftermath of Reconstruction. B. MARSHALL, *supra* note 12, at 51. He recalled that the Supreme Court's unequivocal declaration that Jim Crow was unconstitutional had been met with no general compliance. Marshall noted that the federal government is invested with the responsibility above all to ensure that none are indifferent to federal law and that court orders are enforced. Obstruction of federal law by the states required federal action. In order for the executive to enforce civil rights laws, Marshall concluded, "it is necessary to create again, by statute, federal rights and federal remedies, in a new effort to rid the nation of discriminatory practices." *Id.* at 83. For Marshall's account of the constitutional dilemma facing the Justice Department, see *supra* notes 14-17 and accompanying text.

tion. Justice Department prosecutions in the *Price*⁶⁴ and *Guest*⁶⁵ cases demonstrated a greater executive commitment to battling at least the most virulent methods used to deprive citizens of their rights.⁶⁶ By the mid-1960s, Congress, too, began to accept its responsibility to safeguard the rights secured by the thirteenth, fourteenth, and fifteenth amendments. The Civil Rights Acts of 1964 and 1968, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 moved the country closer to the promise of equality.

At the end of *Federal Law and Southern Order*, Belknap concludes, "The federal response to anti-civil rights violence was not too little, but it did come too late."⁶⁷ However, evidence that federal action was sufficient is unconvincing. While Congress, the executive branch, and the courts took steps to protect the exercise of constitutional rights against flagrant and some subtle forms of invasion,⁶⁸ the constitutional mandate to ensure the rights of citizenship is still unfulfilled. Society is moving toward a deeper appreciation for the great promise of equality and the flexibility of the system of federalism, yet protection of civil rights remains inadequate. Indeed, gains made in the 1960s and 1970s in assuring equal rights for members of minority groups and for the disadvantaged in our society have been threatened in the past decade.⁶⁹ The nation has experienced a retrenchment. The Justice Department today fights to dismantle affirmative action policies and school desegregation programs, rather than targeting discrimination and inequality.⁷⁰ Unfortunately, efforts to curtail and even reverse civil rights progress have already met with some success.⁷¹

64. *United States v. Price*, 383 U.S. 787 (1966).

65. *United States v. Guest*, 383 U.S. 745 (1966).

66. In addition, decisions in the two cases strengthened the two federal civil rights laws at issue, 18 U.S.C. § 241 (1964) (punishing conspiracies to deprive citizens of their rights) and 18 U.S.C. § 242 (1964) (punishing deprivation of rights under color of law). Pp. 159-82.

67. P. 250. Here Belknap is once again unclear as to whether or not he believes that constitutional principles of federalism limited the power of the national government. If the federal government possessed the authority to intervene and protect against anti-civil rights violence, earlier Justice Department reliance on state and local law enforcement cannot be exonerated on constitutional grounds.

68. As Belknap states, "Extralegal violence against blacks was a bulwark of the southern system of white supremacy, and even those white southerners who refrained from such conduct themselves were disinclined to punish those who did engage in it." P. 1. Just as racial violence is inextricably bound to the larger system of oppression to which it contributes, the federal response to lynching and physical forms of civil rights violations should be viewed in the context of federal protection of civil rights generally. Steps taken to check racial violence, however helpful in preventing immediate harm to the person, are inadequate if they merely alter the type of discrimination suffered and fail to address the underlying problems of inequality and racial intolerance.

69. Swinton, *Economic Status of Blacks, 1987*, in *THE STATE OF BLACK AMERICA 1988*, 130 (1988).

70. See N. AMAKER, *CIVIL RIGHTS AND THE REAGAN ADMINISTRATION* (1988); Chambers, *The Law and Black Americans: Retreat from Civil Rights*, in *THE STATE OF BLACK AMERICA 1987*, at 15 (1987); CITIZENS' COMMISSION ON CIVIL RIGHTS, *THE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S* (1989).

71. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (establishing "intent" standard for

Tragically, minorities still suffer the effects of centuries of racial subjugation. The United States remains scarred by economic and social inequality based on race. Racial isolation, impoverishment, limited opportunity, and inferior education, medical care, and housing compromise the lives of black Americans today. Even a quick scan of the facts reveals unconscionable inequity. For example, a child's quality of life all too often correlates with the race of his or her parents. Compared to white children, black children are approximately twice as likely to be born prematurely, live in substandard housing, and die within the first year of life.⁷² Over forty percent of black children live below the poverty line.⁷³ Indeed, poverty increased significantly over the last decade due in part to the increased number of poor families receiving little or no government assistance.⁷⁴

It is disgraceful that from the moment of birth so many minority citizens are met by the grim realities of poverty,⁷⁵ isolation⁷⁶ and diminished opportunity.⁷⁷ Indeed, America still falls short of offering equal educational and employment opportunities. Illiteracy plagues the disadvantaged.⁷⁸ Black students who complete high school are

equal protection analysis); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (finding a study showing racial disparity in the imposition of the death penalty insufficient to show unconstitutional discrimination); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989) (invalidating Minority Business Utilization Plan).

72. See CHILDRENS' DEFENSE FUND, KEY FACTS (1986). In 1985, the mortality rate of black infants was a shocking 18.2 deaths per 1000 live births; the rate for Whites was 9.3. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1988, at 75, 76 (1987) [hereinafter STATISTICAL ABSTRACT].

In addition, black children are more than two times as likely to be born to teenage mothers, suffer low birth weight, and lose their mothers during childbirth. The maternal mortality rate for black mothers rose to 20.4 per 100,000 live births in 1985, the most recent year for which statistics are available. *Id.* at 62, 63, 75. Significantly, black mothers are more than twice as likely to receive late or no prenatal care. In fact, black Americans visit physicians less frequently than Whites generally. *Id.* at 95.

73. *Id.* at 435. A disproportionately high percentage of Hispanic children, 37.1 in 1986, are also in poverty. *Id.*

74. S. DANZIGER, *Recent Trends in Poverty and the Antipoverty Effectiveness of Income Transfers*, in THE DISTRIBUTIONAL IMPACT OF PUBLIC POLICIES 33, 41 (S. Danziger & K. Portnoy eds. 1988); see also S. DANZIGER & D. WEINBERG, FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T (1986).

75. Black Americans are disproportionately subjected to the horrors of crime. Black citizens are more likely to be victimized not only by crimes against the person, but also by burglary and larceny. Black males are almost six times more likely to die by homicide than are their white counterparts. Black females are more likely to be victims of homicide than white males, and more than three times more likely than white females. STATISTICAL ABSTRACT, *supra* note 72, at 81, 160, 163.

76. Racial isolation remains a prevalent condition in the 1980s. Notably, two of every three minority students at the elementary and secondary levels attend schools in which minorities account for more than fifty percent of the student body. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, at 132 (1984).

77. The average life expectancy at birth for Whites is 5.8 years longer than for Blacks. In 1986, the life expectancy at birth of white females was 78.9 years; of black females, 73.6; of white males, 72.0; and of black males, 65.5. STATISTICAL ABSTRACT, *supra* note 72, at 70.

78. Approximately forty percent of minority youths are said to be functionally illiterate. See

less likely to enroll in college⁷⁹ or to be employed.⁸⁰ Unacceptably high unemployment rates worsen the already discouraging outlook for black youth.⁸¹ Disproportionately high unemployment afflicts even those who have beaten the odds by completing four or more years of college.⁸² For many of those struggling to overcome the obstacles, the promise of equality seems illusory.⁸³

Although inequity is still embedded in the societal structure of this nation, civil rights laws have eroded the forces of discrimination. As Belknap is quick to emphasize, most Americans no longer countenance flagrant racial violence (pp. 229, 248-50). Black Americans have toppled racial barriers, creating access to educational institutions, employment opportunities, and the political arena. There have been numerous, hard-earned victories. Successes have resulted from civil rights activism, litigation, and the enactment and enforcement of federal and state civil rights laws. The dramatic increase in the number of black elected officials across the country is one notable example. Yet despite these advances, Blacks still hold fewer than 1.5 percent of elective offices in the United States,⁸⁴ and analysts caution that the rate of growth in the number of Blacks elected to office has substantially slowed.⁸⁵

These conditions cry out for action by the federal government. They plead for reexamination of programs, policies, and procedures by the Congress, the executive branch, and the judiciary to ensure that all citizens are treated fairly and have an equal chance to life. Recent government civil rights policies dominated by principles of self-help and voluntary compliance have exacerbated rather than improved the problem. They threaten the limited economic gains made by Blacks during the 1960s and 1970s and have contributed to the deterioration of opportunities in housing and education.⁸⁶ In order for progress to

N. Francis, *Equity and Excellence in Education*, in ASSOCIATION OF BLACK FOUNDATION EXECUTIVES CONFERENCE PROCEEDINGS 73 (1985).

