JUDICIAL SUPREMACY AND EQUAL PROTECTION IN A DEMOCRACY OF RIGHTS

Stephen M. Griffin

Even before the controversy stirred by Bush v. Gore, a number of scholars had initiated a debate concerning the long-term viability of judicial supremacy. Post-Bush, these arguments may well receive a more respectful hearing. Before the debate can be productive, however, its structure will require a substantial overhaul. It has been apparent for some time that the traditional argument over whether judicial review is countermajoritarian is played out. Indeed, the most sophisticated works of recent scholarship avoid this old dispute entirely. They ask a different question: what kind of judicial supremacy can be justified in a democracy that respects rights?

I suggest this new challenge to judicial supremacy applies particularly well to the area of equal protection. Indeed, I believe that we no longer need any form of heightened scrutiny in equal protection jurisprudence. In this Article, I will support this intuition by arguing that we should not rely on the Supreme Court to protect the rights against discrimination traditionally afforded by the Equal Protection Clause.

---

1 Professor of Law and Vice Dean for Academic Affairs, Tulane Law School.
2 See, e.g., Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999) (providing a blueprint for future of judicial review involving judicial minimalism); Mark Tushnet, Taking the Constitutional Away from the Courts (1999) (debating the effectiveness of continuing judicial review and supremacy).
I imagine some readers will ask immediately why Americans, particularly those who have historically benefited from heightened scrutiny, should be interested in giving up something so valuable. I am afraid my answer is blunt: if you are a member of a racial minority, the Supreme Court is not your friend. The past twenty years of decisions by the Court have made this abundantly clear. Furthermore, the protection against unjust discrimination all Americans receive from civil rights statutes is plainly superior to the protection provided by the Equal Protection Clause. But the development that has sealed the case against heightened scrutiny is the Court's relatively new interest in destroying civil rights created through democratic deliberation.

These developments are not merely passing phenomena. They are rooted in the current institutional structure of the American state and are thus part of the American constitutional order. However, I also wish to show that the move away from heightened scrutiny should not be viewed as merely politically strategic, but normatively desirable. My way of summarizing this normative desirability is to say that we presently live in a "democracy of rights." The concept of a democracy of rights connects rights with democratic deliberation. In such a democracy, government actors take it for granted that it is desirable to create, enforce, and promote individual constitutional and legal rights. Hence, the political branches of government (not just the courts) are seeking constantly to maintain and extend the system of rights they have created through democratic means.

Our democracy of rights and the current hostility of the Court toward certain forms of civil rights are products of two important historical discontinuities in American constitutionalism. The United States has not always been a democracy of rights. For most of its history, with the singular exception of Reconstruction, there was no perceived need for a national guarantee of civil rights. Thus, the first discontinuity was the civil rights movement and my argument emphasizes the importance of this movement in transforming American government into a democracy of rights. But while the civil rights movement democratized rights by making them an important part of the agenda of the political branches, it also had the effect of politicizing the issue of rights. This is the second discontinuity. This politicization eventually reached the Supreme Court itself and ensured that the Court could not be counted on as a steady defender of civil rights.

---

5 See, e.g., GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993) (illustrating how unreceptive the Supreme Court has been to legal claims brought by minorities).
6 For a discussion of the relationship between the Constitution and the American state, see STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 68-87 (1996).
7 See discussion infra Part I.B.
I want to make two observations about the kind of argument I will be offering. First, my argument is historicist. This means that while I will be making a sort of democratic critique of judicial supremacy (limited to the area of equal protection law), it is not a critique that could have been offered just a few decades ago. The advent of the civil rights movement and our present democracy of rights should be viewed as transforming the ground of the debate over judicial supremacy. Therefore, I do not purport to advance a general critique of judicial supremacy, applicable to any moment in American history. Second, my argument is comparative. As I proceed, some will think of particular equal protection issues where it appears the Court is still making an important contribution to defending the civil rights of reviled groups. Some will also find reason to think that the political branches have not been as protective of civil rights as they should be. What I will be urging, however, is that we not simultaneously use an idealized conception of how the Supreme Court operates while also employing a realistic understanding of how the political branches operate. This kind of comparison is clearly unfair to the political branches and is a non-sequitur in any case. Any realistic appreciation of how the branches of government interact on issues of rights must take into consideration the effect of the politicization of rights on all the branches, including the judiciary.

In Part One, I first describe the contemporary politics of rights in a way that makes clear how present circumstances make it possible to advance a critique of judicial supremacy that is at once democratic and rights-protecting. I then demonstrate how the two historical discontinuities described above came about and why they necessitate a historicist and comparative approach to evaluating judicial supremacy. Finally, I show how the idea of a democracy of rights links the concepts of rights and deliberation in terms of democratic theory.

Part Two shows why heightened scrutiny is no longer needed in equal protection jurisprudence. Specifically, I will argue that the political branches have a distinct deliberative advantage over the judiciary in ensuring that racial minorities are protected against discrimination. Indeed, recent Supreme Court decisions have had the effect of destroying valuable constitutional rights for minority groups. I discuss three examples in some detail: affirmative action, racial redistricting, and Congress' power to enforce the Fourteenth Amendment.

---

8 For an argument that constitutional theory should proceed from a historicist perspective, see Stephen M. Griffin, Constitutional Theory Transformed, 108 YALE L.J. 2115 (1999) (showing how all three branches of government have contributed to constitutional development).

9 See Griffin, supra note 6, at 123 ("To fairly justify judicial review in a prudential sense, we must compare the nonideal legislative process to the nonideal judicial process.")
I. A DEMOCRACY OF RIGHTS

A. How the Political Branches Protect Rights

In contemporary American democracy, the politics of rights is governed by the reality that all government actors are in the business of protecting constitutional and legal rights. As I will show below, the popularity of rights as a political issue is perhaps the most important legacy of the civil rights movement and justifies describing our form of government as a democracy of rights. That legacy includes laws providing a national guarantee of civil rights along with agencies to enforce them. Further, the rights recognized in the laws passed since the advent of the movement are not limited to those already recognized in the Constitution. The Americans with Disabilities Act (ADA) is perhaps the most prominent example, a law that sweeps broadly to create completely new legal rights that had no prior precedent in American law.

At the same time, no one doubts that the Supreme Court continues to stand ready to protect constitutional rights in a wide variety of contexts. In the course of his recent argument for “judicial minimalism,” Cass Sunstein provides a useful list of ten generally accepted core principles that constitute the foundation of contemporary constitutional law. Sunstein’s principles include protection against unauthorized imprisonment, protection of political dissent, the right to vote, religious liberty, and protection against racial or sexual subordination. Sunstein is certainly correct that the Court stands ready in some sense to vindicate all of these rights. What he does not point out is that the political branches stand ready as well, and have taken numerous concrete actions to that end.

Congress has a long and impressive record, now extending over nearly forty years, in protecting constitutional and legal rights. This record includes such famous laws as the Equal Pay Act of 1963, the Civil Rights Act of 1964, and the Voting Rights Act of 1965 (renewed on three separate occasions in 1970, 1975, and 1982). It also includes less famous but still important laws such as the Age Discrimination in Employment Act of 1967, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, and the Vot-
ing Accessibility for the Elderly and Handicapped Act of 1984.\textsuperscript{20} When the Civil Rights Act of 1968\textsuperscript{21} failed to reduce housing discrimination, Congress revisited the issue and passed a much stronger measure, the Fair Housing Amendments Act of 1988.\textsuperscript{22} When Congress saw that the Court's decision in \textit{Widmar v. Vincent}\textsuperscript{23} was not being enforced, it approved the Equal Access Act,\textsuperscript{24} which made it unlawful for school administrators to deny access to facilities to students who wanted to participate in extracurricular religious activities. Congress also took a limited step to redress a severe violation of civil rights by compensating citizens of Japanese ancestry for their internment in concentration camps during World War II through the Civil Liberties Act of 1988.\textsuperscript{25}

These examples show that Congress has acted to protect a number of different constitutional rights. In this Article, I will focus my attention on the right to vote and the rights against discriminatory treatment guaranteed by the Equal Protection Clause of the Fourteenth Amendment. Once attention is directed at rights against discrimination, it is even more apparent that Congress has created important new legal rights. Here, one of the most persuasive examples is the ADA.\textsuperscript{26}

