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CONGRESSIONAL POWER TO CONTRADICT THE SUPREME COURT'S CONSTITUTIONAL DECISIONS: ACCOMMODATION OF RIGHTS IN CONFLICT

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I. INTRODUCTION

Two decades ago, in *Katzenbach v. Morgan*,[1] the Supreme Court upheld a federal statute, enacted under section five of the fourteenth amendment,[2] prohibiting state English literacy requirements for voters. The Court's approval of this use of the fourteenth amendment enforcement power was somewhat surprising in light of the Court's rejection of a fourteenth amendment equal protection challenge to literacy requirements several years earlier.[3] The Court supported its decision with a sweeping rationale. According to the Court, Congress possesses plenary legislative authority under the fourteenth amendment enforcement power, authority unbounded by the scope of fourteenth amendment rights articulated in prior Court decisions.[4] The Court maintained that Congress not only could devise remedies for judicially-declared violations of the fourteenth amendment, but also could decide for itself whether a state had violated that amendment.[5]

In his dissenting opinion in *Morgan*, Justice Harlan suggested that the Court's recognition of congressional power to interpret the

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1. 384 U.S. 641 (1966).

2. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

3. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

4. *Morgan*, 384 U.S. at 648-49.

5. *Id.* at 652-56. This interpretation of the fourteenth amendment enforcement power is particularly significant because of the broad scope of potential constitutional violations covered by the amendment and thus by the enforcement power. Section one of the amendment includes the frequently-invoked due process and equal protection clauses, as well as the privileges and immunities clause. *See* U.S. CONST. amend. XIV, § 1.

substance of the fourteenth amendment, in a manner inconsistent with the Court's interpretation, compromised the principle of judicial supremacy enunciated in *Marbury v. Madison*.[6] Justice Harlan contended that Congress could not revise or contradict a constitutional decision of the Court through ordinary legislation, and he noted that Congress could use the power recognized by the majority to curb fourteenth amendment rights.[7] The majority's response to this argument was oblique. In a footnote, Justice Brennan argued that, while Congress could exercise the enforcement power to expand judicially-created rights, it could not "exercise discretion in the other direction . . . to restrict, abrogate, or dilute [fourteenth amendment] guarantees."[8] This assertion, which has become known as the one-way "ratchet" theory, has provided a continuing source of controversy.

Whatever their intrinsic appeal, Justice Harlan's views concerning judicial supremacy have not prevailed. With the notable exception of *Oregon v. Mitchell*,[9] decided in 1970, the Supreme Court consistently has upheld congressional efforts to expand fourteenth amendment rights beyond their previous judicial confines.[10] To date, however, the Court has had no occasion to test the limits of Justice Brennan's ratchet footnote. Despite a wealth of scholarly commentary on *Morgan* and its progeny,[11] the precise contours of

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6. *See id.* at 666-68 (Harlan, J., dissenting) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

7. *Id.* at 668 (Harlan, J., dissenting); *see also* Oregon v. Mitchell, 400 U.S. 112, 204-05 (1970) (opinion of Harlan, J., elaborating on this argument).

8. 384 U.S. at 651 n.10.

9. 400 U.S. 112 (1970).

10. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

11. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-12 to 5-15 (1978); Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971) [hereinafter cited as Cox, *Constitutional Determinations*]; Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) [hereinafter cited as Cox, *Human Rights*]; Gordon, *The Nature and Uses of Congressional Power under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656 (1977); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

The Human Life Bill, discussed *infra* notes 163-77 and accompanying text, triggered a second wave of commentary on Congress' fourteenth amendment enforcement power. *See,*

Congress' authority to revise the Supreme Court's constitutional decisions remains unclear.

This Article examines the outer boundaries of this congressional revisory authority. First, the Article briefly summarizes the doctrinal framework established by the Court in the *Morgan* line of cases. The Article proceeds to evaluate the efforts of commentators to explain the *Morgan* doctrine and to reconcile it with *Marbury v. Madison*. Based on this analysis, the Article presents a modified theory of congressional power under *Morgan*, a theory which emphasizes Congress' special role in accommodating rights in conflict. The Article then tests the limits of this "rights in conflict" theory by applying it to two proposals that have engendered considerable controversy: the Equal Access Act,[12] a recent congressional enactment that prohibits federal funding of state secondary schools that do not accord religious groups the same access to school facilities granted to other extracurricular groups; and the Human Life Bill,[13] a proposal raised in Congress that sought to reverse the Supreme Court's decision in *Roe v. Wade*[14] by defining fetuses as "persons" protected by the fourteenth amendment. The Article concludes that the rights in conflict theory offers a convincing basis for Congress to assume an enhanced role in arbitrating vital constitutional disputes and thereby to strike a more desirable constitutional balance with the Supreme Court than the balance that prevails under the status quo.

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e.g., Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U.L. REV. 129 (1982); Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333 (1982); Galebach, *A Human Life Statute*, 7 HUMAN LIFE REV. 5 (1981); Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337 (1984); *see also* Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969 (1984) (discussing various uses of the enforcement power).

12. Education for Economic Security Act, Pub. L. No. 98-377, §§ 801-805, 98 Stat. 1267, 1302-04 (1984) (codified at 20 U.S.C.A §§ 4071-4074 (West Supp. 1985)).

13. *See* S. 26, 98th Cong., 1st Sess., 129 CONG. REC. S225 (daily ed. Jan. 26, 1983).

14. 410 U.S. 113 (1973).

II. THE Morgan DOCTRINE

A. Katzenbach v. Morgan

In *Morgan*, voters from New York City challenged the constitutionality of section 4(e) of the Voting Rights Act of 1965,[15] which prohibited states from applying English literacy requirements to voters who had completed the sixth grade at "American-flag" schools where instructors taught in languages other than English. In practical effect, the statute enfranchised most of New York's Puerto Rican population by suspending New York's literacy requirement. The plaintiffs argued that the Court could not sustain section 4(e) as a measure enforcing the fourteenth amendment because the Court previously had held that English literacy requirements do not per se violate the fourteenth amendment equal protection clause.[16]

The Supreme Court rejected this attempt to tie congressional authority to judicially-declared violations of the fourteenth amendment, and instead framed the issue before it broadly: "Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement . . . could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?"[17] Citing historical evidence suggesting that the fourteenth amendment primarily was designed to enlarge congressional power, the Court held that the enforcement power granted Congress "discretion" akin to the discretion it enjoys under its article I powers.[18] The Court indicated that it would review congressional exercises of the enforcement power under the deferential standard of *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are

15. Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b(e) (1982)).

16. *See* 384 U.S. at 648-49 (citing Lassiter v. Northampton Bd. of Elections, 360 U.S. 45 (1959)).

17. *Id.* at 649.

18. *See id.* at 648-51 & nn.7-8.

plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[19]

Faced with the scant legislative record accompanying the Voting Rights Act of 1965, the Court identified two alternative theories to affirm section 4(e) of the Act as "plainly adapted" to the ends of the enforcement power.[20] The Court's first theory was that Congress' extension of the franchise served a remedial purpose in this case by preventing actual or potential discrimination against New York's Puerto Rican minority in the provision of public services—discrimination that clearly would violate the equal protection clause.[21] The Court's second, more controversial theory was that Congress itself could have balanced the state interests proffered in support of English literacy requirements against the interests of Puerto Ricans in exercising their voting rights, and it could have concluded that literacy requirements in this context violated the equal protection clause.[22] The Court concluded that independent judicial concurrence with Congress' interpretation of the fourteenth amendment was not necessary to uphold an exercise of the fourteenth amendment enforcement power. As long as Congress respected the ratchet,[23] according to the majority opinion, the Court needed only to "perceive a basis" for Congress' interpretation of the amendment.[24]

The Court in *Morgan* also considered whether Congress' action itself violated the fifth amendment's equal protection component by denying non-English-speaking citizens educated in foreign schools the voting rights granted to those educated in "American-flag" schools. Again, the Court employed a deferential standard of

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19. *Id.* at 650 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)). The Court identified this standard as "[t]he basic test . . . concerning the express powers of Congress with relation to the reserved powers of the States." *Id.* at 651 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

20. *Id.* at 652.

