
2003

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Recommended Citation

Linda Greenhouse, *Roy R. Ray Lecture, Southern Methodist University Dedman School of Law: Because We Are Final: Judicial Review Two Hundred Years after Marbury*, 56 SMU L. REV. 781 (2003)
<https://scholar.smu.edu/smulr/vol56/iss2/5>

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ROY R. RAY LECTURE,
SOUTHERN METHODIST UNIVERSITY
DEDMAN SCHOOL OF LAW:
BECAUSE WE ARE FINAL:
JUDICIAL REVIEW TWO HUNDRED
YEARS AFTER *MARBURY*

*Linda Greenhouse**

SOME in the audience may recognize the provenance of my title, Justice Jackson's wry, if not cynical, observation that "[w]e are not final because we are infallible, but we are infallible only because we are final."¹ Fifty years later, that statement remains highly pertinent. Two hundred years after *Marbury v. Madison*² established the Supreme Court's authority to set aside legislation as inconsistent with the Constitution, the institution of judicial review—the power of the last word—is, in the hands of the current Supreme Court, as robust as it has ever been. Today's Justices have taken to heart John Marshall's famous declaration from his most famous opinion: "It is emphatically the province and duty of the judicial department to say what the law is."³

Whether the current Court is fulfilling that duty in ways that Chief Justice Marshall and his contemporaries would regard as appropriate is the subject of lively scholarly debate. Larry Kramer argues in his *Harvard Law Review* "Foreword" on the 2000 Term that the Marshall Court meant only to establish "that courts had the same duty and the same obligation to enforce the Constitution as everyone else, both inside and outside of government"—a far cry from the current discourse of judicial supremacy, let alone the exclusive role in constitutional interpretation that the Court claims for itself today.⁴ Paul Kahn, on the other hand, finds *Marbury* a strategically brilliant act of institutional self-enhancement. He argues that almost by definition, judicial review sowed the seeds of judicial supremacy by its very claim of authority through which

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1. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3. *Id.* at 177.

4. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 5, 90 (2001).

“the Constitution is transferred from the original text to the judicial opinion.”⁵ Kahn asserts that “[t]he Constitution is, for the *Marbury* Court, a strategic resource by which the Court projects law beyond the reach of any actual conflict with action.”⁶

Whatever the institution of judicial review was originally thought to be, there is little doubt about what it has become: a powerful tool in the hands of a Court that has assigned to itself the job of policing our democracy’s deepest structures: the allocation of power among the branches of the national government and between the federal government and the states. One can debate the wisdom and/or legitimacy of the Court’s assertion of power and the uses to which it is currently putting that power. Another lively debate now underway is whether judicial review is even desirable, with voices from both the right and the left, from Robert Bork to Mark Tushnet, raising provocative questions.⁷ That is a debate I don’t plan to resolve. Since I’m in the business of describing rather than passing judgment, I’ve set myself the more modest task of marking *Marbury*’s bicentennial by describing the status of judicial review today.

First, I suppose I should pay homage to history and, in the manner of Tom Stoppard’s fifteen-minute version of *Hamlet*,⁸ set the stage by offering a brief synopsis of *Marbury*. Like so many great cases, it arose in the context of political ferment, in Paul Kahn’s phrase, “the first great political crisis of the new national order,”⁹ the defeat of the Federalists by Jefferson’s Republicans in the election of 1800. William Marbury was one of President John Adams’ “midnight appointments,” one of forty-two justices of the peace nominated by Adams in the final days of his administration. The Senate confirmed Marbury’s appointment, but the actual commission authorizing him to take office was not delivered before Adams’ term ran out. President Jefferson refused to acknowledge the validity of the commission and James Madison, his secretary of state, refused to deliver it. Marbury and several others in the same position invoked the original jurisdiction of the Supreme Court seeking a writ of mandamus to force Madison to deliver the commission.

Speaking for a unanimous Court on February 24, 1803, Marshall said that Marbury’s commission had indeed been wrongfully withheld. That was the good news for the Federalists. The good news for the Jeffersonians was that the Court lacked jurisdiction to issue the writ because Congress’s grant of mandamus jurisdiction to the Supreme Court in the Judiciary Act of 1789 conflicted with Article III of the Constitution, which limits the Court’s original jurisdiction to cases involving states or

5. PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 224 (1997).

6. *Id.* at 170.