In enacting the ADA, Congress found that forty-three million Americans have physical or mental disabilities\textsuperscript{27} and that discrimination against the disabled persists in "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."\textsuperscript{28} In one of its findings, Congress tracked the famous language of the \textit{Carolene Products} footnote,\textsuperscript{29} saying that "individuals with disabilities are a discrete and insular minority who have been...subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society...resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and con-

\textsuperscript{22}Pub. L. No. 90-284, tnts. VIII-IX, 82 Stat. 73, 81-90.
\textsuperscript{23}Pub. L. No. 100-430, 102 Stat. 1619.
\textsuperscript{24}454 U.S. 263 (1981).
\textsuperscript{26}Pub. L. No. 100-383, 102 Stat. 903.
\textsuperscript{29}Id. at § 12101(a)(3).
\textsuperscript{30}See United States v. Carolene Prods., 504 U.S. 144, 152-53 n.4 (1938) (discussing a stricter scrutiny where prejudice against discrete and insular minorities may seriously curtail the operation of those political processes ordinarily relied upon to protect minorities).
tribute to, society." The ADA prohibited discrimination against the disabled by private employers and state and local governments. For my purposes, the key point to grasp about the ADA is that it is targeted at a form of discrimination for which there is no parallel federal constitutional right. The Supreme Court has never recognized the disabled as a "suspect class" under the Equal Protection Clause and thus there is no constitutional problem with state and local governments discriminating against them. Furthermore, the Civil Rights Act of 1964 and the ADA are similar in that they prohibit discrimination in private employment, an area unreachable by the terms of the Fourteenth Amendment. Clearly, there are forms of discrimination for which the statutory civil rights provided by Congress are superior to those provided by the Supreme Court.

Anyone taking stock of the contemporary environment in which judicial review is exercised must therefore take notice of the phenomenon of Congress at times having greater solicitude for individual rights than the supposedly rights-conscious judiciary. In 1994 alone, Congress enacted the Freedom of Access to Clinic Entrances Act, the Violence Against Women Act, the Drivers’ Privacy Protection Act, and certain rights-protective provisions of the Violent Crime Control and Law Enforcement Act. Showing that the political branches have protected rights does not advance my argument against heightened scrutiny very far. It simply demonstrates that Congress has joined with the judiciary, at least on occasion, as a partner in the creation of important individual rights. The story becomes more complex, however, once it is understood that Congress has also been a reliable defender of civil rights in response to decisions by the Supreme Court that have restricted the scope of rights against discrimination. In passing the Pregnancy Discrimination Act of 1978, for example, Congress dealt with a form of employment discrimination that the Court had failed to address. It restored the effectiveness of the Voting Rights Act by amending it in 1982 to negate the Court’s decision in City of Mobile v. Bolden. When the Court narrowed the scope of several anti-discrimination


The Civil Rights Act of 1991 is the most consequential recent example of this congressional maintenance of civil rights. *Wards Cove Packing Co. v. Atonio*, *Price Waterhouse v. Hopkins*, and *Martin v. Wilks* were prominent 1989 statutory decisions interpreting Title VII of the Civil Rights Act of 1964 in which the Court seriously damaged the rights of litigants who were the victims of employment discrimination. Congress responded relatively quickly with the Civil Rights Act, which reversed the harmful effects of all of these decisions.

Most remarkably, Congress attempted to reverse *Employment Division v. Smith* with the Religious Freedom Restoration Act (RFRA). While RFRA did not implicate directly the kind of equal protection and discrimination issues with which I am concerned, the Court's decision in *City of Boerne v. Flores*, which ruled RFRA unconstitutional, most assuredly did have important implications for Congress' power to protect citizens against discrimination.

*City of Boerne* astonished many scholars in that the Supreme Court chose to preserve its exclusive right to interpret the Constitution over an effort to protect an important individual right, the free exercise of religion. In doing so, the Court invented a doctrine restricting Congress' power to enforce the provisions of the Fourteenth Amendment that appears to be having a radioactive influence on the Equal Protection Clause.

In *Kimel v. Florida Board of Regents*, the Court used *City of Boerne* to immunize state governments against suits based on the Age Discrimination in Employment Act of 1967. The majority in *Kimel* reasoned that since the Court had never regarded classifications based on age as appropriate for strict scrutiny, Congress had no reason to do roughly the equivalent via statute. The majority did not address the

---

490 U.S. 228 (1989).
528 U.S. at 78-91 (2000).
question of why Congress could not, on its own, determine that age discrimination by state governments was a significant violation of the Equal Protection Clause. *City of Boerne* was also cited in *United States v. Morrison*, which struck down the civil remedy for gender-motivated violence provided in the Violence Against Women Act.

In *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court extended the rationale of *City of Boerne* and *Kimel* by holding that states cannot be sued for money damages under Title I of the ADA. The Court noted that the disabled had never been held to be a suspect class for purposes of equal protection analysis and so states could not be required "to make special accommodations for the disabled, so long as their actions towards such individuals are rational." Congress could nonetheless subject the states to private actions if it could meet *City of Boerne*’s requirements of congruence and proportionality. Unfortunately, despite the massive record assembled by Congress, the Court found no sufficient evidence that the states themselves were systematically discriminating against the disabled.

I will consider these cases in greater detail in Part II.C. For the moment, I hope two points are clear. First, regardless what one thinks of RFRA, it should be apparent that it is part of a larger pattern of Congress concerning itself with rights issues. This substantiates my point that in contemporary American democracy, all branches of government are concerned consistently with rights and, generally speaking, act to create, promote and enforce important constitutional rights. Second, my argument shows that the Supreme Court does not act solely to advance the rights of minorities. In fact, on numerous occasions the Court has destroyed their constitutional rights. I enumerated the relevant instances earlier, but a reminder is appropriate: the Court limited the effectiveness of the Voting Rights Act in *City of Mobile*, set back the effort against race and sex discrimination in *Grove City College* and *Wards Cove*, struck down

---

6 121 S. Ct. 955 (2001).
7 Id. at 964.
8 See id. at 963.
9 See id. at 964-68.
10 See Alexander v. Sandoval, 121 S. Ct. 1511 (2001) (holding there is no private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964).
11 City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that Mobile’s at-large electoral system did not violate the Fifteenth Amendment and that the Voting Rights Act is intended to have an effect no different from that of the Fifteenth Amendment itself).
12 Grove City Coll. v. Bell, 465 U.S. 555 (1984) (holding that a federally assisted program must be identified before Title IX of the Education Amendments of 1972, prohibiting sex discrimination in education, is triggered).
13 Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that an employee claiming race discrimination under the Civil Rights Act of 1964 must demonstrate both disparate im-
RFRA in *City of Boerne*,64 hurt the effectiveness of the law against age discrimination in *Kimel*,65 damaged the ability of the legal system to fight gender-motivated violence in *Morrison*,66 and dented the ADA in *Garrett*.67

B. The Rights Revolution Creates a Democracy of Rights

The systematic concern shown by the political branches for questions of rights is something new. Indeed, for most of American history the political branches (along with the Supreme Court itself) were not terribly concerned with providing a national guarantee of civil rights to all citizens. At the same time, we can be relatively certain that this new concern with rights is not a passing phenomenon. It came about because of a structural change in American politics and a constitutional change that the political branches themselves helped create. These changes are the ultimate product of the civil rights movement, a broad-based social, political, and legal effort which is still reshaping American politics long after it effectively ended.68 One of these ongoing changes is the politicization of rights issues, which has altered the Supreme Court nomination process and the Court itself. In this Section, I will attempt to demonstrate these points and their meaning for the concept of a democracy of rights.