21. *Id.* at 652-53. The Court noted that the right to vote is " 'preservative of all rights.' " *Id.* at 652 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). Extension of the franchise, according to the Court, would provide the Puerto Rican community with "enhanced political power" to guard against discriminatory treatment in the provision of public services. *Id.*

22. *Id.* at 653-56.

23. *See id.* at 651 n.10; *supra* note 8 and accompanying text.

24. 384 U.S. at 656.

review.[25] Characterizing the enfranchisement as a "reform" measure, the Court refused to declare such remedial legislation unconstitutional simply because " 'it might have gone farther than it did.' "[26] The Court concluded that the perceived differences between American and non-American schools provided a rational basis for Congress' distinction.[27]

B. Subsequent Decisions

The Court's application of the deferential *McCulloch* standard in *Morgan* suggests that legislation enacted under the fourteenth amendment enforcement power is subject both to the "internal" limitations applicable to congressional actions under a particular grant of legislative power and the "external" limitations applicable to congressional actions in general. To satisfy the internal limitations, legislation must be within the broad delegation of authority and must be "plainly adapted" to its ends. To satisfy the external limitations, on the other hand, legislation must be consistent with the Bill of Rights and other constitutional restrictions on congressional power.

In subsequent cases, the Court consistently has evaluated the internal limitations on the enforcement power under a permissive rationality standard. Instead of substituting its judgment for Congress' perception of various measures and their necessity, the Court has sought only to "perceive a basis" for congressional determinations.[28] In *Fullilove v. Klutznick*,[29] for example, the Court allowed Congress to use its fourteenth amendment enforcement power to establish affirmative action quotas for minority business participation in public construction projects, even though the Court previously had held that the fourteenth amendment prohibited only purposeful discrimination.[30]

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25. *See supra* note 19 and accompanying text.

26. 384 U.S. at 657 (quoting Roschen v. Ward, 279 U.S. 337, 339 (1929)).

27. *Id.* at 657-58.

28. *See supra* note 24 and accompanying text.

29. 448 U.S. 448 (1980).

30. *Id.* at 476-78. The Court also has applied this deferential standard to the internal limitations associated with the fifteenth amendment enforcement power. In City of Rome v. United States, 446 U.S. 156 (1980), for example, the Court held that Congress could use its fifteenth amendment enforcement power to ban electoral changes that have a disparate

Similarly, in *Oregon v. Mitchell*,[31] although the Justices were divided badly on other issues, every Justice agreed that Congress could impose a nationwide ban on literacy tests for voters.[32] The Court explained *Mitchell* and other post-*Morgan* decisions largely under the less controversial "remedial" theory it propounded in *Morgan*.[33] As a practical matter, however, these decisions may be regarded as establishing a more radical proposition: Congress possesses power to expand constitutional protections beyond the boundaries established by the Court, to create breathing space around core constitutional rights or to legislate prophylactically against potential or speculative constitutional violations, as long as its measures bear a plausible connection to the ends and values of the fourteenth amendment.

The Court's treatment of the external limitations in *Morgan* has been far less clear. In *Morgan*, the Court applied a highly deferential standard in reviewing the extension of the franchise for consistency with equal protection, partially because the Court viewed the enactment as a "reform" measure.[34] The same might be said for the Court's decision to uphold the affirmative action program in *Fullilove*,[35] although the Court in *Regents of the University of California v. Bakke*[36] had appeared to apply a more stringent standard of review to such programs.

A comparison of *Oregon v. Mitchell*[37] and a later decision, *Fitzpatrick v. Bitzer*,[38] demonstrates even more pointedly the confusion prevailing with respect to external limitations on Congress' fourteenth amendment enforcement power. In *Mitchell*, five Justices declared that Congress could not exercise its fourteenth amendment power to lower the voting age in state elections to eighteen. Although some commentators have regarded this holding as a pronouncement concerning the internal limitations on the

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impact on minority groups, even though the Court previously had held that the fifteenth amendment banned only purposeful discrimination. *See id.* at 173-78.

31. 400 U.S. 112 (1970).

32. *See id.* at 118-19.

33. *See, e.g., id.* at 143-44 (opinion of Douglas, J.).

34. *See supra* note 26 and accompanying text.

35. *See* 448 U.S. at 476-78; *supra* notes 29-30 and accompanying text.

36. 438 U.S. 265 (1978).

37. 400 U.S. 112 (1970).

38. 427 U.S. 445 (1976).

enforcement power,[39] at least four of the five Justices who voted to strike down the provision arguably based their opinions on the external limitations[40] imposed by the constitutional grant of power to the states to fix voting qualifications.[41] In *Bitzer*, by contrast, the Court upheld congressional abrogation of the states' eleventh amendment immunity.[42] Noting that the fourteenth amendment represented a "shift in the federal-state balance," the Court held that the eleventh amendment was "necessarily limited" by subsequent congressional exercises of its enforcement power under that amendment.[43] Taken together, *Morgan*, *Fullilove*, *Mitchell*, and *Bitzer* do not indicate clearly whether external limitations, such as the Bill of Rights, constrain legislation enacted under the fourteenth amendment enforcement power as stringently as they constrain legislation enacted pursuant to other congressional powers.

The *Morgan* ratchet footnote[44] presents a particular problem because it can be construed either as an expression of internal limitations or as an expression of external limitations. On one hand, Justice Brennan's opinion intimated that congressional acts purporting to curb Court-articulated rights would not be "appropriate" legislation "enforcing" the fourteenth amendment.[45] This suggestion of internal limitations is puzzling because most observers would regard the notion of "enforcement" as broad enough to embrace the drawing of reasonable limitations to accommodate competing interests. If Congress really possesses power to interpret the substance of the fourteenth amendment, no obvious rationale readily explains why Congress may expand but not contract Court-established rights. On the other hand, an example offered in *Morgan* supports the opposite inference that the ratchet embodies

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39. *See, e.g.*, Cohen, *supra* note 11, at 603 n.3 (characterizing *Mitchell* as an "ultra vires" decision).

40. *See* 400 U.S. at 124-25 (opinion of Black, J.); *id.* at 287-88 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.). Justice Stewart's statement that "even though general constitutional power clearly exists, Congress may not overstep the letter or spirit of any constitutional restriction in the exercise of that power" buttresses the conclusion that his opinion rests on external rather than internal limitations. *Id.* at 287.

41. U.S. CONST. art. I, § 2, cl. 1.

42. 427 U.S. at 456.

43. *Id.* at 455, 456.

44. 384 U.S. at 651 n.10; *see supra* note 8 and accompanying text.

45. *See id.*

external limitations. According to Justice Brennan, a hypothetical congressional act authorizing the states to establish racially segregated schools would be invalid because the equal protection clause "of its own force prohibits such . . . laws."[46] Such an operation of the equal protection clause (really the equal protection component of the fifth amendment due process clause) clearly would be external because it would rest on the Bill of Rights.[47] Since *Morgan*, however, the Court has not decided a case that would compel elaboration of the ratchet theory or its theoretical foundations.

III. Theories About the Basis and Limits of Morgan

Congress generally has avoided constitutional confrontations with the Court that would test the ratchet theory.[48] Nonetheless, the Supreme Court's recognition in the *Morgan* line of cases of congressional power to interpret the Constitution, subject only to deferential judicial review, has troubled many leading commentators.[49] These commentators have questioned whether this power ultimately is compatible with the declaration in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[50] In part, these concerns may arise from doubts about the analytical strength or enduring quality of the ratchet theory—which was, after all, merely

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46. *Id.*

47. *But see* Note, *supra* note 11, at 1983-89 (questioning whether such a limitation is "external" to the enforcement power).

48. For example, the Equal Access Act was intended not to challenge, but rather to extend, the rationale of a Supreme Court decision, Widmar v. Vincent, 454 U.S. 263 (1981). *See infra* notes 147-48 and accompanying text. The Act, however, contradicted several lower court decisions in which the courts had distinguished *Widmar*.