7. See ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

8. TOM STOPPARD, *DOGG’S HAMLET; CAHOOT’S MACBETH* (1980).

9. KAHN, *supra* note 5, at 9.

ambassadors. The provision conferring jurisdiction on the Court was unconstitutional, meaning that, while the Court found Marbury and his fellow plaintiffs suffered an injury, they had no remedy. Since Congress had not conferred mandamus jurisdiction on the circuit courts and no provision existed for suing the federal government for money damages, they had reached a legal and constitutional dead end. Marbury had to content himself with being one of the most famous litigants in constitutional history. He never served as a justice of the peace. The only winner in this episode was the Supreme Court, which had managed to extract strength from weakness, making momentous constitutional law that enhanced its own power in the course of declaring that it lacked jurisdiction.

Having given itself the power of judicial review, the Court was quite diffident about using it. It did not declare another act of Congress unconstitutional for fifty-four years, when it struck down the Missouri Compromise in *Dred Scott v. Sandford* and held that Congress exceeded its constitutional authority in seeking to abolish slavery in the territories.¹⁰ This was an early indication that judicial review was hardly an unalloyed blessing, and it has been at the times of greatest political stress that debates over the Court's exercise of its countermajoritarian power have flared.¹¹

That is, in fact, one of the mysteries that confronts us on *Marbury's* bicentennial. There is no obvious external reason why, in the early- to mid-1990s, the Rehnquist Court decided to reopen what is often referred to as the "New Deal settlement," under which the Supreme Court emerged from the trauma of the Court-packing crisis reconciled to an essentially plenary national power that would go unchecked by the historic constraints of federalism, and at the same time having redefined its own essential function, ensuring that the exercise of that power did not violate individual rights.

The Court's deferential stance toward Congress during the ensuing decades is captured by then-Justice Rehnquist's assertion for the majority in a 1980 decision, *Railroad Retirement Board v. Fritz*: "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."¹² That statement was an accurate reflection of mid-century reality. From 1936 until 1995—that is, from *Carter v. Carter Coal*,¹³ which invalidated Congress's effort to regulate coal mining through the Bituminous Coal Conservation Act, until *United States v. Lopez*,¹⁴ which struck down the Gun-Free School Zones Act, a law that barred possession of a gun within 1,000 feet of a school—the Supreme Court did not invalidate a single act of Congress as exceeding the limits of national authority under the Commerce Clause.

10. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

11. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383 (2001).

12. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

13. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

14. *United States v. Lopez*, 514 U.S. 549 (1995).

So what was there about the year 1995 that caused the unraveling of the New Deal settlement and brought the Court back to using the power of judicial review to police the exercise of national power? The simplest answer is that 1995 was the earliest time that Chief Justice Rehnquist had both the votes and the vehicle to accomplish a longstanding goal: to reinvest the states with the attributes of sovereignty that he believed since early in his career had been improperly submerged in modern constitutional analysis. He had come close, so close, to achieving that goal in *National League of Cities v. Usery*,¹⁵ which invoked the Tenth Amendment to hold that Congress could not make federal wage and hour laws binding on the states for their own employees.¹⁶ But that victory had slipped away only nine years later when the Court repudiated *National League of Cities* and remitted the states to the mercies of the national political process.¹⁷ Justice Rehnquist announced, in dissent, that he would bide his time,¹⁸ and he did. By the 1993 Term, when the government's petition in *United States v. Lopez* reached the Court, Chief Justice Rehnquist had gained allies not available to him back in 1985: Justices Scalia, Kennedy, and Thomas had all joined the Court in the interim.

The deeper reason why the New Deal settlement began to unravel is, of course, that it was never completely settled. The belief that the Supreme Court had abdicated its role in the mid-1930s to keep the federal government in constitutional harness—that the Court had sent the Constitution into exile, in Chief Judge Douglas H. Ginsburg's evocative image¹⁹—never disappeared and by the early 1990s was beginning to emerge from the closet. It was the Fifth Circuit, after all, that had invalidated the Gun-Free School Zones Act on Commerce Clause grounds,²⁰ leading the Solicitor General to petition the Supreme Court for what he certainly had reason to assume would be a straight path to reversal. The “Constitution in exile” was on the way home, and judicial review was the horse it was riding.