Our contemporary democracy of rights is based on an ideal of citizenship that consists of an effective national guarantee of civil rights, including the right to vote.69 Although this ideal is accepted uncritically today, this was not always the case. It is apparent that we can speak of a democracy of rights as a development that occurred only after the Civil War. Prior to the war, the single institution of slavery is enough to deny the United States the status of a democracy of rights. It should not be assumed, however, that after the adoption
of the Reconstruction Amendments the United States enjoyed a steady progress toward the kind of democracy we have in the present. During the Progressive era, for example, standards for government turned in a distinctly anti-democratic direction.\footnote{In what follows, I draw on my discussion of this topic in Griffin, supra note 6, at 102-04.}

On balance, despite such improvements as the direct election of senators and the extension of suffrage to (white) women, the United States moved towards less democratic politics during the Progressive years. The political aspirations of African-Americans, poor whites, and Populists were suppressed by force and fraud.\footnote{See Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863-1877 at 598 (1988); Lawrence Goodwyn, Democratic Promise: The Populist Movement in America 299-300, 304-05 (1976) (providing an account of the communication and finance problems the Populists faced).} Attempts by workers to organize unions were met by a devastating combination of court decisions and unrestrained violence. Business used omnibus labor injunctions to throw a net over all political activity in working-class communities while it used the state to suppress civil liberties.\footnote{See William E. Forbath, Law and the Shaping of the American Labor Movement 59-97 (1991); Harold G. Vatter, The Drive to Industrial Maturity: The U.S. Economy, 1860-1914 at 280-81, 296 (1975) (describing the national resistance to organized labor and business’s refusal to collectively bargain in the late nineteenth and early twentieth centuries).}

As Eric Foner concludes,

\begin{quote}
[taken as a whole, the electoral changes of the Progressive era represented a significant and ironic reversal of the nineteenth-century trend toward manhood suffrage and a rejection of the venerable idea that voting was an inalienable right of American citizenship . . . . In the name of improving democracy, millions of men—mostly blacks, immigrants, and other workers—were eliminated from the voting rolls, even as millions of white women were added.\footnote{Eric Foner, The Story of American Freedom 154 (1998). See also Michael Schudson, The Good Citizen: A History of American Civic Life 182-85 (1998) (describing how the Progressive Era’s emphasis on a voter of intelligence and a pure citizenship led to electoral reforms that made legal citizenship, literacy, and the ability to pay a poll tax requisites of the vote).}

The contemporary democracy of rights in which we live differs in many significant respects not only from the kind of white republican government endorsed by the Founders,\footnote{Griffin, supra note 6, at 74-75 (“As the founding generation . . . understood the matter, a republican, liberal, and democratic constitutional order was not possible unless the American population was white . . . . White supremacy was thus an integral assumption of the 1787 Constitution.”).} but also from the “purified” democracy of Progressive reformers.\footnote{See Schudson, supra note 73 at 182-85 (describing the “purification of citizenship” in the Progressive Era).} First, we recognize the importance of a national guarantee of civil rights, backed by effective enforcement agencies. These civil rights are truly universal in that they apply to all citizens and include political rights, including the right to vote and to run for office. There are no property, class, race, or sex-based restrictions on the exercise of any civil right. Second, unlike
the Founders, we accept the institutions of political parties and interest groups as legitimate means of organizing citizens for political participation. Third, we accept (to a certain extent) a "populist" form of democracy in which all of the elected branches are understood to be directly elected by the people (the electoral college notwithstanding), and there is a direct role for public opinion in the form of polls, initiatives, and referenda. Fourth, unlike both the Founders and Progressives, we reject slavery, white supremacy, and racial discrimination as well as any doctrines of states' rights and federalism that support a system of racial oppression. Neither the Founders nor Progressives would have accepted the kind of multi-racial, multi-ethnic society and government that we take for granted.

Recent scholarship on the history of democracy and citizenship seems to agree that these principles do not originate in the Founding era, Reconstruction, the Progressive era, or even the New Deal. The proximate origin of our contemporary democracy of rights is the "rights revolution" led by the civil rights movement. In his insightful history, Michael Schudson argues that the "struggle of blacks for inclusion in the body politic would prove the fountainhead for a new understanding of citizenship." This movement did not simply lead to the end of segregation and the long-overdue extension of voting rights to African-Americans. It redefined democracy, citizenship, and rights for all Americans. This "revolution in rights" led to "a growing inclination of people and organized groups to define politics in terms of rights, a growing willingness of the federal government to enforce individuals' claims to constitutional rights, and a widening of the domain of 'politics' propelled by rights-consciousness."

At some point in the early 1960s, a political logic took hold in which the elected branches of government perceived distinct rewards for approving civil rights legislation. This was a sign that the United States was becoming a democracy of rights. Once nearly all Americans had full citizenship rights, the constitutional logic of separated and divided power began to work for civil rights policy as well as it did with respect to other policy matters. That is, if state and local governments violated civil rights, citizens could turn to the elected branches, as well as the Supreme Court, for assistance. If, on the other hand, the Court failed to protect civil rights, citizens could turn to the elected branches for redress. Past experience was not of much use in understanding this new reality since the United States was not a democracy of rights for most of its history.

---

76 On the Founders' rejection of these institutions, see id. at 54-55, 87.
77 See FONER, supra note 73, at 299-305 (describing the development of protection of rights by the Supreme Court in the 1960s); SCHUDSON, supra note 73, at 245-74 (providing a history of the development of legal rights in the twentieth century).
78 SCHUDSON, supra note 73, at 231.
79 Id. at 242.
A democracy of rights is thus a recent and valuable achievement. Historicizing the concept of democracy has significant implications for the traditional argument about the legitimacy of judicial review. From the perspective of those who support judicial review, it has always been important to point out the historic role the Supreme Court has played in protecting the rights of Americans against the excesses of majoritarian democracy. Of course, careful students of judicial enforcement of the Bill of Rights know that Court decisions protecting these rights are largely a phenomenon of the twentieth century. Still, there is no doubt that Court decisions protecting valuable constitutional rights antedate the civil rights movement. But this reality does not show that the Court has been protecting us against democracy. It shows rather that the Court was able to protect some rights in an era in which the United States had yet to achieve the status of a democracy of rights.

Furthermore, Charles Epp's valuable study of the "support-structure" of the rights revolution makes clear that Court decisions that are part of the civil rights movement were themselves the product of a democratization of access to the federal judiciary. That is, the Court did not simply act on its own to protect individual rights against majoritarian attack. It acted with the support of groups of citizens who summoned significant resources in a quest to protect rights. Exercising their democratic rights to organize to the extent possible, these citizens provided a crucial impetus for Court decisions that defended the rights of the individual. As Epp asserts, "sustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above." This support-structure is, if anything, more robust today than it was in the formative years of the civil rights movement. It provides a democratic medium ensuring that issues relating to the protection of rights are constantly on the public agenda.

The new interest of the political branches in protecting rights is thus not a transitory phenomenon. It derives from the changes made by the rights revolution, changes that affected the very nature of

---

80 See ROBERT H. WIEBE, SELF RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY 241 (1995) (citing, for example, Nadine Strossen, president of the ACLU, who "called upon the Supreme Court in 1991 to fulfill 'its traditional historic role as the unique protector of [such] fundamental constitutional rights' as the individual's 'privacy and freedom and autonomy'"").

81 See, e.g., CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 1-2 (1998) (describing how less than ten percent of the Court's decisions involved individual rights in the 1930s, but almost seventy percent of its decisions involved individual rights by the late 1960s).

82 See id. at 48-70 (describing how the "growth of a support structure for legal mobilization—consisting of rights-advocacy organizations, a diverse and organizationally sophisticated legal profession, a broad array of financing sources, and federal rights-advocacy efforts—propelled new rights issues onto the Supreme Court's agenda").

83 Id. at 2.
American democracy. As long as Americans formulate their political demands in terms of rights, this new form of politics will continue.

One might mark the beginning of this new form of politics at the moment all three branches of government embraced the agenda of the civil rights movement. Even as the movement was winning its signal victories, however, the ground was laid for a conservative response that would eventually affect the membership and role of the Supreme Court. I will exaggerate a bit to make my point more clearly. Beginning in the Nixon Administration, the Court’s efforts to assist racial minorities were undermined as it was penetrated by agents of a new conservative majority. A Court that better reflected the full range of American racial attitudes could no longer be counted on to advance consistently the goals of the civil rights movement.

This shift can be traced to the recent history of the Supreme Court appointment process. As Mark Silverstein and David Yalof have demonstrated, this process has undergone a qualitative change centered on a new awareness that took root in the 1960s that the Supreme Court was playing an important role in setting the national policy agenda. Prior to that time, senators and politicians generally did not necessarily perceive the Court as an important policy actor. As Silverstein states, “[w]ith few exceptions, appointments to the Supreme Court were of little electoral import to senators . . . . [U]ntil the Warren Court revolution of the 1960’s, the nature of judicial power did not make judicial appointments critical events for potent political forces.” As the Court became more important politically, senators and presidents took notice.

