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Introduction

Every year, thousands of students in constitutional law classes throughout the country learn about the special role that the federal courts have in our constitutional system—the role of protecting discrete and insular minorities. With its roots in Justice Stone’s famous footnote four in *United States v. Carolene Products*, the “representation reinforcement” theory of judicial review posits that federal courts are best suited for protecting individual rights in general, and the rights of minorities in particular, because they are insulated from political pressures experienced by the majoritarian political branches.¹ No less than one of the Founders of our Constitution, Alexander Hamilton, first made this argument, claiming that “the independence of the judges is equally requisite to guard the Constitution and the rights of the individual from the effects of those ill humors which [are] the arts of designing men.”² To legal scholars educated in these classes and inspired by the Warren Court’s ruling in *Brown v. Board of Education*, it is axiomatic that the primary protectors of individual rights within our constitutional system are the federal courts.³ However, this theory does not accurately reflect the relationship among Congress, the federal courts, and individual rights throughout the history of our country. Repeatedly, and during key periods of our history, Congress, representing the majority of the people in our nation, has acted not to *infringe upon* but to *protect* equality norms. In this book I describe that history, question the primacy of federal courts as protectors of individual rights, and present an alternative picture—that of Congress, the majoritarian branch, protecting equality norms.

In this book I revisit one of the oldest and most important controversies in constitutional law: how to reconcile equality norms with democratic rule.⁴ Most constitutional scholars believe that equality norms need protection from majority rule and that only the insulated federal courts can provide that protection.⁵ To the contrary, I argue that

democracy must be able to function without undue judicial interference to ensure the adequate enforcement of equality norms.⁶ Throughout our history, groups of people have worked together to fight for constitutional change in order to expand the scope of individual rights. For example, abolitionists fought to end slavery and later to establish rights for newly freed slaves, labor leaders fought for the right to organize, and civil rights workers in the 1950s and 1960s fought for legislation to end race discrimination in society. These activists directed their arguments to the political branches, not to the courts, and they were successful in the political branches, often despite the opposition of courts. The voice of these political activists is mostly lost in the conventional “representation reinforcement” view of individual rights. Here I seek to restore their voice and to analyze the manner in which members of Congress translated the constitutional theories of these activists into statutes protecting individual rights.

At the outset of this analysis, it is useful to consider recent examples where the government has protected two separate individual rights: the First Amendment right to free exercise of religion and the Second Amendment right to bear arms. Defining the scope of the Free Exercise Clause has been the subject of a constitutional dispute between Congress and the Supreme Court throughout the past two decades. By contrast, the courts have shied away from enforcing the Second Amendment individual right to bear arms, leaving its enforcement to the political branches. While proponents of both rights enjoy strong public support, the second right is arguably more robust and less subject to restriction in our legal system.

On April 17, 1990, the Supreme Court decided the case of *Employment Division v. Smith*, holding that the Free Exercise Clause of the First Amendment requires that state policies that incidentally infringe on the free exercise of religion need only surpass rational basis scrutiny, the lowest level of constitutional review.⁷ The *Smith* ruling marked a significant constitutional change because prior to *Smith*, the Court had applied strict scrutiny, the highest level of review, to such policies.⁸ The ruling immediately generated a battle over constitutional meaning between the Court and Congress.

Public reaction to the Court’s ruling in *Smith* was swift and negative. Members of the public, political interest groups, and politicians on both sides of the political spectrum condemned the ruling as insufficiently

protective of religious freedom. Responding to this criticism, a broad-based coalition of religious organizations unsuccessfully took the unusual step of petitioning the Court to re-hear the case.⁹ Members of Congress responded to the outcry by adopting the Religious Freedom Restoration Act (RFRA), which statutorily reinstated the strict scrutiny test for state actions incidentally infringing on the free exercise of religion. RFRA required state and local regulations that burden religious practices to be the least restrictive means of furthering a compelling governmental interest in order to pass statutory muster, effectively restoring the strict scrutiny test.¹⁰ The statute passed both houses of Congress by an overwhelming margin and was signed into law on November 16, 1993. Members of Congress agreed almost unanimously that religious exercise deserved a higher level of protection than that provided by the U.S. Supreme Court.¹¹

