THE SUPREME COMMON LAW COURT OF THE UNITED STATES

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The U.S. Supreme Court's primary role in the history of the United States, especially in constitutional cases (and cases hovering in the universe of the Constitution), has been to limit Congress's ability to redefine and redistribute rights in a direction most people would characterize as liberal. In other words, the Supreme Court, for most of the history of the United States since the adoption of the Constitution, has been a conservative force against change and redistribution.

To those like me who grew up in the 1960s and 1970s, this thesis seems radically out of step with the reality of that era, in which the Supreme Court appeared to be creating and protecting fundamental rights and rights for minorities against powerful conservative forces. In recent years, however, this thesis has been accepted and even adopted by the left as a critique of judicial power and its effects. Mark Tushnet's book is perhaps the best example of a left-wing critique of judicial power,[1] but Tushnet does not stand alone in recognizing that a strong federal judiciary has not helped progressive causes.[2]

The Supreme Court's activist conservative project is potentially limited by the federalism principles underlying the scope of the Constitution and other federal law. Because the federal courts generally and the Supreme Court in particular have no jurisdiction over state law, the Supreme Court can reshape state law only when it conflicts with federal law. Therefore, a striking aspect of the Supreme Court's methodology in recent years has been its willingness to aggressively expand the reach of federal law into areas that had been considered well within the realm of state law. In effect, despite the *Erie*[3] doctrine, which recognizes that each state court system has the power to prescribe common law within its jurisdiction, the Supreme Court of the United States is be-

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[1] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[2] *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 152, 229 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

[3] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

having increasingly as if it is the Supreme Common Law Court of the United States.

The Court has used five distinct devices to advance its control over the law. First, it has construed rights-creating constitutional provisions narrowly when those provisions are advanced by minorities and other disadvantaged groups.[4] Second, it has construed Congress's power to create rights narrowly, holding unconstitutional many efforts by Congress to either expand the rights of minorities and other disadvantaged groups, or to create new rights for such people.[5] Third, the Court has construed civil rights statutes narrowly, often provoking legislative responses by Congress.[6] Fourth, the Court has construed some constitutional provisions broadly in order to take control of areas of the law that had been thought of as within the control of the states.[7] Fifth, the Court has expanded the scope of federal preemption of state law, which results in reducing the sphere governed by state common law. While these devices do not all necessarily result in taking the law in a conservative direction, by and large that has been the use to which the Court has put them.

The Court has advanced its agenda in another way, by seizing power that, under federalism traditions, belongs to state courts and state legislatures. In several senses, the Supreme Court has begun to function like a Supreme Common Law Court of the United States. The Court has seized control of areas of the law that have traditionally been the domain of the states and has imposed federal norms created for that purpose. The Court has also applied interpretive methods, in both constitutional and non-constitutional cases, that draw from traditional common law methodology and allow for a high degree of creativity.[8]

This Article proceeds as follows. The first part introduces the historical role of the Supreme Court as structured by the Constitution of the United States, and examines that role in light of contemporary understandings of the legal reasoning process. The second part divides the history of the Court into four periods: the post-Reconstruction period, the *Lochner* era,[9] the twentieth century Civil Rights Movement era, and the current period. The third part discusses how the Court has behaved in each period. This Article concludes by expanding the discussion of the current period to elaborate the ways in which the Court has behaved, and continues to behave, as if it is the Supreme Common Law Court of the United States.

The main focus of this Article is positive— to illustrate the actual behavior of the Supreme Court. There are, however, numerous interesting normative questions beneath the surface which will occasionally erupt. For example, in the

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[4] *See infra* Part I.

[5] *See infra* Part I.B.4.

[6] *See infra* Part I.B.4.

[7] *See infra* Part II (discussion of punitive damages).

[8] *See infra* Part II (discussions of punitive damages and exactions).

[9] Lochner v. New York, 198 U.S. 45 (1905).

first part of this Article, I argue that in the face of constitutional uncertainty and a robust democratic political culture, the Court should be restrained rather than activist. Throughout the Article my normative baseline is that judges should at least begin from the familiar minimalist perspective of overturning the output of more democratic branches only when there are strong reasons to act, for example when powerless minorities are targeted and the political process does not seem to be up to the task of protecting them.[10] However, the primary mission of this Article is to illustrate the actual behavior of the Court rather than to advance normative claims about how the Court should behave.

I. THE COURT'S HISTORICAL ROLE

A. *Judicial Activism in Perspective*

Many people, especially those of us who lived through the Civil Rights Movement of the 1950s and 1960s in the United States, have an image of the Supreme Court as creator and protector of the rights of minorities and other historically disadvantaged groups such as women and political dissidents. If one examines the behavior of the Supreme Court throughout the history of the United States, it quickly becomes clear that, insofar as the Court was a leader in the Civil Rights Movement, this behavior appears to have been an aberration. In general, both before and since that period, the Court has stood as an obstacle to the redistribution of rights and power in the legal and political system of the United States. In fact, the Court has usually assumed a leadership role in preventing legislatures from initiating progressive change.

One way of illustrating the Court's role in the area of rights is to compare the Court's behavior to that of Congress. Court decisions with which Congress has expressed disagreement, both as to constitutional interpretation and statutory construction, provide a window into this comparison. There is an overwhelming pattern of rejection by Congress of conservative Supreme Court decisions. Congress has amended civil rights statutes numerous times in reaction to Supreme Court decisions, and in nearly every instance the Court's rejected decision was more conservative than Congress's reaction.[11] There are also several

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[10] Minimalist legal theory contains a number of attractive elements, including judicial reticence to withdraw questions from political decisionmaking and respect for traditions emanating from society generally or the other branches of government. *See* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006). It is beyond the scope of this article to develop and apply a comprehensive legal theory, but the theory underlying this article would certainly draw upon minimalist understandings.

[11] A good example of this is the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.), in which Congress explicitly stated its intent "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* at § 3(4) (codified at 42 U.S.C. § 1981 (note)). Another

examples of Congress creating statutory rights after the Court has held that the Constitution does not contain the rights involved.[12] When the Court construes a statute narrowly, and Congress quickly legislates against the Court's narrow interpretation, it is sometimes the case that the Court's interpretation was overly narrow and that a Court with a more generous attitude toward Congress might have decided otherwise in the first place.[13]

The Court's behavior may be perfectly consistent with the role that the Framers of the Constitution envisioned when they created the Supreme Court. The Court was designed as an elite institution, free from political pressure via life tenure and protected compensation.[14] Chosen by an indirectly elected President and confirmed by Senators chosen by state legislatures,[15] the structure reveals a fear of populism that threatened the status quo in the young nation. The power of judicial review was not thought of as necessary to protect the rights of minorities and women—they really did not have rights, and no one intended to give them any. Rather, it was to protect property and power from legislatures that might be overly influenced by the general populace.[16] It should not be surprising if an elite institution structured for immunity from popular sentiment would act in the interests of the elite, rather than in the interests of those who would benefit from change.

In this Article, I do not dissect numerous Supreme Court decisions to show that the Court was wrong, or that a different outcome or analysis would have been better law. Rather, this critique takes as its starting point a non-formalist view of law. Each Supreme Court opinion—majority, concurrence, and dis-

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example is the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, and 42 U.S.C.), in which Congress found that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and . . . legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." *Id.* at § 2. *See generally* Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1027-28 (2002).

[12] For example, after the Court decided in *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974), and *General Electric Co. v. Gilbert*, 429 U.S. 125, 146-47 (1976), that government discrimination against pregnant women was not sex discrimination in violation of the Constitution and that private discrimination against pregnant women did not violate existing civil rights statutes, Congress enacted the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e).

[13] *See supra* note 11.

[14] U.S. CONST. art. III, § 1

[15] *See* U.S. CONST. art. II, § 3 (senators chosen by state legislatures), superseded by U.S. CONST. amend. XVII (providing for election of senators).

[16] *See generally* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

sent—purports to be based on the law. Most claim to follow logically from clearly articulated legal principles laid down in prior cases. Usually, these claims are transparently false, and although law professors tend to spend a great deal of energy demonstrating this, either in print or in the classroom, for the purposes of this Article, I take it as a given that the Court always makes choices among various legal outcomes and analyses.

In my view, William Eskridge and Philip Frickey have captured a useful approach to understanding how the Supreme Court functions within the political system of the United States:

> [L]aw is an equilibrium, a state of balance among competing forces or institutions. Congress, the executive, and the courts engage in purposive behavior. Each branch seeks to promote its vision of the public interest, but only as that vision can be achieved within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs. To achieve its goals, each branch also acts strategically, calibrating its actions in anticipation of how other institutions would respond. We doubt that many readers will question our assumptions of institutional rationality and interdependence with respect to Congress, the President, and administrative agencies. To some lawyers, however, the notion that the Supreme Court engages in strategic behavior may be shocking.[17]

This analysis places the Supreme Court within the system of checks and balances as understood by the Framers of the Constitution. On that understanding, each branch of government uses its power to its own ends. The Framers hoped that by separating power and instituting checks and balances in the form of competing centers of power, the results of the political process would be in the public interest as much as possible.

The Court's decisions are part of that system of checks and balances. When Congress writes a statute, it depends on cooperation from the President and the federal courts to bring the policy of the statute into fruition. When the Court makes a decision, it knows that it might provoke a reaction from the President and Congress. In addition to the obvious gain in legitimacy from the public, the Court writes its decisions in legalistic terms as part of its effort to have those decisions accepted by the public as well as competing forces within the government.[18]

I do have a quibble with Eskridge and Frickey which leads to serious issues about the Court's role. I disagree with the statement that "[e]ach branch seeks

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[17] William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term – Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28-29 (1994).

[18] *See* Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 329 (2007); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008).

to promote its vision of the public interest."[19] Rather, in my view, each branch promotes its own private interests. Members of Congress and the President are often most concerned about reelection and about the economic, political, and social benefits of the influence they have by being in office and their prospects after they are out of office. It has been a bit more difficult to identify the private interests that judges pursue.[20] It is probably some combination of prestige within a peer group, power, leisure, satisfaction and post-service career opportunities, although in recent decades Supreme Court Justices have rarely pursued post-service careers.

Assuming that judges pursue private interests and are not simply neutral arbiters of the law leads to serious questions as to the legitimacy of the Supreme Court's methodology. Unlike Members of Congress and the President, the Court is not subject to the ultimate checks and balances of democratic control. One would think that this would lead a responsible court to take a minimalist attitude toward the judicial role—deferring to the other branches and interpreting statutes in accord with legislative intent rather than Members' own preferences. That clearly has not been the case with the Supreme Court of the United States. As more people seem to recognize the political nature of the Court's decisions, the Court has become ever more emboldened, going so far, for example, as to decide a contested presidential election on novel grounds.[21] Whatever one thinks of the Supreme Court's decisions, this is not a restrained court.[22]

Lawyers and judges engage in an elaborate game of charades when they dress up their political arguments in legal terms. The recognition that the Court is making political rather than legal decisions leads to the normative question of where its principles should come from. This, of course, is a question addressed at great length by legal theorists. While I will not engage that body of thought, I will offer a relatively simplistic answer from a separation of powers point of view. In my view, legal principles should, whenever possible, reflect the broadly held views of the society in which they operate. In the United States,

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[19] Eskridge & Frickey, supra note 17, at 28.

[20] Some analysts still naively assume that courts are faithful agents of the legislature, at least in statutory interpretation cases; so, for example, when a court chooses between deferential and non-deferential review of administrative statutory interpretation, it is choosing between Congress and the President. *See* Doug Geyser, *Courts Still "Say What the Law Is": Explaining the Functions of the Judiciary and Agencies After* Brand X, 106 COLUM. L. REV. 2129, 2135 (2006) (citing Richard L. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2231-32 (1997)). For more discussion of this, *see* Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183 (1991).

[21] *See* Bush v. Gore, 531 U.S. 98 (2000); Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227 (2001).

[22] See CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 15-16 (2005).

with a freely elected legislature drawn from a wide geographic base, the outputs of the legislative branch are much more likely to embody such views than judicial decisions, and the courts should defer to the legislature except in extraordinary circumstances. Courts should embrace, rather than resist, the output of the legislative branch.[23]

Historically, the United States Supreme Court has restricted, rather than embraced the output of the legislative branch. The Court has done this in a number of ways, including holding statutes unconstitutional and interpreting statutes narrowly and contrary to the spirit that motivated the legislation. The Court has also played a similar role vis à vis the states, forcing state law into the Court's preferred mold and resisting innovation by states, especially when the innovation threatens the preexisting distribution of power and wealth.

The aggressiveness of the Court has tended to play in one direction on the political spectrum. Congress has, by and large, been more liberal than the Court.[24] As discussed above, although there are many instances in which a Supreme Court decision interpreting a civil rights statute has provoked a reaction from Congress, in the vast majority of such cases, congressional reaction was to move the law in a more liberal direction than the Court.[25] This pattern illustrates a systematic, longstanding disagreement between the Court and Congress over civil rights policy.

That the Court and Congress seem to disagree often is not necessarily a cause for concern. The protection of life tenure[26] was intended, after all, to allow the Court to forge its own path free of political pressure.[27] Judicial action, however, should be supported by some reason for distrusting the output of the legislative branch. For all their faults, Members of Congress stand for reelection every two or six years, and this tends to make them more responsive to the will of the electorate than life tenured judges. No reason or theory was articulated for the Court's rejection of a great deal of the civil rights output of Congress. To the contrary, most of the time the Court does its best to make it appear that its decisions follow from the words or intent of Congress or of the words of the Constitution. At least in the civil rights area, life tenure seems to have made the Court resistant to the will of the people without any indication that there is some defect in the political process that ought to lead to aggressive judicial behavior.[28]

Defenders of the Court insist that the Court is fulfilling its assigned role and is not "activist" in any negative sense of the word. Defenders argue that when

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[23] *See* John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 49-51 (1978).

[24] *See, e.g., supra* note 11 and accompanying text.

[25] *Id*.

[26] U.S. CONST. art. III, § 1.

[27] *See* THE FEDERALIST NOS. 78, 79 (Alexander Hamilton) (tenure and protection of judicial salaries essential to ensure judicial independence).

[28] *See infra* note 45 and accompanying text.

a court enforces the requirements of the Constitution, the Court is not activist but rather is fulfilling its traditional role within a system that includes a written constitution.[29] Judicial failure to enforce constitutional provisions would be an act of defiance, because the Constitution itself declares that all judges are bound by its provisions.[30] The defense against charges of judicial activism comes from both the left and the right, depending on the issue before the Court.