The Supreme Court made no special mention of the *Marbury* anniversary last month. Actions speak louder than words, perhaps. In the last eight terms, the Court has overturned all or parts of thirty-three federal statutes, ten of them on the ground that Congress had exceeded its authority either under the Commerce Clause²¹ (usually in the context of an

15. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

16. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

17. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

18. *Id.* “I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.” *Id.* at 580 (Rehnquist, J., dissenting).

19. Douglas H. Ginsburg, *Delegation Running Riot*, 18 REG. 84 (1995) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES PEOPLE THROUGH DELEGATION* (1993)).

20. *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993).

21. Commerce Clause invalidations: *United States v. Lopez*, 514 U.S. 549 (1995) (in criminalizing possession of guns near schools, the Gun-Free Schools Zones Act attempted

attempted abrogation of the states' Eleventh Amendment immunity) or Section 5 of the Fourteenth Amendment.²² In addition, the Court has applied the doctrine of constitutional doubt to give narrowing constructions to several other statutes that would otherwise, in the Court's view, have raised serious Commerce Clause or Eleventh Amendment problems.²³

And in this inventory of overrulings, let's not forget the fascinating *Dickerson v. United States*²⁴ from the 1999 Term, in which the Court reaffirmed the constitutional basis for the holding in *Miranda v. Arizona*.²⁵ In this decision, the Court overturned 18 U.S.C. § 3501, a law Congress had enacted two years after *Miranda* to express its disapproval of that ruling and to restore the same case-by-case test of a confession's voluntariness the *Miranda* Court had repudiated. The underlying question in *Dickerson* was whether *Miranda* was based on an established constitutional rule. If it were, it would be obvious that Congress could not overturn it by legislative fiat. On the other hand, if *Miranda* had simply established "prophylactic" and "procedural" rules that "were not themselves rights protected by the Constitution," as Justice Rehnquist himself had written for the Court in a 1974 case, *Michigan v. Tucker*,²⁶ then Congress was not so constrained.

When *Dickerson* reached the Court, Chief Justice Rehnquist put aside his doubts about the origins of *Miranda* to declare firmly that *Miranda* was solidly grounded in the Fifth Amendment and that because "Congress may not legislatively supersede our decisions interpreting and ap-

to regulate activity not sufficiently connected to commerce); *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (commerce power not sufficient to abrogate states' Eleventh Amendment immunity from suit in federal court); *Alden v. Maine*, 527 U.S. 706 (1999) (Congress lacks power under the Commerce Clause to abrogate states' immunity from suit in their own courts); *United States v. Morrison*, 529 U.S. 598 (2000) (civil suit provision of the Violence Against Women Act addressed conduct outside the commerce power; also invalid under Section 5 of the Fourteenth Amendment); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (Congress lacks authority to abrogate state immunity from having to answer a private complaint before a federal regulatory commission). On related state sovereignty grounds, the Tenth Amendment, the Court in *Printz v. United States*, 521 U.S. 898 (1997), invalidated the provision of the Brady Handgun Violence Prevention Act that required local sheriffs to conduct background checks of handgun purchasers.

22. Section 5 invalidations: *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act); *Fla. Prepaid v. College Sav. Bank*, 527 U.S. 627 (1999) (Congress lacked authority to abrogate state immunity from suit under the Patent and Plant Variety Protection Remedy Clarification Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act as applied to the states); and *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Americans With Disabilities Act as applied to the states).

23. See, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (False Claims Act as applied to the states); *Jones v. United States*, 529 U.S. 848 (2000) (federal arson statute as applied to private residences); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (the agency's Migratory Bird Rule unauthorized by the Clean Water Act).

24. *Dickerson v. United States*, 530 U.S. 428 (2000).

25. *Miranda v. Arizona*, 384 U.S. 436 (1966).

26. *Michigan v. Tucker*, 417 U.S. 433, 439, 444 (1974).

plying the Constitution,”²⁷ Section 3501 was unconstitutional. As long as the debate over the validity of *Miranda* had been framed as state versus suspect, the suspect did not carry a lot of weight. But now that it was the Court versus Congress, the Court’s victory was inevitable.²⁸

During its sixteen years, the Warren Court declared nineteen federal statutes unconstitutional, an average of 1.19 per year. The Burger Court struck down thirty-two statutes over its seventeen years, an average of 1.88 per year. Heading into seventeen years, the Rehnquist Court has overturned forty-one laws, 2.55 per year, more than twice the rate of the “activist” Warren Court.