During the debate over RFRA, members of Congress on both sides of the aisle made it clear that they believed the Court had wrongly interpreted the Constitution. Oregon Republican Senator Mark Hatfield declared, “the Smith decision . . . has severely limited the first amendment’s protection of the right to exercise religious beliefs,” and his colleague, Dan Coates of Indiana complained, “The Court has effectively turned religious Americans into second class citizens.”¹² On the other side of the aisle, Democratic Senator Bill Bradley agreed that “Smith has, in essence, removed any real or significant constitutional protection for the free exercise of religion. It has, in effect, gutted the Free Exercise Clause.”¹³ In the House, Republican Bob Goodlatte of Virginia opined, “The U.S. Supreme Court has allowed serious erosion of this right [to free exercise],” and his Democratic colleague, Charles Schumer agreed, “incomprehensibly, Justice Scalia’s decision explained that requiring the Government to accommodate religious practice was a luxury. Tell to millions of Americans that religion is a luxury, and I think we get the reaction that we have had universally here on the floor from the most liberal to the most conservative member.”¹⁴

Some members of Congress made it clear that they intended RFRA to overrule the Court’s interpretation of the Free Exercise Clause.¹⁵ Representative Henry Hyde of Illinois cautioned, “Of course the label restoration is inappropriate in this context since the Congress writes the laws—it does not and cannot overrule the Supreme Court’s interpretation of the Constitution. We are unable to restore a prior interpretation of

the first amendment.”¹⁶ Others were less circumspect. Representative Charles Schumer insisted, “The bill will restore the first amendment to its proper place as one of the cornerstones of democracy.”¹⁷ House Judiciary Chairman Jack Brooks, a Democrat from Texas, explained that overturning a Supreme Court decision “is not an action to be taken lightly,” but, he added, “If the judicial branch is unwilling to afford adequate protection to our basic constitutional rights, Congress must step into the breach.”¹⁸ Signing the bill, President Bill Clinton agreed: “The power to reverse by legislation, a decision of the United States Supreme Court, is a power that is rightly hesitantly and infrequently exercised by the United States Congress. But this is an issue in which that extraordinary measure was clearly called for.”¹⁹ Hence, while they varied in the extent to which they were willing to directly challenge the Court, the president and the members of Congress who enacted RFRA asserted Congress’s authority to independently interpret the meaning of the Free Exercise Clause.

The Court’s response to RFRA was equally swift and correspondingly negative. In *City of Boerne v. Flores*, the Court struck down RFRA as applied to state governments on the ground that it exceeded Congress’s Section Five authority to enforce the Fourteenth Amendment. The *Boerne* Court held that RFRA, and all future Section Five legislation, must satisfy a new “congruence and proportionality” test in order to ensure that Congress uses its Section Five powers only to enact “remedial,” not “substantive,” legislation.²⁰ In *Boerne*, the Court emphatically asserted its own preeminence in constitutional interpretation, maintaining that when Congress attempts to define the substance of unconstitutional conduct, it intrudes on the proper function of “the Judicial Branch . . . to say what the law is.”²¹ The Court cited to *Marbury v. Madison* for the proposition that congressional interpretation of the constitution would place the constitution “on a level with ordinary legislative acts.”²² Despite the fact that *Marbury* itself made clear that all branches of the government have an obligation to interpret the constitution,²³ the *Boerne* Court insisted that Congress lacks the institutional competence to interpret the Constitution, effectively ruling that Congress lacks the authority to interpret the Fourteenth Amendment more expansively than the Court’s interpretation.²⁴

After *Boerne*, some members of Congress continued the battle over the Free Exercise Clause. Senator Orrin Hatch complained, “the Court has once again acted to push religion to the fringes of society,” and

Representative Charles Schumer opined that the Court's *Boerne* opinion forces citizens "to choose between their government and their God."²⁵ In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), a more modest, spending power-based statute that imposes the RFRA strict scrutiny test only on state regulations governing land use and institutionalized persons.²⁶ Recently, the Court held that RLUIPA does not violate the Establishment Clause, but it has yet to rule on whether or not Congress had the power to enact the statute.²⁷

In contrast to the battle over the Free Exercise Clause, consider the Second Amendment right to bear arms, one of the few individual constitutional rights that have developed with little input from the courts. Scholars differ over whether the Second Amendment protects an individual's right to bear arms.²⁸ The Supreme Court has not decided a single case interpreting the scope of that right since its ambiguous ruling in the 1939 case of *United States v. Miller*, and lower courts consistently rule against Second Amendment claims.²⁹ However, the individual right to bear arms has flourished in the popular realm, and advocates of that right have achieved significant political success. Opponents of gun control have defeated numerous legislative proposals by asserting their Second Amendment right to bear arms, and Congress has recognized that right in at least three separate pieces of legislation.³⁰

