Foreword: Federalism and Anti-Federalism As Civil Rights Tools

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Foreword: Federalism and Anti-Federalism as Civil Rights Tools*

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The focus on Civil Rights and the Supreme Court 1994 Term in this issue of the Howard Law Journal has one relatively consistent underlying theme—the role of federalist and anti-federalist arguments in the formulation of civil rights policy. As you might expect, there is not much dispute among the authors about the proper goals of civil rights law, for virtually every author in this issue is in one sense or another a traditionalist on policy. So the policy goals are somewhat uniform: promotion of “more” civil rights, promotion of affirmative action and race-based quotas, promotion of race-consciousness in districting.

What separates the authors is their instrumentalist arguments; that is, how they would accomplish their goals. Because this is America, where levels of government may compete to promote or retard political agendas, the authors’ thoughts naturally turn to federalism, and on the federalism issue they divide. Some are traditional federalists, supporting the federal role for civil rights and lamenting any possible decline in federal power. Others have given up on the federal government and argue for a return to states’ rights, or at least for a much diminished federal role in superintending state efforts to promote the traditional civil rights agenda.

Although the articles and essays diverge on their substantive proposals, some federalist and some anti-federalist, virtually all have one common thread. Federalism, for it or against it, is only a tool to be used in promoting their agendas. Some of the proposals would have been deemed heretical only a few decades ago, among them a call for massive resistance to the federal government’s role in civil rights, at

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least to its role in retarding the use of affirmative-action remedies. Others may write about what the new civil rights movement should aspire to attain. But for the traditionalists represented in this issue, the issue is not the agenda, it's how to accomplish the agenda. Federalism and anti-federalism are mere tools to be worked.

This Foreword serves not only to link together the common message of many different authors, it also acts as an introduction and commentary about the thoughts that populate this issue of the Journal. I share some criticisms as I review these articles, but because I must necessarily capsize and truncate some of the authors' views in this introduction, my criticism comes with the caveat that I have taken the various authors' views as jumping-off points for further discussion. Any criticism is more of where the authors' ideas may lead than it is a criticism of the authors themselves.

Although my main focus is on the authors' use of federalist and anti-federalist themes, I am concerned about one deeper problem displayed in all the papers: how does one argue to persuade others about civil rights policy? How does one argue to others about appropriate tools if they are not already deeply committed to underlying policy? Many of these papers are frankly and openly result-oriented, and whether with self-awareness or not, the authors preach to the choir, they argue to the already committed. With some notable exceptions, there is very little attempt to persuade non-believers to accede to the authors' suggestions, either as to policy or tools, including the tool of federalism. How would these articles be written if the audience needed to be persuaded?

I. FEDERALISM AND DEFERENCE TO CONGRESS: J. CLAY SMITH, JR.

Professor Smith in Shifts and Implications of Federalism for Civil Rights\(^1\) has once again carefully defined his topic, and it is the topic that has traditionally formed the core issue in civil rights—the role of the federal government in protecting less powerful minorities. In United States v. Lopez,\(^2\) the Supreme Court found the federal Gun-Free School Zone Act of 1990 unconstitutional because it exceeded Congress's authority under the commerce clause and thus intruded on

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powers reserved to the states. The *Lopez* case, joined with this Term’s recent decision in *Seminole Tribe of Florida v. Florida*, marks the return of federalism as an important issue at the Supreme Court.

Professor Smith has raised the issue of whether recent federalism cases have implications for civil rights enforcement, particularly for the constitutionality of important civil rights laws passed under Congress’s Commerce Clause power. Balancing concern with an appreciation for the possibility of over-reading *Lopez*, Professor Smith notes that the decision itself is less important—and less worrisome to civil rights advocates—than the reasoning that is offered up by Chief Justice Rehnquist and Justice Thomas. I agree with much of what Professor Smith argues and add only two specific comments.

Is *Lopez* the augury of a future restricted view of the Commerce Clause so that civil rights might once again be placed beyond the pale of federal control? I doubt it. As Professor Smith argues so well, concurring justices specifically stated their continued support for important precedents upholding the Civil Rights Act of 1964, and Professor Smith’s overall thesis—that tone is as important to a holding as its specific rationale—provides valuable insights when reading these concurring opinions. Justices Kennedy and O’Connor appear to me to be reluctant and limited joiners of the majority opinion. Theirs is more a statement of outer jurisprudential boundaries than predictors of their future voting behavior.

Another active Commerce Clause case from last Term supports my view of the limited nature of the *Lopez* holding, even its specific exaltation of schools as a matter of local concern. In the heyday of the old Court’s restricted Commerce Clause jurisprudence, the Court actively used the “local activity” doctrine to strike down federal legislation, and quintessential among the activities considered local was mining. If one expected a bold return of the “local activity” doctrine, therefore, one would reasonably expect to see it applied to mining activities.