Theoretically, under at least one definition of judicial activism,[31] it is true that if a court simply enforces clear law, whether it is a statute, a constitutional provision or even clearly applicable common law, the court should not be considered activist even if the court's decision rejects the judgment of another branch of government. This argument relies, in many instances, on assertions that the particular provision is so clear that failure to apply it would be an act of defiance. In many situations, however, the law is unclear, and the Court is making a choice between deferring to the judgments of other branches of government and creating new law to frustrate those choices.

A somewhat convoluted example of this reasoning can be found in a recent criticism of the Supreme Court's *Kelo* decision.[32] *Kelo* held that it does not violate the Takings Clause for a governmental unit to take private property by

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[29] *See generally* CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY (2007), which argues that the Supreme Court is acting properly when it enforces constitutional provisions. *See also* David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 657-58 (1982) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-78 (1803)).

[30] U.S. CONST. art. VI., cl. 2.

[31] There are many different definitions of judicial activism. The one in operation here defines as "activist" a court that aggressively pursues its agenda against other lawmaking organs, such as Congress, the Executive Branch and the states. An activist court makes law rather than applies preexisting law. This definition of activism arises out of the traditional understanding of the judicial role. The primary competing definition holds that an activist court strives to bring more controversies within its jurisdiction, while a restrained court employs jurisdictional bars and doctrines of deference to allow the other branches of government to make more decisions. *See* RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985). Both definitions arise out of a preference for democratic resolution of social issues. However, the latter definition's preference for democracy results in tension over the attitude a court should take toward the jurisdictional determinations and arguments of the other branches. If, for example, the best reading of a statute is that the legislature has granted the courts jurisdiction over a class of cases, judicial restraint on this definition might counsel the courts to strain to find an interpretation that would deny jurisdiction. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984). A tempered version of this second definition combines with the first to say that a court should apply its best judgment on what the constitutional or statutory provision requires, but in cases of true doubt, the court should defer to the judgments of other branches. A court should not adopt an attitude of defiance when it disagrees with the policy judgments of other branches.

[32] Kelo v. City of New London, 545 U.S. 469 (2005).

eminent domain in order to convey that property to another private party for economic development purposes.[33] The ruling left the decision of whether to allow takings for economic development to state and local governments. This has been a controversial issue both before and after *Kelo*, with regard both to the public use requirement for takings and for the public purpose requirement for other state and local economic development programs such as revenue bonding. In a review of Kermit Roosevelt's recent book (which defends *Kelo* as proper deference to legislative judgments), Timothy Sandefur argues that the Court was wrong for deferring to the legislative judgment because "the Constitution does not allow legislators to approve whatever law has benefits that exceed costs, let alone to 'do good.' Rather, it declares that while the government may do many things, there are some things it may not do—such as taking property for private use."[34] In support of this proposition, Sandefur cites to the Fifth Amendment to the Constitution.[35] Apparently, with reasoning reminiscent of Bobby Kennedy's admonition to California authorities that they should read the Constitution before they arrest peaceful protesters,[36] Sandefur believes that the Takings Clause is so clear that had the Court simply remembered to read it, they would have arrived at the correct answer.[37]

There are several related reasons for viewing the *Kelo* decision as restrained rather than activist. First, *Kelo* left the decision over whether to allow takings in these situations to the more democratic and accountable government entities.[38] Second, it acknowledged that there was no clear constitutional ban on the takings at issue, and thus declined to upset the judgments of the other branches in the absence of clear law.[39] Finally, the Court opted not to create new constitutional law which would have upset decades of settled understandings and invalidated a widespread established practice.[40] When faced with significant uncertainty regarding whether a legislative judgment runs counter to the Constitution, a court's instinct should be deferential. Admittedly, a deferential attitude does not answer any constitutional questions, but it is a better starting place than a transparently false assertion of certainty about the meaning

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[33] *Id.* at 484, 490.

[34] Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay on Kermit Roosevelt's* The Myth of Judicial Activism, 23 J.L. & POL. 1, 27 (2007) (reviewing KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 136-37 (2006)).

[35] *Id.* at 27 n.140 (citing U.S. CONST. amend. V).

[36] Commonwealth v. Abramms, 849 N.E.2d 867, 886 n.11 (Mass. App. Ct. 2006) (quoting *Amending Migratory Labor Laws: Hearing on S. 1864, S. 1866, S. 1867, and S. 1868 Before the Subcomm. on Migratory Labor of the S. Comm. on Labor and Pub. Welfare*, 89th Cong. 629-30 (1966) (statement of Sen. Robert F. Kennedy)).

[37] Sandefur, *supra* note 34. R

[38] *Kelo*, 545 U.S. at 489-90

[39] *Id.*

[40] *Id.*

of the Constitution that just happens to lean in the same direction as views of the author or judge.

In fact, a recurring criticism of Supreme Court imposition of constitutional norms of doubtful provenance is that the matter should be left to the political branches, mainly the legislature.[41] This comes up, for example, in federalism arguments regarding state versus federal powers. When dealing with economic regulation of states, such as minimum wage and overtime rules, the Court deferred explicitly to the political process on the theory that the states are perfectly able to protect themselves in Congress.[42] This is sensible in light of the fact that Congress is composed entirely of representatives drawn from the states, either as a whole (Senators) or from districts that do not cross state lines (Representatives).

In other federalism areas, however, the Court is much more assertive in protecting states and has rejected arguments that the political process is sufficiently protective of state interests. There are two separate sets of decisions here. The first created the anti-commandeering doctrine, which holds that Congress lacks the power to require state officials to administer federal law against third parties.[43] The second narrowly construed Congress's power to legislate against effects on interstate commerce when federal regulation might intrude on the traditional state "police power."[44] In both of these areas, the Supreme Court has acted aggressively to rein in Congress's attempts to reshape the legal landscape.[45]

I do not intend to enter definitively the larger debate over whether judicial review for constitutionality is appropriate either as a matter of our constitutional system of separation of powers, or democratic theory wholly apart from our particular Constitution. I accept the premise that the Supremacy Clause anticipates judicial review of congressional and executive action, at the very least so that judges can obey the command that they are bound by the Constitution, other law notwithstanding.[46] On a more theoretical level, talk of the counter-majoritarian difficulty and questions concerning the need for and legitimacy of judicial review in a democratic society persist.

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[41] This issue is commonly referred to as the "counter-majoritarian difficulty," a phrase that was apparently first used in Alexander Bickel's book THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

[42] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551-52 (1985).

[43] Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 178 (1992).

[44] United States v. Morrison, 529 U.S. 598, 617-18 (2000); United States v. Lopez, 514 U.S. 549, 567 (1995).

[45] *See* SUNSTEIN, *supra* note 22, at 15-16.

[46] U.S. CONST. art. VI, cl. 2. I do not mean to say that the language of the Supremacy Clause clearly mandates judicial review, only that it strongly implies that the Constitution is the supreme law of the land and should be applied in cases in which its terms appear to conflict with other law.

For example, Richard Fallon's recent article responding to Jeremy Waldron's attack on judicial review reveals the modesty of the argument in favor of judicial review.[47] Waldron argued that in a society with well-functioning democratic institutions (including legislators that take seriously questions about rights), a well-functioning judicial system, a commitment to protecting individual rights and reasonable disagreement about the content of those rights, judicial review is unnecessary and undesirable because there is no reason to believe that courts will do a better job of answering questions about rights correctly than will the legislature.[48] Fallon answers by arguing that Waldron has not made a case against redundancy, i.e., he has not made a case against allowing both the legislature and the courts to resolve rights questions. Permitting redundancy may ensure that courts might correct legislative failure to recognize rights and would only be expanding rights beyond the range recognized by the legislature.[49]

Fallon recognizes limitations on his argument which may actually be the exceptions that swallow the rule. First, Fallon admits that his "core case extends only to the kinds of fundamental rights characteristically protected in [the] bills of rights and does not necessarily apply directly to 'ordinary' liberty rights to freedom from governmental regulation."[50] The distinction between "Bill of Rights" rights and ordinary liberty rights is controversial. There are some who view ordinary liberty as the most fundamental interest protected by the Constitution, much more important than some aspects of the Bill of Rights, such as requirements for the interrogation of criminal suspects or the composition of the civil or criminal jury.[51]

Fallon's second limitation is that his "argument for judicial review does not encompass cases in which the legislature enacts its interpretation of fundamental rights into law and the resulting legislation does not threaten the fundamental rights of others."[52] This exception encompasses recent cases, discussed below,[53] in which the Supreme Court has limited Congress's power to define civil

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[47] Richard Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008) (discussing Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006)).

[48] *Id.* at 1701 (discussing Waldron, *supra* note 47, at 1361-69). R

[49] *Id*.

[50] *Id.* at 1728. I cannot imagine that this distinction between "ordinary liberty rights" and "Bill of Rights rights" can hold up to scrutiny. For example, the right to abortion is not mentioned in our Bill of Rights, and in this sense has the same status as the freedom of contract and property rights that were protected in the *Lochner* era.

[51] *See*, *e.g.*, BOLICK, *supra* note 29 (building a case for judicial review based on the need to combat oppressive and protectionist economic regulation).

[52] Fallon, *supra* note 47, at 1729.

[53] *See infra* notes 177-202 and accompanying text. The problem with this second limitation is that it depends on the same hierarchy of rights as the first limitation. In most cases in which Congress expands the rights of one group, it limits the liberty of others to ignore those

rights under the Enforcement Clause of the Fourteenth Amendment. Fallon is correct that judicial review of Congress's power to define rights is undesirable, and there is no reason for judicial review in such cases under his theory, which depends on redundancy in protecting fundamental rights.[54]

My skepticism concerning judicial review is built on a more practical and less theoretical basis, but it ultimately results in the same conclusion as Fallon's second limitation. In a well-functioning democracy, there is no good reason for judicial review of legislative decisions to increase the rights of the relatively less powerful when the legislative action alters the status quo, and decreases the liberty of the relatively more powerful interests in society. Historically, judicial review has gone largely in the opposite direction, favoring the interests of the powerful and limiting Congress's ability to protect the interests of those in society with relatively less power. I do not view the legislature's decisions as more "correct" than what the courts have done in this area. Rather, I find the statutes generally more desirable, and I don't see any special reason to be distrustful of Congress's actions in this area as compared with other areas in which Congress's actions are subject to much more deferential judicial review.

B. *The Court's Four Historical Periods*

As mentioned above, the Supreme Court's behavior can be divided into four periods: the Reconstruction period, the *Lochner* era, the Civil Rights Movement era and the current period. The dominant tendency in each period, except for the Civil Rights Movement era, was for the Court to resist major change. Even during the Civil Rights era, the Court put into place some doctrines that severely limited the scope of many civil rights statutes.[55] During the current period, the Court has returned to its most resistant stance and may be more aggressive than ever in denying Congress the power to create and protect civil

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rights. If Congress, for example, requires states to refrain from age discrimination, it limits the ordinary liberty of state actors (and the entire state polity) to discriminate based on age, but without trammeling upon any "Bill of Rights rights" as understood by Fallon.

[54] There are some who would take issue with the notion that the federalism principles underlying the Supreme Court's decisions limiting Congress's power to enforce the Fourteenth Amendment are less fundamental than what Fallon considers rights belonging to the Bill of Rights. In fact, they might point out that, properly understood, the Tenth Amendment is implicated and should be considered on par with other provisions of the Bill of Rights. *See generally* Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763 (2006). Fallon also recognizes a third limitation on his case for judicial review—that judicial review may be undesirable in matters involving a clash of fundamental rights, for example when free exercise and establishment claims butt up against one another. Fallon, *supra* note 47, at 1730. This limitation obviously also depends on being able to distinguish between fundamental rights and the ordinary liberty interest in being free from government regulation.

[55] *See infra* notes 131-47 and accompanying text.

rights.[56] The Court has increased its domain to such a large extent that it may be on the brink of becoming the Supreme Common Law Court of the United States.

1. The Reconstruction Era

Immediately after the Civil War, Congress for the first time ventured into the civil rights field, passing legislation and constitutional amendments designed to grant legal rights to the newly freed slaves and prevent states from denying them these rights. Congress passed civil rights statutes in 1866, 1870, 1871 and 1875.[57] Congress also passed, and sent to the states for ratification, the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.[58] When cases involving the amendments and the statutes came to the Court, it is fair to say that the Court's reaction was hostile, effectively frustrating Congress in its attempt to legislate a more just society.[59]

One important commonality among the Reconstruction-era constitutional amendments is that, in addition to their substantive provisions, they grant Congress the power to enforce them. Although the language varies slightly among them, the final provisions of the Thirteenth, Fourteenth and Fifteenth Amendments grant Congress the power to enforce each amendment "by appropriate legislation."[60] This power was vital to the potential success of the amendments. For example, while the Thirteenth Amendment ended slavery and involuntary servitude except as punishment for crime, the Amendment specified no penalty or other method for ensuring that slavery could no longer be maintained. Without the enforcement provision, it may have been unclear whether Congress had the power to bring federal legislation to bear on the problem of slavery.

The Court's attitude toward the civil rights statutes (passed in the wake of the Civil War) is revealed in decisions concerning two key provisions: the Civil Rights Act of 1875,[61] which prohibited race discrimination in hotels, restaurants and places of public entertainment, and the criminal provision of section 2 of the Civil Rights Act of 1871,[62] which made Ku Klux Klan violence a federal crime. In both cases, the Supreme Court ruled that Congress lacked the power

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[56] *See infra* Part I.B.4.

[57] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866); Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870); Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

[58] U.S. CONST. amend. XIII-XV.

[59] *See* Beermann, *supra* note 12. R

[60] U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

[61] Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *declared unconstitutional in* The Civil Rights Cases, 109 U.S. 3, 25 (1883).

[62] Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13, *declared unconstitutional in* United States v. Harris, 106 U.S. 629, 644 (1883).

to enact the statutes.[63]

Many of the statutory provisions passed by Congress after the Civil War were aimed at creating social and legal equality for the freed slaves and for all blacks and other racial minorities. The Supreme Court decided, in the infamous *Dred Scott* case, that even free blacks were not citizens of the United States.[64] The first sentence of the Fourteenth Amendment overrode this aspect of *Dred Scott*: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[65] To enforce this new principle of equality, various provisions of the Civil Rights Acts of 1866, 1870 and 1871 provided for equal rights regarding property, contract and legal processes.[66] Congress was clearly legislating a social revolution.