The fact that Chief Justice Rehnquist let the *Marbury* bicentennial go unremarked last month does not mean that he does not have John Marshall very much in mind, perhaps even as a role model. Almost exactly two years earlier, on February 20, 2001, the Chief Justice departed from the usual formulaic opening of a session of the Court to offer from the bench a brief, but striking, reflection on the two-hundredth anniversary of Marshall’s swearing-in as the fourth Chief Justice. After noting that the actual bicentennial, February 4, had passed while the Court was in recess, he said:

I am quite convinced that Marshall deserves to be recognized along with George Washington, Alexander Hamilton, and Thomas Jefferson as one of the “founding fathers” of this country.

Marshall served as Chief Justice from 1801 until 1835. He authored more than 500 opinions, including most of the important cases the Court decided during his tenure. Using his remarkable ability to reason from general principles to conclusions based on those principles, he derived from the Constitution a roadmap of how checks and balances could be enforced in practice. I don’t think I overstate the case to say, that it is in large part because of Marshall’s tenure on the Supreme Court that the Third Branch of our government occupies the co-equal position it does today.²⁹

He concluded by describing the modern Supreme Court as “the lengthened shadow” of John Marshall.³⁰

Electronic databases make it easy to demonstrate the extent to which *Marbury* itself—the actual opinion, not the abstract notion of judicial review—is part of the day-to-day discourse at the Supreme Court. Until the middle of the last century, the Court cited it infrequently—only seven times during the decade of the 1950s. It was cited twenty-two times during the 1960s, twenty-four times during the 1970s, forty-one times during

27. *Dickerson*, 530 U.S. at 437.

28. See Linda Greenhouse, *The Last Days of the Rehnquist Court: The Rewards of Patience and Power*, 45 ARIZ. L. REV. 251 (2003).

29. William H. Rehnquist, Remarks from the Bench on the Occasion of the 200th Anniversary of John Marshall’s Swearing-In as Chief Justice (Feb. 20, 2001), in J. SUP. CT. OF U.S., Feb. 20, 2001, at 549, available at <http://www.supremecourtus.gov/orders/journal.html>.

30. *Id.*

the 1980s, and twenty-nine times during the 1990s. Recognizing that the Court's docket of decided cases fell by approximately fifty percent from the 1980s to the 1990s, it is clear that the rate at which the Court cited *Marbury* actually increased during the 1990s. So far in the current decade, the Court has cited *Marbury* nine times.

Of course, not every citation means that the Court invoked *Marbury* as a basis for overturning a federal statute. Justice Stevens cited it in his dissenting opinion in *Bush v. Gore* as support for his argument that the Florida Supreme Court simply "did what courts do"³¹ and its decision, therefore, should not have been overruled by the United States Supreme Court.

Justice Kennedy cited *Marbury*'s famous line in his opinion for the Court in *Legal Services Corp. v. Velazquez*³² to make a somewhat similar structural point in the course of striking down on First Amendment grounds a congressional restriction on the type of advocacy in which lawyers paid by the Legal Services Corporation can engage on behalf of their clients. The lawyers were forbidden from arguing that a statute or regulation was unconstitutional. Justice Kennedy said that given *Marbury*'s understanding of the judicial role, such a restriction on advocacy left courts themselves handicapped in their ability fully to understand the dimensions of the cases they were obliged to decide. Citing *Marbury*, he explained that "[i]nterpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy" and that "[a]n informed, independent judiciary presumes an informed, independent bar."³³

Justice Souter cited *Marbury* in his opinion concurring in the judgment in *Washington v. Glucksberg*,³⁴ the case that rejected the claim of a constitutional right to physician-assisted suicide. In the course of analyzing the substantive due process foundation of this claim, Justice Souter referred to Justice Harlan's dissenting opinion in *Poe v. Ullman*.³⁵ Then, citing *Marbury*, Justice Souter said: "This enduring tradition of American constitutional practice is, in Justice Harlan's view, nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text."³⁶

As these few examples—a handful of the many available—suggest, *Marbury* has in some ways evolved into a shorthand civics lesson, a rhetorical device that Justices use to remind one another of the judicial function. But make no mistake: *Marbury* has teeth, and it can bite.

31. *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177) ("It is emphatically the province and duty of the judicial department to say what the law is.").

32. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

33. *Id.* at 545 (citing *Marbury*, 5 U.S. (1 Cranch) at 177).

34. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

35. *Id.* at 752 (Souter, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

36. *Id.* at 763 (Souter, J., concurring).