The Reagan Administration made appointments to the federal bench an important part of its overall political strategy. Silverstein notes,

before the Reagan presidency executive scrutiny of potential nominees to lower federal courts was haphazard at best and limited by respect for senatorial patronage. Under Reagan, however, the President’s Committee on Federal Judicial Selection, consisting of key members of the White House staff and the Justice Department, was formed to screen judicial appointments and allow the administration to apply a consistent ideological measure.

Yalof expands on Silverstein’s account by describing the Reagan Administration’s effort to anticipate vacancies on the Supreme Court.

---

84 See Mark Silverstein, Judicious Choices: The New Politics of Supreme Court Confirmations (1994) (providing “an appreciation of the evolving political and legal contexts in which the transition from the politics of acquiescence to the politics of confrontation has taken place”); David Alistair Yalof, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees (1999) (relating how presidents since World War II have selected nominees to serve on the Supreme Court in the context of a high-stakes political event).
85 Silverstein, supra note 84, at 141.
86 Id. at 120-21 (footnotes omitted).
When Edwin Meese became Attorney General at the beginning of Reagan's second term, he created a task force to find potential nominees to the Court should a vacancy open up. The task force identified twelve factors to be taken into account in assessing nominees. Among them were such items as: "awareness of the importance of strict justiciability and procedural requirements"; "refusal to create new constitutional rights for the individual"; "deference to states in their spheres"; "recognition that the federal government is one of enumerated powers"; and "respect for traditional values." The task force looked for federal judges who met the requirements and produced a report for each judge reviewing their opinions. Yalof notes, "[n]ever before in history had there been such an excruciatingly detailed examination of judicial rulings by the Justice Department in anticipation of a Supreme Court nomination."

When a presidential administration goes looking for Supreme Court nominees who believe that it is unwise to create new constitutional rights, it is evident that we are no longer in a world in which minorities can count on the Court. Again, to exaggerate somewhat, once majorities realized that certain Court decisions were contrary to their interests, they resolved to put their own representatives on the Court. This created a new Supreme Court appointment process, one that has been politicized and democratized. Silverstein concludes:

[the current [Supreme Court confirmation] process is disorderly, contentious, and unpredictable. In short, it is now a thoroughly democratic process, and the increased public participation in the selection of federal judges and Supreme Court justices is a consequence of profound changes in American politics and institutions. The most important development is the heightened activism of the modern federal judiciary.]

It is important to note that when I refer to the Supreme Court appointment process as politicized, I am not referring to partisanship. The party factor must always be considered in assessing any action by Congress, but to simply think of the appointment process as newly partisan would miss the point. Those who think along the lines of partisanship might be inclined to believe that the process can be altered by means of procedural reforms that might produce a less contentious nomination atmosphere. A less contentious process is certainly possible, but this would not reduce in the slightest what I mean by politicization. Politicization is a function of the degree of importance rival political groups attach to the Court and judicial nominations. Ever since the Warren Court, politicians have perceived the Court as an institution that can affect their goals and political

---

87 See YALOF, supra note 84, at 143-44.
88 Id. at 143-44.
89 Id. at 144.
90 SILVERSTEIN, supra note 84, at 6 (footnote omitted).
agenda. This guarantees the politicization I describe, regardless of how contentious the nomination process is or becomes.

Once the Court is politicized, it is no longer possible for it to achieve the independence from politics required to maintain a consistent posture with respect to the protection of individual rights. Of course, if one political party continuously dominated the presidency and the Senate, the appointment process might well produce a Court that was fairly cohesive. For better or worse, we do not live in such a world. The contemporary Court has thus become another forum in which political battles over individual rights are played out. It is closely balanced between the contending sides and each presidential election and possible vacancy is monitored for its potential impact on constitutional issues. Indeed, the politicization of the appointment process makes it unlikely that the Court can perform a special function in educating the citizenry or assuming a vanguard role to promote a national dialogue on rights. Instead, politicization ensnares the Court in the same contentious politics of rights that occupies the political branches.

While I suggested above that the Court has been taken over by agents of the majority, this is too simple. When all three branches of government are in the business of protecting constitutional rights, the vocabulary of the “countermajoritarian difficulty,” with its contrast between majoritarian legislatures and a minoritarian Court, no longer makes sense. In our democracy of rights, the issue becomes not under what circumstances constitutional rights should be protected against legislative incursion, but rather what rights should be created, who should enforce them, and which institution should have the last word with respect to their scope and meaning. The issue becomes fundamentally comparative, because in a politicized climate it is unlikely that any branch will have a special institutional advantage when it comes to defending individual rights.

It therefore becomes important to ask whether there is good reason to think that the political branches are at least as good (if not better) than the judiciary in creating, promoting, and enforcing con-

---

51 Mark Graber provides an incisive argument in support of this position in the context of abortion. See Mark A. Graber, Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics 121-31 (1996).

52 It is worth keeping in mind that the last president who was able to appoint a five-member majority to the Court was Franklin Delano Roosevelt. Recent presidents have not been as fortunate.


54 For an argument that the Court can perform these roles, see, e.g., 1 Laurence H. Tribe, American Constitutional Law 27 (3d ed. 2000).
stitutional and legal rights. This involves inquiring into the relationship between rights and deliberation within democratic theory.

C. Rights and Deliberation in Democratic Theory

One of the problems with the countermajoritarian critique of judicial review was that it never bothered to justify democracy as a value. The desirability of democracy was simply assumed. But this theoretical failure on the part of those who insisted that judicial review was "deviant" in a democracy led to a corresponding underestimation of the value and purpose of democracy by scholars who responded to the countermajoritarian critique. The legal scholars who defended judicial review paid scant attention to what democracy means and why some have thought it a good form of government. In a fundamental sense, the whole debate over the legitimacy of judicial review took place with one of the main characters, democracy, off-stage and unexamined.

To restore democracy to its proper place, we must focus on normative arguments and set aside the assumption that voting procedures like majority rule are the best place to start in understanding why democracy is desirable. I suggest the insistence by a number of democratic theorists that democracy is the one form of government that is in the common interest is a good place to start. As Amy Gutmann and Dennis Thompson put it, democracy "is a conception of government that accords equal respect to the moral claims of each citizen, and is therefore morally justifiable from the perspective of each citizen." Robert Dahl, Thomas Christiano, and Rex Martin have also made some form of this argument. These theorists all stress that what is important about democracy is not majority rule in the first instance, but rather a commitment to treat citizens equally and ensure that the actual operation of government works to advance the interests of everyone.

Rex Martin has made a particularly important version of this argument that has implications for how constitutional and legal rights

---

95 I developed this argument in detail in my own critique of the scholars who challenged judicial review on democratic grounds. See Stephen M. Griffin, What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition, 62 S. CALIF. L. REV. 493, 506-15 (1989) (arguing that scholars who have challenged judicial review on democratic grounds fail to acknowledge differing conceptions of democracy that might call into question the nature of the American political system).

96 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 18 (1962) (arguing that judicial review is an outlier in the American democratic system because the judicial branch is not electorally accountable).


100 See REX MARTIN, A SYSTEM OF RIGHTS (1993).
fit into a democratic order. Martin's theory is intended to show that a harmony exists between democracy and the protection of basic civil rights. In his account, civil rights are defined as political rights universal within a given society. They are beneficial ways of acting, or ways of being treated, that are specifically recognized and affirmed in law for all citizens. Thus, all civil rights are beneficial to the rightholder and can easily be seen as part of the good of each citizen or instrumental to it. New rights can be established if a reasonable argument can be made that they would be in the interest of all citizens.

If civil rights are indeed beneficial, they can be regarded as justified given that they identify ways of acting, or ways of being acted toward, that satisfy the criterion of mutual perceived benefit. That is, civil rights are valuable because they are in everyone's interest. Given this, it is plausible that people might come to see the creation and promotion of civil rights as not simply one goal among many, but the principal political objective of their society. They would therefore give a certain priority to civil rights.