In 1874, Senator Charles Sumner of Massachusetts introduced a bill in Congress to outlaw race discrimination in hotels, restaurants, transportation and places of public entertainment—businesses that the law refers to as "places of public accommodation."[67] This law, the Civil Rights Act of 1875, which was finally passed after Sumner's death in 1875, was characterized as enforcing the Thirteenth Amendment's ban on slavery and the Fourteenth Amendment's Privileges and Immunities, and Equal Protection clauses.[68] In 1883, cases involving alleged violations of the Act reached the Supreme Court, and the Court held that neither Amendment provided Congress with the power to outlaw private discrimination.[69]

With regard to the Thirteenth Amendment, the Court stated that although Congress has the power to define and ban all the "badges and incidents" of slavery, the connection between private discrimination in places of public accommodation and slavery was too remote to provide a basis for the Act.[70] With regard to the Fourteenth Amendment, the Court held that this Amendment only addressed action by state governments, and that Congress thus could not en-

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[63] The Civil Rights Cases, 109 U.S. at 35; *Harris*, 106 U.S. at 644.

[64] Dred Scott v. Sandford, 60 U.S. 393, 427 (1856).

[65] U.S. CONST. amend. XIV, § 1.

[66] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; Act of May 31, 1870, ch. 114, 16 Stat. 140; Civil Rights Act of 1871, ch. 22, 17 Stat. 13. Although the 1866 Act was passed before the Fourteenth Amendment was adopted, it was reenacted because of doubts over Congress's power, and it was designed to enforce many of the same rights recognized in the Fourteenth Amendment. *See* Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144.

[67] *See* Goodwin Liu, *The First Justice Harlan*, 96 CAL. L. REV. 1383, 1389 (2008) (discussing application of Civil Rights Act of 1875 to public accommodations).

[68] Civil Rights Act of 1875, ch. 114, 18 Stat. 335; The Civil Rights Cases, 109 U.S. 3 (1883).

[69] The Civil Rights Cases, 109 U.S. at 12-14, 25 (1883); United States v. Harris, 106 U.S. 629, 640-41 (1883).

[70] The Civil Rights Cases, 109 U.S. at 21-22.

force the Fourteenth Amendment by outlawing private discrimination.[71] The Court also noted that no one could claim that any provision of the pre-Amendment Constitution (such as the power to regulate interstate commerce) could support the law.[72] Thus, despite Congress's best efforts, the Supreme Court authorized privately enforced segregation. In combination with the infamous doctrine of "separate but equal,"[73] the Court doomed generations of blacks to segregation and other discriminatory laws that became known as *Jim Crow*.[74]

Another problem faced by blacks and their supporters (mainly Republicans) after the Civil War was racially motivated violence, led by private racist groups such as the Ku Klux Klan, aided and abetted by white government officials (mainly Democrats) throughout the South.[75] Congress attempted to deal with this through section 2 of the Civil Rights Act of 1871, which, among many other things, made it a crime to "go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws."[76] The reference to "disguise" apparently refers to the costumes worn by Klan members.

In 1883, relying on its decision in the Civil Rights Cases, the Court held this provision unconstitutional because it was aimed at the conduct of private parties, not the state.[77] The federal government, according to the Supreme Court, was powerless to act against private racial violence even though everyone knew that, at best, local government officials were turning a blind eye to the violence and, at worst, they were participating in it (albeit in their Klan disguises rather than their everyday clothes).[78]

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[71] *Id.* at 11.

[72] *Id.* at 18-19.

[73] *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

[74] The Court also prevented states from acting in some cases. For example, in *Hall v. DeCuir*, 95 U.S. 485 (1877), the Court struck down, as intruding on Congress's Commerce Power, a Louisiana statute that prohibited segregation in transportation. This decision and related developments are discussed in Gabriel Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008). This article is a fascinating look at the law and politics of the Reconstruction Era, when blacks were a majority in some of the Southern states and had a working majority together with Republicans in others. The article examines how the white minority seized power and prevented the black majority from enacting laws that would have benefited them, and how this paved the way for Jim Crow and other aspects of the race problem in the United States.

[75] Chin & Wagner, *supra* note 74, at 87-90, 97.

[76] Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13. This section contained several additional provisions including some aimed at insurrection against the United States and against activity designed to prevent people from advocating for political candidates. *Id.* at 13-14.

[77] United States v. Harris, 106 U.S. 629, 640 (1883).

[78] Chin & Wagner, *supra* note 74, at 97.

These two decisions epitomize the Supreme Court's attitude toward Congress's efforts to address the race issue in the nineteenth century. Neither decision was dictated by clear constitutional language or intent. Rather, the Court created the state action doctrine as part of its strategy for limiting Congress's power to enact civil rights laws,[79] just like the Court's conclusion that private discrimination was not sufficiently related to slavery to justify federal intervention under the Thirteenth Amendment. The Court's determination that the federal government could not act against private discrimination prevailed until Congress enacted Title II of the Civil Rights Act of 1964 as a new public accommodations law, which was upheld by the Court as a proper exercise of the power to regulate interstate commerce.[80]

In addition to the state action doctrine and the Court's confined view of the scope of the Thirteenth Amendment, the Court's narrow construction of Congress's enforcement powers under the Reconstruction-era amendments played an important role in the defeat of Congress's efforts to legislate social and legal equality for newly freed slaves. Even if most[81] of the substantive provisions of the Reconstruction-era constitutional amendments are directed at state action, it does not follow that Congress lacks the power to use private criminal and civil remedies as a method of ensuring that blacks are able to enjoy the rights granted by the amendments. The Court, however, took it as a given that if the conduct attacked does not itself violate the Constitution, then Congress lacks power to legislate against it under its enforcement powers.[82] The Court thus adopted perhaps the narrowest plausible reading of the enforcement powers granted in the Reconstruction-era amendments.

By the time the Court rendered its decisions in 1883, the civil rights moment in Congress had passed, and the Court's action effectively destroyed the pro-civil rights program Congress had enacted. The Court's 1896 near-unanimous decision in *Plessy v. Ferguson*,[83] interpreting the Equal Protection Clause of the Fourteenth Amendment to allow "separate but equal" facilities for blacks and whites,[84] was the final nail in the coffin for potential equality for African-Americans, including the freed slaves and their descendants. As we now know, subsequent to *Plessy*, the authorities enforced the "separate" aspect of this rule,

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[79] *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883); *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 507-08 (3d ed. 2006).

[80] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a-h), *upheld in* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964).

[81] Not all—the Thirteenth Amendment does not refer to state action, and neither does the opening sentence of the Fourteenth Amendment, declaring national and state citizenship for "all persons born or naturalized" in the United States. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV § 1.

[82] The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[83] Plessy v. Ferguson, 163 U.S. 537 (1896).

[84] *Id.* at 552 (Harlan, J. dissenting).

but were somewhat lax in their obedience to the requirement that facilities be "equal."[85] These decisions should not be viewed as resolving abstract arguments over legal principles. Rather, they had profound effects on the lives of millions of Americans in countless large and small ways that still haunt us today. For example, a candidate for President of the United States, in response to a question of whether he is authentically black, can advert to his experience in trying to hail a taxicab in New York City.[86] Our society lost nearly one hundred years of potential progress on the race issue when the Supreme Court chose to interpret the Constitution to preclude Congress from effectively dealing with it.

2. The *Lochner* Era

From a constitutional history perspective, the period that includes the late nineteenth century and the early twentieth century is referred to as the "*Lochner* era," after the Supreme Court decision in *Lochner* held invalid a New York law that prescribed maximum hours for bakers.[87] During this period, the race issue was effectively submerged, and the new issue was economic reform, especially relating to the interests of labor and capital. The Supreme Court constructed a doctrine of freedom of contract that limited the other branches' ability to regulate, by holding, for example, that interference in the freely contracted terms and conditions of employment violated the right to freedom of contract.[88] The Court grounded this doctrine primarily in the Due Process Clauses of the Fifth and Fourteenth Amendments, effectively creating what has become known as "substantive due process," the legal oxymoron that holds that some government action is prohibited by due process regardless of the procedures employed. As Erwin Chemerinsky has stated, "a vast array of legislation to protect workers, consumers, and even businesses was invalidated by the Supreme Court in the first third of [the twentieth] century under the doctrine of substantive due process."[89]

During this period, the Supreme Court was doing exactly what the framers of the Constitution hoped and expected the Court would do, and it was doing it with stunning creativity, constructing a jurisprudence of freedom of contract out of a pair of constitutional provisions that facially address nothing beyond procedure. The Court protected established interests against the potentially

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[85] *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 43-48 (2004).

[86] *YouTube Democratic Presidential Debate* (CNN television broadcast July 24, 2007) (statement of Barack Obama) (Transcript of debate at 6, Fourth Democratic Debate, http://www.nytimes.com/2007/07/24/us/politics/24transcript.html?pagewanted=5 (last visited May 29, 2008)).

[87] Lochner v. New York, 198 U.S. 45, 46, 64 (1905).

[88] *See* CHEMERINSKY, *supra* note 79, at 614-16.

[89] *Id.* at 620. For more detail on the *Lochner* era, its precursors, and its end, *see id.* at 608-29.

negative effects of democratically adopted reforms, where numerous voters could overrun the interests of the privileged few.[90] In addition the Court prevented federal and state governments from taking actions that would tend toward equalizing unequal power relationships, such as between worker and employer and consumer and seller.[91] Whether these government actions were misguided or necessary or even reflected social reality is beside the point. The Court rejected the judgments of state and federal legislatures, not because those bodies had violated a preexisting constitutional norm, but rather because the Court disagreed with those legislative bodies and therefore constructed a constitutional jurisprudence to advance the Court's preferences over those of the federal and state legislatures.

Although the *Lochner* era ended when new Court appointees moved constitutional law in a different direction, its effects are still with us. For one, all legislation is still subject to substantive review under the Due Process Clause, albeit mostly on a more lenient rational basis standard.[92] In some areas, however, such as reproductive rights, the review is much more stringent, based not on any facially applicable constitutional provision but rather on the Court's judgment that certain rights are so important that they should receive more protection.[93]

Another instance of strong intervention by the Supreme Court has been in the area of punitive damages. The recently created jurisprudence limiting awards of punitive damages, which is discussed in more detail below, holds that awards the Court views as excessive violate due process.[94] Although the Court made a feeble attempt to link this jurisprudence to the textually supportable procedural aspects of due process, the doctrine has become clearly substantive.[95] Thus, the same clause of the Constitution of the United States that protects abortion rights also regulates the size of punitive damages awards.

3. The Civil Rights Era: Activism in a Different Direction

The next period to examine is the Civil Rights era, running roughly from the mid-1950s through the late 1970s.[96] During this period, the Court appeared to

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[90] *Id.* at 620 (discussing democracy-based objections to *Lochner*).

[91] *Id.* ("unequal bargaining power made real freedom of contract illusory").

[92] *Id.* at 625-29.

[93] *See generally*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 792-919 (3d ed. 2006) (discussing fundamental rights, infringements of which are subject to heightened scrutiny).

[94] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996).

[95] *Id.* at 547-85 (discussing limits on punitive damages in terms of fair notice of magnitude of possible penalty).

[96] Some people date the Civil Rights era as running from the 1950s through the 1960s. *See* JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965 (1987). In my view, however, the courts were still generally more receptive to civil rights claims through the 1970s than they had been in any other period. After the election of

lead a revolutionary expansion of individual rights and protections against discrimination and oppression.[97] This was an aberrant period for the Court because it was protecting the rights of the weaker in society; the Court was still, however, actively pursuing its own political agenda rather than deferring to the other branches and government entities.

Although there had been some foreshadowing in decisions involving segregated higher education, the iconic start to the Civil Rights era was the Court's decision in *Brown v. Board of Education* rejecting "separate but equal" in public schools.[98] At about the same time, the Court began to expand the procedural rights of criminal defendants,[99] and later the Court entered into a substantial project of creating and elaborating individual rights across a wide spectrum.[100]

The Supreme Court during this period was strongly committed to ending racial segregation. In fact, some important criminal procedure decisions, and even a landmark free speech decision involving the law of defamation,[101] had racial overtones that might help explain the Court's aggressive action. In the criminal procedure area, for example, the Court's decision that the sufficiency of the evidence underlying a conviction could be challenged in federal court on a petition for a writ of habeas corpus may have been related to the fact that the criminal process was being used during the civil rights movement as a tool of racial oppression.[102] Similarly, the Court's first decision constitutionalizing the law of defamation was in a case involving race.[103] Just as criminal prosecutions were a powerful tool to prevent peaceful protest, civil defamation actions could be used as a tool to prevent civil rights advocates from spreading their

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Ronald Reagan, with his appointment of conservative judges in the 1980s, things began to change.

[97] The developments in this period are too numerous and wide-ranging to attempt to name. I will mention just two of the most noteworthy decisions—first, the criminal procedure right to state-provided counsel for criminal defendants who cannot afford to hire an attorney, Gideon v. Wainwright, 372 U.S. 335 (1963), and second, the decision that created the right for married people to use contraception (and recognized a constitutional right to privacy), Griswold v. Connecticut, 381 U.S. 479 (1965).

[98] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[99] *See, e.g.*, *Gideon*, 372 U.S. 335.

[100] *See, e.g.*, *Griswold*, 381 U.S. 479.

[101] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[102] Jackson v. Virginia, 443 U.S. 307 (1979); Thompson v. City of Louisville, 362 U.S. 199 (1960). *Thompson* held that a conviction should be upheld on federal habeas corpus review unless the record is wholly devoid of evidence to support the conviction. 362 U.S. at 204. In *Jackson*, the Court made this review less deferential to the state court, holding that the federal habeas court should determine whether there was enough evidence to support the conviction "beyond a reasonable doubt." 443 U.S. at 324. *See also* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (attributing early twentieth century developments in criminal procedure to flagrant racist abuses of state criminal justice systems).

[103] *See infra* notes 150-154 and accompanying text.

message.[104]

Another exceedingly important element of the Court's jurisprudence during the Civil Rights Period is the standard it used to determine whether Congress had the power to enact civil rights laws under the Reconstruction-era amendments. Recall that in the 1880s, the Court appeared to require an actual violation of an amendment before Congress could act.[105] In the 1960s, the Court took an entirely different approach, equating the Reconstruction era enforcement powers to Congress's power to make laws "necessary and proper" to carrying out the powers of the federal government under the Sweeping Clause of article I, section 8 of the Constitution.[106] This is a very deferential standard, basically trusting Congress's judgment that legislation advances the goals of the amendments.

Under this standard, the Court upheld legislation prohibiting the use of literacy tests for certain Puerto Rican voters after the Supreme Court held that literacy tests for voting are not generally unconstitutional.[107] Congress purported to act under its power to enforce the Equal Protection Clause of the Fourteenth Amendment. The Court stated the test for whether legislation is a valid exercise of the enforcement power:

> By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18. The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579:
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> "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."
>
> We therefore proceed to the consideration whether § 4(e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch v. Maryland* standard, whether § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."[108]

This standard paved the way for extremely generous constructions of Reconstruction era statutes, part of a general revival of many of the provisions of the Civil Rights Acts of 1866, 1870 and 1871. For example, in 1968, the Supreme Court interpreted a provision of the Civil Rights Act of 1866 to prohibit private

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[104] *See, e.g.*, *N.Y. Times Co.*, 376 U.S. 254.