One instance in which Congress apparently did seek to "overrule" a Supreme Court constitutional decision is Title II of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701, 82 Stat. 197, 210-11, 90th Cong., 2d Sess. (codified as amended at 18 U.S.C. §§ 3501-3502 (1982)), passed in response to Miranda v. Arizona, 384 U.S. 436 (1966). *See* Burt, *supra* note 11, at 118-34. More commonly, however, legislative proposals hostile to the Court's constitutional decisions have failed to pass Congress. One recent example is the Human Life Bill, discussed *infra* notes 163-77 and accompanying text.

49. *See supra* note 11; *infra* notes 52-72 and accompanying text.

50. 5 U.S. (1 Cranch) at 177; *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (reaffirming "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution").

dicta relegated to a footnote[51]—and the consequent danger that Congress could use its fourteenth amendment enforcement power to eviscerate substantive constitutional guarantees. As a result, commentators have offered various theories concerning the congressional power recognized in *Morgan*, positing internal and external limitations that restrain congressional power and preserve the Court's basic role as expositor of the principles of constitutional law.

A. The Factfinding Theory

One group of commentators, led by Professor Archibald Cox,[52] has attempted both to explain and to limit the reach of *Morgan* by reference to Congress' superior factfinding attributes. According to this "factfinding" theory, the Court in *Morgan* conferred no power upon Congress to develop normative constitutional principles that vary from those declared by the Court, but it did recognize Congress' ability to apply Court-articulated principles to a greater range of empirical situations than are available to the Court.[53] This theory is consistent with Justice Brennan's opinion in *Mitchell*. On behalf of three members of the Court, Justice Brennan stated: "The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions. . . . Limitations stemming from the nature of the judicial process, however, have no application to Congress."[54] The theory articulated by Justice Brennan suggests that Congress can dispense with the presumption customarily entertained by courts that facts exist to support a state's justifications for legislative classifications. Instead, according to the theory, Congress may investigate the factual basis of such classifications independently to determine whether they transgress Court-articulated fourteenth amendment standards.

In *Mitchell*, Justice Brennan also attempted to explain the ratchet effect in terms of Congress' factfinding competence. Justice

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51. *See Morgan*, 384 U.S. at 651 n.10; *supra* note 8 and accompanying text.

52. *See* Cox, *Constitutional Determinations*, *supra* note 11; Cox, *Human Rights*, *supra* note 11.

53. *See* Cox, *Constitutional Determinations*, *supra* note 11, at 199-200, 234; Cox, *Human Rights*, *supra* note 11, at 108-09; Gordon, *supra* note 11.

54. 400 U.S. at 247-48 (opinion of Brennan, J., joined by White and Marshall, JJ.).

Brennan reasoned that, because a Court decision striking down a state law indicates that no reasonably conceivable set of facts is available to support it, Congress' "identical findings on the identical issue would be no more reasonable than those of the state legislature."[55] This explanation is flawed, however, because the Court no longer pays homage to the presumption of constitutionality in reviewing "preferred rights" or "suspect classifications" but instead routinely finds facts independently.[56] More fundamentally, as some proponents of the factfinding theory concede,[57] any advantage that Congress enjoys in investigating and appraising facts logically cuts both ways. No apparent basis supports granting a lesser degree of deference to a congressional judgment about empirical conditions when a judgment serves to restrict the scope of constitutional rights than when a judgment serves to expand the scope of those rights.

Although the factfinding theory does not persuasively justify the ratchet, and thus may cede to Congress a limited revisory power over the Court's constitutional decisions, it does offer an apparent means of reconciling the Court's interpretation of Congress' fourteenth amendment enforcement power with concerns about *Marbury v. Madison* and judicial supremacy. This reconciliation, however, is premised upon the Court's ability to distinguish between Congress' "empirical" and "normative" judgments, and to defer only to the former. Unfortunately, no reliable method is available to discern whether a disagreement between Congress and the Court is a disagreement in practice or a disagreement in principle. In *Mitchell*, for example, Justice Brennan viewed as a factual determination Congress' conclusion that the maturity of eighteen-year-old citizens in today's society undermines any legitimate state interest in denying them the vote.[58] Justice Harlan, however, viewed the same determination as "striking a balance between incommensurate interests" that "depends ultimately on the values and the perspective of the decisionmaker."[59] A reconciliation of

55. *See id.* at 249 n.31 (opinion of Brennan, J.).

56. *See* L. TRIBE, *supra* note 11, § 5-14, at 270-71.

57. *See* Cox, *Constitutional Determinations*, *supra* note 11, at 254-56; Gordon, *supra* note 11.

58. 400 U.S. at 240 (opinion of Brennan, J.).

59. *Id.* at 206 (opinion of Harlan, J.).

Morgan and *Marbury* that is based on such a nebulous distinction is hardly satisfying. Characterization of a congressional action as involving factual determinations rather than value judgments, some commentators have suggested, simply may represent a policy conclusion that the issue ought to be resolved politically rather than judicially.[60] Such a policy judgment, whether or not a real threat to *Marbury*, ought to be aired candidly.

B. The Interest Balancing Theory

Other commentators have attempted to justify and limit *Morgan* by invoking a different advantage that the political process enjoys over the judicial process. These commentators point out that Congress, unlike the Court, does not need to explain its decisions through principles that transcend the particular problem addressed. Instead, these commentators note, Congress is free to balance competing interests through pragmatic compromises that do not serve as precedents in other contexts.[61] Congress can draw "either rough or finely tuned distinctions, justified by practical considerations . . . in a manner not generally thought open to a court."[62] Although Congress cannot supplant the Court as primary expositor of core constitutional principles, according to these commentators, it can assist the Court at the margins.[63]

Commentators advancing the interest balancing theory generally would reject the ratchet footnote and would empower Congress to revise the Court's constitutional decisions in both directions, albeit within a relatively narrow peripheral zone. The interest balancing theory thus reconciles the congressional power recognized in *Morgan* with the judicial supremacy concerns thought to be embodied in *Marbury* by relegating Congress to the role of "adjunct" to the Court. In this way, the theory preserves the Court's ultimate role of declaring core constitutional principles.

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60. *See* Pilchen, *supra* note 11, at 396-98.

61. *See* Burt, *supra* note 11, at 112-14.

62. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975).

63. This notion has been formulated in several ways. *See* Burt, *supra* note 11, at 112 (Congress can "devis[e an] appropriate adjustment of directly conflicting principles"); Monaghan, *supra* note 11 (Congress can modify the amalgam of provisional subrules and corollaries that comprise "constitutional common law"); Sager, *supra* note 11 (Congress can supplement the Court in advancing "underenforced" constitutional norms).

The interest balancing theory has considerable intuitive appeal. It evokes an image of Congress as a national forum for the pragmatic adjustment of competing interests—an image that rings truer than the image associated with the factfinding theory.[64] The theory also makes a strong case for the advantages of pragmatic resolution of conflicting principles over a purely doctrinal resolution. The problem with the theory, however, is the difficulty in confining Congress within the suggested limits. A vast array of the Court's constitutional decisions adjust conflicting principles "at the margins"; moreover, the distinction between core principles and peripheral subrules is not always obvious.[65] As a result, the theory threatens to subject much of the Court's constitutional decisionmaking to congressional revision. This may be a desirable goal, but it will require a weightier political justification than the mere insight into the advantages of the political method over the judicial method. The theoretical support for such an enhanced congressional role in defining constitutional rights ultimately must lie in the realm of political legitimacy rather than methodology alone.[66]

C. The Statutory Rights Theory

A third set of commentators has launched a counterrevolution against *Morgan*, challenging the suggestion that the enforcement power of the fourteenth amendment grants Congress any power to interpret the substantive meaning of the amendment or to revise the Court's constitutional decisions. One commentator in this group, for example, has suggested that

> there is no basis for the assertion that *Morgan* grants to Congress anything more than another fairly generous basis of

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64. For a critique of the empirical assumptions associated with the factfinding theory, which challenges both Congress' factfinding advantages over courts and Congress' objectivity, see Pilchen, *supra* note 11, at 362-77.

65. *See* L. TRIBE, *supra* note 11, § 5-14, at 271. *Compare, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3412 (1984) (stating that the exclusionary rule is only a judicially-crafted remedy) *with id.* at 3430-31 (Brennan, J., dissenting) (stating that the exclusionary rule is an integral part of the fourth amendment right).