Once a priority has been given to civil rights, however, the question becomes how best to implement that priority in a system of government. Practical experience suggests that for rights to be truly meaningful, a set of institutions will be required to create, enforce, and harmonize them. Democratic practices such as universal suffrage with regular and contested elections could serve as a foundation for the institutions necessary to protect civil rights. This is so because democratic procedures are a reliable way of identifying, and then implementing, laws and policies that serve the common interests of all citizens or, at least, a large number of citizens.

Here, however, it is important to understand that the notion of what is in the common interest is deeply ambiguous because it involves a number of concepts that should remain distinct. Common interests can be understood as (1) those policies and laws that are in the interest of each and all; or (2) those policies and laws concerned,

101 See id.
103 On Martin's account, each civil right has a core content that can be individuated (given out equally to all individuals in a certain class) and distributed in a determinate amount under publicly recognized rules. Judicial or administrative agencies must exist in order to assure the distribution of civil rights as a benefit to each person in the class. See MARTIN, supra note 100, at 126.
104 Martin emphasizes:
[the indispensable role of political agencies and of institutional processes in the development of rights. Such agencies, acting in concert, are required in order to formulate civil rights, to promote and maintain them (as is necessary, if they are to be more than merely nominal rights), and to harmonize them through judicious drafting. MARTIN, supra note 100, at 124.
for example, with national defense or the growth of the economy, that is, concerned with things that are in the collective interest of society (though not necessarily in the particular interest of each citizen); or (3) those policies and laws that are in the interest of most citizens (presumably a majority) though not in the interest of others (presumably a minority).

Unless an order of priority is chosen among these different concepts, democratic institutions might operate to promote laws and rights that were only in the interest of a majority, rather than in the interest of all. On reflection, then, anticipating the possibility of conflicts, citizens would value category (1), policies in the interest of each and all, over categories (2) and (3) and they would further choose policies in category (2) over category (3). This means that policies shown clearly to be in the interest of most citizens could not conflict with or take priority over the rights justified in terms of the definition of common interests in category (1). In such a way, the basic rationale for democratic government, that it is in the interest of everyone, would be refined to ensure that laws and policies in the interest of each and all would be the principal political goal of society.

So far the argument has been that democratic government can provide the setting required by civil rights. Democracy also needs to be justified, but giving priority to preferences shared by each and all can provide this justification and such preferences would include universal political (civil) rights. Thus two independent elements—civil rights and democratic procedures—can be systematically brought together and shown to be mutually supportive. They are mutually supportive because they are grounded in the same justification, one founded on the idea of mutual perceived benefit.

Since democratic procedures are relatively good at identifying policies that are in everyone's interest, over time democratic institutions will tend toward the creation and enforcement of civil rights. That is, they will tend to produce new rights on a continuous basis. Only a tendency can be posited, given the inherent imperfections of democratic institutions. These imperfections mean that we will never be able to say that literally all civil rights laws are in the interest of each and all, but we do have adequate evidence for saying that long-established civil rights are in that interest. Long-established civil rights are those approved by legislative majorities and those that survived the scrutiny of time, experience, and public discussion and have

---

105 See id. at 163.
106 The basic reasoning as to why citizens would prefer category (1) is that civil rights (which are, in effect, universal benefits given to all citizens) can be individuated in some determinate degree and that benefit each citizen. By contrast, the policies and laws in categories (2) and (3) provide benefits, but cannot be guaranteed to benefit each citizen in a determinate amount. Civil rights (again, universal political rights) would therefore be preferred over aggregative or majority benefits. See id. at 153-66.
thus been winnowed by the self-correcting character of the democratic process.

Within this democratic system of rights, judicial review can be justified rather easily as a check on majority rule designed to ensure that civil rights are not infringed. As the above argument implied, there is no guarantee that legislative majorities will always choose the interest of everyone over the interest of a large majority of voters. The priority accorded to civil rights may be the principal objective of government, but that is not to say it is unlikely that laws will be passed that violate the rights of individual citizens. Therefore, checking devices such as judicial review are appropriate to ensure that democratic institutions continue working toward that principal objective. Once justified in this way, however, it becomes clear that such checks are not external to democratic ideals or in any way are undemocratic. They are, rather, to be numbered among the fundamental democratic institutions. This harmony between checking devices such as judicial review and democracy flows from the more foundational idea of a harmony in principle between basic civil rights and democratic institutions.

At the same time, this reasoning implies that if judicial review (or any other checking device) starts to work against civil rights that are in the interest of each and all, then other procedures and institutions will be required to again guide the system toward its goal. For while it is important to acknowledge that legislative majorities can impair rights, the more fundamental tendency of a democratic system of rights is constantly to create new rights and ensure that the rights already on the books are enforced. In such a democracy, legislators and policymakers that successfully create and enforce civil rights generally can count on public favor because such rights are correctly perceived to be in everyone's interest.

The argument that there is a harmony between civil rights and democracy thus has subtle implications for the traditional debate over the legitimacy of judicial review. In what I have called a democracy of rights (one that realizes this harmony), judicial review is not brought in to adjust the system toward a goal (the protection of rights) that the system does not naturally achieve on its own. Rather, the point of having a democracy is that it does tend to regularly achieve the successful creation and enforcement of basic civil rights. Judicial review is simply an additional institution that can help achieve this goal.

A democracy of rights aims at identifying policies that are in the common interest. It is a democracy because in some sense everyone's views are valued and respected. It is a democracy of rights because civil rights tend to be political goods that are in the common interest. But how does this happen exactly? So far, I have not addressed the process by which citizens in a democracy of rights reach a collective judgment about what policies are in the common interest. Here
Gutmann's and Thompson's emphasis on the necessity for deliberation in a democracy is helpful. Deliberation means citizens are expected to argue with one another in the face of disagreement over moral and political values. Gutmann and Thompson contend that one reason for requiring democratic deliberation is that it "responds to the incomplete understanding that characterizes moral conflict in politics. Compared to other methods of decision making, deliberation increases the chances of arriving at justifiable policies."

This reasoning dovetails nicely with the rationale I presented for a democracy of rights. The benefit of living in a democracy is that compared with other systems of government, democracies tend to most readily identify policies in the common interest. Encouraging citizens to argue over issues of moral and political principle helps achieve this goal by informing everyone of the views of others, ensuring that mistakes will be identified and corrected and increasing the likelihood that citizens will "develop new views and policies that are more widely justifiable." Widening the circle of deliberation makes it more likely that citizens will be able to find their way to the common interest. Gutmann and Thompson stress that deliberation is especially important for what they call "middle democracy" where laws are applied on a day-to-day basis by government officials and to the vibrant politics that occurs in "interest groups, civic associations, and schools." So deliberation is a value not simply for one branch of government, but for all branches and levels of government, all private groups concerned with politics and for citizens at large.

At this point Gutmann and Thompson comment directly on the tendency of legal scholars to see the Supreme Court as the government institution best suited for deliberation. As I have argued elsewhere, lawyers tend to contrast an ideal Court to the nonideal world of Congress and argue that the quality of deliberation in the former is always superior to the latter. Gutmann and Thompson note appropriately, "[e]mpirical evidence about the behavior of judges and legislators is almost never offered to support the contrast." They remark that such arguments rest on a "deductive institutionalism" that does not capture the way courts and legislatures actually operate.

---

107 See GUTMANN & THOMPSON, supra note 97, at 39-51.
108 See id. at 39-41.
109 Id. at 45.
110 Id.
111 Id. at 43.
112 Id.
113 See id. at 45-47.
114 See GRIFFIN, supra note 6, at 123.
115 GUTMANN & THOMPSON, supra note 97, at 45.
116 Id.
Frank Cross has recently offered a catalog of arguments to show that deliberation in the Supreme Court may actually be worse than deliberation in the political branches. The limited size of the Court makes it a poor forum for deliberation in a multi-racial, multi-ethnic, multi-cultural society. Even if we imagine a Court that is more diverse than at present, the upper limit of nine members means that legislatures will always be superior in this respect. The advocacy of the parties in a given case cannot make up for the Court’s lack of diversity and perspective because they tend to be self-interested and “many interested parties, such as the general public, are not present before the Court.” In addition, the justices tend to be policy generalists rather than experts. The Court is simply too small to enable the Justices to attain the kind of specialized policy expertise that is taken for granted in the elected branches. Finally, the fact-finding resources available to legislatures will always be superior to those of the federal courts.