Supporters of the individual right to bear arms have often bemoaned the fact that courts shy away from enforcing the Second Amendment.³¹ However, even if the courts were to enforce the Second Amendment, it is difficult to imagine that right being more robust than it is currently in the political realm. If the Court did recognize an individual right, it probably would qualify that right in the way that it has limited freedom of expression in its interpretation of the First Amendment. In point of fact, supporters of the individual right to bear arms have good reason to keep that issue away from the courts and in the political process.

In *Smith* and *Boerne*, the Court interpreted the Free Exercise Clause more narrowly than Congress had, and in RFRA, Congress was more protective of the rights of religious minorities than the Court had been. Hence, the story of RFRA and *Boerne* is inconsistent with the conventional theory that courts must protect individual rights from infringement by the majority. The story of the Second Amendment also is arguably inconsistent with that theory. Gun owners have been politically active precisely because they know they cannot count on the courts to protect their rights. The lack of court enforcement has added urgency to

their concerns and enhanced their political appeal.³² As a case study, the Second Amendment suggests that some rights actually might receive *more* protection *without* the institution of judicial review.

Of course, it is problematic to generalize based on two examples. Perhaps the First Amendment right to free exercise and the Second Amendment right to bear arms are different from other individual rights because they are supported by either a majority of Americans or at least a significant minority. Other rights are not as politically popular and likely would not achieve the same success in the political process. Thus, a more systematic analysis of the strengths and weaknesses of courts and legislatures as rights-protectors is warranted.

In this book I focus on a certain category of rights, what Denise Morgan and I have called “rights of belonging.”³³ “Rights of belonging” are those rights that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that community. Legislation that defines and protects rights of belonging is the end product of a decision by the majority to embrace minorities and facilitate their inclusion in social and political institutions, as well as in the economic life of the country.

The term “belonging” is most closely associated with Kenneth Karst, who has written extensively about equal citizenship. Belonging, he explains, is essential to equal citizenship because “[a]mong full members of the community, the ideal of equality prevails; as to outsiders, the issue of equality seems irrelevant.”³⁴ The term “rights of belonging” is intended to be more encompassing than the term “civil rights,” including rights that historically were not considered to be civil rights such as economic and social rights. While it has its roots in the republican view of citizenship rights, the term “rights of belonging” also attempts to avoid the distinction between insiders and outsiders that the term “citizenship” implies.³⁵ National citizenship can be a force that brings people together, but the concept of national unity also can signal a sharp divide between those who belong and those who are excluded.³⁶ In sum, rights of belonging are best understood as the set of entitlements that are necessary to ensure inclusion, participation, and equal membership in our diverse national community.³⁷

In general, rights of belonging are based in equality. In *Brown v. Board of Education*, the Supreme Court created a right of belonging for African American schoolchildren by holding that segregated elementary schools violated the Equal Protection Clause. Court decisions like

Brown, and statutes like the Reconstruction Era civil rights statutes and the 1964 Civil Rights Act, create rights of belonging because they facilitate the belonging of people of color as equal members in our society. In contrast, liberty interests, like the right to family autonomy and freedom of speech, in and of themselves are not rights of belonging. However, liberty-based rights can implicate equality-based rights. For example, the right to marry is a liberty interest, rooted in individual autonomy, but it becomes an equality interest when it is denied to one group of people based on immutable characteristics.³⁸ Similarly, the First Amendment protects liberty interests such as freedom of speech and association, but it can also facilitate belonging by enabling people to participate in the political process on an equal basis. Hence, the right to join a union, based in part in the First Amendment and protected by the Wagner Act (formally, the National Labor Relations Act),³⁹ is a right of belonging because it facilitates the equal participation of workers in the workplace and in the political process. Both rights are rights of belonging because they enable outsiders to become part of the larger community.