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4. Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000e (1988), are the most important of these statutes, and they deal specifically with racial discrimination in public intercourse—restaurants, hotels, amusements, and jobs.
5. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (coal mining is a local activity). See generally *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895) (discussing such “local” activities as “manufacture, agriculture, mining”).

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Yet in *United States v. Robertson*, decided the same Term as *Lopez*, the Supreme Court summarily rejected the contention that the gold mining at issue was a local activity or that the distinction was relevant because, in that case, the mined products themselves had moved in interstate commerce. This decision, upholding a RICO conviction, tells us much about the limited holding in *Lopez*. As Professor Smith so carefully argues, the economic integration of the nation now leaves so many products actually moving in interstate commerce that the *Lopez* rationale has much less force than it did in the 1890s. *Lopez*, therefore, tells us more about the Court's tone than about its willingness actually to use such old-fashioned doctrines.

Even if federal power remains strong, another set of questions remains. Is unrestrained federal power in the best interest of civil rights advocates? And are all persons who worry about unlimited federal power anti-civil-rights? Professor Smith is worried that more inquiring judicial scrutiny may lead to limiting congressional power under the commerce clause. I am more ambivalent. I agree that traditionally civil rights has been peculiarly the concern of the federal legislature and federal judiciary. But the two branches are not necessarily the same in either goals or effects, and of the two, the traditional position in American constitutional law has been that the Supreme Court—not Congress—is the ultimate arbiter of what statutes are or are not constitutional. And this is true of federal as well as state laws. To that extent, therefore, Justice Rehnquist's statement in *Lopez* that the Supreme Court should ultimately decide whether Con-

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7. Id. at 1733.
8. Professor Smith does not discuss a related Commerce Clause issue, whether *Lopez* suggests the demise of federal regulation of state and local governments under Title VII. Regulation for court-declared constitutional violations, for example, the Fourteenth Amendment's ban on intentional discrimination, seems secure. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Congress may use § 5 power to regulate state entities without violating Eleventh Amendment) (Rehnquist, J.). The problem area after *Lopez*, and especially *Seminole Tribe*, is federal regulation under the Commerce Clause for non-Fourteenth-Amendment violations, such as violations of Title VII's ban on effects-type discrimination. For example, EEOC v. Wyoming, 460 U.S. 226 (1983), which upheld a Title VII analogue—the Age Discrimination in Employment Act—in this context, now appears vulnerable.
11. See Frontiero v. Richardson, 411 U.S. 677 (1973) (equal protection principles inherent in the Fourteenth Amendment will also be applied by the Court to control federal legislation).
gress has exceeded its power is a position as familiar as the statement from *Marbury v. Madison*. The traditional federalist approach to finessing the issue of judicial or congressional supremacy has been the rational basis test, or equivalents, when reviewing federal legislation alleged to exceed congressional power. Justice Breyer's dissent in *Lopez* uses this approach to uphold the gun-control statute at issue there. But in Justice Breyer's hands, the rational basis test turns out to be a total abdication of judicial review: it is difficult to see how his "house-that-jack-built" argument—connecting guns to reduced studying, to reduced education, to reduced job skills, to reduced movement of businesses across state lines—would ever result in a federal statute being held unconstitutional. Certainly Justice Breyer's willingness to buy the Brooklyn Bridge of legal arguments casts no doubt on *Heart of Atlanta Motel, Inc. v. United States* or *Katzenbach v. McClung*, where the evidence of the impact of racial discrimination on interstate commerce was overwhelming and immediate.

12. See United States v. Lopez, 115 S. Ct. 1624, 1629 n.2 (1995) ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring))).

13. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").


18. Everyone, especially younger Americans, should re-read the factual background against which Congress acted. In *Heart of Atlanta Motel*, for example, the evidence showed that because of local acts of racial discrimination, African-Americans often had to drive far off their route to find food and accommodations. This not only impaired the interstate mobility of African-Americans who chose to travel, the uncertainty that it caused also "had the effect of discouraging travel on the part of a substantial portion of the Negro community." *Heart of Atlanta Motel*, 379 U.S. at 253 (citation omitted).

19. It is true that the *McClung* case contains what might be called a chain-of-events argument to show an impact on interstate commerce. See *McClung*, 379 U.S. at 300 (racial discrimination by restaurants deterred professional people from moving to area where discrimination was practiced, and this in turn deterred companies from moving to such new locations because professional people would not move there). This chain, however, is not only considerably shorter (companies with interstate operations will not move to some states because their professional employees refuse to go along) than the one hypothesized by Justice Breyer in *Lopez*, it is in many respects no different from causal chains recognized in even early twentieth-century Commerce Clause cases. See Southern Ry. Co. v. United States, 222 U.S. 20 (1911) (defective train cars used only in intrastate commerce may affect interstate trains to which they are coupled; Federal Safety Appliance Act regulation upheld). Had the 1990 Congress evidenced, even secondarily, any desire to protect interstate movements by business, Breyer's argued connection might have been more persuasive.