Cross’s arguments suggest that there may be areas of constitutional law in which the political branches actually have a deliberative advantage over the Supreme Court. In Part II, I will argue that this has been borne out in three main areas of equal protection law: affirmative action, racial redistricting, and Congress’ power to enforce the Fourteenth Amendment.

II. EQUAL PROTECTION IN A DEMOCRACY OF RIGHTS

In a democracy of rights, there is good reason for thinking that rights created by the political branches through a deliberative process are in the common interest. Therefore, when the Supreme Court renders decisions destroying those rights, there is reason to be concerned. This is precisely what has been going on in the law of equal protection. The Court has acted against civil rights produced not simply by a “majoritarian” political process, but by a democratic process, which embodies a form of deliberation that is superior to anything the Court can offer.

A. Affirmative Action

City of Richmond v. J.A. Croson Co. is well known to students of the Equal Protection Clause as the case in which a majority of the Supreme Court finally settled on strict scrutiny as the standard to be

118 Id. at 1546-47.
119 Id. at 1547.
120 See id. at 1546-47.
121 See id. at 1548-49.
applied to "race-based measures to ameliorate the effects of past discrimination."\textsuperscript{123} At issue was an ordinance adopted by the Richmond City Council that required thirty percent of city construction contracts to be subcontracted to businesses run by racial minorities.\textsuperscript{124} The purpose of the ordinance was to benefit construction firms owned and operated by African-Americans.\textsuperscript{125}

\textit{Croson} features a debate among members of the Court as to the appropriate standard of review to be used in affirmative action cases that involve race-conscious remedies. Writing for the Court, Justice O'Connor insisted on strict scrutiny,\textsuperscript{126} while Justice Marshall in dissent continued to apply the "intermediate scrutiny" standard he had first set forth in \textit{University of California Regents v. Bakke}.\textsuperscript{127} For my purposes, however, I want to consider \textit{Croson} from the perspective of a democracy of rights—that is, I want to concentrate on the role of deliberation and rights. In \textit{Croson}, the Supreme Court destroyed a valuable legal right, one adopted through a deliberative process to advance the constitutional guarantee of equal protection.

In adopting its thirty percent ordinance, Richmond was following the example of Congress,\textsuperscript{128} which had approved a ten percent minority business set-aside in the Public Works Employment Act of 1977.\textsuperscript{129} Congress acted pursuant to extensive findings of racial discrimination against minority businesses in general and in the awarding of government contracts.\textsuperscript{130} The predominantly black City Council of Richmond, Virginia knew full well that the effects of past and present discrimination against African-Americans continued to prevent minority businesses from gaining any significant share of public contracts.\textsuperscript{131} The Council believed that public money should not be used to reinforce ongoing practices of racial discrimination. The Council therefore granted a valuable legal right to minority businesses, one that enabled them to participate more effectively in the awarding of public contracts.

This legal right to a certain share of public contracts had an important constitutional dimension. A general purpose of the Fourteenth Amendment is to provide a guarantee of equal citizenship to all Americans.\textsuperscript{132} The Equal Protection Clause implements this purpose by encouraging all branches of government to provide a legal

\textsuperscript{123} Id. at 476-77.
\textsuperscript{124} Id. at 477.
\textsuperscript{125} Id. at 479-80.
\textsuperscript{126} See id. at 493-94.
\textsuperscript{127} 438 U.S. 265, 359-62 (1978) (holding that racial classifications designed to further remedial purposes need only serve important governmental objectives and be substantially related to achievement of those objectives).
\textsuperscript{130} See \textit{Croson}, 488 U.S. at 531-33 (Marshall, J., dissenting).
\textsuperscript{131} Id. at 534-35.
\textsuperscript{132} See U.S. CONST. amend. XIV, § 1.
JUDICIAL SUPREMACY AND EQUAL PROTECTION

regime that counters the present effects of the past systems of slavery and white supremacy and additionally works against any tendencies in the present toward racial discrimination. Richmond's minority business ordinance advanced the purpose of the Fourteenth Amendment and the Equal Protection Clause by establishing a new legal regime that made it more difficult for racial discrimination to influence who received city contracts.

The adoption of minority set-asides by Congress and in cities like Richmond was part of a general public reconsideration in the 1970s of the measures that would be necessary to truly implement the promise of the Fourteenth Amendment. At the local level, action was often prompted by the election of the first black mayors and majority-black city councils. These developments, which were the product of the civil rights movement, showed that the nature of public deliberation on issues of race had changed. Demands for black participation were based on a belief that true equality required vigorous “affirmative” action by government in the present, not a reliance on vague promises of a remote future in which racial discrimination would somehow be eliminated.

Set-asides for minority groups in public contracting emerged out of this more inclusive public debate. They provided new legal rights to obtain a greater share of public contracts. When the Supreme Court entered the picture in Croson, it abrogated the results of this public discussion even though none of the justices of the majority understood what it was about. The Court noted that the City Council had concluded that there was racial discrimination in the Richmond construction industry, but said that “a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.”

Note initially that this statement appears to stand the separation of powers on its head. Legislatures or city councils are in a good position to gather general sorts of evidence and make general findings. What they are not good at is making determinations of wrongdoing and defining the “precise” scope of injuries suffered by specific firms. That is normally a job for the courts. In any event, the point of the set-asides was to create a legal regime more favorable to minority businesses and less susceptible to the influence of racial discrimination. It was based on the particular experience of city council members and their knowledge of racial discrimination in Richmond gen-

---


134 Croson, 488 U.S. at 498.
eraly and in the awarding of public contracts (which the Court conceded).

From the perspective of a democracy of rights, the *Croson* decision did not advance public deliberation about affirmative action because it imposed a standard suitable for the judiciary on a legislative body. Since this standard could not be met, it had the effect of stifling minority set-asides even as those concerned with public contracting knew perfectly well that racial discrimination and lack of opportunity for minority firms continued to exist. By destroying rights designed to fulfill the purpose of the Fourteenth Amendment, the Court helped perpetuate existing racial discrimination.

Contrast this with the situation that would exist if heightened scrutiny were eliminated. Under a regime where rational basis review was the only standard, the Court's inquiry would be properly directed at whether the legislature had good reason to believe that a set-aside program would improve opportunities for minority businesses. There is, of course, no question of this and so the Richmond program would have been found constitutional.

**B. Race and Congressional Districting**

In *Shaw v. Reno*, the Supreme Court recognized a new cause of action for "racial gerrymandering" in congressional districting under the Equal Protection Clause. This cause of action enabled the white plaintiffs in *Shaw* to challenge congressional districts drawn pursuant to a process established by the Voting Rights Act Amendments of 1982 (VRA). As I noted in Part I, Congress adopted those amendments to nullify the effect of the Court's ruling in *City of Mobile*.

In *Shaw*, the Court did not refer to the process established by the VRA. The Court did, however, voice its concern that the unusual shape of the district under challenge raised the inference of racial gerrymandering. The redistricting plan questioned in *Shaw* was defined as "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the"
races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.\textsuperscript{142}

In \textit{Shaw}, the Court recognized a new cause of action, but did not decide whether the districting process under review was unconstitutional. However, as Peter Rubin notes, "since \textit{Shaw} the Court has in fact invalidated every district line drawn on the basis of race that it has considered in a fully briefed and argued case."\textsuperscript{143} The most prominent cases are \textit{Miller v. Johnson},\textsuperscript{144} involving congressional districting in Georgia, \textit{Bush v. Vera},\textsuperscript{145} examining the same process in Texas, and \textit{Shaw v. Hunt},\textsuperscript{146} a North Carolina case that was the direct follow-up to \textit{Shaw v. Reno}.

Voting rights experts have criticized \textit{Shaw v. Reno} on many grounds.\textsuperscript{147} Critics have argued that a cause of action for "racial gerrymandering" is itself contrary to the Equal Protection Clause since there is no reasonable chance that this cause of action will be available to black plaintiffs;\textsuperscript{148} that the Supreme Court ignored its normal standing requirements;\textsuperscript{149} that \textit{Shaw} was clearly inconsistent with prior precedents;\textsuperscript{150} and that its reasoning simply made no sense.\textsuperscript{151} While all of these criticisms are cogent and important, for my purposes I would like to bypass them in favor of focusing once again on how the Court treated civil rights created by the political branches through democratic deliberation.