Because rights of belonging facilitate the inclusion of “outsiders” into the community in which they live, they appear at first glance to be precisely the type of individual rights best enforced by non-majoritarian courts. Indeed, there is a significant overlap between those who benefit from rights of belonging and “discrete and insular minorities,” the term that invokes judicial solicitude. Yet here I show that precisely the opposite has happened during two of the periods of history marked by the greatest expansion of rights of belonging, post-Civil War Reconstruction and the New Deal Eras. The Court arguably preceded Congress during the third such period, the Second Reconstruction of the 1960s, with its ruling outlawing segregation in *Brown v. Board of Education*. However, even during that period, the ineffectiveness of judicial enforcement of the Court’s mandate in *Brown* meant that congressional action was necessary to fulfill the promise of equality in that decision.

Like the recent dispute over RFRA, the periods in which Congress has acted to protect rights of belonging often have been marked by battles over constitutional meaning between Congress and the Supreme Court. The Fourteenth Amendment itself was enacted in the midst of such a battle. Moreover, as during the battle over the meaning of the Free Exercise Clause, Congress, and not the Court, often took on the role of the branch that is *more* protective of individual rights. Some-

times, as during Reconstruction and the New Deal Eras, members of Congress have taken a defiant attitude toward the Court and asserted their own authority to interpret the Constitution. In other times, including the New Deal and the Second Reconstruction Eras, members of Congress have acted in the shadow of the Supreme Court and shaped their strategy to conform to the Court's restrictive interpretation of their power. Only during the debate over the 1964 Civil Rights Act did members of Congress see themselves as acting in harmony with the Court's constitutional vision. Even then, though, their power to act was restricted by Supreme Court precedent, and members of Congress shaped their strategy to avoid a possible confrontation with the Court. The battles between the Court and Congress over constitutional meaning are more than just a power struggle between coordinate branches. What is at stake in those battles is the adequate protection of our rights of belonging.

The rights-protecting role of Congress was central to the constitutional vision of the principal architect of our constitution, James Madison, and is enshrined in the enforcement provisions of every constitutional amendment expanding individual rights since the Reconstruction Era. Nevertheless, until now constitutional scholars have largely overlooked Congress's important role as protector of individual rights.⁴⁰ This oversight is due in large part to the fact that many constitutional law scholars simply do not trust Congress to act as a constitutional interpreter. As Mark Tushnet describes this view: "Familiarity leads us to assume that constitutional review must occur in courts and that non-judicial actors—politicians, said in a disparaging tone of voice—would fail to do a decent job of constitutional review were they given a chance. Courts are said to be distinctly the forum of principle, the legislature and executive the forum of politics."⁴¹ Many legal scholars simply ignore the role that Congress has in interpreting the Constitution. Others argue that as a political body, Congress cannot properly evaluate the kind of constitutional norms that underlie rights of belonging because it is not suited to determining matters of principle. In contrast to courts, which are institutionally designed to allow judges to determine matters of principle, members of Congress must pay attention to the desires of their constituents, hence, the "prevailing winds" of politics will affect their decision-making.⁴²

In this book I take issue with those scholars and argue not only that Congress has the power and the competence to play an important part

in creating constitutional norms but also that members of Congress have often used that power to protect rights of belonging. This book joins the growing body of work that Larry Kramer describes as “popular constitutionalism”—the study of constitutional interpretation outside of the courts. Some of this work, including Kramer’s, focuses on the interpretation of the constitution by “the people themselves” apart from the influence of political bodies.⁴³ Other scholars, such as Mark Tushnet and Keith Whittington, focus on constitutional interpretation by the political branches, including Congress.

In this book I explore the relationship between the two phenomena.⁴⁴ Popular constitutionalism by “the people themselves” has always preceded congressional protection of rights of belonging. For example, the antislavery constitutional theories of abolitionists influenced the Framers of the Reconstruction Amendments and Reconstruction Era civil rights legislation. The labor movement’s “constitution of freedom” influenced the New Deal Congress’s protection of workers, and the demands for equality of civil rights activists in the 1950s and 1960s inspired Congress to enact the 1964 Civil Rights Act and numerous other pieces of civil rights legislation. Here I focus primarily on what members of Congress did with those constitutional theories.

Here I also explore in detail the congressional debates over legislation protecting rights of belonging during those three eras, and in doing so, I treat Congress as a constitutional actor with an important role in constitutional interpretation. Like federal judges, members of Congress also swear an oath to uphold and defend the Constitution and thus are expected to consider the constitutionality of their actions.⁴⁵ Keith Whittington calls the process of determining constitutional meaning in the political branches “constitutional construction—the method of elaborating constitutional meaning in the political realm.”⁴⁶ Consistent with that view, in this book I take the words of the members of Congress at face value, just as a reader of a court decision would do. This methodology rejects the claim that the political nature of congressional decision-making necessarily results in unprincipled decisions. Many of the members of Congress debating the important statutes discussed in this book were acting on principle.

However, motive is not decisive to my analysis. Even those members who were not acting on principle, but instead acted according to political expediency, had to make convincing arguments in order to obtain their political objectives. Politicians make arguments in order to persuade, as

do judges when they write decisions.⁴⁷ While it is undeniable that members of Congress make decisions based on political calculations, the political nature of congressional decision-making in and of itself does not make that decision-making either illegitimate or inferior to courts' interpretation of the Constitution. Extensive research by political scientists reveals that the rulings of federal courts tend to track public opinion at about the same rate as congressional policies, indicating that, like members of Congress, judges also may be influenced by politics.⁴⁸

Still, constitutional construction is different from courts' interpretation of the constitution because, unlike judicial decisions, it is openly influenced by, and responsive to, political forces. In a majoritarian body, the most persuasive arguments resonate with popular sentiment and thus are useful to determining that sentiment. The vote on a piece of legislation is the final indicator of whether or not members of Congress succeeded in convincing their colleagues.

The study of congressional protection of rights of belonging is particularly salient given the Court's ruling in *Boerne* and other cases in the past decade, limiting congressional power to protect those rights. For example, in a series of recent cases, the Court has limited Congress's power to abrogate sovereign immunity, making it more difficult for individual plaintiffs to enforce their federal rights against state infringement.⁴⁹ In another group of cases, the Court limited Congress's use of the commerce power to establish individual rights.⁵⁰ Although the Court's ruling in *Boerne* placed the most stringent limitations on congressional power to define constitutional norms, all of these cases make it harder for Congress to create rights of belonging and to make them individually enforceable. These cases make it apparent that, to the current Supreme Court, other constitutional norms, including state sovereignty and protecting the Court's role as constitutional interpreter, take precedence over congressional protection of these important rights. More importantly, these decisions prevent Congress from adopting an alternative position—one that favors the protection of rights of belonging over these other constitutional norms.

The Rehnquist Court has been criticized widely for the restrictions that it has imposed on Congress's rights-enforcing power.⁵¹ Much of this criticism contrasts the Rehnquist Court's lack of deference toward Congress with the deference of the Warren Court. While this criticism is justified, it is somewhat ahistorical because it treats the Warren Court as the norm. It is the Warren Court, and not the current Court, that is the

historical anomaly. Throughout the history of this country, the Court has placed constitutional barriers in the way of congressional protection of rights of belonging, and it often has narrowly construed the statutes protecting those rights. Learning this history should cause constitutional scholars to reexamine their views on the role of legislatures and courts as protectors of rights of belonging. Advocates of rights of belonging should also take note and reconsider their reliance on courts instead of political bodies as the principal enforcers of those rights.

Along with the history explored in this book, there are institutional reasons why Congress is better suited to protect rights of belonging than are the federal courts. The insulation of federal courts from the political process arguably make those courts better suited to protect minorities because courts need not answer to the will of the majority. However, political insulation also weakens courts and can lead to resistance when courts enforce equality norms. By contrast, legislatures benefit from the legitimacy of being politically accountable to the people they serve. The transparency of the decision-making process also contributes to its legitimacy. Moreover, legislatures speak with the power of the majority, and Congress speaks for the majority of the entire country. Thus, it is not surprising that even when courts act in concert with Congress, federal legislation protecting rights of belonging has been more successful than court enforcement of those norms. Finally, focusing on congressional protection of rights restores the agency of political activists that fought for constitutional change. Their arguments were not directed toward courts but toward political actors.

Moreover, there are also normative reasons why, whenever possible, debates over rights of belonging should be conducted in the political realm rather than within the courts. Rights of belonging represent the decision of the community to expand itself to include more members and to improve the treatment of those who live within that community. Legislatures are the more natural enforcers of these positive rights because legislatures represent the will of the community. Political debates over the meaning and scope of rights of belonging can strengthen the community because it fosters an open dialogue about those rights. Because rights of belonging express the values of our national community, they are integrally linked to the political process. Perhaps most importantly, relying primarily on judges to define and enforce rights of belonging diverts energy from political action and engagement in the community, which is the most effective means of bringing about social change.⁵²