66. Part IV of this Article sketches a position that builds on the view that courts should exhibit special deference to congressional resolution of rights in conflict. *See infra* notes 77-134 and accompanying text.

> legislative authority, analogous in breadth to the commerce clause and other powers enumerated in article I. . . . [T]he decision gives Congress no more authority over constitutional interpretation, within the domain of equal protection and due process, than it enjoys under article I grants such as the commerce clause.[67]

These commentators suggest that any congressional action under the fourteenth amendment enforcement power, even if purportedly enacted as an "interpretation" of what due process or equal protection requires, really represents nothing more than a creation of statutory rights that support the broad purposes and values of Court-articulated constitutional rights. According to this view, congressionally created rights may extend beyond Court-articulated rights in a prophylactic "buffer" zone.

Proponents of the statutory rights theory disagree about the appropriate internal limitations on Congress' fourteenth amendment power. Some commentators cling tenaciously to the dichotomy between rights and remedies, arguing that the enforcement power allows Congress only to implement the Court's constitutional mandates with remedial legislation.[68] This position, however, glosses over important substantive implications associated with the concept of remedies that make "rights" and "remedies" difficult to distinguish.[69] Other commentators, such as Professor Tribe,[70] see less importance in the internal limitations on Congress' fourteenth amendment power. These commentators are content with the permissive rationality standard applied in *Morgan*, but they emphasize the constraining role of external limitations such as the Bill of Rights. In their view, the Court should apply the same standards to legislation enacted under the fourteenth amendment enforcement power as it applies to other congressional acts.[71]

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67. Estreicher, *supra* note 11, at 421.

68. *See, e.g.*, Emerson, *supra* note 11, at 137.

69. The Court's opinion in *Morgan* is illustrative. In *Morgan*, the Court suggested that it could sustain Congress' extension of the franchise as a "remedy" for a perceived possibility of discrimination in the provision of public services. 384 U.S. at 652-53. Such tail-wagging use of a power to create "remedies" has few apparent substantive limits.

70. *See* L. TRIBE, *supra* note 11, § 5-14, at 272.

71. *See id.*; Estreicher, *supra* note 11, at 371.

This latter version of the "statutory rights" theory readily explains the ratchet. According to this theory, congressional expansion of individual rights beyond the contours of the Court's constitutional decisions merely represents an exercise of Congress' plenary legislative authority, which may at times test internal limitations and supplant the legislative role of the states, but does not change the meaning of the Constitution. Congressional abridgment or dilution of Court-articulated fourteenth amendment rights, on the other hand, represents a violation of the fifth amendment due process clause.[72] This explanation of the ratchet offers an eminently plausible basis for reconciling the *Morgan* line of cases with traditional concepts of judicial supremacy thought to be dictated by *Marbury v. Madison*. As the next section points out, however, this explanation is not without its weaknesses.

D. Conclusions About Existing Theories

All of these theories attempt to square the congressional power recognized in *Morgan* with the precept of *Marbury* by attempting to confine Congress' power in some fashion through either internal or external limitations.[73] The factfinding and interest balancing theories sought to impose internal limitations by confining Congress to applying the Court's principles to its view of the facts or to adjusting the Court's principles "at the margins." Similarly, some proponents of the statutory rights theory would limit Congress to the creation of remedies for judicially-articulated rights.

Other proponents of the statutory rights theory, such as Professor Tribe, disavow any attempt to impose rigid internal limitations. Their disavowal is based in part on the realization that concerns about *Marbury* are fundamentally misplaced. According to Professor Tribe:

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72. The Court's approach in *Morgan* and *Fullilove* is consistent with this view. In both cases, the Court considered not only whether the challenged congressional action was within the internal limitations associated with the fourteenth amendment enforcement power, but also whether the action abridged any individual rights that were protected by the fifth amendment. *See Fullilove*, 448 U.S. at 480-92, 503 n.4 (plurality opinion); *Morgan*, 384 U.S. at 656-58; *supra* notes 25-27 and accompanying text.

73. *See supra* notes 52-54, 61-63, 67-68 & 70-71 and accompanying text.

> *Marbury* implies nothing about the criteria by which the Court should determine whether an act of Congress is constitutional; it requires only that such criteria should exist. Criteria which invalidate all legislation founded on interpretations of the fourteenth amendment different from those of the Supreme Court, therefore, are no more consistent with *Marbury* than criteria which allow Congress to adopt any plausible interpretation of the fourteenth amendment. . . .[74]

Professor Tribe, however, fails to carry his insight over to the question of *external* limitations on the enforcement power. In his view, the Court must subject exercises of the enforcement power to the same scrutiny under the Bill of Rights that it applies to legislation enacted under other congressional powers.[75] Professor Tribe implies this requirement not from *Marbury*, but from the interest in preserving the institution of judicial review. This interest, however, would seem to be purely prudential rather than constitutionally compelled. The Supreme Court may possess the power to test exercises of the enforcement power for consistency with external limitations under the same standards it applies to exercises of other congressional powers. As *Morgan* demonstrates, however, the Court need not always exercise its power. Instead, the Court can choose to defer to Congress' interpretation of the Constitution.[76] Such deference is particularly appropriate in the context of the fourteenth amendment enforcement power, in light of the fourteenth amendment's explicit invitation to an enhanced congressional role in enforcing civil rights.

The leading cases also indicate that the Court on occasion has relaxed the external limitations on the enforcement power. In *Morgan*, for example, the Court reviewed Congress' distinction between persons educated in American-flag schools and persons educated in foreign-flag schools under a deferential "rational basis"

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74. L. TRIBE, *supra* note 11, § 5-14, at 271-72.

75. *Id.* § 5-14, at 272.

76. *See Morgan*, 384 U.S. at 656 ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote . . . constituted an invidious discrimination in violation of the Equal Protection Clause."); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968) (deferring to congressional interpretation of the thirteenth amendment in enforcement legislation).

test. In *Fullilove*, the Court reviewed an affirmative action plan under what apparently was an intermediate level of scrutiny. Seemingly, the Court ordinarily would review classifications of this sort under a vigorous "strict scrutiny" standard. Although the Court depicted its task in these cases as straightforward constitutional interpretation, something more seems afoot. This Article suggests that the Court's deference to Congress in these cases is best explained as a recognition of Congress' legitimate, if not coequal, authority to interpret the fourteenth amendment, and a prudential decision to defer to exercises of that authority.

IV. Development of an Alternative Theory: The Accommodation of Rights in Conflict

A. Principles Directing Judicial Deference to Congressional Determinations

Once the mystique of *Marbury* is cleared away, the task is to determine what considerations should prompt the Court to exercise self-restraint and defer to a congressional interpretation of the Constitution. A wealth of legal and scholarly materials is available to guide this task, once the inquiry is posed in this manner. Although the Court has fashioned a number of general principles that suggest the propriety of deference in particular situations, two of these traditional principles pertain especially to the Court's consideration of congressional actions under the fourteenth amendment enforcement power. The satisfaction of one of these principles argues for deference in a particular case, and the convergence of both principles makes an especially compelling case.

The first principle directs the Court to defer to Congress' resolution of issues when no clear or manageable judicial criteria are available to guide judicial review of these actions—in other words, when the Court has "no law to apply."[77] This principle is illustrated most vividly by the "political question" doctrine,[78] which, interestingly, was spawned by dicta in *Marbury* itself.[79] Although the complete judicial abstention given to political questions makes

77. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).
78. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).
79. *See* 5 U.S. (1 Cranch) at 169-71.

the doctrine appear jurisdictional in nature, one commentator has pointed out that "[o]ften both the considerations underlying the ruling that a question is political and the ruling's consequences for the future course of the litigation seem indistinguishable from those attendant upon judicial deference to legislative determinations under the due process or equal protection clause."[80] In such situations, courts have no principled basis upon which to second-guess the resolution of issues by the political process. The courts ought to defer in such situations not merely because Congress is better suited to make pragmatic policy decisions, but also because Congress enjoys the legitimacy of a representative and accountable political institution.[81]

The second principle directs the Court to defer to congressional determinations that do not, on their face, seem to be the product of majoritarian oppression of minorities. This principle stems from the traditional notion that the Court's exercise of its constitutional power to strike down legislation, which necessarily compromises democratic values, is most justifiable when it operates to protect the interests of politically vulnerable minorities.[82] Non-minorities ordinarily can protect their interests through the political safeguards of a democratic polity. In this conception, therefore, the Court should use its power of judicial review to check the majoritarian excesses potentially associated with a winner-take-all political process, rather than to protect those political interests that merely have lost a legislative battle. When a confrontation in

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80. Cox, *Constitutional Determinations*, *supra* note 11, at 201.

81. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-4 (1971).

82. *See generally* J. ELY, DEMOCRACY AND DISTRUST (1981); Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 113 (1985) (elaborating on the tradition of judicial protection for "discrete and insular minorities" enunciated in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

In its most extreme and unabashedly sociological form, this minority rights notion suggests that the Court should examine the actual patterns of political power that give rise to legislation. Placing the justices into the role of political scientists, however, seems inconsistent with another traditional principle of deference that instructs the Court not to look behind the facial purposes of congressional enactments to inquire into the actual motives of the legislators. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383-84 (1968). Because of this potential inconsistency, the minority rights notion best is applied only in the more general sense of whether *categories* of cases entail a significant risk of majoritarian oppression of minorities.

Congress does not squarely pit the interests of a cohesive majority against a vulnerable minority, the "political safeguards" principle suggests that the Court should defer to the balance Congress struck between the competing interests, thereby maintaining political legitimacy and the integrity of institutions in a democratic society.

B. Application of Principles to Particular Situations

These two principles are particularly helpful in explaining judicial decisions that accord extreme deference to certain types of legislative actions. For example, these principles offer perhaps the best explanation of the modern Court's prudential decision to refrain from challenging Congress' impairment of federalism interests. Historically, the Court's efforts to enforce federalism-based internal limitations on Congress' exercise of its express powers, such as the commerce power, required the Court to employ relatively amorphous and unmanageable standards involving artificial distinctions between "local" and "national" functions. Somewhat similarly, the Court's efforts to enforce external federalism-based limits embroiled it in distinctions between "essential" and "non-essential" attributes of state sovereignty.[83] Application of these standards not only was difficult at best, many commentators have maintained, but also was largely unnecessary because the interests of the states are more than adequately represented in Congress.[84] In many instances, then, deference to congressional actions adverse to federalism interests arguably is supported by both the "no law to apply" principle and the "political safeguards" principle. As a result, considerations of sound judicial policy, properly respectful of democratic values, arguably should direct the Court to defer to Congress' accommodation of the states' interests.

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83. Recently, in Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985), the Court stressed the amorphous nature of these standards as a justification for its decision to overrule National League of Cities v. Usery, 426 U.S. 1 (1976), in which the Court had imposed relatively vigorous federalism constraints on congressional legislation that sought to regulate the structure of state governments.

84. *See* Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensibility of Judicial Review*, 86 YALE L.J. 1552 (1977); Cohen, *supra* note 11, at 614, 620; Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954).

The same analysis also can be applied in the context of individual rights. This Article suggests that when congressional legislation reconciles a conflict between competing individual rights, the two principles call for the same judicial deference to Congress that was appropriate in the context of federalism issues. The explosion of individual rights in recent decades, resulting from expansive construction of explicit rights and liberal implication of non-textual rights, inevitably has led to situations in which these rights butt heads. The Court is faced with the embarassing task of reconciling these overlapping and conflicting claims of rights: the due process rights of criminal defendants to fair trials against the first amendment rights of the press to report about trials;[85] the property rights of shopping mall owners to exclude unwanted guests against the first amendment rights of individuals to demonstrate in "public forums";[86] the free exercise rights of members of religious groups to exemption from burdensome laws against the establishment clause rights of individuals seeking to preserve government neutrality toward religion.[87]

Although the Court regularly decides such cases, and no doubt should continue to do so, its reconciliation of these conflicts should be regarded as provisional, subject to some congressional revision under its fourteenth amendment enforcement power. Cases of competing rights arguably satisfy both principles of deference. First, the Court has "no law to apply" when resolving such conflicts. Although each claimant asserts a right supported by an independent constitutional principle, no overriding principles are available to order these putative rights into a constitutional hierarchy.[88] The Court must resolve such cases to prevent the government from being whipsawed by inconsistent claims. Such resolutions, however, must rest largely on grounds of expediency rather than principle, and should not be binding on Congress. These frankly pragmatic or policy-oriented choices between competing rights are

85. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

86. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976).

87. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970).

88. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values.").

made most legitimately by a broadly representative and responsive political institution like Congress.

Second, adequate "political safeguards" are present in cases involving rights in conflict. In such cases, the risk of a coherent majority oppressing a politically vulnerable minority is insubstantial. When Congress resolves these conflicts, persons claiming the subordinated right remain constitutionally protected, in other contexts, from the majority. Congress simply has decided, in a single context, which "politically vulnerable" interest must give way to the other or what compromise should be struck between them. Congress' accommodation of competing constitutional rights, therefore, is analogous to the traditional legislative task of mediating conflicts between opposing private interests. These situations ordinarily do not involve a square conflict between a coherent, identifiable majority and a vulnerable minority. They simply involve a battle between opposing pressure groups and a legislative choice between them—the essence of democracy.[89] The choice may reflect the legislators' conscientious view of what the public interest requires, or it simply may respond to the relative political power of the competing interests. Such decisions, however, are the standard fare of legislation in a democratic polity. The mere existence of the fourteenth amendment enforcement power suggests that the framers of the amendment did not regard Congress as precluded from addressing such conflicts when they arose at a constitutional level.

C. The Rights in Conflict Theory

1. Outline of the Theory

The rights in conflict theory would hold that the enforcement section of the fourteenth amendment empowers Congress to strike a balance between competing constitutional claims, subject to limited judicial review. Because the scope of this authority should not depend on whether Congress or the Court addresses an issue first,[90] Congress should be free to revise the Court's prior

89. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928) (legislative decision to destroy cedar tress because they harmed nearby apple trees was not an unconstitutional "taking").

90. *See* Burt, *supra* note 11, at 122-23.

resolution of such cases when it disagrees with the balance struck by the Court. Under this theory, Congress would not be entirely unconstrained because the Court still could review congressional accommodations for consistency with the internal and external limitations of the fourteenth amendment enforcement power, albeit under relatively relaxed and deferential standards.[91]

2. Consistency with Court Pronouncements

The rights in conflict theory resembles the approach that Justice White suggested in his dissenting opinion in *Welsh v. United States*,[92] decided in 1970. In *Welsh*, the Court considered whether a statutory draft exemption for conscientious objectors that was limited to "religious" beliefs, as opposed to purely philosophical beliefs, violated the establishment clause of the first amendment. Basing its holding solely on the statute, a majority of the Court held that purely moral or ethical beliefs were included under the exemption.[93] Justice White, however, read the statute as limited to religious beliefs, and therefore would have reached the constitutional issue. Justice White maintained that an exemption limited to religious beliefs did not run afoul of the establishment clause. He reasoned that Congress could have created such an exemption simply to avoid violating the free exercise rights of members of religious groups, and thus could have limited the exemption to individuals with free-exercise-based objections to the draft.[94] Justice White conceded that the Court, free of any congressional pronouncements, probably would deny a free exercise challenge by religious objectors to the draft.[95] He noted, however, that "this Court is not alone in being obliged to construe the Constitution in the course of its work; nor does it even approach having a monopoly on the wisdom and insight appropriate to the task."[96] Citing *Morgan*,

91. For example, the Court could decide whether Congress, in interpreting competing rights and resolving a conflict by advancing a particular right, acted according to a "rational" interpretation of the fourteenth amendment. *See Morgan*, 384 U.S. at 650-51; *supra* notes 19-27 and accompanying text.

92. 398 U.S. 333 (1970).

93. *Id.* at 343-44.

94. *Id.* at 367-73 (White, J., dissenting).

95. *See id.* at 370 (White, J., dissenting).