The VRA and its 1982 amendments granted valuable rights to racial minorities. The 1982 amendments established that voting rights were violated if it were shown that "political processes . . . are not
equally open to participation" 152 by citizens on account of race or color 153 in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 154 The amendments explicitly called for a broad assessment, "based on the totality of circumstances" 155 as to whether a denial of "fully effective voting strength" 156 has occurred.

The 1982 amendments thus pointed in the direction of a practical and comprehensive study of whether jurisdictions covered by the VRA (mostly southern states) were ensuring that racial minorities, especially African-Americans, were being given the same opportunity as whites to participate and to elect the representatives they wanted. The amendments were first implemented for congressional districting in 1991, as states such as North Carolina, Georgia, and Texas found themselves with new seats as a result of the 1990 census. Under Section 5 of the VRA, the Department of Justice (DOJ) was responsible for enforcement. The DOJ was generally unsatisfied with the congressional district plans proposed by these states because the states had avoided drawing majority-black congressional districts when they could have done so fairly easily.

In general, scholarly analyses of Shaw v. Reno and its progeny have not sufficiently emphasized that all of the "racial gerrymandering" cases concern states in the South. That is, all of the cases arise in a region in which blacks have historically been excluded from the political process and denied the ability to select representatives of their choice. 157 The politics of the contemporary South continue to be saturated by racial distrust and its voting companion, racially polarized bloc voting. 158 This history undoubtedly influenced the DOJ to encourage states to draw additional majority-black congressional districts. 159

The Supreme Court in the Shaw line of cases, however, ignored the DOJ's rationale. Sometimes the Court would refer to the fact that the DOJ had rejected various districting plans, but the Court never identified the DOJ's rationale with any great clarity because the DOJ's rationale destroyed the basis for the Court's intervention. As Peter Rubin argues, "[t]he Court in Shaw and Miller refused to examine the factual situations in which North Carolina and Georgia decided to draw race-conscious districts. If the Attorney General was correct in his initial denial of preclearance in each case, North Carolina and

---

153 Id.
154 Id.
155 Id.
156 Rubin, supra note 143, at 79.
157 See generally KOUSSER, supra note 147.
158 See id.
159 See Rubin, supra note 143, at 94-96 (discussing the Attorney General's reluctance to preclear reapportionment plans that did not recognize concentrations of minority voters).
Georgia were both faced with racially polarized bloc voting, and the additional black-majority congressional district in each case served to combat vote dilution. "Certainly the complete absence of blacks from either state's congressional delegation over a ninety-year period suggests that the Attorney General's determination was not without support."160

The VRA and its 1982 amendments afforded African-Americans a right to vote for representatives of their choice. In the circumstances of the South, this meant a right to be free, to the extent possible, of racially polarized bloc voting by whites against black candidates.161 The DOJ implemented this policy by mandating that states create additional majority-black congressional districts. By creating a cause of action for racial gerrymandering, the Supreme Court put a stop to this policy without examining the constitutional reasons it had been adopted in the first place. The Court did avoid holding the 1982 VRA amendments to be unconstitutional. But, by nullifying their effect on congressional districting, the Court abrogated the rights of African-Americans living in southern states. Given the South's sorry history of racial discrimination, this was an unfortunate result.

The analysis does not stop here, however. The example of racial redistricting is yet another instance in which the Supreme Court has destroyed the rights of minorities. Once again, the Court has done so without investigating the reasons, founded ultimately in democratic deliberation, as to why the policies it opposes were created in the first place. Given the lack of such an investigation, there is no basis for saying that the Court has a superior title to reasoned deliberation in making constitutional decisions with respect to the meaning of equal protection. I suggest the considered judgment of the political branches, reached first during the Reagan administration (in which the 1982 amendments were passed) and enforced during the Bush Administration (Bush I, that is) was superior when it comes to the practical assessment of racial politics in the South and the appropriate remedy.

C. Enforcing the Fourteenth Amendment

In City of Boerne,162 the Supreme Court invalidated RFRA and opened a new front in its contest with Congress over which branch should set the boundaries of our constitutional rights. RFRA was an unusual statute in that its manifest intent was to overturn Employment Division v. Smith,163 something which can be accomplished normally

---

160 Id. at 114.
161 See Thornburg v. Gingles, 478 U.S. 30, 49 (1986) (discussing how bloc voting can defeat candidates supported by a politically cohesive, geographically insular minority group).
163 494 U.S. 872 (1990) (holding that the Free Exercise Clause permits the State to prohibit
only through a constitutional amendment. Nevertheless, RFRA was also an effort by Congress to better secure the First Amendment right of free exercise of religion. In evaluating *City of Boerne* and subsequent cases construing Section 5 of the Fourteenth Amendment, I am again concerned with the issue of how the Court treats rights created by the political branches through democratic deliberation.

RFRA was enacted pursuant to the power of Congress, under Section 5 of the Fourteenth Amendment, to enforce the Due Process and Equal Protection Clauses.\(^6\) Despite the "in your face" atmosphere surrounding the passage of RFRA, the Court could have seen the statute as an effort by Congress to exercise its independent judgment about the nature of the free exercise right and the threat of invidious discrimination against religious beliefs. In *City of Boerne*, the Court did acknowledge that Section 5 is a grant of additional legislative power to Congress\(^5\) and that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."\(^6\) But the Court said this power is still limited to enacting laws which enforce or remedy violations of Fourteenth Amendment rights and does not extend to defining the rights themselves.\(^7\)

To distinguish between laws that remedy violations of Section 1 and laws that create new rights, the Court proposed a test of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."\(^8\) RFRA could not survive this test because it was a sweeping law that prohibited all levels of government in the United States from substantially interfering with the free exercise of religion unless officials could show a compelling interest.\(^9\) To justify such a severe measure, Congress would have had to show that all levels of government were in the habit of persecuting the religious.\(^10\) This Congress did not do. The Court simply saw no justification for RFRA's blanket invocation of the compelling

---

\(^{14}\) See U.S. CONST. amend. XIV, § 5; see also *City of Boerne*, 521 U.S. at 516-17.

\(^{15}\) *City of Boerne*, 521 U.S. at 517 (following the Court's finding in *Katzenbach v. Morgan*, 384 U.S. 461 (1966), that Section 5 was a positive grant of legislative power to Congress).

\(^{16}\) Id. at 518.

\(^{17}\) Id. at 519 (stating that Congress' enforcement power does not include determining what Fourteenth Amendment rights are).

\(^{18}\) Id. at 520. The Court concluded its discussion by citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and unwittingly begged the question: "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" *City of Boerne*, 521 U.S. at 529. Substituting "the Supreme Court" for "Congress" in this quotation poses the key issue that the Court missed.

\(^{19}\) Id. at 515-16.

\(^{20}\) Id. at 530.
interest test given the lack of support in the legislative record and the substantial burden it would impose on all levels of government. With Kimel v. Florida Board of Regents, United States v. Morrison, and Board of Trustees of the University of Alabama v. Garrett, the Court moved the City of Boerne doctrine into the area of equal protection. In all three cases, the Court made it more difficult for citizens to obtain a remedy for discrimination suffered at the hands of state governments. Age discrimination was at issue in Kimel, while Morrison and Garrett concerned discrimination against women and the disabled, respectively.

In Kimel, the Court ruled that the Age Discrimination in Employment Act (ADEA) could not be applied to the states pursuant to Congress' power to enforce Section 5. Applying the congruence and proportionality test, the Court stated that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." This was so because the Court had previously held that classifications based on age were subject to rational basis review, not strict scrutiny. This meant that the stringent anti-discrimination provisions of the ADEA could not be justified, given that they, in effect, presumed that age discrimination was always irrational. According to the Court, states can rationally make distinctions among their employees on the basis of age.

Morrison concerned the constitutionality of the civil remedy against gender motivated violence provided by the Violence Against Women Act (VAWA). The Court ruled that the remedy could not be sustained either under the Commerce Clause or Section 5. With respect to Section 5, the Court noted that the civil remedy was directed against individuals who commit crimes of violence, not against states, thus failing the state action requirement. However, there was evidence in Morrison that state officials were discriminating against women in the enforcement of the criminal law—not only a clear instance of state action, but one which violated the Court's precedents.

---

171 Id. at 532.
175 Kimel, 528 U.S. at 63.
176 Id. at 65-65 (stating that age classifications are not subject to strict scrutiny because the classification may be related to a legitimate state interest).
177 Id. at 83 (stating "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest").
178 See Morrison, 120 S. Ct. at 1740.
179 See id. at 1754-58 (discussing Congress' lack of power to enforce anti-discrimination laws against private actors).
giving heightened scrutiny to classifications based on gender.109 Here
the Court used the congruence and proportionality test from City of
Boerne to hold that, because VAWA's civil remedy was different from
remedies against state officials the Court had previously upheld, it
could not be constitutional.110

Kimel appeared to be based on a doctrine that Congress could not
provide a remedy against state governments for forms of discrimina-
tion that the Court had refused to recognize. As Post and Siegel
summarize, "[i]f the exercise of congressional Section 5 power must
be congruent and proportional to behavior that a court would hold
unconstitutional under rational basis review, virtually all antidis-
crimination legislation, except that protecting racial minorities and
women, will be rendered beyond Congress' Section 5 power."111 This
implication was realized fully in Garrett, in which the Supreme Court
employed City of Boerne and Kimel to immunize states from suits
brought under the ADA.

Unlike RFRA and the ADEA, Congress had amassed an extensive
and thorough legislative record justifying the provisions of the
ADA.112 It proved unavailing. After demonstrating that discrimina-
tion against the disabled was subject only to rational basis review,113
the Court in Garrett found the legislative record insufficient.114 Al-
though Congress had documented the pervasiveness of discrimina-
tion against the disabled in American society, it could not be assumed
that a similar pattern existed with respect to the states.115 Even if
there was such a pattern, the Court stated that the congruence and
proportionality test would counsel against the constitutionality of any
remedy against the states. This was because the ADA required state
employers to provide "reasonable accommodation"116 to the disabled.
This was far out of proportion to what the Court has ruled the Consti-
tution requires in terms of redressing discrimination.117 Subjecting
the states to suits for damages was therefore an unconstitutional ex-
ercise of Congress' Section 5 powers.118

City of Boerne's congruence and proportionality test has functioned
as a strict standard of review of Congress' Section 5 powers.119 As Post

109 See id. at 1758 (stating that there was "gender-based disparate treatment by state authori-
ties" in Morrison).
110 See id. at 1758-59 (stating that VAWA is not aimed at action made unconstitutional by the
Fourteenth Amendment because it is aimed at individuals who have committed criminal acts).
111 Post & Siegel, supra note 49, at 461.
112 See Bd. of Trs. v. Garrett, 121 S. Ct. 955, 969-72, 976-93 (Breyer, J., dissenting).
113 See id. at 963-64.
114 See id. at 964-68.
115 See id. at 965-66.
116 See id. at 967.
117 See id.
118 See id. at 967-68.
and Siegel argue, this "suspicion and hostility" toward the exercise of one of Congress' enumerated powers exists nowhere else in constitutional law. Notably, there is no parallel to the means-end scrutiny involved in the congruence and proportionality test with respect to the Commerce Clause. In carrying out this form of strict scrutiny in *Kimel* and *Garrett*, the Court had to make some very questionable assertions concerning the evidence that Congress amassed. In *City of Boerne* such assertions were largely unnecessary, given the sweep of the statute and the generally inadequate job Congress did building a legislative record. It would have been better, however, if both Congress and the Court could have found a way to more directly address what appeared to be the real nature of the problem—not "religious bigotry" as the Court thought, but the systematic undervaluing of constitutional norms concerning religion by officials in the administration of state and local laws.

In *Kimel*, the Court applied the congruence and proportionality test by finding that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." The Court was unable to back this essentially legislative assertion with any substantial evidence because it had faced the problem of age discrimination in only three cases. The Court stated that the aged "have not been subjected to a 'history of purposeful unequal treatment," but again did not cite any evidence. The Court did examine the legislative record of the ADEA but here it arguably went beyond even strict scrutiny in questioning the evidentiary basis of arguments made by members of Congress. In reaching their conclusion that extending the ADEA to the states was justified, members of Congress were, as a constitutional matter, entitled to rely on any evidence at all, including their own personal experience. The Supreme Court's criticism raises separation of powers concerns in that it implies that the Court will be requiring in the future that Congress justify statutes in particular ways. This is a judicial encroachment on a purely legislative function.

With respect to the ADA, I reviewed in Part I the essential findings that Congress made to justify its passage. These findings fully support application of the ADA to the states, as Congress found discrimination against the disabled in the provision of public services, including

---

191 Post & Siegel, supra note 49, at 477.
192 *City of Boerne*, 521 U.S. at 530.
193 See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 773-74 (1998) (stating that there is a reasonable inference that there is a high percentage of government administrators that hold a hostile view towards religious fundamentalists). See also GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL (2001).
194 *Kimel*, 528 U.S. at 83.
195 Id.
196 See id. at 89-92.
voting rights. Despite this, the Court in Garrett found that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."9 Here the Court seems to be reiterating its point that the disabled are not a suspect class. To the extent that the Court was contesting the evidence Congress produced, however, this argument is implausible. The Court appears to want Congress to come up with evidence of state discrimination against the disabled that matches the depth of evidence with respect to society generally. Congress did produce evidence of state discrimination. But the more important point is that the evidence of societal discrimination against the disabled of course applies to the states since their employees are part of American society.10

In City of Boerne, Kimel, Morrison, and Garrett, the Supreme Court destroyed rights that the political branches thought were important to the enforcement of constitutional values. Without the doctrine of heightened scrutiny, the outcome in Kimel and Garrett would have been different. The Court would not have engaged in an inquiry as to whether the elderly and the disabled deserve a higher degree of protection under the Fourteenth Amendment. But City of Boerne and Morrison show that the abolition of heightened scrutiny is not enough to get the Court out of the business of destroying valuable constitutional rights. What is required is the adoption of a deferential standard of review toward the exercise of Congress' power to enforce the Fourteenth Amendment.11

CONCLUSION

Heightened scrutiny of legislative classifications based on race and other forms of invidious discrimination has been justified on the ground that it is important to preserve the rights of minority groups against incursions by the majority. This rationale is not responsive to a situation in which the Supreme Court uses heightened scrutiny to destroy valuable civil rights created by the political branches through democratic deliberation. In this circumstance, what is to be feared is a Court employing judicial standards that are inappropriate to evaluating rights designed to promote constitutional values. To prevent the Court from destroying essential civil rights, the doctrine of heightened scrutiny should be abolished and a uniform "rational basis" test should be employed to evaluate statutes enacted to prevent unjust discrimination. In addition, when Congress uses its powers under Section 5 of the Fourteenth Amendment to enforce the Equal

9 Garrett, 121 S. Ct. at 965.
10 See id. at 970 (Breyer, J., dissenting).
11 See id. at 974-76 (Breyer, J., dissenting).
Protection Clause, the Court should employ a deferential standard of review.

I am well aware that some would regard the abolition of heightened scrutiny as a sign that the constitutional system no longer regards racial discrimination as unjust. Strict scrutiny for racial classifications has been the legal system's way of saying that racism is morally unacceptable. Of course, my call for the abolition of heightened scrutiny is based on the idea that the political branches are doing a better job than the Court in combating racial discrimination, and thus I am not advocating or implying in any way that racial discrimination is morally acceptable. I understand that some may wish that a judicial backstop to the political process exist in case the political branches somehow lose sight of the moral unacceptability of racism. What I would point out is that in the politicized atmosphere that characterizes a democracy of rights, there is no such thing as a true safe haven for any set of political values. The issue of racism or any other matter that poses fundamental questions of justice and rights must be fought out in the real world amid real institutions on a day to day basis. This is the ultimate legacy of the civil rights movement—not a set of fundamental principles based in a theory of justice, but a set of democratized arenas ready to decide politically concrete issues of rights.