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While Professor Smith is worried about the Supreme Court that struck down the Gun-Free School Zones Act, I am worried about the Congress that passed it. The *Lopez* decision calls into serious question the traditional assumption that the federal legislature is always on the side of the angels and civil rights interests. At a time when young African-American males are being incarcerated at alarming rates, civil rights advocates should be wary of another law that denies local authorities the power to deal with school problems in a non-criminal manner. When federal politicians are left with the choice of sensitively dealing with minority concerns or riding tall in the anti-crime saddle, riding tall is too often the winner, especially in an election year.

II. FEDERALISM AND DEFERENCE TO LOWER FEDERAL COURTS: MARK TUSHNET, JOSE FELIPE ANDERSON, AND PATRICIA BRANNAN

Professors Tushnet and Anderson and Ms. Brannan touch another sensitive nerve that civil rights advocates have also finessed, the issue of the degree of deference that should be accorded lower federal courts in formulating remedial decrees that cure prior constitutional violations. The traditional law here could not be clearer to state or more ambiguous to apply: the scope of the permissible remedy should be determined by the scope of the violation to be cured. Civil rights advocates, especially those on the Supreme Court, have traditionally emphasized that this rule reflects equitable concerns that require def-

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20. The defendant in *Lopez* undoubtedly subjected his fellow students to substantial danger when he brought a handgun and bullets to his high school. It was also a crime under Texas law. United States v. *Lopez*, 115 S. Ct. 1624, 1626 (1995). There is no indication whatsoever in the case record or in Congress' records that the individual federal prosecution was brought or the statute was enacted because Congress feared that a young Hispanic man would not be fairly treated in Texas or other state courts. Indeed, in general state courts provide more methods for disposing of criminal charges against young people than are available in federal courts.

21. *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*") (also recognizing two other factors to be considered: that the relief actually be remedial and that some deference be shown to local authorities); *see also* *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) (court may only remedy "incremental segregative effect" caused by unconstitutional discrimination, not other segregation that was not unconstitutional).
ference to the local federal judge's insight in picking and choosing among various available alternatives to formulate an effective remedy.\textsuperscript{22} Justices concerned with the limits of federalism have emphasized that whatever remedy is formulated must not exceed the original constitutional violation, or else federal judges are constituted social legislators to accomplish their view of the social (non-constitutional) good.\textsuperscript{23}

As demonstrated in \textit{Missouri v. Jenkins},\textsuperscript{24} these differing views have now become refined to a set of positions that remarkably parallel those found in the federalism debate in the \textit{Lopez} case.

For traditional liberals, as noted above, the assumed answer here is to trust in district judges, giving them the same broad deference in the desegregation context that liberals on the Court would have given to Congress in the \textit{Lopez} case; lax rationality review accomplishes this goal.\textsuperscript{25} For traditional conservatives the answer is to rein in district court judges by demanding a greater connection between remedy and violation, ensuring that their chosen remedial decrees do not become subterfuges for solving a range of social ills not fairly presented in the original litigation; some type of mid-level review accomplishes this goal.\textsuperscript{26} Indeed, the split in the justices in the \textit{Jenkins} case exactly mirrors that in \textit{Lopez}, with the five-person majority demanding more exacting review and the four dissenters echoing their \textit{Lopez} plea that more discretion be accorded to the policymakers who are under review.

Professor Tushnet in \textit{The "We've Done Enough" Theory of Desegregation}\textsuperscript{27} puts the Court's decision last Term in \textit{Missouri v. Jenkins} into historical perspective and comes to the conclusion that "white America" has once again committed itself to social equality for Afri-

\textsuperscript{22} See Hutto v. Finney, 437 U.S. 678 (1978) (court may enjoin action that is not itself unconstitutional if to do so relieves other conditions that are unconstitutional) (prison litigation); cf. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (emphasizing similar remedial discretion in Title VII litigation).

\textsuperscript{23} Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (finding de jure segregation in part of a school district does not authorize judge to impose remedy for other de facto segregation); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (termination of decree when relief has achieved goal).

\textsuperscript{24} Missouri v. Jenkins, 115 S. Ct. 2038 (1995) [hereinafter \textit{Jenkins III}].

\textsuperscript{25} See \textit{id.} at 2073-91 (Souter, J., dissenting).