96. *Id.*

Justice White stated that he would have deferred to Congress' "arguable" constitutional interpretation and, implicitly, to the balance that Congress had struck between the free exercise and establishment claims at issue.[97]

Justice White's analysis applies at least with equal force to Congress' accommodation of rights in conflict under its fourteenth amendment enforcement power. In fact, it may apply with even greater force. The congressional power to raise armies involved in *Welsh*[98] does not imply authority to interpret the Constitution in the same way the fourteenth amendment enforcement power does. The power to enforce the fourteenth amendment is a power to enforce, and by implication to interpret, important constitutional guarantees such as due process and equal protection.[99] The power to raise armies, on the other hand, is not the sort of textual basis from which one reasonably may imply congressional authority to interpret the Constitution.[100] The deference that Justice White suggested for congressional constitutional interpretations, therefore, seems even more appropriate in the context of the fourteenth amendment enforcement power than it did in the context of *Welsh*.

The rights in conflict theory also is consistent with the concept of the ratchet as an internal limitation on Congress' fourteenth amendment power. A congressional enactment adjusting rights in conflict necessarily expands one of the rights in question, albeit at the expense of the other right. This type of rights balancing is a wholly different matter than cutting down a constitutional right simply to advance the regulatory interests of a majority. If the ratchet footnote is read as embracing external limitations as

97. *See id.* at 370-72 (White, J., dissenting).

98. U.S. CONST. art. I, § 8, cl. 12.

99. *See id.* amend. XIV, § 1.

100. The statute challenged in *Welsh* did implicate first amendment issues such as free exercise and free speech. *See* 398 U.S. at 367-74 (White, J., dissenting). These implications were collateral to the enactment, however, because Congress passed the statute challenged in *Welsh* mainly to establish a draft and not to interpret the first amendment. *See* 50 U.S.C.A. app. §§ 451-473 (West 1981 & Supp. 1985) (Military Selective Service Act); *see also Welsh*, 398 U.S. at 336-39 (outlining constitutional challenge to § 6(j) of the Military Selective Service Act, 50 U.S.C. app. § 456(j) (1964)). If Congress passed legislation under its fourteenth amendment enforcement power, on the other hand, it by definition would have to focus on the proper interpretation of the fourteenth amendment.

well,[101] one could argue that Congress never could dilute Court-articulated rights, even in the course of expanding others. That argument, however, merely asserts in another way that Congress lacks power to enforce an interpretation of the Constitution different from that of the Court. *Morgan* and its progeny do not support this assertion.[102] Enactments under the enforcement power that seek to dilute Court-articulated external limitations may raise prudential concerns about whether these enactments unduly supplant the Supreme Court's unique constitutional role. Regardless of whether these concerns are met adequately by the two principles of deference, however, the ratchet footnote does not settle the question.

Although the relevant precedent does not compel the rights in conflict theory, it does support it. In *Morgan*, for example, the Court reviewed Congress' fidelity to external limitations under a deferential "rational basis" standard. The plaintiffs claimed that Congress had violated the equal protection component of the fifth amendment when it suspended English literacy tests for prospective voters educated in Puerto Rican schools but not for voters educated in foreign schools. The Court disagreed, maintaining that extending the franchise was a "reform" measure that the Court would not invalidate merely because it was underinclusive.[103] The Court's reliance on cases dealing with economic or regulatory legislation[104] was misplaced, however, because the Court traditionally has reviewed distinctions drawn along lines of ethnic or national origin, like those involved in *Morgan*, under the more rigorous "strict scrutiny" test.[105] In addition, *Morgan* involved a congressional enactment that enhanced the political power of Puerto Ricans, but that arguably diluted the political power of foreign-educated minorities. If such a classification had resulted not from a congressional enactment under the fourteenth amendment enforcement power, but from a state enactment, the Court might have

101. *See supra* notes 44-47 and accompanying text.

102. *See supra* notes 73-76 and accompanying text.

103. *Morgan*, 384 U.S. at 648-51 nn.7-8; *see supra* notes 15-18 and accompanying text.

104. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (cited in *Morgan*, 384 U.S. at 657).

105. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny to strike down ban on miscegenation).

focused on this dilution to strike down the enactment. The Court's deferential review in *Morgan*, then, seems best explained by Congress' special constitutional competence to balance rights in conflict.

The Court's review of affirmative action programs in *Fullilove v. Klutznick*[106] and *Regents of the University of California v. Bakke*[107] provides a further demonstration of the Court's tendency to relax external limitations on Congress' fourteenth amendment enforcement actions when accommodation of conflicting rights is involved. The Court in both cases produced a multiplicity of separate and inconsistent opinions, making the extraction of firm principles transcending a simple "head-count" of the Justices difficult.[108] In general, the opinions of Justices Brennan, White, Marshall, and Blackmun demonstrate a willingness to uphold affirmative action programs whether instituted by Congress or another institution,[109] while the opinions of Justices Stevens, Stewart, and Rehnquist demonstrate the opposite conclusion.[110] The swing votes belonged to Justice Powell and Chief Justice Burger, who noted distinctions between the cases that resulted in the Court's overall decisions to uphold the congressionally-imposed affirmative action program in *Fullilove* and to strike down the use of racial quotas in a state medical school's affirmative action program in *Bakke*.[111]

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106. 448 U.S. 448 (1980).

107. 438 U.S. 265 (1978).

108. When the Court recently revisited the affirmative action issue, it produced five separate opinions, none of which commanded a majority. *See* Wygant v. Jackson Bd. of Educ., 54 U.S.L.W. 4479 (U.S. May 19, 1986) (striking down affirmative action provision in state schoolteachers' contract).

109. *See Fullilove*, 448 U.S. at 517 (Marshall, J., concurring, joined by Brennan and Blackmun, JJ.); *Bakke*, 438 U.S. at 324 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). Justice White joined Chief Justice Burger's plurality opinion in *Fullilove*, which, like Justice Marshall's concurring opinion, upheld the challenged affirmative action program. *See Fullilove*, 448 U.S. at 449 (opinion of Burger, C.J., joined by White and Powell, JJ.).

110. *See Fullilove*, 448 U.S. at 522 (Stewart, J., dissenting, joined by Rehnquist, J.); *id.* at 532 (Stevens, J., dissenting); *Bakke*, 438 U.S. at 408 (opinion of Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ.).

111. *See Fullilove*, 448 U.S. at 449 (opinion of Burger, C.J., joined by White and Powell, JJ.); *Bakke*, 438 U.S. at 265 (opinion of Powell, J.); *id.* at 408 (opinion of Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ.).

Justice Powell noted a clear constitutional distinction between the two cases. He maintained that racial distinctions were justifiable on the facts of *Fullilove*, but not on the facts of *Bakke*, because in *Fullilove* an appropriate political institution had made findings outlining past unlawful discrimination against racial minorities. These findings, according to Justice Powell, served to support preferential treatment as a remedy.[112] Congress was an appropriate body to make such findings precisely because of the fourteenth amendment enforcement clause.[113] Justice Powell concluded his concurring opinion in *Fullilove* by noting:

> [R]acial classifications . . . are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses. . . . But the issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments.[114]

Chief Justice Burger, on the other hand, believed that Congress had imposed color-blindness in *Bakke* but that it had authorized racial preferences in *Fullilove*. He regarded the congressional program in *Fullilove* as a reasonable exercise of the fourteenth amendment enforcement power aimed at eradicating the effects of past discrimination.[115] Equating *Fullilove* with *Morgan*, *Mitchell*,[116] and *City of Rome v. United States*,[117] Chief Justice Burger maintained that "congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact."[118] Although the Chief Justice examined whether the congressional means were "well-tailored" and thus consistent with external limitations based on the equal protection guarantee, he repeatedly emphasized the importance of deferring to congressional resolution of such conflicts.[119] He closed his opinion by quoting Justice Jackson:

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112. *See Fullilove*, 448 U.S. at 498-99, 502-06 (Powell, J., concurring).
113. *See id.* at 499-502 (Powell, J., concurring).
114. *Id.* at 516 (Powell, J., concurring).
115. *See id.* at 491-92 (opinion of Burger, C.J., joined by White and Powell, JJ.).
116. 400 U.S. 112 (1970) (cited in *Fullilove*, 448 U.S. at 477).
117. 446 U.S. 156 (1980) (cited in *Fullilove*, 448 U.S. at 477).
118. 448 U.S. at 477 (opinion of Burger, C.J., joined by White and Powell, JJ.).
119. *See, e.g., id.* at 490 (opinion of Burger, C.J., joined by White and Powell, JJ.).