[105] *See supra* notes 39,47 and accompanying text

[106] U.S. CONST. art. I, § 8, cl. 18; *see* Katzenbach v. Morgan, 384 U.S. 641 (1966).

[107] *Morgan*, 384 U.S. at 648, 657.

[108] *Id.* at 650-51 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819)).

discrimination in the sale and rental of real estate.[109] In addition to the fact that this interpretation is contrary to the most natural reading of the language of the statute,[110] the interpretation raised serious constitutional questions under the *Civil Rights Cases*.[111] The state action requirement meant that the Fourteenth Amendment could not be the basis of the legislation aimed at private discrimination.[112] Although the Thirteenth Amendment reaches private conduct,[113] the *Civil Rights Cases* stand for a narrow reading of what constitutes a "badge or incident of slavery," having specifically rejected Congress's determination that private discrimination in entertainment, transportation, meals and lodging constituted a badge or incident of slavery.[114]

In 1968, however, the Court applied its highly deferential "necessary and proper" standard and upheld the statute as having a rational basis: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one."[115] The Court actually cited the *Civil Rights Cases* in support of its conclusion that Congress's determination that private discrimination was a badge or incident of slavery was rational.[116] Glossing over the fundamental distinction between discrimination as a matter of law and discrimination as a matter of private conduct, the Court equated the "right" to purchase property with the "ability" to do so:

> [T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their

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[109] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

[110] The use of the word "right" in section 1982 most likely implies equal legal rights that apply against the state, i.e., that the "right" to own property is protected only against restrictions on the legal right to own property.

[111] *The Civil Rights Cases*, 109 U.S. 3 (1883).

[112] *Id.*

[113] *Id.* at 23 ("Under the thirteenth amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not . . . ."). *See also* George Rutherglen, *State Action, Private Action and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1388 (2008).

[114] *The Civil Rights Cases*, 109 U.S. at 21.

[115] *Alfred H. Mayer Co*., 392 U.S. at 440-41.

[116] *See id.* at 439 (citing The Civil Rights Cases, 109 U.S. at 20).

> ability to buy property turn on the color of their skin, then it too is a relic of slavery.[117]

This liberal interpretation was followed when the Court interpreted (and upheld) a similarly-worded provision creating equal rights to make and enforce contracts to reach private discrimination.[118]

The Court's deferential attitude toward Congress spilled over into an extremely hands-off attitude regarding Congress's power under the Commerce Clause[119] and Spending Clause.[120] Some of this had to do with civil rights, although *Wickard v. Filburn*,[121] the case that is arguably the most deferential to Congress's commerce power, predates the civil rights era by more than ten years. Recognizing that the *Civil Rights Cases* stood against the constitutionality of a public accommodations law based on either the Thirteenth or Fourteenth Amendment, when Congress passed a new public accommodations law in 1964,[122] it relied on its power to regulate interstate commerce. The Supreme Court upheld the application of this law,[123] even to a restaurant engaged in only a very small amount of interstate commerce.[124] In addition to rejecting arguments based on the minimal connection some establishments had to interstate commerce, the Court also rejected the argument that the commerce power does not support legislation motivated by moral concerns over segregation.[125] The Court held that the motivation behind legislation is irrelevant as long as there is a sufficient effect on interstate commerce to satisfy the *Wickard* standard.[126]

Further, during this period, the Court interpreted section 1 of the Civil Rights Act of 1871 to provide a private action for damages and injunctive relief against state officials alleged to have violated federal constitutional rights, even when the defendants also violated state law and might be subject to state liability.[127] This provision, currently codified at 42 U.S.C. § 1983, provides an action against officials acting "under color of" state law.[128] The defendants in *Monroe v. Pape* argued that they were not acting under color of state law because in fact their actions violated state law including the state constitution, and a remedy under state law might be available.[129] The Court rejected this argu-

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[117] *Id.* at 441-43 (citation omitted) (footnote omitted).

[118] Runyon v. McCrary, 427 U.S. 160 (1976).

[119] U.S. CONST. art. 1, § 8, cl. 3.

[120] U.S. CONST. art. I, § 8, cl. 1.

[121] Wickard v. Filburn, 317 U.S. 111 (1942).

[122] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a-h).

[123] Heart of Atlanta Motel. Inc. v. United States, 379 U.S. 241 (1964).

[124] Katzenbach v. McClung, 379 U.S. 294, 300-01 (1964).

[125] *Heart of Atlanta Motel*, 379 U.S. at 257.

[126] *Id.*

[127] Monroe v. Pape, 365 U.S. 167, 171 (1961).

[128] *Id.* at 172 (quoting 42 U.S.C. § 1983 (2000)).

[129] *Id.* at 172.

ment and held that officials in pursuit of their official duties act under color of state law even when they violate that law.[130] This decision, which revived what had been a moribund statute, brought a great deal of official misconduct within the purview of the federal courts.

Although the Court was much more deferential toward Congress's judgments about civil rights enforcement during this period, and appeared willing to move forward on civil rights fronts on its own, the Court did not completely suppress its more conservative urges during this period. There are still examples of the Court reading statutes very narrowly, and the Court was relatively hesitant in ordering effective remedies even in the area of school desegregation.

The most important narrow construction of a civil rights statute involves section 1983,[131] the statute construed broadly in *Monroe v. Pape* to reach misconduct illegal under both federal and state law. Several years after *Monroe*, the Court held that common law immunities limit the remedies available under this statute.[132] Applying the immunities appears inconsistent with the statutory language which provides that "*[e]very person*" who violates federal rights acting under color of law "*shall be liable*" to the party injured for damages and injunctive relief.[133] According to the Court, the statute means that legislators, judges and prosecutors are never liable for damages,[134] that legislators cannot even be sued for injunctive relief, and that, with regard to all other government officials, "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."[135] The Court justified applying the immunities on the ground that the immunities were a well-established element of the common law and that Congress is presumed to have intended to preserve them unless it explicitly stated otherwise (apparently using the words "every person . . . shall be liable" is not explicit).[136] In practical terms, this means that the majority of potential defendants in federal civil rights actions cannot be held liable.

Another pair of statutory interpretation decisions illustrates the Court's reticence even during the civil rights era. Recall that in 1883, a criminal statute aimed at the Ku Klux Klan was struck down by the Supreme Court because it reached private conduct.[137] The civil counterpart to this statute had been virtually dormant (probably because it was assumed to be unconstitutional) until the late 1940s, when some cases were brought under the statute against private

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[130] *Id.* at 183-85.

[131] 42 U.S.C. § 1983 (2000).

[132] Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

[133] 42 U.S.C. § 1983 (emphasis added).

[134] Sup. Ct. of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 731-32, 734-36 (1980).

[135] Davis v. Scherer, 468 U.S. 183, 197 (1984).

[136] *Pierson*, 386 U.S. at 553-54.

[137] United States v. Harris, 106 U.S. 629, 637 (1883).

parties who violently disrupted political gatherings.[138] In 1951, the Court held that the civil counterpart was constitutional because Congress intended the statute to reach only state action, not private conduct.[139] This decision relied on the incredible conclusion that when Congress referred to persons going "in disguise on the highway or on the premises of another" it was referring to government officials, who Congress must have believed were in the habit of disguising themselves while carrying out their official functions.[140]

Twenty years later the Court recognized that this conclusion was erroneous (absurd might be the better characterization), but it still virtually confined the reach of the statute to state action by holding that private persons were only liable if they violated a constitutional provision that applies to private conduct, such as the right to travel or the right to be free from involuntary servitude.[141] The narrow reach of this statute means that it cannot be used to combat organized violence directed at people attempting to exercise their federal rights because in the vast majority of possible cases, private persons or groups cannot violate the federal Constitution.[142]

Perhaps the greatest disappointment of the Civil Rights era was the failure of the Court to ensure an effective remedy for racial segregation in public schools. This failure is linked to a combination of factors. First, long before *Brown*, the Supreme Court created a constitutional right (substantive due process) for parents to send their children to private school.[143] After *Brown*, many white parents took advantage of this right and sent their children to segregated private schools.[144] Second, many white families left cities with large minority populations and sent their children to suburban schools that were all white or nearly all white.[145] The Court contributed to the success of this strategy for avoiding the effects of *Brown* by ruling that desegregation remedies could not include suburban school districts that had never discriminated on the basis of race.[146] These and other factors have resulted in schools that are as segregated today as

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[138] *See* Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 214 n.61 (1993) (citing cases).

[139] Collins v. Hardyman, 341 U.S. 651, 658, 661-62 (1951).

[140] *Id.* at 652.

[141] *See* Griffin v. Breckenridge, 403 U.S. 88, 105 (1971); Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 202, 219-27 (1993).

[142] *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277-78 (1993) (right to abortion is right only against the state, so private groups such as Operation Rescue do not violate 42 U.S.C. § 1985(3) (2000) when they violently prevent women from having abortions).

[143] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

[144] *See* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 793 (2007).

[145] DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 109 (2004)

[146] Milliken v. Bradley, 418 U.S. 717, 744-45 (1974).

they were immediately before *Brown*.[147]

Thus, while there were some instances of heightened deference, in many areas the Court's behavior during the Civil Rights era was similar to its behavior in the past; the Court charted its own course and did not defer to the other branches. In areas such as criminal procedure, abortion rights, gender equality and free speech rights the Court worked against legislative and executive preferences. The major difference between the eras is that in some areas the Court acted in what would generally be regarded as a more liberal direction than the other branches, while in the past the Court generally acted more conservative than the other branches.

Interestingly, the Court made significant changes in the area of commercial speech. During the Civil Rights era, the Court strongly protected freedom of speech in cases involving both direct regulation and common law claims that threatened speech.[148] Political speech was protected from all sorts of regulation, including restrictions on campaign-related speech,[149] and association[150] and assembly.[151] This did not necessarily mean, however, that commercial speech would be protected to any significant degree.

Commercial speech is traditionally subject to a great deal of regulation under the state's police powers, ostensibly to protect consumers.[152] In many areas, such as the regulation of professions including law and medicine, regulation of commercial speech is an important part of a much larger overall scheme of regulation. The Court's decisions protecting commercial speech have overridden a great deal of well-established state regulation.[153] Advertising by lawyers, for example, was unheard of before the 1970s[154] and is now ubiquitous.

The Court's aggressive deregulation of commercial speech may have paved the way for regulators to take a more liberal attitude, even in areas in which the Constitution might not have protected speech. For example, advertising of prescription medicines directly to consumers may not have been constitutionally protected, but it has now become a well-established element of the marketing of those drugs, for better or for worse.[155]

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[147] *See generally* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004).

[148] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[149] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[150] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[151] Healy v. James, 408 U.S. 169 (1972).

[152] *See generally* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[153] *See generally*, CHEMERINSKY, *supra* note 79, at 1084-1109.

[154] *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

[155] *See generally* JOHN ABRAMSON, OVERDOSED AMERICA: THE BROKEN PROMISE OF AMERICAN MEDICINE, Ch. 10 (2004).

The regulation of commercial speech is not the only area in which the Court's protection of speech rights has worked more to the advantage of moneyed, established interests than to the advantage of individual speakers. The Court has created a strong doctrine against compelled speech, which protects newspapers from having to give equal space for opposing views on the editorial page,[156] and protects utility companies from having to include material in their bills with which they disagree.[157] The doctrine against compelled speech also protects union members from being forced to pay dues to support union political activity with which they disagree.[158]

Another hallmark of the Civil Rights Period was the Supreme Court's willingness to expand the jurisdiction of the federal courts by creating new causes of action in areas touched by federal statutes and the federal Constitution. The two most notable examples of this are the recognition of private rights of action under federal regulatory statutes,[159] and the creation of the *Bivens* claim,[160] which provides a damages remedy against individual federal officers alleged to have violated constitutional rights.[161] In both of these areas, the Court functioned much like a common law court, implying rights of action to advance the purported goals of statutory and constitutional provisions.

In the area of statutory implied rights of action, the Court's jurisprudence dictated that the federal courts should recognize a damages action when to do so would advance Congress's overall purpose in passing the regulatory or criminal statute that had been violated.[162] In the *J.I. Case*, for example, the Court implied a private right of action based on violations of federal securities laws in favor of victims of false and misleading proxy statements.[163] Although Congress did not include a private right of action in the statute, the Court noted that the Securities and Exchange Commission lacked the resources to investigate the factual assertions contained in proxy statements, and thus the Court concluded that a private action would advance Congress's purpose of freeing the securities markets from the influence misleading proxy material.[164] The Court's reasoning was similar to the reasoning that state courts use when deciding whether to use a criminal or regulatory statute to supply the standard of care in a common law tort case.[165]

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[156] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

[157] Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986).

[158] Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 455 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[159] J. I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964).

[160] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-96 (1971).

[161] *Id.*

[162] *J. I. Case*, 377 U.S. at 431-32.

[163] *Id.*

[164] *Id.* at 431-33.

[165] *See* Martin v. Herzog, 228 N Y. 164 (1920).

The Court's *Bivens* jurisprudence appeared to create a presumption that an action for damages would be recognized for all constitutional violations unless special factors counseled hesitation or Congress had declared an alternative remedy as a replacement for the *Bivens* action.[166] The Court founded its decision upon an expansive view of the power of federal courts to create causes of action. The *Bivens* Court quoted its statement in *Bell v. Hood*, that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[167] The judicial attitude underlying both *Bivens,* and the decisions recognizing implied rights of action under federal regulatory statutes, is that the Supreme Court should play the federal version of a traditional common law court, creating rights of action and supplying remedies when normatively desirable.[168]

This discussion of the Court's willingness to recognize private rights of action for damages under federal statutes leads back to questions surrounding the definition of "judicial activism" and how it relates to the Court's attitude toward Congress. In the early cases implying private rights of action, the Court purported to act in partnership with Congress, supplying remedies that it claimed would aid in the accomplishment of congressional purpose underlying a statute.[169] The Court did not view itself as frustrating the intent of Congress.[170] Justice Powell's dissent in *Cannon*, however, views the Court as violating the separation of powers by usurping Congress's role.[171] In his view, consistent with public choice accounts of the legislative process, congressional silence on private rights of action is the equivalent of congressional rejection of them.[172] On this account, Congress chooses a level of enforcement when it allocates discretion and resources to agencies and prosecutors, and judicial implication of private rights of action disturbs that choice. There is no simple answer to the question whether the creation of a private right of action is a court partnering with Congress or rejecting Congress's judgment not to have one. Rather, the discussion illustrates the difficulty of resolving these issues.[173]

In conclusion, during the Civil Rights Movement period beginning in the

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166 Carlson v. Green, 446 U.S. 14, 18-19 (1980) (internal citations omitted).

167 Bell v. Hood, 327 U.S. 678, 684 (1946), *quoted in Bivens*, 403 U.S. at 392.

168 This attitude was attacked as contrary to the federal understanding of separation of powers by Justice Powell's dissent in *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting). In that dissent, Justice Powell argued that federal courts should not create causes of action, but should only recognize when Congress clearly intends to create them. *Id.* at 730-31.

169 J.I. Case v. Borak, 377 U.S. 426 (1964).

170 *Id.*

171 *Cannon*, 441 U.S. at 730 (Powell, J., dissenting).

172 *Id.*

173 A similar discussion could be had with regard to the creation of the *Bivens* remedy—does *Bivens* represent a Court attempting to aid in the accomplishment of the purposes of the

mid-1950s, in some areas the Supreme Court continued its activist ways while in others it deferred to congressional judgments that civil rights should be expanded. The best example of deference is the Court's standard for approving legislation enforcing the Reconstruction era amendments.[174] The Court was also active in creating constitutional rights in the areas of reproductive freedom, criminal procedure and free expression.[175] However, it continued to read limitations into some civil rights statutes that appear contrary to their text and underlying legislative intent, thereby limiting the effectiveness of the statutes in ways that continue to the present day.[176]

4. Contemporary Role of the Court

Today, it appears that the Supreme Court has returned to its pre-civil rights era mentality. The Court is non-deferential to Congress on nearly all issues,[177] including Congress's power to legislate civil rights.[178] Further, the Court is generally more conservative than Congress, so when it rules against Congress, it is generally preventing Congress from acting in a liberal direction. The Court has returned to its predominant historical role which is to prevent Congress from altering the distribution of rights and to keep control for itself of the definition of important individual civil rights.

The best illustration of the current Court's role is its creation and application of a new restrictive standard for evaluating Congress's assertions of power to legislate under section 5 of the Fourteenth Amendment. Recall that in the 1960s, the Court held that such laws would be evaluated under the very deferential standard that governs legislation passed under Article I's Necessary and Proper Clause.[179] The standard for determining whether a statute is within the section 5 enforcement power was created in a decision concerning the constitutionality of the Religious Freedom Restoration Act,[180] known as RFRA. RFRA was a very odd statute, amounting to an attempt by Congress to overrule the

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Framers of the constitutional provisions involved or an activist body usurping Congress's role?

[174] *See supra* notes 108-09 and accompanying text.

[175] *See supra* notes 99, 101-02 and accompanying text.

[176] *See supra* notes 130-35 and accompanying text.

[177] In another article, still a work in progress at this writing, I explore ways in which the Court has turned toward Congress and away from the Executive Branch in recent developments in administrative law. The article raises the possibility that the turn toward Congress is actually an effort to increase judicial power at the expense of the Executive Branch, but my conclusion is that it is a genuine move toward more deference to Congress and less deference to the Executive Branch. *See* Jack M. Beermann, *The Turn Toward Congress in Administrative Law* (forthcoming 2009).

[178] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[179] Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966).

[180] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb).

Supreme Court's test for evaluating claims that a state law infringed the Free Exercise Clause.[181] To understand RFRA and the Court's response to it, it is necessary to look at what led to the passage of the statute.

In a series of very liberal decisions, the Supreme Court decided that a law that infringed on the free exercise of religion would be subjected to strict constitutional scrutiny and would be upheld only if it was justified by a compelling governmental interest, and then only if it was narrowly tailored to advance that interest. This standard applied to laws that were facially neutral with regard to religion, such as an unemployment compensation statute that disqualified claimants who were unwilling to work on Saturday,[182] or a law that required all families to send their children to either public or private school up to a certain age.[183]

Subjecting facially neutral laws to strict scrutiny amounts to very aggressive judicial review of laws that are neutral on their face and likely were not aimed at religious practices at all. Given the religious diversity in the United States and the ubiquity of law, claims of free exercise could potentially cripple the government's ability to regulate effectively in areas it deems important. The Supreme Court apparently recognized this in a later decision involving disqualification for unemployment compensation benefits for using an illegal drug as part of a religious ritual.[184]

In *Employment Division v. Smith*,[185] two Native Americans were fired from their jobs as drug counselors because of their religious use of peyote. This violation of state law also disqualified them for unemployment compensation benefits.[186] They challenged the constitutionality of the state law prohibiting the use of peyote on free exercise grounds, and after the Oregon Supreme Court ruled against the state law, the United States Supreme Court reversed.[187] The U.S. Supreme Court, in an opinion written by Justice Scalia, held, contrary to its prior understandings, that there is no free exercise exemption from facially neutral state criminal laws.[188] Although the opinion stated that the Court had

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[181] Among the purposes Congress cited in support of enacting RFRA was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened[.]", Pub. L. No. 103-141, 107 Stat. 1488 § 2(a)(1) (codified at 42 U.S.C. § 2000bb). Congress noted that "in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion[.]" *Id.* at § 2(a)(4).

[182] Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[183] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[184] *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

[185] *Id.*.

[186] *Id.* at 874.

[187] *Id.* at 890.

[188] *Id.* at 881, 890.

never actually applied free exercise-based strict scrutiny to a facially neutral state criminal law,[189] most observers thought that the Court had made a major change in the law, making it much more difficult for free exercise claims to prevail than had been the case in the past.[190]

This decision provoked an outcry among supporters of religious freedom and a reaction from Congress, which quickly passed RFRA.[191] RFRA did not contain any new substantive rights but rather instructed the courts to apply strict scrutiny to free exercise claims. The statute provides that "government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest."[192] Congress's intent was to reestablish what it viewed as the law before the Supreme Court's *Smith* decision.[193]

Insofar as RFRA applied to state and local governments, Congress claimed power to pass it under its power to enforce the Fourteenth Amendment.[194] RFRA was quickly challenged as beyond Congress's power under the Fourteenth Amendment, and in *City of Boerne v. Flores*, in the course of agreeing with the challenge (and striking RFRA down) the Court created a new standard for evaluating whether Congress has the power to pass a law under its Fourteenth Amendment enforcement power.[195] The new standard states that Congress may act to enforce the Fourteenth Amendment (and by presumed analogy the Thirteenth and Fifteenth Amendments as well) only when Congress's actions are *congruent* to actual constitutional violations, and Congress's chosen remedy is *proportional* to the scope of the violations.[196]

The Court's analysis is founded upon the principle that the Court, not Con-

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[189] *Id.* at 872.

[190] Rebecca Rains, Comment, *Can Religious Practice Be Given Meaningful Protection After* Employment Division v. Smith?, 62 U. COLO. L. REV. 687, 707 (1991); Symposium, Employment Division v. Smith: *Just Say "No" to the Free Exercise Clause*, 59 UMKC L. REV. 555, 555 (1991).

[191] RFRA was passed on November 16, 1993, about three years after the *Smith* decision.

[192] RFRA, 107 Stat. at 1488-89.

[193] *See supra* note 184.

[194] The statute itself does not specify the source of Congress's power to enact RFRA. However, an *amicus curiae* brief filed on behalf a group of United States Senators asserts that because RFRA was meant to restore rights that had been protected under the Fourteenth Amendment, it was enacted under Congress's power to enforce the Fourteenth Amendment. *See* Brief for Sen. Edward Kennedy et al. as Amici Curiae Supporting Respondents, at 12-16, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1997 WL 9077. Because religious practices often affect interstate commerce, Congress's power to regulate interstate commerce may support the statute in part, as may Congress's general power to oversee the operations of the federal government, insofar as the statute applies to activity of the federal government that affects the free exercise of religion.

[195] *City of Boerne*, 521 U.S. 507.

[196] *Id.* at 520.

gress, defines the substantive content of the Fourteenth Amendment.[197] This is in stark contrast with the Court's attitude in the 1960s when the Court appeared to grant Congress a substantial role in defining the substantive contours of the Fourteenth Amendment.[198] The relevant precedent for the current Court is the *Civil Rights Cases,*[199] not *Katzenbach v. Morgan*[200]. Recall that in the *Civil Rights Cases*, the Court decided that Congress lacked power over public accommodations because the Civil Rights Act of 1875 was not directed at any actual constitutional violations.[201] The new congruence and proportionality standard requires exactly the same thing—judicial identification of an actual constitutional violation before Congress may act. This new standard is a significant restriction on Congress's power, and the Court has employed it many times to prevent Congress from expanding individual rights against the states.[202]

Congress reacted relatively strongly to the invalidation of RFRA when, in 2000, it passed a new statute with a firmer constitutional basis. In the Religious Land Use and Institutionalized Persons Act ("RLUIPA") Congress restored strict scrutiny to state and local government land use decisions and to actions involving prisoners.[203] Congress relied on the Commerce and Spending Powers, and thus the new statute should not be affected by the narrow reading of the

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[197] *Id.* at 517-21. *See also* Dickerson v. United States, 530 U.S. 428 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution. *See, e.g.,* City of Boerne v. Flores, 521 U.S. 507, 517-521 (1997).").

[198] Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966).

[199] The Civil Rights Cases, 109 U.S. 3 (1883).

[200] 384 U.S. at 650-51.

[201] *The Civil Rights Cases*, 109 U.S. at 13.

[202] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374-76 (2001) (Kennedy, J., concurring) (Congress lacks power under Fourteenth Amendment to force states to pay damages in cases alleging violations of disability discrimination laws); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-83 (2000) (Congress cannot abrogate state sovereign immunity by enacting age discrimination legislation); Alden v. Maine, 527 U.S. 706, 712 (1999) (Congress lacks power to override state sovereign immunity and allow state workers to sue for violation of labor laws requiring overtime); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647-48 (1999) (Congress lacks power to force states to pay damages in patent cases brought by private parties); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59, 66 (1996) (Congress lacks power to abrogate sovereign immunity in statutes passed under Commerce Clause). These cases represent a severe tightening up of the standard. In one recent decision favoring Congress's power under the Fourteenth Amendment, the Court held that Congress has the power to make states pay damages for violating laws requiring businesses to provide family and medical leave. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725, 735 (2003) (based on Congress's ability to remedy gender discrimination). The Court has been reluctant to allow Congress to define rights more broadly except in the areas of race and gender.

[203] Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc).

Fourteenth Amendment's enforcement power to which the Court returned in recent years. However, it is a much narrower statute than RFRA, since it applies only when government activities affect interstate commerce and to programs which receive federal funds.[204] In *Cutter v. Wilkinson*, the Supreme Court upheld an important provision of RLUIPA against a challenge that it violated the Establishment Clause by impermissibly advancing religion.[205] The Court did not, however, rule on whether Congress actually had the power to enact RLUIPA, because the issue was not properly presented.[206]

The Court's rejection of Congress's attempts to redefine constitutional rights is not confined to legislative expansion of those rights. In one of the few instances in which Congress has reacted conservatively to a Supreme Court decision, shortly after the *Miranda*[207] decision, which applied the exclusionary rule to statements made by criminal defendants who had not been informed of their right to remain silent, Congress passed a law providing that voluntary statements were admissible in federal criminal trials even if the *Miranda* warnings had not been given.[208] More than thirty years after this statute was passed, the government finally objected, on the basis of the statute, to the application of the exclusionary rule after the police failed to give the *Miranda* warnings.[209] The Supreme Court held that the exclusionary rule resulted from an application of the Constitution and, relying on *City of Boerne*, stated that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[210] Thus, Congress's attempt to legislatively overrule *Miranda* failed.

The Court has also narrowed the reach of Congress's civil rights laws in cases involving questions of statutory interpretation that do not implicate constitutional rights or Congress's power to legislate.[211] The Court's current approach to statutory interpretation, especially in the civil rights area, interprets statutes as narrowly as plausible in order to minimize the "damage" civil rights statutes do to the preexisting situation.[212] Congress in turn has legislated in response to numerous Supreme Court decisions in the civil rights area, and in the vast majority of cases, Congress has "restored" a more liberal understanding. The Court seizes upon any ambiguity or gap to push its conservative views against the more liberal leanings of Congress.[213] The Court's attitude toward civil

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[204] *Id.* at 803, 804.

[205] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

[206] *Id.* at 718 n.7.

[207] Miranda v. Arizona, 384 U.S. 436 (1966).

[208] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title II, § 701(a), 82 Stat. 210 (codified as amended at 18 U.S.C. § 3501).

[209] Dickerson v. United States, 530 U.S. 428, 432 (2000).

[210] *Dickerson*, 530 U.S. at 437 (citing City of Boerne v. Flores, 521 U.S. 507, 517-21 (1997)).

[211] *See supra* note 11.

[212] *See id.*

[213] A recent example of this is the Court's decision that the 180 day statute of limitations

rights statutes has been to fight Congress rather than work to achieve Congress's aims.[214]

In recent years the Court has also moved sharply away from its jurisdiction-expanding, claim-creating tendencies of the Civil Rights era and has adopted an attitude against recognizing claims under federal statutes and the Constitution. The Court has stated that it will not create private rights of action for damages based on violations of federal statutes unless it is confident that Congress intended that the action exist.[215] In the *Bivens* area, it has been many years since the Court ruled in favor of recognizing a new *Bivens* claim. Rather, it has found some reason for denying every *Bivens* claim it has reviewed going back to at least 1983.[216] In the 1970s, the Court's *Bivens* jurisprudence was understood as creating a presumption that an action for damages would be recognized for all constitutional violations unless special factors counseled hesitation, or Congress had declared an alternative remedy as a replacement for the *Bivens* action.[217] Now, the Court states that the federal courts should engage in a common-law type determination, weighing the desirability of creating a *Biv-*

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in Title VII employment discrimination claims begins to run from the moment of the first discriminatory act even in claims involving unequal pay in which the effect of discrimination is perpetuated over a long period of time. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). As Justice Ginsburg pointed out in her dissent, the plaintiff in *Ledbetter* suffered the continuing effects of discrimination each time she received a paycheck that was lower than the pay received by male employees performing the same or lesser-ranked work. *See id.*, 127 S. Ct at 2178-79 (Ginsburg, J. dissenting). My argument is not that the majority was wrong in this particular decision, but rather that in virtually every case involving a civil rights statute in which the Court has room to make a choice, it chooses the interpretation that favors defendants over plaintiffs. It would not be surprising if the *Ledbetter* decision provoked Congress to amend Title VII to allow victims of pay-related discrimination to bring their claims within 180 days of each tainted pay period. For an interesting discussion of the *Ledbetter* decision focusing on Justice Ginsburg's oral dissent, *see* Lani Guinier, *Foreward: Demosprudence through Dissent*, 122 HARV. L. REV. 4, 40-42 (2008).

[214] For examples of civil rights statutes provoked by restrictive Supreme Court interpretations of existing statutes, *see supra* note 11. The Court's restrictive readings of civil rights statutes continues. For example, in a recent ruling construing a civil rights statute unfavorably for plaintiffs, the Court held that victims of pay discrimination must sue within 180 days of their pay being set. This decision rejected the "ongoing violation doctrine" under which a claim would be considered timely if filed within 180 days of receiving a pay check based on the allegedly discriminatory rate of pay. See Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2161, 2171-72 (2007). One notable exception to the Court's generally conservative attitude toward anti-discrimination statutes has been the creation and continuance of sexual harassment doctrine, which lacks a strong foundation in either the text or legislative history of the Civil Rights Act of 1964. *See* Beermann, *supra* note 12, at 1027-28 (2002).

[215] *See e.g.,* Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 532-33 (1989).

[216] *See* Bush v. Lucas, 462 U.S. 367 (1983).

[217] Carlson v. Green, 446 U.S. 14, 18-19 (1980).

ens action in each particular case, "paying particular heed, however, to any special factors counselling [sic] hesitation before authorizing a new kind of federal litigation."[218] Two members of the Court view *Bivens* as a mistaken "relic" of an earlier era, and would limit it to the specific circumstances involved in claims already recognized.[219]

II. The Supreme Common Law Court of the United States

An important principle that the Court has relied upon for limiting Congress's expansion of civil rights and for refusing to imply rights of action from federal statutes is federalism, under which the federal government should be reluctant to intervene in matters traditionally governed by state law. However, when it suits the political agenda of a majority of the Justices, the Court is not reluctant to forcefully assert federal authority in important areas of traditional state control such as products liability, in which the Court regulates the size of punitive awards,[220] and eagerly finds federal preemption of state tort law.[221]

In these and additional areas, the Supreme Court most clearly behaves as if it is a Supreme Common Law Court of the United States, deciding or at least influencing the shape of the law beyond the traditionally understood boundaries of federal judicial power. There are several ways that the Court has behaved like a Supreme Common Law Court. First, despite all of its federalism rhetoric, the Court seizes control of areas of the law that are traditionally the domain of the states and imposes federal norms that it has created for that purpose.[222] Second, the Court applies interpretive methods, in both constitutional and non-constitutional cases, that draw from traditional common law methodology and allow for a high degree of creativity.[223] Most significantly, in constitutional interpretation, the Court often surveys the legal landscape, identifies what it finds to be the most normatively desirable legal doctrines, and declares that these doctrines are required as a matter of constitutional law.[224] In another common law form of legal reasoning, the Court creates complex multi-factored legal tests in areas that appear to be governed by relatively straightforward statutory or constitutional provisions.[225]

The clearest recent example of the Supreme Court's tendency to become a Supreme Common Law Court is in the area of punitive damages. After some

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[218] Wilkie v. Robbins, 127 S. Ct. 2588, 2598 (2007) (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)).

[219] *Id*. at 2608 (Thomas, J., joined by Scalia, J., concurring).

[220] *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996).

[221] *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

[222] *See, e.g.*, *infra* notes 251-57 and accompanying text.

[223] *See, e.g.*, *infra* notes 297-307 and accompanying text.

[224] *See, e.g.*, *infra* notes 230-37 and accompanying text.

[225] *See, e.g.*, *infra* notes 227-28 and accompanying text.

years of uncertainty, in 1996 the Supreme Court declared that the Due Process Clause of the Fourteenth Amendment places limits on the size of punitive damages awards.[226] Punitive damages have traditionally been a matter of state common law. Most states allow them, subject to judicial supervision for excessiveness.[227] In its first decision limiting the size of punitive damages awards, the Supreme Court took three factors commonly used by state courts to supervise the size of awards and declared that application of those factors is constitutionally required as a matter of due process. These factors are: (1) the reprehensibility of the defendant's conduct, (2) the ratio between compensatory and punitive damages, and (3) the relationship between the size of the punitive award and other available civil and criminal penalties for the conduct.[228] The Supreme Court has in effect seized control of a matter that formerly was purely a matter of state law, mainly common law.

The only effort to justify federal intervention into the size of state punitive awards as a matter of preexisting constitutional law was a rather feeble assertion that a defendant would not have had prior notice that its conduct might lead to such a large award when the three factors would not support an award as large as the one made by the jury.[229] While this signifies an attempt to fit the Court's limitations on punitive damages into the procedural due process model, it seems pretty obvious that the Court's concern is a pure substantive disagreement with the size of the awards. To test this conclusion, imagine the Court's reaction if a state were to authorize very high punitive awards in a statute, for example by legislating that no jury award less than a thousand times greater than the compensatory award could be reduced by the trial judge or on appeal. It seems pretty clear that the Court would find that very large punitive awards would still violate due process even if they are legal as a matter of state law.

The Court continues in the way of a common law court to work out the contours of its punitive damages jurisprudence. In its next foray into the area, the Court declared that punitive awards of greater than nine times compensatory damages are usually unconstitutional.[230] This is an extraordinary decision both for the strength of the Court's intervention into the domain of state common law and for the unusual mathematical element of the standard it set. Given the fact that the Court entered an area that until recently was controlled exclusively by the courts of the fifty states, the Supreme Court should not have been surprised to find that those courts were apparently not applying the three factors in the way that it had hoped.

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[226] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996).

[227] *See, e.g.*, Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989) (detailing seven factor test used to review punitive damage awards under Alabama law). Several of them are the same as those adopted by the Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[228] *Gore,* 517 U.S. at 574-75.

[229] *Id*.

[230] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

Most recently, the Court decided, contrary to widespread practice, that courts may not take into account harm to anyone other than the plaintiff or plaintiffs when determining the appropriate amount of punitive damages.[231] This may be the most significant limitation yet because it undercuts one of the primary justifications for punitive damages: that compensatory damages awarded only to those who actually sue are often inadequate to create the proper incentives for socially optimal behavior.[232] Two related examples of this involve situations in which the harm to absent plaintiffs is relevant. In some cases, the harm to each plaintiff is small, so that no plaintiff would go to the trouble and expense of suing without the possibility of punitive damages, at least when a class action is, for some reason, not an option.[233] The second, and perhaps clearer example, is when the defendant is able to avoid liability because of factual uncertainty or difficulty of proof.[234] In both situations, the best measure of punitive damages may be the total compensatory damages to the present and absent plaintiffs.[235] The Court's new limitation, however, prohibits explicit consideration of harm to anyone other than the actual plaintiff, which severely limits the magnitude of allowable punitive damages in many cases.

Depending on one's perspective on proper judicial construction of the Constitution, the development of the Court's punitive damages jurisprudence is either completely inappropriate or well within the bounds of the traditional judicial role. From an originalist or textualist perspective, the punitive damages cases seem as illegitimate as *Roe v. Wade*[236] or any other famous example of judicial activism. There is no hint in text or history that the Due Process Clause places limits on the size of punitive damages awards.[237] The Court is simply imposing its will in an area that the Constitution and legal traditions leave to the states.

From the perspective of one who believes in an evolving Constitution, the Court's punitive damages jurisprudence is perfectly ordinary. The Court was confronted with a relatively novel problem—extremely large punitive awards sanctioned by state judicial systems—and discovered buried in the normative interstices of the Due Process Clause a new limitation on the size of such awards. The Court did what the Court has traditionally done, i.e., enacted the shared sensibilities of the contemporary legal establishment into law through "interpretation" of a vague constitutional term such as "due process." There is,

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[231] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007).

[232] *See id.*

[233] *See id.*

[234] *See id.*

[235] This is apparently what the *Gore* jury did when it calculated the amount of punitive damages as $4000 times 1000, the number of cars secretly repainted. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 564 (1996).

[236] Roe v. Wade, 410 U.S. 113 (1973).

[237] Another possible basis for a limitation on the size of punitive damages awards is the provision of the Eighth Amendment that prohibits excessive fines. The Court has, however, rested its decisions on due process. *See* U.S. CONST. amend. XIII.

of course, room for disagreement over whether the normative consensus against excessive punitive awards is strong enough to support the Court's jurisprudence, but there is really no room to attack the Court's methodology without attacking 150 years of Supreme Court jurisprudence.

In addition to punitive damages reform, the Court has also limited traditional tort remedies by applying an expanded doctrine of federal preemption of state law. Large verdicts in state courts have provoked calls for tort reform at the state and federal levels.[238] While such calls have not been successful in Congress, they have been somewhat more successful in the federal courts, which are more willing to find that federal safety regulation preempts state tort liability.[239] Until very recently, preemption was treated primarily as a matter of congressional intent, with at least a mild presumption against preemption.[240] This made sense because preemption is a statutory matter and because concern over federalism should lead a court to err on the side of preserving traditional state authority.

Preemption is a matter of congressional intent because preemption arises primarily through the operation of laws passed by Congress. A federal law properly adopted is "Supreme" under the Constitution, and inconsistent state law is preempted.[241] The scope of a law, including its potential for preemption, is a matter of legislative intent. The presumption against preemption arises from federalism concerns. If we assume that Congress does not override state power lightly, then it makes sense to require a higher than usual degree of clarity when determining whether a federal statute has preempted state law.

Although one can argue with specific applications of preemption, the doctrinal framework reflected these two elements—congressional intent and federalism concerns—until relatively recently. This is best illustrated by the way the federal courts handled the existence of an express preemption provision that did not apply. It is necessary to back up for a moment to understand the context of express and implied preemption.[242] Express preemption exists when a federal

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[238] *See* Lou Dobbs, Tort Reform Important to U.S. Future, http://www.cnn.com/ 2005/ US/01/06/tort.reform/index.html (last visited November 11, 2008).

[239] For example, federal courts have found in favor of preemption of state law tort suits involving federally approved drugs. *See, e.g.*, Colacicco v. Apotex Inc., 521 F.3d 253 (3d Cir. 2008). Not surprisingly, state courts have not been as willing to find preemption of state law. *See, e.g.*, Levine v. Wyeth, 944 A.2d 179 (Vt. 2007), cert. granted, 128 S. Ct. 1118 (2008). The Supreme Court of the United States may resolve important issues in this area when it decides the *Wyeth* case.

[240] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) ("Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis." (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)))). *See also* Nina Mendelson, *A Presumption against Preemption*, 102 Nw. U. L. Rev. 695 (2008).

[241] U.S. Const. art. VI, § 1, cl. 2.

[242] *See generally* Mendelson, *supra* note 240.

statute contains an explicit reference to the preemptive scope of the law.[243] For example, the federal statute that requires warning labels on tobacco products also says that states may not impose additional or different labeling requirements based on smoking and health.[244] Implied preemption occurs when, under the circumstances, Congress would have intended that federal law preempt state law even if Congress did not explicitly say so.[245] The most obvious example of this is when federal and state law conflict, for example if federal law sets a maximum price for a product and state law sets a minimum price higher than the federal maximum. In virtually every situation of actual conflict, Congress must have intended for federal law to prevail.

When Congress takes the trouble to write an express preemption provision, the obvious implication, reflected in the *expressio unius* canon of statutory interpretation, is that the statutory provision expresses the limit of the statute's preemptive scope. In other words, when a statute contains an express preemption provision, there should be no implied preemption, only express preemption.[246] This was the understanding until relatively recently. This understanding broke down over the possibility of actual conflict between federal and state law when an express preemption provision in the statute did not apply. Congress may have intended for preemption beyond the terms of the express preemption provision in this limited circumstance—even if there is an express preemption provision that does not apply, Congress must have intended for federal law to prevail in a case of actual conflict.[247] This preserves the primary focus on Congress's intent, understood in light of federalism concerns.

More recently, however, the Supreme Court has abandoned the congressional intent touchstone and all concern for federalism, and has held that implied preemption analysis is the same regardless of the existence of an express preemption provision that does not apply to the particular circumstance.[248] Although the Court stated that the reason for the shift was its conclusion that Congress would want preemption anytime there is an actual conflict between state and federal law, contrary to the Court's conclusion,[249] the case itself did not involve an actual conflict.

Geier v. American Honda Motor Co. was a products liability claim in which the plaintiffs alleged that their automobile was defective under the tort law of the District of Columbia (which is treated like a state in this analysis) because it was not equipped with an air bag.[250] At the time the automobile was manufactured, passive restraints such as airbags were required by federal regulation in

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[243] *See id.* at 699-700.

[244] 15 U.S.C. §§ 1333-34.

[245] Mendelson, *supra* note 240, at 700.

[246] *See* Cipollone v. Ligget Group, Inc., 505 U.S. 504, 517 (1992).

[247] Freightliner Corp. v. Myrick, 514 U.S. 280, 287-89 (1995).

[248] Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

[249] *Id*. at 871-72.

[250] *Id*. at 865.

only ten percent of each manufacturer's fleet, with a three year phase-in after which all new automobiles would be equipped with passive restraints.[251] The federal statute that granted the Department of Transportation the authority to require passive restraints contained an express preemption provision which did not apply because it contained a savings clause stating that compliance with federal law did not exempt an automobile manufacturer from liability under state law.[252] There was no actual conflict between federal and state law—an automobile manufacturer would be in compliance with both state and federal law if airbags were installed in every car. In fact, the Department of Transportation appeared to be encouraging the use of airbags as the method of passive restraint by giving 1.5 cars credit for each car equipped with an airbag.[253] The Supreme Court, however, found conflict because the Department of Transportation justified its phase-in with an expressed desire to encourage diversity in passive restraint methodology, so that perhaps a less expensive or more effective option than airbags would be developed during the phase-in period.[254] This intent, said the Court, would be frustrated if state tort law required, in effect, that all cars be equipped with airbags.[255]

Whatever one thinks of the Court's reasoning, congressional intent has receded into the background in preemption jurisprudence. The language of the savings clause, stating that "'compliance with' a federal safety standard 'does not exempt any person from any liability under common law'"[256] would seem to resolve in the negative the question whether Congress intended for the passive restraint standard to preempt state tort liability. In this savings clause, Congress stated clearly that even if an automobile manufacturer did exactly what Congress and the agency wanted—i.e., equip ten percent of its fleet with airbags and experiment with alternative methods of passive restraints during the phase-in period—there was no exemption from common law liability. *Geier* is an example of judicially created preemption, not one that attempts to carry out Congress's intent.

In the regulatory area, this doctrinal shift has opened up the possibility of a broad swath of federal preemption of state products liability law where it is doubtful that Congress has legislatively endorsed preemption. In the typical situation, a product safety issue arises that Congress determines is not being dealt with adequately at the state level.[257] Congress passes a statute granting an

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[251] *Id*. at 879 (citing Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 28999-29000 (1984) (codified at C.F.R. pt. 571)).

[252] *Id*. at 867-68.

[253] *Id*. at 879 (citing Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 29000 (1984) (codified at C.F.R. pt. 571)).

[254] *Id.* at 878-79 (citing Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 28996, 29001-29002 (1984) (codified at C.F.R. pt.571)).

[255] *Id*. at 881.

[256] *Id*. at 868 (quoting 15 U.S.C. § 1397(k) (1988)).

[257] A good example is the Medical Device Amendments of 1976, Pub. L. No. 94-295, 90

agency the power to impose safety requirements that apply to all products marketed in interstate commerce. Sometimes, Congress includes a savings clause which provides that the statute is not intended to override state tort law. However, the defendant in a state products liability lawsuit has a logical-sounding defense based on compliance with federal safety requirements—if a federal agency has deemed the product safe enough to be marketed in interstate commerce, it would be inconsistent for a state court to determine that the product is defectively designed. This argument, which the federal courts have been accepting with increasing frequency, overlooks the federalism context in which Congress acted. Congress understands itself to be imposing minimum standards that must be met for the product to be allowed on the market. Congress has not determined that every product that meets the minimum standards is actually safe enough to preclude a finding of defective design in a products liability lawsuit. Rather, especially when it includes a savings clause, Congress leaves that judgment to the state courts. In the preemption area, the Supreme Court has been pursuing its own tort law agenda without congressional authorization and in fact perhaps against Congress's expressed intent.

Preemption jurisprudence is another example of the Supreme Court behaving as if it is the Supreme Common Law Court of the United States. There are many good reasons for disagreeing with the expansion of state products liability law and for concern over the size of damages awards in such cases. It may be that products liability stifles innovation and imposes excessive costs on socially worthwhile activities. The Supreme Court, however, has no warrant for superintending the state system of tort liability. Yet the Court in recent years has greatly expanded the scope of federal preemption of state tort law in areas where it seems doubtful that Congress intended to displace state law. As the dissenters in one case accused, the Court majority may be acting as "tort reformers," a role that is beyond doubt outside conventional expectations of the Court's domain.[258]

The Court's preemption jurisprudence is consistent with the Court's willingness to ignore federalism principles when to do so is consistent with other policies the Court would like to pursue. Consider, for example, the constitutionality of public contract set asides for women and minorities. After centuries of discrimination in all aspects of society, including governments at all levels, federal, state and local government units made the judgment that a certain percentage of public contracts should be set aside for businesses owned by minorities and women.[259] It was thought that such set-asides might help compensate

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Stat. 539 (codified at 21 U.S.C. § 301). This act was recently granted extensive preemptive power in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008).

[258] *See Geier*, 529 U.S. at 894 (Stevens, J., dissenting).

[259] City of Richmond v. J. A. Croson Co., 488 U.S. 469, 479-80 (1989) (discussing record of discrimination before city council).

for historical discrimination and combat such discrimination in the future.[260] In a series of decisions beginning in the 1980s, under the leadership of Justice O'Connor, the Supreme Court virtually outlawed such programs, holding that they are justified only in response to specific evidence of past discrimination by the government entity involved and then only if they meet the strictest constitutional scrutiny.[261] More recently, the Supreme Court outlawed race-based public school assignment policies, effectively preventing local schools from pursuing what many localities consider the compelling interest in achieving diversity in the public schools.[262] The Court is apparently unwilling to trust local, more democratic government actors to act against the scourge of racism that has plagued the nation since its founding.

Another area in which the Supreme Court has acted as a Supreme Common Law Court is defamation. For the first 150 years or so of the existence of the United States, defamation was one of a small number of strict liability torts, and it also differed from most torts because it allowed, in some cases, for an award of presumed damages.[263] In a series of decisions beginning in the 1960s, the Supreme Court determined that defamation suits were a threat to freedom of speech under the First Amendment, and thus constitutionalized several aspects of the law of defamation and substituted federal constitutional standards for the state common law standards that had governed certain issues.[264]

There is no question that the first case in which the Court applied First Amendment principles to limit state defamation law presented good reasons for federal intervention. In *New York Times Co. v. Sullivan*,[265] a group of black Alabama clergymen took out an advertisement in the *New York Times* complaining about the treatment of peaceful civil rights protesters. The clergymen and the *New York Times* were sued for libel, and the state judge instructed the jury that the statements were libelous per se under Alabama law and that the law presumes damage so that the jury could award damages without proof of actual loss.[266] The jury awarded $500,000,[267] thus opening up the possibility that civil lawsuits could be an effective weapon against the civil rights move-

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[260] *Id.*

[261] *Id.* at 505 (1989); United States v. Paradise, 480 U.S. 149, 167 (1987). *Cf*. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (mandating strict scrutiny for all racial classifications, whether benign or invidious, whether state-created or federally-created).

[262] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2753-2754, 2768 (2007).

[263] *See* ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES vol. 1, at 404 (Paul Finkelman ed., 2006).

[264] *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[265] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256-57 (1964).

[266] *Id.* at 262.

[267] *Id*. at 256.

ment, just as the criminal process was being used to suppress protest.[268] The Supreme Court's response was to create a new rule of constitutional law under which public officials may not succeed in defamation actions involving their official conduct unless they can prove "actual malice," i.e., knowledge of falsity or reckless disregard as to the truth or falsity of the allegedly defamatory speech.[269] The Court invoked bedrock principles of free political expression as justification for its new rule limiting defamation cases brought by public figures, noting that "the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press."[270] While the case is properly understood as a landmark in the law of free speech that reshaped the state common law of defamation based on First Amendment concerns, the racial context of the case may have convinced the Court that it was appropriate to act.

There were strong reasons for the federal government, including the Supreme Court, to suspect that the case involved a perversion of justice. The white establishment in Alabama and elsewhere was using all means at its disposal to resist the claims of blacks to social and political equality. The statements in the advertisement were largely true, at least in material respects.[271] The award was very large given that Sullivan had not offered proof of actual damages.[272] The state court's action was sure to send the message to civil rights groups that if you speak too loudly, we will make you pay.

In a sense, *New York Times Co. v. Sullivan* was a race case, as closely related to *Brown v. Board of Education*[273] as to other First Amendment cases of the day. However, it was obviously written as a free speech decision,[274] and it unleashed a continuing stream of decisions limiting state defamation law in the name of free speech principles.[275] Supreme Court decisions have substantially reshaped the common law of defamation. For example, the Court prohibited strict liability in defamation cases not involving public figures brought against media defendants, placing First Amendment concerns above the interests of a non-negligently defamed private person who brings a defamation suit in part to clear her name.[276] The rules have become complex and have required numer-

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[268] *See id.* at 279.

[269] *Id*. at 279-80.

[270] *Id*. at 265.

[271] *Id.* at 256-59.

[272] *Id*. at 256, 260-63.

[273] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[274] The Court presented the issue in *New York Times v. Sullivan* as follows: "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." 376 U.S. at 256.

[275] *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985).

[276] *See Gertz*., 418 U.S. at 347 (noting that the defendant must be at least negligent,

ous Supreme Court decisions to work out the issues in a common law type way—Who is a public figure? What is the standard of proof for non-public figures? Are newspapers and other media treated differently than non-media defendants?[277] The Court has had to elaborate on these and additional issues, resulting in numerous changes to the state law of defamation.[278]

The Supreme Court's constitutionalization of the law of defamation has had spillover effects on the state common law. The Court's decisions were very skeptical of the tradition of strict liability in defamation law, although the Court did not categorically rule out strict liability in cases not involving media or public figures.[279] However, the Court's decisions did put pressure on the common law of defamation in general. The common law of defamation has always recognized that strict liability was not appropriate when it might stifle important speech, such as speech about public figures or matters of public concern.[280] Doctrines referred to as "privileges" were created under which proof of negligence would be required in a defamation case that would otherwise be subject to strict liability.[281] For example, a qualified privilege had been recognized in tenure evaluations of university faculty members under which the speaker must be at least negligent as to the truth or falsity of his or her speech to be held liable.[282] The Illinois Supreme Court, in a closely divided decision, decided that the *New York Times Co.* actual malice standard should govern cases involving tenure reviews.[283] Although it is not altogether clear from the opinion,[284] it appears that the Illinois court was influenced (but did not feel itself required) by considerations of federal constitutional law to heighten the standard of proof in this category of defamation cases. The Illinois court explained the effect of the U.S. Supreme Court's decisions as follows:

> Since the 1964 Supreme Court decision in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, . . . a large area of the law concerning privileges has

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despite a longstanding tradition of strict liability in the common law of defamation). The rule does not apply in non-media cases, on which the Court has divided. *See Dun*, 472 U.S. at 763.

[277] *See id.*

[278] *See infra* at notes 288-92.

[279] *See Gertz*, 418 U.S. at 347; *see also Dun*, 472 U.S. at 749-50.

[280] *See generally.* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[281] These doctrines create a sort of "privilege" to engage in defamatory speech because of the importance of the particular subject matter of the expression. *See* Killebrew v. Jackson City Lines, 82 So. 2d 648, 649-50 (1955).

[282] Staheli v. Smith, 548 So.2d 1299, 1301, 1305-06 (Miss. 1989).

[283] Colson v. Stieg, 433 N.E.2d 246, 249 (Ill. 1982).

[284] Even the Illinois Appellate Court has expressed uncertainty over whether the Illinois Supreme Court meant to constitutionalize the law of privileges in defamation. *See* Am. Pet Motels, Inc. v. Chicago Veterinary Med. Ass'n, 435 N.E.2d 1297, 1301 (Ill. App. Ct. 1982) ("We are not convinced that the court in *Colson* intended to elevate all qualified privilege to constitutional stature.").

> been taken over and altered by first amendment constitutional considerations. (See generally Schaefer, *Defamation and the First Amendmen*t, 52 Colo.L.Rev. 1 (1980).) As a result, the scope of the privileges in the law of defamation has been broadened beyond that within which they had previously been recognized. (Prosser, Torts § 118, at 819 (4th ed. 1971).) The *New York Times* holding has essentially replaced the common law qualified privilege which was stated in the terms of "fair comment" upon public figures and public employees. The "fair comment" common law privilege was not limited to public discussion of public officials or figures, but also extended to the discussion of matters of public concern. Professor Prosser has stated that there is no reason the constitutional privilege of *New York Times* should not be extended to all matters of public concern. (Prosser, Torts § 118, at 823 (4th ed. 1971).) This court has, to a degree, extended the holding of *New York Times* in that direction.[285]

Three members of the Illinois court, while agreeing with the judgment, disagreed with this reasoning and argued that the preexisting rule of qualified privilege, under which the "plaintiff need only allege and prove that the defendant publisher did not believe in the truth of the defamatory matter, or had no reasonable grounds for believing it to be true"[286] was sufficient to protect the interest in free expression in tenure reviews. The concurring justices resisted the use of *New York Times Co. v. Sullivan* to make changes to the common law of defamation beyond those necessary to comply with the U.S. Supreme Court's decision.[287]

Perhaps the ultimate example of Supreme Court intrusion into the law of defamation is its approach to the standard of review. The Court decided that trial courts' factual decisions on whether the actual malice standard is met are to be reviewed on a less deferential standard of review than is usually applied, so that the Court of Appeals can be sure that the trial court took adequate heed of free speech interests.[288] The decision not to trust federal trial courts to apply the actual malice standard properly came in a case involving a magazine's critical review of Bose speakers.[289] The Court dissected the truth or falsity of allegations made in the review that instruments sounded out of proportion and seemed to wander about the room, when the actual technical report indicated that the instruments wandered along the wall between the speakers rather than about the whole room.[290] The Supreme Court discarded the Federal Rule of Civil Procedure that normally applies to appellate review of trial court factual

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[285] *Colson*, 433 N.E.2d at 247-48.

[286] *Id*. at 253 (Clark, J., joined by Moran, J. and Simon, J., specially concurring).

[287] *Id.* at 251-53.

[288] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-11 (1984).

[289] *Id.*

[290] *Id*. at 490.

determinations,[291] holding that free speech concerns militate in favor of less deferential appellate scrutiny of the facts.[292] This is a far cry from the concerns over political speech and racial justice that appear to have motivated the Court's initial foray into defamation law. It illustrates just how far the momentum of the Supreme Court's intervention into an area of common law can take it.

The Court also behaved like the Supreme Common Law Court in its supervision of the land use practices of state and local governments, especially in the area known as "exactions." Exactions occur when a local government conditions the grant of a permit on the landowner's agreement to concessions, such as public access to the property.[293] Land use regulation presents Takings Clause[294] concerns because of the effects of regulation on the value of land.[295]

There is a terrible conceptual conflict between the usual federal solicitude for state police power regulation and the exactions branch of the regulatory takings doctrine requirement that compensation be paid when private property is taken for public use through over-regulation. Normally, the Court has resolved this conflict by upholding regulation as long as the landowner can make reasonable use of the property or when the property has reasonable value despite the restrictions.[296] The Court has treated exactions differently, apparently because exactions often involve the grant of an interest in the property to the government rather than a regulatory limit on the owner's use of the property.[297]

Each state decides for itself, through statutes, constitutional doctrines or common law, whether and to what extent its localities have the power to require exactions as part of its land use regulation.[298] The Supreme Court, in constructing federal constitutional limits on exactions based in the Takings Clause,[299] has behaved like a common law court by surveying the state decisions, identifying what it considers the most attractive doctrine and declaring it as the federal constitutional norm.[300] In the key opinion, after surveying the various approaches employed by state courts, the U.S. Supreme Court stated: "We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously dis-

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[291] FED. R. CIV. P. 52(a)(6).

[292] *Bose*, 466 U.S. at 510-11.

[293] For the two most important cases, *see* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[294] U.S. CONST. amend. V.

[295] *See Dolan* 512 U.S. 374; *Nollan* 483 U.S. 825.

[296] *See, e.g.,* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[297] *See Dolan*, 512 U.S. at 385 (singling out the fact that the regulated party must "deed" a property interest to the city to qualify for the redevelopment permit).

[298] *Id.* at 389-91 (discussing various state practices).

[299] U.S. CONST. amend. V.

[300] *See Dolan*. 512 U.S. at 389-91.

cussed."[301]

This is a remarkable example of constitutional decisionmaking. Before these decisions, as the Court appears to acknowledge, there was no established federal constitutional norm regulating exactions.[302] Because a landowner can avoid the exaction simply by refraining from seeking the permit, there is reason to doubt that an exaction should ever be considered a taking unless the preexisting regulations disallowing further development without a permit would be considered a taking. Given this doubt, in the absence of a federal norm, one might think that federal law has nothing to say on the matter and it should be left to the state courts to work out. The Supreme Court, however, could not resist taking control over yet another area of law traditionally belonging to the states. Thus, the Court declared that what it found to be the best state norm is "closer" to some undefined yet apparently extant federal constitutional norm.[303] This is very convenient.

There are more examples of doctrinal areas in which the Supreme Court adopts a state law norm and declares it to be part of the Constitution of the United States. Another example of this is the exception to the *DeShaney* rule for "special relationships."[304] The *DeShaney* rule holds that government is not constitutionally required to come to the aid of victims of private violence and thus cannot be held liable under federal constitutional law for failing to do so.[305] *DeShaney* itself involved a child who was severely injured by his father after inept efforts at intervention by a local government social services agency.[306] The Court held that the government agency was not responsible for the private violence in that case, but it did allow that if the government was in a "special relationship" with the victim, it might be constitutionally required to prevent third party violence.[307] This "special relationship" test comes straight out of state common tort law doctrines that establish the limits of duties owed under tort law.[308]

Sometimes, the fact that a state is in a minority is used as a reason to delegitimize the state's practice and support a finding of unconstitutionality. Consider, for example, the Supreme Court's decision striking down pre-litigation *ex parte* writs of attachment as violating due process.[309] The Court surveyed the

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[301] *Dolan*, 512 U.S. at 391.

[302] *Id.*

[303] *Id.*

[304] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201-02 (1989).

[305] *Id* at 196-97.

[306] *Id*. at 191.

[307] *Id*. at 201-02.

[308] *See, e.g.,* MOSLEY v. SAN BERNARDINO CITY UNIFIED SCH. DIST., 134 Cal.App.4th 1260 (Cal. Ct. App. 2005); Zelenko v. Gimbel Bros., 287 N.Y.S. 134, 135 (N.Y. Sup. Ct. 1935).

[309] Connecticut v. Doehr, 501 U.S. 1, 2 (1991).

practice of all 50 states,[310] and supported its decision (which in the main applied the traditional balancing test to find a due process violation)[311] with the following reasoning:

> Connecticut's statute appears even more suspect in light of current practice. A survey of state attachment provisions reveals that nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place. . . . Twenty-seven States, as well as the District of Columbia, permit attachments only when some extraordinary circumstance is present. In such cases, preattachment hearings are not required but postattachment hearings are provided. Ten States permit attachment without the presence of such factors but require prewrit hearings unless one of those factors is shown. Six States limit attachments to extraordinary circumstance cases, but the writ will not issue prior to a hearing unless there is a showing of some even more compelling condition. Three States always require a preattachment hearing. Only Washington, Connecticut, and Rhode Island authorize attachments without a prior hearing in situations that do not involve any purportedly heightened threat to the plaintiff's interests. Even those States permit *ex parte* deprivations only in certain types of cases: Rhode Island does so only when the claim is equitable; Connecticut and Washington do so only when real estate is to be attached, and even Washington requires a bond. Conversely, the States for the most part no longer confine attachments to creditor claims. This development, however, only increases the importance of the other limitations.[312]

This reasoning flies in the face of one of the reasons for maintaining a federalist system—that decentralization allows experimentation among the states which produces better results than if all practices were imposed by the central government.[313] Perhaps Connecticut, Washington and Rhode Island have discovered that the system of civil justice functions better if plaintiffs have a way to secure their potential judgments before defendants have a chance to take evasive action. Once again, the Supreme Court could not resist the temptation to seize power and impose its will on that of the states whose practices it did not like.[314] The Court used the novelty of a state's practice as evidence of its

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[310] *Id.* at 24-26.

[311] *Id*. at 11.

[312] *Id*. at 17-18.

[313] *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

[314] The Court also uses the fact that a practice is widespread as evidence that it is constitutional. For example, in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 (1978), the Court supported its decision that it was proper for cities to have regulatory jurisdiction beyond their borders without giving the residents of these areas the right to vote in municipal elections with the observation that thirty-five states follow the practice.

unconstitutionality, thus striking at the heart of the American idea of federalism.

Looking at the practices of other courts or other governmental units to arrive at the "best" rule is one of the well-established practices of a common law court. While a common law court may find the practices of other jurisdictions persuasive, the federal courts would do better to focus on the meaning of federal constitutional provisions when they decide whether to allow states to continue their chosen practices. It is not clear whether it is legitimate for a court applying a written constitution to use the practices of other jurisdictions as evidence of the meaning of that constitution without some reason to believe that the practices were adopted by the framers of that constitution or shed light on its meaning for some other reason. It seems like one more element of a standardless, anything goes method of interpretation.

To an extent, an anti-democratic role for the Court is structurally ordained. The Court's place in the structure of the U.S. government is reactive, ruling on the legality of the actions of other branches. In criminal procedure, for example, if the Court acts in federal cases, it will virtually always be to rule that a statute, rule or particular action is unconstitutional, thus upholding a claim of an individual right. With regard to cases arising in state court, this is not true. The Court has made it easier to bring a case to the Supreme Court in which a state court has upheld an individual rights claim,[315] and in such cases the Court often overrules the state courts, telling them that the federal Constitution does not protect individual rights to the degree the state court had found.[316] But even in cases that arose in the state courts, the federal courts usually are in the position of saying "yes or no" to a claim of a violation of individual rights where such rights have allegedly been denied by some other governmental unit. In constitutional cases generally, the Court functions largely as a one way ratchet, either expanding individual rights or leaving them alone, but not decreasing them.[317]

This leads to two further realizations about the role of the Court. First, it is possible to imagine a Court taking a more positive role in the creation of individual rights, for example by creating positive rights to such things as adequate necessities such as food, shelter and clothing.[318] In the abortion area, for exam-

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[315] *See* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (the Court will not review judgments of state courts if they "rest on adequate and independent state grounds," but the Court will assume that there are no such grounds when the state court opinion does not clearly articulate them or when the state court relies mostly on federal law).

[316] *See id.*

[317] This is contrary to what the Court does in statutory cases. When the Court construes a statute narrowly to deny rights that it appears Congress intended to grant, the Court in a sense has decreased the scope of individual rights.

[318] *See generally*, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008), chpts. 7-8, pp. 196-264; HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW,

ple, the German Constitutional Court ruled that abortion on demand would violate the rights of the fetus, and that therefore German law must prohibit abortion except when certain indications exist.[319] The U.S. Supreme Court has been skeptical of such claims, ruling that the U.S. Constitution is "a charter of negative liberties" that protects against government action but does not compel government to act on anyone's behalf.[320] The Court has thus shown restraint in not acting to create positive constitutional rights.

Second, there will always be a credible argument that the Court has played the opposite role than that described here—that it expands rights rather than contracts them. In criminal procedure and other areas, when the Court acts, it acts almost exclusively to expand individual rights, except perhaps when it overrules a precedent from the Warren or Burger Court periods. The fact that the Court's individual rights decisions, especially in the abortion area, are still subjected to strong criticism from the right[321] is evidence that my thesis, that the Court's role is to take away rights, is at a minimum overstated and possibly incorrect.

I rely on two bases for resisting the idea that the Court's historical role has been to protect and expand rights rather than to take them away. First, while there are certainly counter-examples, time and time again, the Court says "no" to other governmental entities who are acting in what is best characterized as a liberal or progressive direction. The most recent example of this is the Court's disapproval of public schools' race-based admissions policies designed to increase the prospects of minorities, mainly African Americans, to receive a quality, integrated education.[322] As Derrick Bell has explained, school desegregation failed in the sense that African Americans are not more likely today than they were before *Brown v. Board of Education* to be educated in an integrated

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POLITICS, MORALS 263-374 (3d ed. 2008) (discussing economic and social rights). The constitutions of some countries grant positive rights, which are then enforced by their courts. The best examples appear to be India and South Africa. *See* Steiner, at 321-47; *see also* Eric Posner, Essay, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1765-66 (2008). Ran Hirschl is skeptical about the existence of positive rights at least in Canada, Israel and New Zealand. *See* Ran Hirschl, *Negative Rights vs. Positive Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22 HUMAN RIGHTS QUARTERLY 1060 (2000).

[319] Bundesverfassungsgericht [BVerfG] [federal constitutional court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.), *translated in* John D. Gorby & Robert E. Jonas, *West German Abortion Decision: A Contrast to* Roe v. Wade, 9 J. MARSHALL J. PRAC. & PROC. 605, 605-06 (1976).

[320] *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 203-04 (1989) (Brennan, J., dissenting).

[321] Gerard Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329 (1993).

[322] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2753-54, 2768 (2007); Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

school.[323] Furthermore, many minorities attend inferior inner city schools.[324]

Using race as a criterion for admission has been one effort to deal with these realities. The Court's recent ruling threatens programs such as Metco in the Boston area, which allows blacks in the City of Boston to choose to attend suburban schools of much higher quality than the average Boston public school.[325] The Court pursues its own agenda regardless of the realities and social consensus behind what other government entities are trying to accomplish.

This leads to the second point, which is that when the Court recognizes individual rights, very often the rights are in favor of status quo interests as opposed to interests looking for change. In discrimination, the Court has been most aggressive when it is protecting the rights of whites against race discrimination. In the First Amendment area, the Court has very strongly protected the rights of owners of media against open access claims from others.[326] In a sense, many or all rights claims involve competition for rights rather than a pure expansion. Recognizing the rights of African-Americans to special treatment because of the history of slavery and discrimination is often done at the expense of whites. Recognizing a claim of equal access to media would come at the expense of media owners. The Court has to make a choice between competing interests, and the Court's choice seems to be mainly for those already in a favored position.

This raises the question of what the Court views its purpose to be. In my view, the Members of the Court vary in their awareness of their role in government. Since Robert Bork's willingness to discuss his views on numerous subjects contributed to the rejection of his nomination to the Supreme Court, the confirmation process has invariably included statements from nominees that their understanding of the law, not their personal views, will drive their Supreme Court decisionmaking.[327] Perhaps they believe this, but voting patterns on the Court can be easily discerned, and a Justice's vote can often be predicted simply by the identity of the parties rather than the legal merits of the cases.[328] In all cases, the Members of the Court offer neutral justifications of law or legal

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[323] *See generally* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004).

[324] *Id.*

[325] Richard Kahlenberg & Albert Shanker, *How to Save METCO*, The Boston Globe 11A (Nov. 13, 2007).

[326] *See, e.g.*, Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville (91-1721), 508 U.S. 656 (1993) (liberal standing for white owned contractors challenging minority set-aside); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 479-80 (1989) (striking down minority set-aside program).

[327] Stephen B. Presser, Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary, 39 Loy. U. Chi. L.J. 427, 436-438 (2008) (discussing hearing on the nomination of Chief Justice John Roberts).

[328] *See generally* Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to As-*

principle for their decisions, and they never reveal any hint that they are conscious that their historical role has been to limit the efforts of Congress and other governmental entities to expand individual rights. The Members of the Court are too smart to actually believe much of what they write in support of their decisions, and are also too smart not to realize what role they are playing in the overall governmental structure.

My own reading of the Supreme Court is that it has been influenced by the critique of law, which claims that judges inevitably make personal, political judgments when deciding cases. Rather than chasten the Court, this has freed it to basically do whatever it wants in any case that it decides to hear. Judicial power presents a strong problem of legitimacy in a largely democratic process where judges are protected by life tenure from the political process. It is ironic that a critique coming from the left[329] has become the primary excuse for the Court advancing an anti-rights, conservative political program.

In the whole area of recognition of rights, had the Court just followed Congress's lead by employing a minimalist form of plain meaning interpretation, and only invalidating legislation for compelling reasons, we may have avoided some of the greatest threats to the ideals of freedom and equality that have been perpetuated over the past 125 years. The liberal belief in judicial activism has been at the price of the courts frustrating the advancement of rights of minorities and the powerless, in favor of the rights of the privileged and powerful. In the case of the Supreme Court of the United States, nine people, the leaders of the least democratic branch of the government, have vast power over all Americans, including the power and inclination to prevent the more democratic and local governmental institutions from taking important steps more in line with the outcome of democratic processes.

III. Conclusion

The Supreme Court of the United States has been a mostly conservative force since its creation under the Constitution of 1789. During the Reconstruction era that followed the Civil War, the Court invalidated important statutes aimed at achieving racial equality[330] and then it established the doctrine of separate but equal, which doomed generations of African-Americans to separate but unequal treatment at the hands of their governments.[331] Later in the nineteenth century, the Court pursued an anti-reform program in the name of contract and property rights, hindering state and federal efforts to protect workers from the concentrated power of employers.[332] In a brief period during the mid-twentieth

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sess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift, 101 Nw. U. L. Rev. 1891 (2007).

[329] Duncan Kennedy, A Critique of Adjudication: Fin de Siècle (1997).

[330] *See supra* Part I.B.1.

[331] *See supra* notes 73-74 and accompanying text. **R**

[332] *See supra* Part I.B.2.

century, the Court became an agent of social change, pursuing an agenda motivated primarily by the apparent realization that achieving racial justice was important not only to those discriminated against, but for American society as a whole.[333] Even during that period, however, the Court laid the groundwork for limiting doctrines that have severely limited the reach of Reconstruction era civil rights laws still on the books and more recent civil rights laws passed during the civil rights movement of the twentieth century.[334]

The current Court has returned to the predominantly conservative place that the Supreme Court has traditionally occupied in the U.S. government.[335] The Court has beaten back attempts by Congress, states and local governments to deal with discrimination against minorities and women through preferential treatment in contracting and education. The Court has, in effect, returned to the nineteenth century standard for evaluating congressional assertions of power to define and protect civil rights. And it has done these things without offering a normative justification sufficient to justify frustrating the will of the more democratic organs of government.

In recent times, the Court has become something of a Supreme Common Law Court of the United States. The designation "common law court" signifies two different tendencies. First, the Court has expanded the reach of federal law, mainly through expansive application of constitutional doctrines, to encompass areas that had previously been left to the law of the individual states, mainly common law.[336] Second, the Court has employed a common-law like methodology. Rather than refer to the text of or history behind constitutional provisions, the Court surveys the legal landscape, picks state law doctrines it finds most normatively attractive and then proclaims them as federal constitutional law.[337] In this way, the Court behaves the way state common law courts do when they face novel questions of state law.

Just how a Court should behave in the face of conflicting normative ideals and less than crystal clear textual requirements, statutory or constitutional, is one of the great subjects of legal and constitutional theory. Without pretending to come remotely close to answering that question, given the Court's complicity in creating the conditions for the Jim Crow laws that prevailed from the late nineteenth through the mid-twentieth centuries, and the legacy those laws and related social practices have left behind, I can confidently say that had the Court, as much as possible within the bounds of authoritative legal principles, been a faithful agent of the legislature, in theory and in practice, the world would be a better place.

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[333] *See supra* Part I.B.3.

[334] *See id.*

[335] *See supra* Part I.B.4.

[336] *See supra* Part II.

[337] *Id.*