\textsuperscript{26} See \textit{id.} at 2042-56. Although Justice Rehnquist plays up the bright-line error of the district judge in Kansas City—using an interdistrict remedy for an intradistrict violation—the much stronger theme from the majority opinion is the tension between deferential rationality-type review of district court desegregation orders and more exacting mid-level review.

\textsuperscript{27} Mark V. Tushnet, \textit{The "We've Done Enough" Theory of Desegregation}, 39 How. L.J. 767 (1996).
can-Americans only to decide some years later that it is tired of the commitment, that it has "done enough." The late twentieth century appears in this regard to be imitating the late nineteenth, Professor Tushnet would say, as revolutionary fervor wanes and social equality for African-Americans is left only partially attained.\textsuperscript{28} Professor Tushnet presses the argument that desegregation law is merely "desegregation politics." There can be little doubt that, at least over the course of decades, as described by Tushnet, politics becomes law as Presidents and parties win elections, again at least partly, on the promise of changing the Supreme Court's personnel and policies.

In this historical context, Professor Tushnet sees his role as answering an all-important practical, political question: what more could the federal courts have done to accomplish desegregation? An implicit answer is offered, Tushnet suggesting that what the trial court wanted to do in Kansas City—induce voluntary white integration rather than compel it through busing—was the "more" that should have been tried. There are problems with this argument, not the least of which is that the social scientists and their work, on which Tushnet had earlier relied, fail to support his position.\textsuperscript{29} His general political view, therefore, must be supported by trotting out the usual bad actors—in general, "Republicans" who set traps to "weaken Democratic strength," and in particular, Republican nominee Barry Goldwater and President Richard Nixon.\textsuperscript{30}

In Tushnet's world, therefore, "more" ultimately becomes, like "enough," a symbol for a political position rather than a plan of attack. Implicit in his argument is the traditional liberal assumption that the federal courts can be trusted to decide when enough has in fact been done. Yet, by stereotyping the opposition to further desegregation efforts, calling them "white America," my colleague begs two very difficult questions. Why would persons of goodwill think that Kansas City's school desegregation remedy went too far? And maybe the "more" that comes from deference sometimes amounts to "less" for civil rights?

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\textsuperscript{28} Cf. \textsc{Kenneth M. Stampp}, \textit{The Era of Reconstruction,} 1861-1865 (1965) (documenting shift in social attitudes toward newly freed slaves immediately after end of Civil War); The Civil Rights Cases, 109 U.S. 3 (1883) (invalidating 1875 Civil Rights Act).

\textsuperscript{29} See Tushnet, \textit{supra} note 27, at 770 & n.25.

\textsuperscript{30} Id. at 770-71. Tushnet does not pause to reflect on the apparent irony that Republican judicial nominee Souter wrote the dissenting opinion in \textit{Jenkins.} Perhaps a Harvard Law School education shapes more views than does politics? Or perhaps Professor Tushnet's stereotype of Republicans and "white America" is unhelpfully broad?
Professor Anderson, in *Perspectives on Missouri v. Jenkins: Abandoning the Unfinished Business of Public School Desegregation “With All Deliberate Speed”*, 31 picks up the discussion where Professor Tushnet ends, turning us toward the issue of what remedies should be on the judicial agenda and who should decide how much is enough. Professor Anderson notes that education “represents the largest expenditure for local government”32 and that the Kansas City district court’s remedial decree certainly raises concerns that the intervention of one federal judge into the local community to spend its money on desegregating schools should be used with caution.33

Although Anderson ultimately would himself have done more, his approach identifies the gravest political challenge to plaintiffs’ desegregation orthodoxy. On one side, the orthodoxy always demands “more” because it views the harms of segregation as unimaginably high for most African-Americans.34 But the word “more” has no limit, as the Kansas City case so readily exemplifies. When the case earlier came to the Supreme Court, the desegregation bill of $142 million in operating expenses and $187 million in capital improvements looked so high that the Court ducked the very issue of its appropriateness.35 By the time *Jenkins III* arrived only five years later, the figure had ballooned to over $1.4 billion dollars, over a half-billion dollars for capital improvements alone.36 To show for that expenditure, the school board and district court had a model United Nations, a planetarium, an art gallery, a bevy of enclosed swimming pools, air-conditioning for all classrooms, an animal farm, and a host of other educational frills.37 But there was little trustworthy or quantifiable

32. *Id.* at 709-10.
33. *Id.* at 710.
34. Justice Ginsburg is in this respect a traditional liberal. *See Jenkins III*, 115 S. Ct. 2038, 2091 (1995) (Ginsburg, J., dissenting) (“Given the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon.”) (emphasis added).
36. *See Jenkins III*, 115 S. Ct. at 2043-44 (“quality education” programs such as full-day kindergarten, $220 million; magnet schools program, $448 million; capital improvements, $540 million; salary assistance, $200 million). The total of these components is over $1.4 billion.
37. *Id.* at 2044-45. It startles me that neither Professor Tushnet nor Professor Anderson, in arguing for “more,” cites all that the school system had already acquired. Exactly what “more” would have proved helpful, “more” of “more”? In my yearly class in Civil Rights, taught ordinarily at Georgetown University Law Center and this year also at Howard University School of Law, I teach the *Milliken* doctrine by giving hypothetical decrees that the student must then link up to underlying violations. When I gave them the relief awarded in the *Jenkins* litigation as a
improvement in black educational attainment in return for these vast expenditures, and students in the Kansas City schools continued to perform at or below national norms in many grades.\(^{38}\)

That there were no vast improvements in black education should not be surprising, for the avowed purpose for the court-ordered improvements, according to Tushnet and the Court, was to attract white students to the schools, not to raise black educational attainment. Benefits to the African-American community appear to have been small, and not inconsequential was what Professor Anderson alludes to as the cost to the community at large. In an era of scarce public resources, every expenditure on a natatorium for indoor swimming competes dollar-for-dollar with a new child-care center, an immunization program, or a private citizen's choice of how to raise her children. Politically, the only reason that the Kansas City decree lasted as long as it did was this: the plaintiffs and the school board had agreed non-adversarially\(^ {39}\) to an expensive decree—and then sent most of the enormous bill to the state.\(^ {40}\) These expenditures were insulated from competition from other valid public and private uses.

Although this criticism of the district court may seem harsh, I believe that it is probably too modest. Though attracting white students might have been a goal for some participants in creating the decree, others were quite probably motivated by a more general desire to "upgrade" public education. Just as the American Bar Association and American Association of Law Schools have worked hard in recent years to upgrade legal education, the school board in Kansas City worked to upgrade its educational program.\(^ {41}\) Under this scenario, even Professor Tushnet's assumption that the trial court was accurately pursuing an integrationist strategy becomes problematic. General educational improvement in a community is a laudable goal, but so are many others—from cleaning the environment to protecting ten-

\(^{38}\) Id. at 2046.
\(^{39}\) See id. at 2042 (school board was original plaintiff in the action against the state and was later realigned as a "nominal defendant"); id. at 2044 (school board has pursued a "friendly adversary" relationship with the plaintiffs).
\(^{40}\) Id. at 2045 (Missouri, "through the operation of joint-and-several liability, has borne the brunt of these costs.").
\(^{41}\) It is not surprising that the efforts to upgrade have been accompanied by ever-increasing tuition bills for students. Upgrades cost money. In the legal education market, consumers can decide if they want the product offered, subject to suits against such entities as the A.B.A. for violating the antitrust laws. In Kansas City the court's decree might be seen as helping school professionals control the market.
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ants in public housing. Indeed, the general goal of upgrading all public education is in competition with the specific civil rights goal of aiding minority educational opportunities.42

This very difficult “scarce-resources” dilemma expands upon federalism issues raised in the Lopez case by pointing out that federalism takes on special concerns when the issues of horizontally separating governmental powers are added to the issues of vertically separating power. Virtually echoing the Lopez majority, Professor Anderson notes that education is the most important function of local government.43 Federal decrees, he implies, interfere with the necessary give-and-take at the local level for allocating scarce resources. The central tenet, I suppose, is that a federally announced interest in school desegregation does not make that interest more important—at least not limitlessly more important—than fighting crime in Gary or dirty water in Boston. The horizontal component of separation of powers notes that it is an unelected judge that is doing the allocating of scarce resources, defensible within limits when the issue involves a cure of constitutional violations—Marbury v. Madison and all that—but not defensible when the judge and collusive adversaries are setting out toward an extra-curative agenda.44

Professor Anderson would ultimately solve the problem by counseling courts to avoid painting with a broad brush, instead narrowly focusing on the remedial nature of each individual decree.45 Patricia A. Brannan in Missouri v. Jenkins: The Supreme Court Reconsiders School Desegregation in Kansas City, Criteria for Unitary Status, and

42. In my Civil Rights Policy Seminar some students argue at this stage that the “scarce resources” argument fails because “the rich” (or some similar group) always get the lion’s share of public dollars, so civil rights is competing with them, not “good” alternatives such as environmental clean-ups. I think that there is much to this argument (though the stereotyping of “the rich” bothers me). Nevertheless, to the extent that some public servants have used the civil rights agenda, specifically the desegregation agenda, to raise teachers’ salaries, upgrade school construction, and create programs they would have favored even in the absence of a desegregation decree, they have merely used the civil rights agenda—hijacked the civil rights agenda—to serve other competing interests.

43. See Anderson, supra note 31, at 709-10.

44. Cf. James U. Blacksher, Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery, 39 How. L.J. 633, 686 (arguing in favor of less federal interference in redistricting and asserting that “the greatest victories” for civil rights have come from “fairly negotiated compromises”).

45. The difficulty of the issue can be seen in one question: How much of the $1.4 billion spent under the Kansas City decree was necessary, and how much was hijacked for other non-desegregation goals?
Remedies Reaching Beyond School District Lines\(^{46}\) picks up the discussion at this point and gives us a litigator's hopeful view of how Jenkins will ultimately be received. She makes two very relevant early points. First, Jenkins must be read in context with its companion case, Adarand Constructors, Inc. v. Pena,\(^{47}\) and both together suggest a more demanding Supreme Court review of claimed curative goals, whether promoted by Congress or the lower courts.\(^{48}\) Second, the narrow precedential issue before the Court in Jenkins, salary increases, may actually be unaffected as it relates to most ordinary decrees. As Brannan points out, salary increases for instruction personnel are much easier to link to curative goals,\(^{49}\) while across-the-board increases raise suspicions about an end-run on collective bargaining. The problem with the Kansas City decree, therefore, was its breathtaking breadth: starting first with teachers, the court later awarded assistance to each of the 5,000 school board employees, save three.\(^{50}\)

Brannan's insight about the connection between relief decrees and affirmative action is also an important counterpoint to Professor Tushnet's thesis that what is always needed in civil rights is "more." By pursuing such goals as "desegregative attractiveness," the district court had embarked on a journey "without any objective limitation,"\(^{51}\) thus implicating a basic concern of even liberal affirmative-action plans—that there must be some time limit on the benefits that are to be reallocated pursuant to a curative rationale.\(^{52}\) Otherwise, the benefits of the curative decree fall increasingly on a set of persons who are new to schooling and thus never actually suffered the harms of the


\(^{47}\) Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (requiring courts to use strict scrutiny when reviewing racial preference programs, whether established by federal, state, or local government).

\(^{48}\) See Brannan, supra note 46, at 789.

\(^{49}\) See id. at 790-91.

\(^{50}\) Jenkins III, 115 S. Ct. 2038, 2044 (1995).

\(^{51}\) Id. at 2054. It seems to me that the Court has not articulated precisely its concern with these words. If the Court were concerned with "objective" measures alone, the district court's choice of nationwide educational norms would be an "objective" measure for determining the end to the decree. The Court's concern, as Ms. Brannan suggests, is that the relief does not objectively correlate with the underlying violation. Thus, "desegregative attractiveness" fails because it is a variation of Professor Tushnet's argument: there could always be "more."

school board's past segregation. Those who actually suffered, meanwhile, have now left the system and are effectively uncompensated for their loss.\footnote{As I said earlier, the authors in this issue are traditionalists in civil rights. A more avant-garde group might have seriously asked why we are so preoccupied with the "system" and cures within it. Why not just pay reparations to all those wronged by prior desegregation?}

III. AFFIRMATIVE ACTION AND THE NEW ANTI-FEDERALISM: IVAN BODENSTEINER, STANLEY FISH, AND JAMES BLACKSHER

The modern affirmative action controversy stands traditional liberalism on its head, not in the usual way that posits that liberalism's racial neutrality is corrupted by racial consciousness, but in the more instrumental way that shows that federalism is a neutral concept, neither more nor less favorable to civil rights goals. The assumption of traditional civil rights advocates, exemplified in this issue of the \textit{Journal} by Professor Tushnet's defense of federal court remedial decrees and Professor Smith's implied defense of federal congressional power, has assumed that the federal judiciary is the trustworthy defender of the civil rights community. The present affirmative action controversy should reacquaint us with the notion that federal politics may be just another venue for resolving conflict, not a guarantee of success for traditional civil rights positions.

The core issue in the affirmative action debate today centers on whether we should accept only the curative rationale for race-conscious remedies, the same curative rationale at the basis of federal judicial power in the \textit{Jenkins} case. This returns us once again to a pure issue of federalism, but this time with the shoe on the other foot—for the ascendant Supreme Court majority now becomes the federalist Court, overturning state decision-making that would recognize a wider role for affirmative action. In a sense, therefore, the debate about affirmative action takes us back to Professor Smith's discussion of federalism, but now in the purely judicial context and with all roles reversed.

A. Result-Oriented Jurisprudence and the New Anti-Federalism

Professor Bodensteiner argues the need for further affirmative action,\footnote{Ivan E. Bodensteiner, \textit{Affirmative Action—The Need for Leadership}, 39 How. L.J. 757 (1996).} but in a curious fashion that bows to traditional liberal con-
cerns even as it disavows them. He invokes the traditional liberal "meritocracy" litany that insists that affirmative action is not antithetical to concern with ability to perform;\textsuperscript{55} the sole purpose of affirmative action is to remove the distortions caused by lingering effects of prior racial discrimination.\textsuperscript{56} His discussion of affirmative action that involves quotas or specific allocation of jobs by race, and of whites' reactions to it,\textsuperscript{57} comes directly from the Brennan Court's Title VII cases of the 1970's.\textsuperscript{58} Like the majority in those cases, he concludes that "[t]he remedial purpose assumes evidence of prior discrimination."\textsuperscript{59}

Yet Professor Bodensteiner's god, like most, resides in the details, and his definition of what is being cured is not identifiable, on-site discrimination, as in \textit{Croson},\textsuperscript{60} but the discriminatory assumption that white males are competent: "[a]ffirmative action is warranted as long as this assumption and burden remain."\textsuperscript{61} When, the modern Court might ask, will there be an end to race-consciousness? Professor Bodensteiner suggests that forty years is not yet a good start; the Court is suggesting that it is a good end.\textsuperscript{62} Professor Bodensteiner further complicates his theology by departing from his curative rationale when he suddenly recognizes "diversity" as an independent, additional justification for affirmative action.\textsuperscript{63} What "diversity" has to do with curing past discrimination he does not say, but the modern Court's refrain might well be the same: so long as there are distinct minority groups, when will affirmative action end?

By failing to see any need for limits or by lacking any appreciation that people of good will might want limits, Professor Boden-
steiner replicates Professor Tushnet’s position that “more” is needed without specifying the limits of “more.” His own discussion suggests a need for limits: does he seriously believe that an employer should be able to base its hiring on race just because that would make the employer “more accepted in a community [by] reflect[ing] the racial composition of its customers”? The lower courts have decidedly rejected the “customer preference” idea in the context of sex discrimination, and the Supreme Court has specifically rejected the idea that a school district should have a racial proportion of teachers that matches that of its customers, the students enrolled. The argument is more a defense of Hooters’ desire to hire attractive young females than it is a defense of affirmative action—unless one appreciates what is never explicitly articulated in his argument, that it applies only to racial considerations favoring minorities. Professor Bodensteiner never articulates a justification for this position: is it the curative rationale in disguise?

Although he follows most traditional civil rights arguments, Professor Bodensteiner ultimately refuses to replicate the traditional civil rights position that the federal Congress can do no wrong on civil rights. He distrusts Congress, the President, and “the majority of people in this country.” He wants private actors as well as state and local government to be more assertive for affirmative action. Perhaps it is not a call to “massive resistance,” but now that the federal government is not on his side, Professor Bodensteiner has become an anti-federalist.

Joining Professor Bodensteiner’s camp is Stanley Fish, who has presented us with a joyously witty and revealing piece, At the Federalist Society. Although he has nothing to say about federalism—the only author in this 1994 Term focus uninterested in the topic—he joins Professor Bodensteiner in tone and feel, ardently rejecting anyone who does not agree with the current pro-affirmative-action agenda. Attending the annual Federalist Society meeting as one of “a small

64. At least Professor Tushnet notes that the literature leaves in doubt the benefits of affirmative integration; to Professor Bodensteiner this is just more obvious “common sense.” See id. at 764.
65. Id. at 764.
66. See Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971) (rejecting customer-preference defense to excuse practice of hiring only female flight attendants).
68. Bodensteiner, supra note 54, at 765.
chorus of designated scapegoats,” Fish shows us that he is the one committed non-traditionalist represented in this issue. Going beyond Professor Bodensteiner’s conflicted commitment to both “curative” and “diversity” rationales for affirmative action, Fish explicitly rejects “universal principles like equality and color-blindedness” as mere “relativism.” He would instead “rely upon the norms, histories, and practices” of his and other racial and gender groups. Thus, he notes, Dinesh D’Souza “thinks it’s relativism when you take race, gender, and group history into account in your decisions about hiring and college admission. I think it’s relativism when you don’t.”

It is Fish’s thinking that is relativism, in the sense of being purely instrumentalist, and he admits it with pride. This, he argues, is what makes conflict, and from the conflict choices must be made. This is an only slightly skewed version of the now-familiar argument from Critical Legal Studies that all law is indeterminate and subject to manipulation by the advocate and judge. And the problem with the argument is that it usually stops at this point, failing to proceed to persuade us which side of a moral argument should prevail. Ultimately, Fish runs the risk of preaching to the choir just as he accuses the Federalists of doing.

Fish admirably tries to avoid failure to persuade by attaching what he curiously calls his “appendix” of well-rehearsed arguments on affirmative action. It is telling, however, that he only rehearses and challenges the arguments against affirmative action, not the arguments in favor of it. And in challenging the opponents of affirmative action, he thinks he has winners when, in reality, he has answers that only persuade himself. In any event, Fish’s argument from relativism must by definition appeal to shared values; the broader the shared

70. Id. at 722.
71. Id. at 724.
72. Id.
73. Id.
74. Id.
76. Take Fish’s number six, for example, which focuses on the idea that because the violation was aimed at the group AA, so must the remedy be group-oriented on all members of the group AA. See Fish, supra note 68, at 731. This is, of course, only half the equation, for while one violator from group W may have focused on group AA, that violator’s own co-group members have not. Perhaps Fish is right and the remedy should run in favor of all in group AA, but should it run against all in group W? If an African-American kills a non-African-American because he is prejudiced against all non-African-Americans, should all non-African-Americans have a remedy against the killer alone? Against all African-Americans?
values, the greater the chances of persuasion. Fish can be seen as a partner of Professor Bodensteiner, therefore, on the federalism issue: if he can win at the federal level, he would be a federalist; if not, he would be an anti-federalist.

B. Beyond Anti-Federalism: Removing the Federal Courts from Racial Districting.

James Blacksher's thoughtful article on affirmative action in redistricting, Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery,77 is a back-to-the-future piece, taking civil rights law back to its roots. Praising Justices Frankfurter and O'Connor for their opposition to federal judicial supervision of legislative and congressional districting, he calls for an end to strict scrutiny of the use of race in creating majority-minority districts.78 Alternatively, he would recognize conscious affirmative inclusion of African-Americans as a compelling state interest justifying race-conscious districting.79

Key to Blacksher's argument is an even older notion, the concept of the Constitution and constitutional law as contractarian enterprises in which the legitimacy of government depends on the assent of the governed.80 He argues that majority-minority districts are necessary if American society is to allow all of the governed, including African-Americans, to have a voice in American political life. The title's allusion to Dred Scott is part of the working hypothesis, for Blacksher argues that African-Americans were incapacitated by slavery and thus could not consent to join the American compact—a condition that, he argues, continued even after freedom.81

The contractarian view of constitutional law is somewhat quaint these days, at least in academia. Professor Tushnet and his fellow "crits" would be amused, perhaps, at the re-birth of the doctrine in this new guise. But in vogue or not, the contract notion is an adequate vehicle for raising essentially the same issue presented in this issue's other articles on affirmative action: should African-Americans participate in elections in a race-neutral manner, individually (as voters) cutting deals, or failing to do so, along with all individuals in American life? In this scenario, any "black" interests are represented by the

77. Blacksher, supra note 44, at 633.
78. See id. at 635-36.
79. Id. at 636.
80. Id. at 636-39.
81. Id. at 639-40.
representative who is elected. Alternatively, should African-Americans be represented by other African-Americans? Under this scenario, "black" interests would be brokered by the representative directly.

Blacksher's thesis is not a political one; he does not argue that one scenario or the other is more effective or authentic for representing African-Americans. He does not argue that one scenario or the other is more effective or authentic for representing African-Americans. His point is that the first scenario is necessary to integrate African-Americans into the national system of government, to induce assent to the contract. Otherwise, the badges of slavery that prevented original assent will be perpetuated.

As Blacksher himself recognizes, federalism has historically been an instrumentalist proposition when the issue is voting. He wants the Court to be receptive to race-conscious districting by tolerating it; normally anti-federalist supporters of strict scrutiny in voting—that is, essentially the majority in the Lopez case—here stand for federalizing a rule against affirmative action. On this issue, Blacksher finds himself in somewhat the same uneasy position—in favor of federalizing some issues on African-American voting, but against federalizing majority-minority districting rules. One need not buy the conspiracy aspects of Blacksher's arguments, that the Court's redistricting cases are a conscious "strategy for reuniting querulous whites around their nonblackness," to recognize that federalism is also a tool in search of users.

Welcome to this review of Civil Rights and the 1994 Supreme Court Term. Federalism is the issue at its core, but other issues abound.

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82. But see id. 678-79 (no formal assent need be required; a "real" political dialogue by empowered African-Americans is all that is needed).
83. Id. at 662.
84. See id. at 664-65.
85. He favors the Voting Rights Act of 1982, for example, and its favorable "results" test. See id. at 663.
86. See id. at 693 ("My own experience with twenty years of voting rights litigation has convinced me that the greatest victories legal action has achieved for black plaintiffs, for black and white communities, and for American democracy came not from judicial decrees, but from fairly negotiated compromises between black and white political leaders.").
87. Id. at 673.