> The Supreme Court can maintain itself and succeed only if the counsels of self-restraint . . . are humbly and faithfully heeded. After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure such as the Missouri Compromise, the N.R.A., the A.A.A., a minimum-wage law, or some other legislative policy, a decision striking it down closes an area of compromise. . . . The vice of judicial supremacy . . . has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.[120]

Both Justice Powell and Chief Justice Burger in these cases seemed to stress the importance of Court deference to the reasonable resolution of competing constitutional claims by an accountable national forum, regardless of whether the Court would strike the same balance between the claims.[121] Although one could read Chief Justice Burger or Justice Powell's opinions as suggesting deference only to congressional determinations of "facts" rather than "law," this reading would not capture the spirit of their opinions.

These precedents do not compel acceptance of the rights in conflict theory. They do, however, at least authorize it. The rights in conflicts theory, therefore, should be examined on its own merits.

3. Potential Objections to the Theory

The rights in conflict theory may prompt several objections. Some have suggested, for example, that congressional protection of "rights" and congressional advancement of regulatory interests cannot be distinguished sufficiently.[122] Because the Court would have no reason to defer to congressional enactments that diluted Court-articulated rights simply to advance the majority's interests, these critics argue, the Court similarly should not defer to such enactments when they are cloaked in the form of "rights."[123]

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120. *Id.* at 490-91 (opinion of Burger, C.J., joined by White and Powell, JJ.) (quoting R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 321 (1941)).

121. *See supra* notes 112-13 & 119 and accompanying text.

122. *See* Estreicher, *supra* note 11, at 428 n.318; Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1031-32 (1978).

123. For example, if Congress passed a law banning demonstrations in public parks, to secure the public interest in peaceful parks, the Court would not acquiesce in Congress'

Although the task sometimes may be difficult, however, an attempt to distinguish rights from regulatory interests would be worthwhile in light of our jurisprudential and constitutional heritage that uniquely recognizes the importance of individual rights that transcend the broad interests of diffuse majorities.[124]

The principles spelled out earlier in this Article that determine when deference is appropriate[125] also explain why deference is more important when rights in conflict are involved than it is when the rights of citizens against the government are involved, and therefore why a distinction between the two situations is important. The "no law to apply" principle supports greater deference when the Court considers the accommodation of competing rights because no clear manageable criteria exist to prioritize those rights in particular situations. Although judges must exercise sensitive judgment when deciding whether the interests of the majority outweigh asserted individual rights, the resolution of rights in conflict requires not only a similar balancing analysis with respect to each right, but also a subsequent balancing analysis weighing the outcome for each right against the other. The whole process resembles a type of general equilibrium analysis, without determinate standards to guide the Court.

The "political safeguards" principle suggests a similar conclusion because congressional adjustment of rights in conflict does not entail the same risks of majoritarian oppression involved in congressional balancing of individual rights against governmental interests. If the Court deferred to a congressional determination that a particular individual right should be subordinated to governmental policy objectives, it in essence would be allowing Congress to be the judge of its own cause.[126] If the Court deferred to a

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judgment that such a law is constitutional. Similarly, according to the argument, the Court should not defer to such a law if Congress passed it under the enforcement power, phrasing it in terms of securing individuals' constitutional rights to peaceful parks. Under the rights in conflict theory, however, the Court still could invalidate such a measure if it concluded that the "right to peaceful parks" was not of colorable constitutional vintage.

124. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978); *supra* notes 85-87 and accompanying text.

125. *See supra* notes 77-81 and accompanying text ("no law to apply" principle); *supra* note 82 and accompanying text ("political safeguards" principle).

126. This insight may constitute the best explanation of the ratchet footnote. *See Morgan*, 384 U.S. at 651 n.10; *supra* note 8 and accompanying text. Because Congress, in

congressional accommodation of rights in conflict, on the other hand, it simply would be permitting Congress to decide conscientiously which right better deserves protection against the majority.

Another potential objection to the theory is the idea that in " 'hard cases' . . . the politically independent status of the judiciary is most welcome."[127] Even if one concedes that the federal judiciary is more familiar with constitutional rights than Congress is, rendering the judiciary more competent to order competing rights in a constitutionally "correct" manner,[128] the criteria employed to accommodate such conflicts typically will not be constitutionally compelled and will relate more to concerns of expediency than of principle. Because the Court cannot offer a clear constitutional answer to these conflicts, the course arguably required by concerns of political legitimacy is to seek not a "politically independent" decisionmaker, but a politically responsive one like Congress.

Finally, critics of the rights in conflict theory might argue that Congress could abuse its authority by using it to overturn constitutional decisions to which it is hostile. To use the frequently cited example suggested by the ratchet footnote, Congress could purport to subordinate the equal protection rights of minority schoolchildren to the free association rights of white schoolchildren to justify

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balancing individual rights against governmental interests, would be acting against the majority's interests by deciding to expand individual rights, the Court need not scrutinize these actions closely. On the other hand, Congress' incentive to dilute individual rights to achieve what it views as important governmental objectives suggests the need to scrutinize those decisions carefully.

127. L. TRIBE, *supra* note 11, § 5-14, at 271 n.50. Justice Powell's statement in *Fullilove* that "[d]istinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task," 448 U.S. at 516, might be read as support for this notion. Taken as a whole, however, Justice Powell's concurring opinion clearly maintains that the Court should give Congress leeway to address the issue of affirmative action, despite the Court's indications of disapproval in *Bakke*. *See, e.g., id.* at 515 ("When Congress acts to remedy identified discrimination, it may exercise discretion in choosing a remedy that is reasonably necessary to accomplish its purpose."); *id.* at 516-17 ("In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate [Congress' action].").

128. This contention is by no means unassailable. Some of the Court's most eminent members have questioned its validity. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final.").

a reversal of *Brown v. Board of Education*[129] under its fourteenth amendment enforcement power.[130] At best, such examples represent "slippery slope" logic. Even assuming that such a threat is plausible, the rights in conflict theory provides a check against such abuses by allowing the Court to retain ultimate authority to review congressional judgments for rationality.[131] If the Court considered the hypothetical congressional attack on *Brown*, for example, it could find that the measure did not represent a rational interpretation of the free association right standing alone,[132] much less a defensible accommodation of free association and equal protection rights.

Beyond the context of such hypothetical slippery slope cases, congressional participation in the process of defining fundamental rights plainly is desirable. Today, the Court decides on constitutional grounds most of the important public policy controversies in the Republic, often resolving conflicts among rights that the Court either expressly or impliedly has recognized in prior decisions. This expansive constitutional jurisdiction threatens to supplant the processes of self-government spelled out in the constitutional plan. A congressional role in resolving conflicts among competing rights would make the constitutional lawmaking process more responsive and flexible, assuaging the so-called "countermajoritarian difficulty" of judicial review.[133] By allowing Congress to enter the constitutional lawmaking process through the exercise of its fourteenth amendment enforcement power, a "dialogue" would open between Congress and the Court that would compel a continuous reevaluation of the frontiers of constitutional doctrine.[134]

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129. 347 U.S. 483 (1954).

130. *Morgan*, 384 U.S. at 651 n.10; *see* Emerson, *supra* note 11, at 142.

131. *See supra* note 91 and accompanying text.

132. *See* Norwood v. Harrison, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."). Even if Congress rationally could interpret constitutional rights of association to encompass private discrimination, Congress in the public school context could not advance the associational rights of some white schoolchildren through segregation without impairing the associational rights of other schoolchildren, white and black, who opposed segregation.

133. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

134. *See* Gunther, *Congressional Responses to Supreme Court Decisions: Distinguishing Constitutionality and Wisdom*, 18 STAN. LAW. 24, 25 (1983) (noting the salutory function of "permit[ting] political tensions to be aired" by measures short of constitutional

V. Two Applications of the Rights in Conflict Theory

The rights in conflict theory illuminates some of the difficult issues raised in current controversies before Congress and the courts. The dramatic expansion of the Supreme Court's constitutional decision-making in recent decades has given rise to a variety of situations in which putative constitutional claims and interests have conflicted.[135] The Court in effect has established a general supervisory authority over the states' regulation of primary conduct and relationships under their common law and police powers. Quite naturally, Congress increasingly has responded by asserting its interest in addressing these fundamental conflicts between constitutional rights of free expression, free association, freedom from discrimination, and the like.[136] The rights in conflict theory offers a convincing basis both for justifying these congressional responses and for suggesting the appropriate limitations on Congress' authority.