79. STATISTICAL ABSTRACT, *supra* note 72, at 140.

80. *Id.* at 139.

81. More than one-third of black teenagers in the labor force are unemployed. The overall civilian unemployment rate for Blacks is double that for Whites. *Id.* at 37, 365, 381. Inequities in job classification and pay scale levels, as well as assets, should also be taken into account. *See id.* at 365-67, 430, 482. Individual, family, and household income levels are marked by considerable disparity. In 1986, for example, the per capita money income of \$7207 for Blacks contrasted sharply with that for Whites, \$12,352. *See id.* at 37, 394, 422-23, 425-27, 429-30, 432.

82. The unemployment rate for Blacks who completed at least four years of college is more than twice that for Whites. *Id.* at 382.

83. As John Jacob of the National Urban League commented, "black teenagers . . . see the dream did not work for their kin and have no reason to believe that it will work for them." Jacob, *An Overview of Black America in 1985*, in THE STATE OF BLACK AMERICA 1986, at i.

84. JOINT CENTER FOR POLITICAL STUDIES, BLACK ELECTED OFFICIALS: A NATIONAL ROSTER I (1986).

85. *Id.* at 1, 5.

86. *See Swinton, supra* note 69.

be made, the federal government must become more active in civil rights advocacy and enforcement.⁸⁷

The onerous, unyielding obstacles faced by the disadvantaged in our society must be dismantled. The enormity of this task argues for reassessment of the exclusion of the poor from the purview and protection of the fourteenth amendment.⁸⁸ The indignity of discrimination suffered by minorities today also necessitates review of the intent requirement presently imposed on individuals seeking equal protection under the fourteenth amendment.⁸⁹ The constitutional mandate to safeguard the rights of freedom demands congressional attention and strict civil rights enforcement. The federal government has an obligation not only to protect citizens against blatant, violent invasions of their constitutional rights but also to ensure that individuals are not denied basic opportunities because of entrenched, structural inequality. The legal legacy of the Reconstruction era demands no less.

Reconstruction transformed relations between the nation, the state, and the individual. The history of the thirteenth and fourteenth amendments demonstrates that Congress intended the national government to possess the authority to secure the status and rights of American citizens. In the post-Reconstruction years, however, the government abdicated its responsibility to safeguard constitutional guarantees of freedom and equality, exposing Blacks in the South to violence and intimidation and licensing segregation and racial discrimination. Belknap criticizes the Justice Department's use of federalism as a pretext for quiescence, yet he fails to offer an alternative account of the division of powers between the federal government and the states. This omission is dangerous. By ignoring constitutional development in the Reconstruction era and, thus, the complexity of the federalist system, the nation risks accepting excuses for inaction. Failure to appreciate the breadth of our constitutional heritage encourages misconceived toleration of continued discrimination and inequality. Events of the past three decades do not vindicate policies of inaction. Progress in the fight against racial violence, discriminatory practices, and inequality has been achieved when the federal courts, Congress, and the executive have undertaken civil rights enforcement responsibilities. Indeed, recent experiences confirm the importance of federal leadership in the struggle for civil rights.

87. For example, the effort to eliminate entrenched patterns of racial discrimination in employment has been undermined by lax enforcement and counterproductive policies. See Leonard, *The Effectiveness of Equal Employment Law and Affirmative Action Regulation*, 8 RES. IN LAB. ECON. 319 (1987) (originally published as National Bureau of Economic Research Working Paper 1745 (1985)); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); Chambers, *supra* note 70, at 21-27; Citizens' Commission on Civil Rights, *supra* note 70.

88. See *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

89. See *Washington v. Davis*, 426 U.S. 229 (1976).