Perhaps the most significant recent invocation of *Marbury* in a decision overturning an act of Congress came in Justice Kennedy's opinion for the Court in a 1997 case, *City of Boerne v. Flores*,³⁷ which overturned the Religious Freedom Restoration Act of 1993 (RFRA).³⁸ It was not apparent at the time, but this decision was to provide the analytical foundation for a substantial portion of the Rehnquist Court's federalism revolution. So it is worth reviewing the context for the ruling and examining with some care the Court's exercise of judicial review in this extremely important case.

Congress passed the RFRA for the explicit purpose of overturning a highly controversial and unpopular Supreme Court decision from three years earlier, *Employment Division v. Smith*.³⁹ That decision rejected a First Amendment free exercise claim on behalf of two American Indians who lost their jobs for using the illegal drug peyote for ritual purposes in their Native American Church.⁴⁰ Oregon denied their request for unemployment benefits because their dismissal resulted from a violation of the state's narcotics law.⁴¹ The men argued that although the statute was facially neutral and generally applicable, not targeted at religion or religious practice, it could not constitutionally trump their free exercise claim unless the state could justify it under the compelling state interest test set forth in an earlier free exercise case from 1963, *Sherbert v. Verner*.⁴² But the Court now disavowed the *Sherbert* test, holding there was no constitutional bar to enforcing a facially neutral, generally applicable law, even one that placed a substantial burden on a religious practice.⁴³

A broad coalition of religious and political groups organized to respond to *Employment Division*. Congress held its first hearing five months after the Supreme Court's decision, and many prominent constitutional scholars took part in drafting the bill and compiling the legislative history.⁴⁴ As its title suggested, one of the act's stated purposes was to "restore the compelling interest test as set forth in *Sherbert* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."⁴⁵ To accomplish this purpose, the statute provided that "governments should not substantially burden religious exercise without compelling justification."⁴⁶ That meant that it was the government's task to show that a burden on the free exercise of religion resulting from a rule of general applicability was "in furtherance of a

37. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

38. 42 U.S.C. § 2000bb (2000).

39. *Employ. Div. v. Smith*, 494 U.S. 872 (1990).

40. *Id.* at 874.

41. *Id.*

42. *Id.* at 875 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

43. *Id.* at 884-85.

44. Having unanimously passed the House of Representatives and after receiving only three dissenting votes in the Senate, President Clinton signed the RFRA into law on November 16, 1993.

45. 42 U.S.C. § 2000bb(b)(1) (2000).

46. 42 U.S.C. § 2000bb(a)(3) (2000).

compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”⁴⁷

Here, certainly, was a challenge to the Supreme Court’s authority, and one the Court promptly accepted in *City of Boerne v. Flores*.⁴⁸ The case was an appeal challenging the constitutionality of the RFRA brought by a Texas city locked in a zoning dispute with a Roman Catholic church. The church wanted to enlarge its building, which was located in a historic preservation zone.⁴⁹ The Archdiocese of San Antonio was the first party to invoke the RFRA, after the city’s Landmark Commission refused to issue a building permit and the City Council turned down the church’s appeal. Archbishop P.F. Flores went to court seeking a declaration that the historic district zoning ordinance violated the RFRA as applied to the church and, in response, the city challenged the constitutionality of the RFRA itself. With the constitutionality of a federal law in question, the United States intervened to defend the statute.

The law’s drafters had, of course, anticipated such a challenge and prepared for it. The statute was based explicitly on Section 5 of the Fourteenth Amendment, which provides that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”⁵⁰ What were the “provisions of this article”? The relevant provision was understood to be the due process guarantee of Section 1, through which the Free Exercise Clause of the First Amendment had been incorporated and applied to the states. So the constitutional question was whether the RFRA was “appropriate legislation” under Section 5 in light of the Supreme Court’s newly constricted definition of free exercise. Both the House and Senate reports considered the question and concluded, as the House report put it, that under Section 5, as well as the Necessary and Proper Clause, “the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority.” The report noted that the Court “has repeatedly upheld such congressional action after declining to find a constitutional protection itself,” as long as Congress was not creating a statutory right that withdrew constitutional protection or conflicted with another constitutional provision.⁵¹

This analysis did not impress Senior District Judge Lucius D. Bunton III, who took only four paragraphs to declare the Religious Freedom Restoration Act unconstitutional. Judge Bunton wrote: “[I]t has come to the Court’s attention that this Act seeks to overturn an interpretation of the United States Constitution by the Supreme Court,”⁵² and he began his legal analysis by stating:

47. 42 U.S.C. § 2000bb-1(a)(1)-(2) (2000).

48. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

49. *Id.* at 507.

50. U.S. CONST. amend. XIV, § 5.

51. H.R. REP. NO. 103-88, at 9 (1993).

52. *Flores v. City of Boerne*, 877 F. Supp. 355, 356 (W.D. Tex. 1995).

According to the holding of *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is."

... The Court is cognizant of Congress' Authority under Section 5 of the Fourteenth Amendment, yet is convinced of Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary.

... RFRA is in violation of the United States Constitution and Supreme Court precedent by unconstitutionally changing the burden of proof as established under *Employment Division v. Smith*.⁵³

Now the stakes were really high, and it was obvious that this was not an ordinary case. Amici flocked to the Fifth Circuit to participate in the appeal: Professor Douglas Laycock, one of the principal drafters of the statute, came in to represent the Archbishop; Rex E. Lee, the former Solicitor General, came to represent Senator Orrin Hatch, a leading congressional sponsor; and Professor Marci A. Hamilton of Cardozo Law School, a leading critic of the RFRA whose writing had been influential with the District Court, came to help represent the city.

The Fifth Circuit reversed and upheld the law.⁵⁴ Judge Higginbotham cited a long list of Supreme Court precedents rejecting the notion that Congress was limited in its Section 5 powers by the boundaries of the Court's own interpretation of the Fourteenth Amendment's substantive guarantees. He noted that in *Fullilove v. Klutznick*, the Court took the view that Congress could remedy the past effects of discrimination under Section 5 even though the Court had interpreted the Fourteenth Amendment as barring only intentional discrimination.⁵⁵ In upholding the RFRA, the Fifth Circuit relied heavily on the Supreme Court's 1966 decision in *Katzenbach v. Morgan*, which upheld a provision of the Voting Rights Act that prohibited English-language literacy tests even though the Supreme Court itself had ruled that literacy tests were not unconstitutional.⁵⁶ The Court in *Katzenbach* interpreted Section 5 as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁵⁷

Reviewing this history, the Fifth Circuit concluded that by taking a broader view of the Free Exercise Clause, Congress did not "usurp the judiciary's power to interpret the Constitution,"⁵⁸ nor had it "arrogated to itself the unrestricted power to define the Constitution."⁵⁹ Rather, Congress had engaged in a shared enterprise of constitutional interpreta-

53. *Id.* at 356-58.

54. *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996).

55. *Id.* at 1357 (citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

56. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

57. *Id.* at 651.

58. *Flores*, 73 F.3d at 1364.

59. *Id.* at 1363.

tion, one with roots in history and precedent: "In short, the judiciary's duty is to say what the law is, but that duty is not exclusive."⁶⁰

That statement, by a mainstream group of rather conservative federal judges (Higginbotham, Emilio Garza, and Benavides), was perhaps a statement of the obvious on January 23, 1996. But as of June 25, 1997, when the Supreme Court overturned the Fifth Circuit in *City of Boerne v. Flores*, it was no longer an accurate statement of the relationship between the Supreme Court and Congress or of the modern meaning of judicial review. Not only was this the first time since 1883, when the Court decided in the *Civil Rights Cases* that Congress lacked authority to regulate private action under the Thirteenth and Fourteenth Amendments, that the Court had invalidated a federal statute as exceeding Congress's Section 5 authority,⁶¹ but as Ruth Colker and James J. Brudney point out, the Court in *City of Boerne* "did not merely hold that the RFRA was unconstitutional in *Marbury* terms; it set forth a new framework for considering the constitutionality of Congress's actions under Section 5."⁶² Deferential review of Congress's exercise of its enumerated powers, the basis for the New Deal settlement, was over. In ways that have become fully apparent only in retrospect, *City of Boerne* started the Court on the road to treating the Constitution "as a document that speaks only to courts"—a "juricentric Constitution," in the words of Robert Post and Reva Siegel.⁶³

Writing for the Court in *City of Boerne*, Justice Kennedy made clear that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."⁶⁴ An interpretation of *Katzenbach*, upholding legislation that had a rights-expanding rather than a remedial, anti-discrimination purpose, was neither a necessary nor "even the best" interpretation of that decision, he said.⁶⁵ And it was obvious, he continued, that the RFRA was not remedial or preventive legislation: "It appears, instead, to attempt a substantive change in constitutional protections," exacting "substantial costs" on the states both by imposing on them a "heavy litigation burden" and by "curtailing their traditional general regulatory power."⁶⁶ In its sweep and potential for intrusion, the RFRA was far out of proportion to any demonstrated problem that needed remediation: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁶⁷ (The opinion cited no authority for that particular formulation.)