A. The Equal Access Act

The broad construction that the Court has accorded to both the free exercise clause[137] and the establishment clause[138] of the first amendment has led to an apparent tension between the two constitutional guarantees.[139] In *Widmar v. Vincent*,[140] decided in 1981, the Court grappled with this tension. In *Widmar*, a public university had denied student religious groups the use of school facilities, claiming that the exclusion was necessary to avoid a violation of

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amendment); *cf.* A. Bickel, *supra* note 133, at 143-69 (noting the interplay between legislative and judicial forces).

135. *See, e.g.*, Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) (holding that state statute banning sex discrimination in private clubs did not violate club members' free association rights); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that denial of tax exemption to school practicing religiously-motivated racial discrimination did not violate school's free exercise rights); Runyon v. McCrary, 427 U.S. 160 (1976) (holding that congressional statute banning private schools' racially discriminatory practices did not violate privacy rights, free association rights, or the rights of parents to direct their children's educations).

136. *See, e.g.*, 20 U.S.C.A. §§ 4071-4074 (West Supp. 1985) (Equal Access Act).

137. U.S. Const. amend. I, cl. 2.

138. *Id.* amend. I, cl. 1.

139. *See* Sherbert v. Verner, 374 U.S. 398, 416 (1963) (Stewart, J., concurring).

140. 454 U.S. 263 (1981).

the establishment clause.[141] The Court, without reaching the free exercise issue, held that the university's exclusionary policy violated the groups' free speech rights.[142] Because the university had created a "forum" generally available to voluntary student groups, the Court maintained, the university could not deny one group access to that forum based on the content of the group's speech, absent a compelling interest.[143] The Court conceded that avoidance of a establishment clause violation could, in principle, amount to a compelling interest.[144] On the facts of *Widmar*, however, the Court found no potential violation of the establishment clause.[145] The Court reasoned that, because a university policy allowing all voluntary student groups to use school facilities would not imply an endorsement of these groups' activities, a grant of equal access to religious groups would not compromise the neutrality toward religion mandated by the establishment clause.[146] The Court in *Widmar* thus avoided a conflict with the establishment clause by restricting the reach of that clause essentially on an ad hoc basis.

Congress subsequently passed the Equal Access Act,[147] which extended to secondary school religious groups the protections that the Court had afforded to university level groups in *Widmar*. The Act forbids public secondary schools that receive federal funds from denying student groups access to any extracurricular "open forum" based on the content of the groups' speech.[148] Congress' purpose was "to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of

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141. *Id.* at 265, 270.

142. *Id.* at 277.

143. *Id.* at 267-70.

144. *Id.* at 271.

145. *Id.* at 271-75.

146. More specifically, the Court held that an equal access policy would pass the three-pronged test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971) (cited in *Widmar*, 454 U.S. at 271). According to the Court, an equal access policy would have a secular purpose, its primary effect would neither advance nor inhibit religion, and it would not entail "excessive entanglement" of government and religion. *Widmar*, 454 U.S. at 271-75.

147. The Equal Access Act was passed as title VIII of the Education for Economic Security Act, Pub. L. No. 98-377, §§ 801-805, 98 Stat. 1267, 1302-04 (1984) (codified at 20 U.S.C.A. §§ 4071-4074 (West Supp. 1985)).

148. *Id.* § 802(a), 98 Stat. at 1302 (codified at 20 U.S.C.A. § 4071(a) (West Supp. 1985)).

religion which accrue to public school students."[149] Congress specifically determined that the treatment of voluntary, student-initiated religious activities in the same manner as other extracurricular activities would not create establishment clause problems. According to the legislative history, Congress found no establishment clause problems because it found that high school students were sufficiently mature to realize that a school did not sponsor or endorse religion merely by providing access to school facilities.[150]

In the absence of the Equal Access Act, some lower courts had refused to extend the reasoning in *Widmar* to the secondary school context. In *Bender v. Williamsport Area School District*,[151] decided before Congress passed the Equal Access Act, the United States Court of Appeals for the Third Circuit rejected a free speech challenge brought by a religious student group that had been denied the opportunity to participate in an extracurricular activities period. The Third Circuit maintained that religious activities on high school property might create an appearance of school sponsorship or endorsement. The court distinguished *Widmar* based on perceived differences between the high school and university environments.[152] The court concluded that, although the school's exclusionary policy implicated free speech concerns, an equal access policy would violate the establishment clause.[153]

The Third Circuit thus explicitly recognized the conflicting constitutional claims present in *Bender*. According to the court, the case involved a "constitutional conflict of the highest order" between the free speech and establishment clauses,[154] for which the framers of the Constitution must have intended "some sort of compromise and accommodation."[155] The court frankly stated: "Recognizing that, under these circumstances, some constitutional protections must unavoidably be abridged, we believe that our role

149. S. REP. No. 357, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2349.

150. *See id.* at 8-10, 35, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 2354-56, 2381.

151. 741 F.2d 538 (3d Cir. 1984), *rev'd on standing grounds*, 106 S. Ct. 1326 (1986).

152. *See id.* at 556.

153. *See id.* at 559-60.

154. *Id.* at 557.

155. *Id.* at 558.

is to maximize, as best as possible, the overall measure of the fundamental rights created by the Framers. . . ."[156] In this context, the Third Circuit struck the balance in favor of the establishment clause.

The Third Circuit's opinion in *Bender* offers a uniquely candid discussion of the problems that courts face when they attempt to reconcile rights in conflict. Often, courts have accommodated such conflicts simply by holding that one right or another did not extend to the context under review.[157] Although the Supreme Court did not reach the merits of the constitutional issues in *Bender*,[158] it may follow this pattern if it ultimately addresses the same issue in another case. The Court may resolve the conflict, as it resolved *Widmar*, by holding that an equal access policy would not violate the establishment clause. Such a holding would remove the doubts about the constitutionality of the Equal Access Act that the Third Circuit created in *Bender*.[159]

Under the rights in conflict theory, however, even a Supreme Court decision holding that an equal access policy would be unconstitutional in the secondary school context would not necessarily invalidate the Equal Access Act. No matter how the Court independently balances free speech and establishment rights, according to the theory, the Act represents Congress' accommodation of those rights under its fourteenth amendment enforcement power, which should stand as long as it survives a review for rationality. The Equal Access Act very arguably meets that standard.

The Equal Access Act seems to accord with the internal limitations on the fourteenth amendment power. Congress passed the Act to secure more fully the free speech guarantees recognized by the Court in *Widmar*. Extension of the equal access right to

156. *Id.* at 559.

157. *See, e.g.*, *Widmar*, 454 U.S. at 271-75; *supra* notes 145-46 and accompanying text. The Solicitor General of the United States, in fact, took such a position in the amicus brief he submitted to the Supreme Court in *Bender*. Brief for the United States as Amicus Curiae at 10-12, Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986). According to the Solicitor General, the Third Circuit's holding in *Bender* that the case implicated the establishment clause was erroneous. *Id.* Interestingly, however, the Solicitor General also maintained that, even if free speech and establishment rights did conflict in the case, Congress and not the courts should settle the conflict. *Id.* at 12-13.

158. The Supreme Court reversed *Bender* on standing grounds. 106 S. Ct. 1326 (1986).

159. *See* Brief for the United States as Amicus Curiae, *supra* note 157, at 1-3.

secondary school groups plainly is "rational" in light of the Court's previous recognition that free speech rights exist in such settings.[160]

The Act also is consistent with the external limitations on the enforcement power, when measured by the relaxed, deferential scrutiny appropriate for exercises of that power. According to the rights in conflict theory, the fourteenth amendment enforcement power authorizes Congress to accommodate these conflicting rights by assigning priority to free speech and free exercise interests over establishment clause concerns. In passing the Act, