# BETWEEN SUPREMACY AND EXCLUSIVITY

**Owen Fiss**[†]

CONTENTS

INTRODUCTION ..... 187
I. HISTORICAL ROOTS OF LEGISLATIVE CONSTITUTIONALISM ..... 188
II. TWO FORMS OF LEGISLATIVE CONSTITUTIONALISM ..... 198

## INTRODUCTION

The Constitution of the United States is a broad charter that establishes the structure of government and identifies the values to which the country aspires. All Americans have the prerogative as well as the responsibility to give this charter meaning in our day-to-day lives. We live under the Constitution and must be faithful to its mandates. This duty of fidelity applies as forcefully to ordinary citizens as it does to public officials.

Throughout history, the Supreme Court has been depicted as the final arbiter of the meaning of the Constitution. Such a view does not deny the role that the other branches of government or, for that matter, the general citizenry have in interpreting the Constitution. It only posits a priority for the interpretations of the judicial branch. The governing assumption is that where there are conflicting interpretations, the Court's should prevail.

In our time, this assumption found powerful expression in *Brown v. Board of Education* and in the struggles to make that decision a living reality.[1] This assumption is now being challenged by a movement in the legal academy known as legislative constitutionalism, which claims a new and important role for Congress in the process of constitutional interpretation, but which, I am sad to say, is born of a misunderstanding of the role of the judiciary during the civil rights era and of a frustration with the Court ever since.

---

[†] Sterling Professor of Law, Yale University. With special thanks to David Harris, Michael Gerber, Rebecca Charnas, and Peter Harrell for their research assistance.

1. Brown v. Bd. of Educ., 349 U.S. 294 (1955); Brown v. Bd. of Educ., 347 U.S. 483 (1954).



HeinOnline -- 57 Syracuse L. Rev. 187 2006-2007

## I. HISTORICAL ROOTS OF LEGISLATIVE CONSTITUTIONALISM

The Supreme Court's decision in *Brown* declared the Jim Crow system of school segregation unconstitutional and in so doing set aside the laws of seventeen states and the District of Columbia.[2] In the face of massive and forceful resistance, most notably to the desegregation of the Little Rock schools, President Dwight D. Eisenhower treated the Supreme Court's edict in *Brown* as authoritative—not necessarily right, but nevertheless authoritative—and used the military force at his disposal to ensure compliance. President John Kennedy did the same in 1962 when James Meredith sought to integrate the University of Mississippi.

Congress also treated the *Brown* decision as authoritative and, in a series of enactments that began in 1957 and continued through the 1960s, became an important participant in the project that came to be known as the Second Reconstruction. Some of these measures sought to enhance the enforcement of rights that had been declared by the Court. For example, Title IV of the Civil Rights Act of 1964 authorized the Attorney General to commence school desegregation suits[3] and Title V of that same law commanded federal agencies not to fund programs that discriminated on the basis of race.[4] The Voting Rights Act of 1965 suspended literacy tests that, according to statistical indices devised by Congress, excluded blacks from the polls.[5] This act also authorized the appointment of federal officials to register voters.[6]

Other statutes were more ambitious and created rights not previously recognized by the Court. Title II of the Civil Rights Act of 1964, for example, prohibited racial discrimination in restaurants, hotels, and other privately owned public accommodations.[7] Similarly, Title VII prohibited discrimination by private employers.[8] Title VIII of the Civil Rights Act of 1968 prohibited racial discrimination in privately owned housing.[9] In

2. *Brown*, 347 U.S. at 495.

3. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 401-410, 78 Stat. 241, 246-49 (codified as amended at 42 U.S.C. §§ 2000c to 2000c-9 (2000)).

4. *Id.* §§ 601-605, 78 Stat. 252, 252-53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4a (2000)).

5. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

6. *Id.*

7. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201-207, 78 Stat. 241, 243-46 (codified as amended at 42 U.S.C. §§ 2000a to 2000a-6 (2000)).

8. *Id.* §§ 701-716, 78 Stat. 253, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

9. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89 (codified as amended at 42 U.S.C. §§ 3601 to 3619 (2000)).

HeinOnline -- 57 Syracuse L. Rev. 188 2006-2007

creating these rights to be free from discrimination by private actors, Congress did not dispute the authority of the Court as the final arbiter of the Constitution. Rather, Congress viewed the Court's rulings on the scope of equal protection as a minimum or baseline and sought to build on it.

The Second Reconstruction was supported, maybe even inspired, by a broad-based organization of citizens, mostly black, led by Martin Luther King. Few of the achievements of the Second Reconstruction would have been realized without the courageous and noble protests of civil rights activists and the brutal sacrifices those protests entailed. A similar point must be made about the work of the Executive Branch and Congress: it was essential. For that reason, the Second Reconstruction should be viewed as a coordinated effort by all of the branches of government, in which each branch used the powers at its disposal for a common purpose prodded and inspired by the civil rights movement. Yet at the center of this extraordinary endeavor was the Supreme Court, then led by Earl Warren. The Court had issued the initial edict—the racial caste structure must be dismantled. The Court amplified that command at crucial junctures and went out of its way to protect the activities of the civil rights movement and to encourage the full participation of Congress and the President in the effort to achieve racial equality. The Second Reconstruction and its many achievements stand as a tribute to the Court and have greatly enhanced its claim to authority.

The Second Reconstruction has long been over, as the proponents of legislative constitutionalism often remind us. The Second Reconstruction finally collapsed in August 1996 when President Bill Clinton signed into law a welfare reform measure that divested the federal government of responsibility for America's poorest citizens, a disproportionate number of whom are black.[10] Yet the decline had begun years earlier. Starting in 1966, fissures developed in the civil rights movement, some over the leadership of Martin Luther King, most over the demand by some factions of the movement for black separatism. In April 1968, King was assassinated, and the movement was left without a charismatic leader. By that time, President Lyndon Johnson had massively increased American military involvement in Vietnam, and public attention began to shift to the war. Protests against the war replaced marches for civil rights.

---

10. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. § 1305); *see also* Peter Edelman, *The Worst Thing Bill Clinton Has Done,* ATLANTIC MONTHLY, Mar. 1997, at 43; JASON DEPARLE, AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION'S DRIVE TO END WELFARE (Penguin Books 2004) (giving a background to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

HeinOnline -- 57 Syracuse L. Rev. 189 2006-2007

The impact of the war was soon felt in organized politics, most notably in the presidential election of 1968. Fearful of defeat because of the growing strength of antiwar sentiment, Johnson decided not to run for reelection. Robert Kennedy, then a senator from New York, who had served as Attorney General in the early 1960s and in that capacity had emerged as a forceful advocate for civil rights, was a critic of the war and a popular contender for the Democratic nomination. He was assassinated in June 1968. Later that summer, Hubert Humphrey, Johnson's vice president, secured the Democratic nomination and, in November, faced Richard Nixon, the Republican candidate. Unlike Humphrey, Nixon was free of the onus of the war. He sought to broaden his appeal, especially in the South, by campaigning against the Warren Court and all that it stood for. He primarily attacked judicial decisions reforming criminal procedure, claiming that the Court was soft on crime, but also made it clear that he was opposed to the role the Court had played in launching and then directing the Second Reconstruction.[11]

Richard Nixon won the 1968 election. That event marked the end of one era of American law and the beginning of another. Upon taking office, Nixon reversed the civil rights policies of his Democratic predecessors. From 1960 through 1968, the Attorney General had been on the forefront of the effort to implement *Brown*, crafting and proposing new legislation and then using all the authority conferred by the civil rights statutes to enforce the decision.[12] Nixon's Attorney General, John Mitchell, was of another inclination altogether, and even asked the courts for further delays in implementing *Brown*.[13] More significantly, during the six years that he was in office, President Nixon made a number of appointments to the Supreme Court—Warren Burger, William Rehnquist, Lewis Powell, and Harry Blackmun—that effectively changed the direction of the Court.

Throughout the 1970s and early 1980s, Warren Burger served as Chief Justice, but the intellectual and ideological leadership of the Court was provided by William Rehnquist.[14] When Burger retired in 1986, President Reagan conformed outward appearances to the inner reality by naming Rehnquist Chief Justice. Antonin Scalia filled Burger's vacancy and added great vibrancy to the conservative thrust. The direction

---

11. *See* Richard H. Rovere, *Letter from Miami Beach*, NEW YORKER, Aug. 17, 1968, at 93-94.

12. *See* BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 9-15, 135-143 (University Press of Kansas 1997).

13. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969).

14. *See* Owen Fiss & Charles Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 14.

HeinOnline -- 57 Syracuse L. Rev. 190 2006-2007

Rehnquist and Scalia charted for the Court was aided by the appointment in 1991 of Clarence Thomas (to replace Thurgood Marshall). These three justices also received support, to a lesser extent, from Sandra Day O'Connor, who was appointed in 1981, and Anthony Kennedy, who was appointed in 1988. President Bill Clinton appointed Stephen Breyer and Ruth Bader Ginsburg. They represent the only appointments by a Democratic president in more than thirty years, and join with John Paul Stevens (appointed by Ford to replace William Douglas) and David Souter (appointed by the first President Bush to replace William Brennan), to constitute the so-called liberal wing of the Court. On occasion, they receive support from Kennedy and O'Connor.

Formally, the Rehnquist Court ended in 2005, when Rehnquist died after more than three decades on the Court. But the jurisprudential era he inaugurated is likely to survive his death. Rehnquist's replacement as Chief Justice, John Roberts, as well as the Court's newest member, Samuel Alito, who took O'Connor's seat on her retirement in January 2006, indicated in both their opinions as lower-court judges and in their first votes on the Supreme Court that they share Rehnquist's outlook. Indeed, the decisions of the 2005 Term, in which Kennedy often became the pivotal vote, confirmed this impression.

The doctrine of the present Court has its roots in the program announced by Richard Nixon in the election of 1968. *Brown* remains on the books but has been drained of its generative force. Rights created by the Warren Court have either been diluted or, in some instances, repudiated.[15] Of course, there have been exceptions. In 1992, the Court reaffirmed the earlier decision in *Roe v. Wade*[16] invalidating laws criminalizing abortion.[17] In 2003, the Court invalidated laws criminalizing sodomy[18] and upheld affirmative action in law school admissions.[19] In decisions in 2004 and 2006, the Court placed limits on the wartime detention policies of the second President Bush.[20] The importance of these decisions should not be minimized, yet, in truth, they were anomalies.

15. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Washington v. Davis, 426 U.S. 229 (1976); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

16. 410 U.S. 113 (1973).

17. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845-46 (1992).

18. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

19. Grutter v. Bollinger, 539 U.S. 306, 328 (2003). *But see* Gratz v. Bollinger, 539 U.S. 244 (2003) (finding an undergraduate admissions policy that granted points to applicants from underrepresented minority groups to be a violation of the Equal Protection Clause).

20. Rasul v. Bush, 542 U.S. 466, 485 (2004); Hamdi v. Rumsfeld, 542 U.S. 507, 536-37 (2004); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2749 (2006).

HeinOnline -- 57 Syracuse L. Rev. 191 2006-2007

They were the product of a sharply divided Court and were greeted with a sigh of relief and a measure of surprise. They were not new departures, but rather appeared almost as vestiges of another era.

For many in the academy, the jurisprudence of the Burger and Rehnquist Courts—and now, the prospects of the Roberts Court jurisprudence—proved disheartening. It seemed to be a repudiation of the heroic idealism embodied in *Brown* and other decisions of the Warren Court. This disenchantment with the Court found expression in a movement in the academy known as Critical Legal Studies ("CLS"). Although the proponents of CLS embraced the egalitarianism underlying *Brown*, they proclaimed the indeterminacy of all rules or principles and dismissed the objective aspirations of the law as a form of mystification. By their account, law is not law but simply politics in another guise.[21] Although CLS is now dead, the disenchantment that once gave it life has not disappeared but instead has become the lifeblood of legislative constitutionalism. As a movement of those who have soured on the Court, legislative constitutionalism has considerable sway in the academy today, especially among those committed to equality.

Legislative constitutionalism seeks—in some ill-defined way—a greater role for the legislature in the process of constitutional interpretation. As a purely historical matter, it is understandable why those disenchanted with the Burger and Rehnquist Courts turned to Congress to redeem the promise of *Brown*. Although matters have changed since the arrival of the Newt Gingrich Congress in 1994, throughout the 1970s and 1980s and in the early 1990s, Congress defended rights against retrenchment by the judiciary.[22] In the Pregnancy Discrimination Act of 1978, for example, Congress overturned the Supreme Court's refusal to hold that state discrimination based on pregnancy violated the Equal Protection Clause[23] by explicitly passing a law that made such discrimination unlawful.[24]

---

21. OWEN FISS, THE LAW AS IT COULD BE 200 (2003).

22. William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (describing the new role of Congress). *See also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes: The New American Constitutionalism, in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 320, 337-344 (Richard Bauman & Tsvi Kahana eds., 2006) [hereinafter THE LEAST EXAMINED BRANCH] (noting, though, that the model he proposes is infected by the same disenchantment with the judiciary that belongs to the proponents of legislative constitutionalism by slighting the role the Court played in the civil rights era—when it proclaimed rights and helped generate in an affirmative and positive way such fundamental legislation as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968).

23. Geduldig v. Aiello, 417 U.S. 484, 494, 497 (1974).

24. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified

HeinOnline -- 57 Syracuse L. Rev. 192 2006-2007

Congress could see, as the Court could not, that discrimination based on pregnancy was discrimination against women.

On numerous occasions Congress also responded to the Court's unwillingness to measure illegality in terms of social consequences. In 1982, when it came time to renew the Voting Rights Act of 1965, Congress took the bite out of the Court's decision in *City of Mobile v. Bolden*[25] by making seemingly innocent electoral practices (such as the use of multi-membered districts or at-large elections) illegal if the effect is to disadvantage minorities.[26] In the Civil Rights Act of 1991, Congress made unlawful those employment practices that had the effect of disadvantaging blacks and did not serve a compelling purpose (or in technical jargon, were not justified by a business necessity).[27] As acknowledged in the preamble to the 1991 Act,[28] Congress wished to overturn the Court's grudging interpretation of Title VII of the Civil Rights Act of 1964 in *Wards Cove Packing Co. v. Atonio*[29] and to restore in full the disparate impact principle previously announced by the Court in 1971 in *Griggs v. Duke Power Co.*[30]

When it enacted the 1991 Act, Congress built on the Americans with Disabilities Act ("ADA") of 1990.[31] With the ADA, Congress extended the underlying principles of *Brown* to the disabled and, in requiring covered agencies to make reasonable accommodations for the special needs of the disabled, drew on the *Griggs* principle.[32] Similarly, in the Religious Freedom Restoration Act ("RFRA") of 1993,[33] Congress sought to provide the protection to religious liberty that the Court had refused to extend in *Employment Division v. Smith.*[34] RFRA prohibited the government from enacting measures that substantially burden religious exercise unless those measures served some compelling state purpose and were narrowly tailored

---

as amended at 42 U.S.C. § 2000e(k) (2000)).

25. 446 U.S. 55 (1980).

26. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. 1971, 1973-1973aa-6 (2000)). *See generally* James Forman, Jr., *Victory by Surrender: The Voting Rights Amendments of 1982 and the Civil Rights Act of 1991*, 10 YALE L. & POL'Y REV. 133 (1992).

27. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C. 29, and 42 U.S.C (2000)). *See generally* Forman, *supra* note 26.

28. *Id.* §§ 2-3.

29. 490 U.S. 642 (1989).

30. 401 U.S. 424 (1971).

31. 42 U.S.C. §§ 12101-12213 (2000).

32. *See Griggs*, 401 U.S. at 436; 42 U.S.C. § 12112(a).

33. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-2000bb-4 (2000)).

34. 494 U.S. 872, 888-90 (1990).

HeinOnline -- 57 Syracuse L. Rev. 193 2006-2007

to achieve that purpose.[35]

Given the scope and breadth of this legislative program, it was only natural that those disenchanted with the Court should exalt the authority of Congress. The Court itself also contributed, in an odd way, to the recourse to legislation. Not content to do battle with the Warren Court, the Rehnquist Court took on Congress as well. Starting in the late 1990s, the Court embarked on a program of nullifying many of the congressional measures that sought to enhance rights, and this body of decisions further inflamed the proponents of legislative constitutionalism. The Court seemed to reserve for itself the role of deciding what rights citizens should enjoy.

Rights have often been enhanced by Congress through the exercise of the Commerce Power. The public accommodations provision of the Civil Rights Act of 1964 was sustained soon after its enactment as an appropriate regulation of commerce.[36] As a consequence, everyone assumed that the provisions of that act barring employment discrimination were also valid as an appropriate exercise of the Commerce Power. The Supreme Court's decision in 2000 in *United States v. Morrison* has cast a degree of doubt on this assumption.[37] In that case, the Court held unconstitutional a provision of the Violence Against Women Act ("VAWA") that gave women a federal judicial remedy against gender-based violence inflicted by private actors.[38] Such a measure, the Court declared, could not be sustained as an exercise of the Commerce Power, despite detailed congressional findings showing that gender-based violence against women had a significant impact on the national economy, not least because women are less likely than men to feel safe traveling.[39]

An even more plausible source of authority for VAWA was Section 5 of the Fourteenth Amendment, but the Court held that Congress had exceeded the scope of that authority as well.[40] Section 5 gives Congress the power to enforce the provisions of the Fourteenth Amendment, which, of course, includes the guarantee of equal protection. In 1966 in *Katzenbach v. Morgan*,[41] the Warren Court, anxious to facilitate congressional participation in the Second Reconstruction, gave new life

35. *See generally* 42 U.S.C. §§ 2000bb-2000bb-4 ("RFRA § 3").

36. Katzenbach v. McClung, 379 U.S. 294, 304-05 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964).

37. 529 U.S. 598 (2000).

38. *Id.* at 627.

39. *Id.* at 615.

40. *Id.* at 627.

41. 384 U.S. 641 (1966).

HeinOnline -- 57 Syracuse L. Rev. 194 2006-2007

and force to Section 5 and in that context adumbrated what later became known as the "ratchet theory."[42] One part of this theory proclaimed that Congress could not dilute or undermine the Court's interpretation of a constitutional provision—Congress could not, for example, limit *Brown* or interfere with the exercise of any other constitutional right that the Court had articulated in the process of interpreting a constitutional guarantee.[43] The affirmative part of the theory acknowledged the power of Congress to proclaim and protect rights even where the Court had not done so.[44] Such measures could provide remedies to implement rights that the Court had already articulated, but Congress was not confined to this task. It could also create rights.