60. *Id.*

61. The Civil Rights Cases, 109 U.S. 3 (1883).

62. Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 104 (2001).

63. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. REV. 1 (2003).

64. *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997).

65. *Id.* at 527.

66. *Id.* at 532-34.

67. *Id.* at 508.

At first glance, this analysis contained the suggestion that a better legislative record might have cured the problem. But the state of the record was not the majority's real concern. At the conclusion of his opinion, Justice Kennedy made it clear that Congress had not understood its role.

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.⁶⁸

This is not the time or place for a detailed account of the federalism revolution, other than to note that *City of Boerne's* new "congruence and proportionality" requirement for Section 5 has given the Court a weapon considerably more powerful than it appeared to be at the time.⁶⁹ The Court has since gone on to find an absence of congruence and proportionality with respect to the Age Discrimination in Employment Act,⁷⁰ the Americans With Disabilities Act,⁷¹ and even the Patent and Plant Variety Protection Remedy Clarification Act.⁷² *Nevada Department of Human Resources v. Hibbs*,⁷³ a case awaiting decision in the current Term, brings this series of developments close to the core of the Section 5 authority to address discrimination to which the Court has accorded heightened scrutiny.

The question in *Hibbs* is whether Congress acted within its Section 5 authority when it abrogated state immunity from suit under the family leave provision of the Family and Medical Leave Act of 1993.⁷⁴ This provision provides up to twelve weeks of unpaid leave to women and men who need it to care for a sick family member. The legislative history indicates that in making such leave available on a gender-neutral basis, Congress sought to combat employers' stereotyped expectation that female employees would be the ones to stay home or leave work in a family medical emergency, an expectation that makes women less desirable as

68. *Id.* at 535-36 (*Marbury* citation omitted).

69. Colker and Brudney observe that while Justices Ginsburg and Stevens joined the majority in *City of Boerne*, they have dissented from the ensuing Section 5 decisions, suggesting that "it is possible that they did not appreciate how the opinion subtly created a basis for new limitations on Congress's powers." Colker & Brudney, *supra* note 62, at 104 n.110.

70. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

71. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

72. *Fla. Prepaid v. College Sav. Bank*, 527 U.S. 627 (1999).

73. *Nev. Dep't of Human Res. v. Hibbs*, 273 F.3d 844 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2618 (2002) (No. 01-1368) (argued Jan. 15, 2003).

74. 29 U.S.C. § 2601 (2000).

employees.⁷⁵ Consequently, the law is being defended, both by the United States and a broad coalition of civil rights groups, as legislation designed to remedy sex discrimination.

Hibbs is being watched very closely because it is the first in this series to confront the Court with a Section 5 enactment designed to protect a suspect category. The question is whether the Court will continue down the road of *City of Boerne* or whether it will rediscover the deference traditionally accorded to such congressional efforts. Only twenty-three years ago, Chief Justice Burger, no fan of affirmative action, wrote the plurality opinion in *Fullilove v. Klutznick*, upholding a ten percent minority set-aside for federal contracting. He made it clear that deference to Congress required a thumb on the judicial scale, even on behalf of legislation that the Court found problematic or even distasteful. "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees,"⁷⁶ he wrote.

On *Marbury*'s bicentennial, that statement remains valid in theory, but how quaint it sounds in practice. It is clear that judicial review has not been a static concept. Just as the Court's vision of the Constitution and its role in the constitutional system has changed over time, so too has the use it has made of this once-uniquely American contribution to democratic theory. Today's judicial review may well not be tomorrow's; it may not be insignificant that all the post-*City of Boerne* cases I have mentioned were decided by votes of five to four.⁷⁷ The Court may not be infallible, but, for now, those votes are final.

75. 29 U.S.C. § 2601(a)(6) (2000); H.R. REP. NO. 102-135, pt. 1, at 27-28 (1991).

76. *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980).

77. The same five (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) and the same four (Justices Stevens, Souter, Ginsburg, and Breyer).

Articles