In *Katzenbach v. Morgan* itself, the Court upheld, under Section 5, a provision of the Voting Rights Act of 1965 that banned the application of an English literacy test to students who had completed sixth grade in Puerto Rico.[45] The Court had not yet ruled on this specific issue, but had already upheld North Carolina's use of an English literacy test.[46] The Court now proclaimed, however, that Congress was entitled to make its own judgment about the reach of equal protection and to prohibit the application of the English literacy test on the theory that such a test rendered a large portion of the Puerto Rican community in New York especially vulnerable to discrimination by local officials.[47] The validity of the congressional action did not depend on the willingness of the Court to believe that it would have come to the same conclusion about the meaning of equal protection.[48] Congress could prohibit conduct that the Court might not have, provided, of course, that the Court could "perceive a basis" upon which Congress might think that the prohibited action would amount to or lead to a denial of equal protection.[49]

The scope of the *Katzenbach v. Morgan* principle was immediately recognized, first by commentators[50] and then by Congress itself when it enacted the Civil Rights Act of 1968, which prohibited racial

---

42. *Id.* at 646-47; *see also* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975).

43. Cohen, *supra* note 42, at 606 (citing *Katzenbach*, 384 U.S. at 651 n.10).

44. *Id.*

45. *Katzenbach*, 384 U.S. at 646-47.

46. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959).

47. *Katzenbach*, 384 U.S. at 652.

48. *Id.* at 653.

49. *Id.*

50. *See, e.g.*, Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 103-04 (1966).

HeinOnline -- 57 Syracuse L. Rev. 195 2006-2007

discrimination in private housing and certain race-based violence by private actors.[51] In 1970, the Court limited the reach of *Katzenbach v. Morgan* when it denied Congress the power to extend the right to vote to 18 year olds,[52] but it continued to operate as an important font of congressional authority for the next thirty years—a period in which Congress resisted the Court's retrenchment on rights and crafted the legislative program that made legality turn more on the social consequences of a practice or law than on the motivation lying behind it.

A turning point in the encounter between the Court and Congress came in 1997 in *City of Boerne v. Flores*.[53] In that case, the Court struck down RFRA as an inappropriate exercise of the Section 5 power.[54] Although the enactment of RFRA could be understood to conform to the ratchet theory of *Katzenbach v. Morgan*—after all, Congress was not diluting any right that the Court had declared, but rather was adding to the rights that citizens enjoyed—the Court was of another opinion. It saw RFRA as an affront to its claim of supremacy.[55]

Arguably, the Court was led to this view because of an expansive reading of *Smith*, the decision to which Congress was responding in RFRA.[56] The Court understood *Smith* to define the bounds of the Free Exercise Clause and to declare that laws that are neutral and generally applicable do not interfere with the free exercise of religion.[57] From that perspective, RFRA could not be defended as a measure to protect the religious liberty guaranteed by Section 1 of the Fourteenth Amendment and thus was beyond the powers of Congress under Section 5.[58]

RFRA was an immediate and direct response to the Court's decision in *Smith*, and *Boerne* may have been colored by that particular dynamic, verging on confrontation, between the Court and the legislature. Soon, however, the assertion of judicial authority that was the essence of *Boerne* spread more broadly and extended to situations more similar to that of *Katzenbach v. Morgan*, in which there was no confrontation, but rather something closer to a lacuna. *Morrison* was such a case, though the Court primarily treated VAWA as an exercise of the Commerce Clause and only secondarily disposed of the Section 5 claim.[59] However, in two decisions

51. *See generally* Civil Rights Act of 1968, §§ 3604-3619.
52. Oregon v. Mitchell, 400 U.S. 112 (1970).
53. 521 U.S. 507 (1997).
54. *Id.* at 511.
55. *Id.* at 536.
56. *Id.* at 512.
57. *Id.* at 513-14.
58. *Id.* at 534, 536.
59. United States v. Morrison, 529 U.S. 598, 619 (2000).

HeinOnline -- 57 Syracuse L. Rev. 196 2006-2007

that soon followed—*Kimel v. Florida Board of Regents* and *Board of Trustees of the University of Alabama v. Garrett*—the Court confronted *Katzenbach v. Morgan* more directly and, in effect, overruled it.[60] Section 5 was emptied of the meaning that *Katzenbach v. Morgan* had given it. As before, Congress had the power to provide remedies for well-established rights, but it no longer had the power to articulate rights under Section 1 of the Fourteenth Amendment that the Court itself was not prepared to recognize.[61] The space that *Katzenbach v. Morgan* had opened for an independent role for Congress in the articulation of rights was now closed.

In *Kimel*, the Court held that Congress could not make states liable for damages when they discriminated against elderly employees.[62] In *Garrett*, the Court denied that Congress had the power to make states liable for employment discrimination based on disability.[63] In these two cases, Congress could not possibly be faulted for overruling a Court decision—a claim that might seem plausible in the context of RFRA—but the Court nonetheless concluded that Congress had exceeded the scope of its powers under Section 5.[64] In *Kimel* and *Garrett*, the Court accused Congress of altering the substantial meaning of equal protection, but what it meant was that Congress had deemed certain state practices a denial of equal protection in circumstances in which the Court itself was not prepared to do so.[65]

In 2003 in *Nevada Department of Human Resources v. Hibbs*, the Court upheld the Family and Medical Leave Act as a proper exercise of the Section 5 power.[66] This decision was a surprise to many.[67] The Court reasoned that women were a protected group under Section 1, and that the leave provisions were an appropriate measure to allow them to participate fully in the economy and to do so on equal terms.[68] The next year, in *Tennessee v. Lane*, the Court upheld the obligation of states to make reasonable accommodation for the needs of the disabled in the context of guaranteeing access to courts.[69]

---

60. Kimel v. Florida Bd. of Regents 528 U.S. 62, 81-86, 91 (2000); Bd. of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 374 (2001).

61. *See Kimel*, 528 U.S. at 89-91; *Garrett*, 531 U.S. at 374.

62. *Kimel*, 528 U.S. at 91.

63. *Garrett*, 531 U.S. at 374.

64. *Kimel*, 528 U.S. at 67; *Garrett*, 531 U.S. at 367-68.

65. *Kimel*, 528 U.S. at 86; *Garrett*, 531 U.S. at 374.

66. 538 U.S. 721, 725 (2003).

67. *See, e.g.*, Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 9 (2003) (describing *Hibbs* as "a startling and fascinating decision").

68. *Hibbs*, 538 U.S. at 730, 737.

69. 541 U.S. 509, 533-34 (2004).

HeinOnline -- 57 Syracuse L. Rev. 197 2006-2007

In these two rulings, the Court did not revive *Katzenbach v. Morgan*, but rather indicated that it agreed with the congressional judgment about the rights declared and on that ground upheld the statutes.[70] Thus, despite *Hibbs* and *Lane*, the shadow of *Boerne*, *Morrison*, *Kimel*, and *Garrett* remains and puts into question any effort by Congress to enhance rights. This shadow has only intensified the disenchantment with the Court and, as a purely historical matter, explains the ever-increasing popularity of legislative constitutionalism. It may also account for the especially strident form that this movement has recently taken—throwing out the good with the bad.

## II. TWO FORMS OF LEGISLATIVE CONSTITUTIONALISM

One form of legislative constitutionalism—the more modest version—claims that the legislature has a role to play in constitutional interpretation. This branch of legislative constitutionalism denies the judiciary a monopoly on constitutional interpretation; it simply rejects judicial exclusivity without questioning judicial supremacy and, as such, seems unobjectionable. It derives from a simple recognition of the universalism of the Constitution—that it is binding on us all. Every time the legislature acts, it must determine whether it has the constitutional authority to do so—for example, to decide whether a transaction it seeks to regulate affects interstate commerce or denies equal protection.

The proponents of legislative constitutionalism often present themselves as revisionists and in that posture criticize the role the Supreme Court assumed for itself during the civil rights era. The Warren Court is mocked as a hegemon. If we are speaking, however, of what I have called modest legislative constitutionalism, such a stance seems entirely unfounded. The Warren Court went out of its way to encourage and facilitate congressional participation in the Second Reconstruction, both in the implementation and creation of rights. This is evident from the Court's holding in *Katzenbach v. Morgan*,[71] from its decisions broadly and quickly sustaining the Civil Rights Act of 1964[72] and the Voting Rights Act of 1965,[73] and also from the lengths to which it went to cast the mantle of validity on the fair housing provisions of the Civil Rights Act of 1968 almost immediately after that act was passed.[74] In June 1968, two months

70. *Lane*, 541 U.S. at 530-34; *Hibbs*, 538 U.S. at 737.

71. *See Katzenbach*, 384 U.S. 641, 653, 655-56, 657-58 (1966).

72. *See e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964).

73. *See* South Carolina v. Katzenbach, 383 U.S. 301, 334, 337 (1966).

74. *See* Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-819, 82

HeinOnline -- 57 Syracuse L. Rev. 198 2006-2007

after the enactment of the Civil Rights Act of 1968, the Court transformed an ancient reconstruction statute into a fair housing law and upheld it under the Thirteenth Amendment.[75]

In recent decades, constitutionalism has become a global phenomenon. This worldwide move towards constitutional governments may help explain the growth of legislative constitutionalism and has possibly contributed to its sense of newness. Thanks to the work of an ever-growing group of scholars, the comparative perspective of American lawyers has been enlarged. We now have to consider the familiar American institution of judicial review within a global context that contains many constitutional governments founded on the principle of parliamentary supremacy. Granted, this comparative perspective has the inevitable effect of highlighting the manifold ways that legislatures can participate in the process of constitutional interpretation.[76] But these insights are not new and can easily be accommodated within the terms of the relationship that existed between the Court and Congress during the civil rights era.

What is truly new, and what I do contest, is a version of legislative constitutionalism that, much to my consternation, disputes not only judicial exclusivity, but judicial supremacy as well, and thus strikes at the heart of *Brown* and the claim for authority upon which the Second Reconstruction was built. This form of legislative constitutionalism—the strong version—addresses a situation in which there are conflicting interpretations of the Constitution, one by the legislature and the other by the judiciary, and denies that the judicial interpretation should control.

An example might help us to understand strong legislative constitutionalism more fully.[77] Imagine that the legislature is presently considering whether to enact a statute that proscribes the advocacy of violence, and there is a dispute over whether the First Amendment permits such a law. A majority of Congress is of the view that such a law should be governed by the so-called discounted clear and present danger test.[78] Under this test, the advocacy of violence can be proscribed if such

---

Stat. 73, 81-89 (codified as amended at 42 U.S.C. §§ 3601 to 3619 (2000)).

75. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968). For a short discussion of the case, *see* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 503 (4th ed., Aspen Publishers 2000).

76. *See generally* Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963 (2004).

77. Mark Tushnet used this example during the conference "Legislatures and Constitutionalism: The Role of Legislatures in the Constitutional State," July 2004, Banff Centre for the Arts, Banff, Alberta. The conference became the basis for THE LEAST EXAMINED BRANCH, *supra* note 22.

78. *See* Dennis v. United States, 341 U.S. 494, 505, 509-10, 515 (1951).

HeinOnline -- 57 Syracuse L. Rev. 199 2006-2007

advocacy presents a clear and present danger, with the understanding that the greater the danger, the less immediate or present it need be.[79] Although the Supreme Court used this test in 1951 in *Dennis v. United States* to sustain the convictions of the leaders of the Communist Party of the United States under the Smith Act,[80] it later repudiated the test in 1969 in *Brandenburg v. Ohio*.[81] Under the constitutional doctrine presumably prevailing today, the Court would judge the act under a more stringent test—one that would proscribe the advocacy of violence only when it constituted an incitement to imminent lawless action.[82] An issue would thus arise as to which interpretation of the First Amendment should prevail: should it be the Court's position or the legislature's? I understand strong legislative constitutionalism's demand that we "take the Constitution away from the courts" to mean that the legislative interpretation of the First Amendment should prevail and that there is no basis for the judiciary to impose its understanding of the First Amendment on Congress and declare the act unconstitutional.[83]

Such a conclusion seems startling—not just at variance with *Brown*, but also *Marbury v. Madison* and the two hundred year history built on that precedent.[84] Strong legislative constitutionalism does not purport to be an interpretation of our historical practice, but rather a critical revisionism driven by deep normative commitments, above all, by an attachment to democracy and the system of governance that it implies.[85] Admittedly, Congress is an imperfect institutional embodiment of the democratic ideal, in part because of the inequalities in economic power that infect all elections, but also because of the allocation of power in Congress (two Senators for each state, regardless of the number of people in the state). Yet, Congress is a closer approximation of the democratic ideal than the judiciary, and this may lead some democrats to embrace strong legislative constitutionalism and to insist upon the supremacy of the legislature's interpretation.

Our example involves freedom of speech and thus the very integrity

79. *Id.* at 509-10.

80. *Id.* at 515.

81. 395 U.S. 444, 447-49 (1969). *See generally* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 125-236 (Jamie Kalven ed., Harper & Row 1988) (describing the Court's treatment of subversive advocacy prior to *Brandenburg v. Ohio*).

82. *Brandenburg*, 395 U.S. at 447. (1969)

83. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

84. 5 U.S. (1 Cranch) 137 (1803).

85. *See* TUSHNET, *supra* note 83, at 181.

HeinOnline -- 57 Syracuse L. Rev. 200 2006-2007

of the electoral process. Some may find in this fact the basis for resisting strong legislative constitutionalism and for subscribing to judicial supremacy on the ground that undemocratic means may sometimes be necessary to safeguard democracy. Such a view is not a logical necessity. A staunch democrat might go so far as to insist that the interpretation of the Constitution advanced by elected representatives should be supreme even when it comes to protecting the democratic process itself.[86] Undemocratic means, so the argument goes, should not be used even to preserve democracy.

Believing, as I do, in the equality of all citizens—the moral foundation of democracy—I am as firm in my commitment to democracy as the next person. Yet, when used to provide the basis for legislative constitutionalism in its strong form, this invocation of democracy seems entirely overblown. The democratic ideal should be applied to the political system as a whole and should not be used to ascertain the legitimacy of each component within the system. As a test of the system, democracy only requires that each component be linked to public officials and institutions that are responsive to popular sentiment. Thus, although the judiciary may not be directly responsive to the people, as the legislature is, it is sufficiently embedded within a larger system of democratic governance to meet the objection that judicial review is undemocratic.

Although Justices of the Supreme Court are not elected, they owe their appointments to elected officials—the President and the Senate. The power also remains in the hands of the electorate to respond to the Court's decisions (as it did, for example, with the Sixteenth Amendment, removing the apportionment requirement for an income tax). True, the amendment process is cumbersome, requiring approval of both houses and three-fourths of the states, and life tenure of federal judges allows them to become entrenched and to exercise power long after the political regime that empowered them has disappeared. The test is not, however, whether the judiciary is empowered by, or accountable to, a current majority. Democracy only requires that those links between the judiciary and popular sentiment are sufficiently robust to justify regarding the judiciary as part of the larger democratic system.

The existing links can, of course, be tightened to make a component—here the judiciary—more fully integrated into the political system. Having

86. *See* Jeremy Webber, *Democratic Decision-Making as the First Principle of Contemporary Constitutionalism*, *in* THE LEAST EXAMINED BRANCH, *supra* note 22 at 411; *see also* Harry Arthurs, *Vox Populi: Populism, the Legislative Process, and the Canadian Constitution*, *in* THE LEAST EXAMINED BRANCH, *supra* note 22, at 155.

HeinOnline -- 57 Syracuse L. Rev. 201 2006-2007

Justices of the Supreme Court serve for a fixed term of ten or twelve years, as is true of some of the constitutional courts of Europe, might be such a proposal.[87] It would moderate the dynamic of entrenchment. Provisions like Section 33 of the Canadian Charter of Rights and Freedoms, which permits legislative override of a Supreme Court decision, might be another proposal worth considering.[88] Section 33 seeks a fuller realization of the democratic ideal, but at the same time avoids the extravagant claims of the more stringent form of legislative constitutionalism that disputes judicial supremacy. Although Canada is a parliamentary system, and Section 33 may be regarded as a concession to that fact, the availability of the legislative override does not deny the supremacy of the Charter or the Supreme Court's interpretation of it.

Section 33 allows Parliament or a provincial legislature to declare that a measure shall "operate notwithstanding" particular substantive provisions of the Charter.[89] Section 33 does not extend to all rights.[90] Moreover, the legislative override permitted by Section 33 is only temporary, and thus does not reverse or abrogate a judicial determination that the measure is unconstitutional.[91] Admittedly, Section 33 gives Parliament and the

---

87. *See, e.g.*, Gesetz über das Bundesverfassungsgericht [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBI 1 243, art. 4 § 1 (F.R.G.), *available at* http://www.iuscomp.org/gla/statutes/BVerfGG.htm (last visited Nov. 28, 2006); Constitution of the Czech Republic, ch. 4, art. 83-89, *available at* http://test.concourt.cz/angl_verze/description.html (last visited Oct. 9. 2006), and Constitution of Portugal, ch. 3, art. 224, *available at* http://www.oefre.unibe.ch/law/icl/po00000_.html (last visited Nov. 27, 2006).

88. Constitution Act, 1982, pt. 1, § 33. Section 33 provides:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

89. *Id.*

90. *Id.* § 33(1).

91. *See id.* § 33(3).

provincial legislatures the power to renew the temporary override, but even if that power to renew is exercised, the legislative declaration does not negate either the relevant substantive constitutional provision or the Court's interpretation of it.[92] The provision and the Court's interpretation remain authoritative, though their operation is stayed.

Viewed as part of a larger political system, the judiciary's claim for authority, like that of any component, depends on its competency to perform its assigned task. In the constitutional context, the judiciary's task is not just to arrive at any interpretation, or even a reasonable interpretation—Congress or even the President can do that as well as the Court.[93] Rather, the task is to arrive at a correct interpretation, and, in my view, the judiciary's authority and thus its claim to supremacy are derived from its special competence to arrive at a correct interpretation. By this I mean simply that in the generality of cases, the judiciary is the branch most likely to arrive at a correct interpretation of the Constitution.

The special competence of which I speak does not arise from the sagacity of those who happen to wear the robes. One of the most remarkable features of the American judicial system is the similarity, as a matter of personality and learning, of those who are judges and those who are political leaders or captains of industry. The competence of the judiciary derives not from the persons who are judges, but from the limitations on their exercise of power—limitations that commit the judiciary to what might be called public reason. Judges who fail to respect these limitations forfeit their authority and their claim to supremacy.

One limitation consists of a judge's obligation to listen to grievances that he or she might otherwise prefer to ignore. Another is the obligation of a judge to allow the parties to address the issues in open court with reasoned arguments and to inquire into the factual basis of the various contentions. Still another limitation arises from the requirement that the judge publicly justify his or her decision. To see a court work as it should is to see reason unfold.

Of course, sometimes a court does not work as it should: precedents are ignored; arguments are misunderstood; too much emphasis is given to history as opposed to structure; the facts are not sufficiently developed. Mistakes will be made. This is only to acknowledge the fallibility of reason, not to deny the rationality of the process that is the basis for the judiciary's claim of authority. When we criticize a court and claim that it has erred in its interpretation of the Constitution, we seek to hold the court

92. *Id.* § 33(4).

93. *See generally* TUSHNET, *supra* note 83, at 54-70.

HeinOnline -- 57 Syracuse L. Rev. 203 2006-2007

accountable to reason itself.

Admittedly, the criteria for deciding which interpretations are correct and which are mistaken (should the interpretation be governed by original intent or the structure of the Constitution?) are often contested, as is the interpretation itself (the discounted clear and present danger test or incitement?). Disagreement is, as Jeremy Waldron has reminded us, a persistent and pervasive feature of interpretive practice, even interpretation of law.[94] The presence of such disagreement does not, however, preclude the possibility of a correct interpretation. Nor does it alter the aim of the interpretive practice—to arrive at a correct interpretation—or mean that a correct interpretation is the one that most or all people agree with. A correct interpretation is one that is fully justified, not one that most accept.

Federal judges are not elected, but rather appointed. They serve for life and have protection against diminution in pay. In this way, they are insulated from political pressure, and thus enjoy a certain measure of independence. This feature of the federal judiciary is frequently mentioned in debates about judicial supremacy. From my perspective, however, independence is not the source of judicial authority, but rather a particular institutional arrangement that enables the judiciary to be faithful to its commitment to public reason, and it is that commitment which I claim is the source of the judiciary's authority. To fulfill this commitment, appointment with fixed tenure is better than election at regular intervals, but even if judges are elected, as is true of some state judges, their obligation is the same. They are not the agents of the electorate, charged with enacting their will or promoting some public policy, but rather are obliged to give us an account of justice that is based on principle.

Reason does not belong to the judiciary alone. On the best of days, the legislature that decides, to return to our example, to proscribe the general advocacy of violence on the theory that the discounted clear and present danger test is the proper standard for the First Amendment, presumably has made an attempt to arrive at a reasoned judgment comparable to that of the Court. But we do not allocate authority on the basis of what happens in any one instance. We must look at the generality of cases, and for that purpose, the limitations on the exercise of power are crucial. Although legislatures may sometimes reason in the same way as courts, their authority does not depend on it. Legislatures are not bound by the strictures of public reason. A statute is a statute even if—as in the case of the September 11th Victim Compensation Fund—its enactment is not preceded by hearings or meaningful deliberation and it does not contain

94. *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

HeinOnline -- 57 Syracuse L. Rev. 204 2006-2007

within itself principled justification for all of its provisions. [95] The authority of a statute does not depend on its rationality, or at least not on the rationality that would be conducive to arriving at a correct interpretation of the Constitution.[96]

Anyone with authority should listen. In deciding whether the hypothetical statute is constitutional, for example, the Court certainly should take into account the position that the legislature has taken on the bounds of the First Amendment. The Court's authority rests on reason, and reason dictates that those seeking the right answer should listen to what others have to say. The Court's duty to listen also stems from structural features of Congress—from the fact that Congress is elected and accountable to the public and that it is a coordinate branch of government and as such is entitled, under the Constitution, to a measure of respect. In the end, however, after listening and listening carefully, the Court has the authority, indeed the obligation, to decide for itself whether the challenged act is constitutional and, if necessary, to set the statute aside. Its judgment is supreme.

This appears to be settled doctrine when, in the example we have been using, Congress takes a more limited view than the Court of the protection afforded by the Constitution. What happens, however, if the positions of the Court and Congress are reversed, and Congress takes a more robust view of rights than the Court?

In some instances, Congress may decline to enact any law. For example, if Congress is of the view that any law that restricts speech other than incitement is barred by the First Amendment, Congress would simply not pass the law regulating the advocacy of violence, and that would be the end of the matter. There would be no congressional regulation of speech and thus no federal statute for the Court to review. However, in other cases more closely aligned to *Boerne*, *Kimel, Morrison*, and *Garrett*, Congress affirmatively enacts a measure to further its conception of rights.[97] In such cases, Congress not only adopts a more generous understanding of rights

---

95. *See* Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 5 (2006) (noting that the compensation fund was "proposed, debated, passed by the House, adopted by the Senate, and presented to the President all within eleven days of the terrorist attacks"). *See generally* KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE VICTIMS OF 9/11 (2005).

96. *See* Tsvi Kahana, *Constitutional Cosiness and Legislative Activism*, 55 U. TORONTO L.J. 129, 144-46 (2005) (discussing the difficulties of interpretation by legislatures).

97. *See Garrett*, 531 U.S. at 360-63; *Kimel*, 528 U.S. at 67-69; *Morrison*, 529 U.S. 605-07; *Boerne*, 521 U.S. at 512, 515-16.

HeinOnline -- 57 Syracuse L. Rev. 205 2006-2007

than the Court, but also enacts a measure in furtherance of that view.[98] A prominent and important example is Title VIII of the Civil Rights Act of 1968.[99] In that statute, Congress, acting under Section 5 of the Fourteenth Amendment, sought to prohibit racial discrimination in privately-owned housing as a way of providing equal protection.[100] Congress' action could be justified on the theory, not embraced by the Court, that ghettoization is likely to give rise to discrimination by the state in the provision of its services (police, schools, transportation, and the like) and that, therefore, the state action requirement of Section 1 of the Fourteenth Amendment was satisfied.

In passing on such rights-articulating measures, the Rehnquist Court has been especially jealous of its prerogatives, but such jealousy is unwarranted. Unquestionably, the Court must decide for itself whether the measure falls within the powers granted to Congress—in this instance, whether it is a measure to enforce the Fourteenth Amendment. This much is required by the principle of judicial supremacy. But to insist upon the higher standard asserted by *Boerne*, *Kimel*, *Morrison*, and *Garrett*—specifically, that the Court has embraced or is prepared to embrace the same views as Congress as to what rights the Fourteenth Amendment confers—is to confuse judicial supremacy with judicial exclusivity.[101] Such a standard would deny Congress the deference that it rightly enjoys when a statute enhances citizens' rights.

The statute regulating the advocacy of violence imagined above entails a rights-restricting, as opposed to a rights-enhancing, measure and is predicated on a more grudging conception of rights than the Court's. Even in that context, Congress is entitled to a certain degree of respect. The Court must take seriously the congressional judgment implicit in the enactment, namely, that the statute is an appropriate exercise of an enumerated power and does not violate any rights conferred by the Constitution. In the context of our hypothetical statute,[102] Congress would have to conclude that such a regulation of speech does not violate the First Amendment, and, in reflecting on that issue, the Court should take full account of Congress' judgment. As I said, this obligation to listen derives from the Court's commitment to public reason and from the respect that is

98. *Garrett*, 531 U.S. at 360-63; *Kimel*, 528 U.S. at 67-69; *Morrison*, 529 U.S. 605-07; *Boerne*, 521 U.S. at 512, 515-16.

99. Fair Housing Act §§ 800-820, 42 U.S.C. §§ 3601-3619 (1968).

100. *Id.* § 804.

101. *See Garrett*, 531 U.S. at 365-68; *Kimel*, 528 U.S. at 81; *Morrison*, 529 U.S. at 613-18; *Boerne*, 521 U.S. at 527-29.

102. *See generally* TUSHNET, *supra* note 83.

HeinOnline -- 57 Syracuse L. Rev. 206 2006-2007

due to Congress as an elected and coordinate branch of government. However, additional deference should be given to Congress when the Court reviews a rights-enhancing measure such as Title VIII of the Civil Rights Act of 1968. This added element of deference derives from the very fact that the statute enhances rather than restricts rights.

The distinction between rights-enhancing and rights-restricting measures is often hard to maintain, especially because it is always possible to transform interests into rights.[103] Although I see the fair housing provisions of the Civil Rights Act of 1968 as rights-enhancing, others might claim that they restrict a constitutionally-guaranteed right of property owners to exclude anyone they wish. Cases such as this do not prove the impossibility of making a distinction between rights-enhancing and rights-restricting measures, but only underscore the challenge facing the Court. In applying the principle of *Katzenbach v. Morgan*,[104] the Court must, in the first instance, decide whether the measure is rights-enhancing, and, in order to do this, the Court must determine whether the interests adversely affected by the statute are of constitutional proportions.[105] The Court took up this challenge in *Kimel* and *Garrett*.[106] It erred, however, as a matter of substantive law when it concluded that Congress had overstepped its bounds by providing the elderly and disabled with damage actions against the states for discrimination.[107] The Court not only underestimated the import and scope of the equal protection guarantee, but also misconstrued the principles of federalism and transformed them into rights.[108] It exalted state sovereignty and endowed the state interests adversely affected by the congressional enactments with constitutional significance.[109] By transforming rights-enhancing measures into rights-restricting ones in this way, the Court emptied *Katzenbach v. Morgan* of any significance.

*Katzenbach v. Morgan* also requires the Court to avoid too grandiose an understanding of its own interpretations of the guarantees of the Fourteenth Amendment that operate as the source of rights.[110] If, as in *Boerne*, the Court takes the view that an earlier decision not only turned

---

103. *See generally* Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81 (examining, inter alia, how political interests led to the articulation of voters' rights in the Voting Rights Act of 1965).

104. 384 U.S. 641 (1966).

105. *See, e.g., Garrett*, 531 U.S. at 365.

106. *See Garrett*, 531 U.S. at 365-68; *Kimel*, 528 U.S. at 91.

107. *See Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91.

108. *See Garrett*, 531 U.S. at 365-68; *Kimel*, 528 U.S. at 82-84.

109. *See Garrett*, 531 U.S. at 372, 374; *Kimel*, 528 U.S. at 83-84.

110. *See Katzenbach*, 384 U.S. at 648-49 (citing Fay v. People of the State of New York, 332 U.S. 261, 282-84 (1947)).

HeinOnline -- 57 Syracuse L. Rev. 207 2006-2007

back a constitutional attack on a state statute, but also propounded a full and complete understanding of the rights guaranteed by the Fourteenth Amendment, then the Court would have in effect denied Congress any space in which it might independently create rights under Section 5.[111] Congress could only hope that the rights it confers coincide with the Court's own conception of Fourteenth Amendment rights. The genius of *Katzenbach v. Morgan* was to allow Congress to make a judgment about the meaning of equal protection (as it did in the Civil Rights Act of 1968) that the Court might not have made itself, but which the Court could understand as having a plausible claim to being a true and correct interpretation of equal protection.[112] Quite possibly, this is the *grundnorm* of the more modest and more appealing version of legislative constitutionalism that affirms judicial supremacy but denies judicial exclusivity.

In determining whether a statute is a proper exercise of an enumerated power, the Court must make a judgment about ends and means.[113] When the Court concludes that a statute is rights-enhancing, then it has also made, at least in the context of Section 5, a judgment about the legitimacy of ends. The enhancement of rights is a permissible, indeed worthy, legislative end. A question remains, however, as to whether the statute is an appropriate means for enhancing rights, or in the terms of the classic formula of *McCulloch v. Maryland*, whether the congressional intervention is "plainly adapted to that end."[114] Because the statute is rights-enhancing, the Court should afford Congress a measure of deference in making this judgment over and above that derived from the dictates of public reason and from the fact that Congress is an elected and coordinate branch of government. This additional element of deference stems from the view—perhaps lying at the heart of *Katzenbach v. Morgan*—that the Bill of Rights and the Civil War amendments set forth the fundamental ideals of our nation, such as racial equality, freedom of speech, due process, and religious liberty, and that every measure that plausibly brings us closer to the realization of these ideals is, for that very reason, worthy of a special modicum of respect. More is better.

---

111. *See Boerne*, 521 U.S. at 527 (citing Oregon v. Mitchell, 400 U.S. 112 (1970)).

112. *See Morgan*, 384 U.S. at 648-49 (citing *Fay*, 332 U.S. at 282-84).

113. *See, e.g., Boerne*, 521 U.S. at 530 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

114. 17 U.S. (4 Wheat.) 316, 421 (1819) (the formula in full states: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional").

HeinOnline -- 57 Syracuse L. Rev. 208 2006-2007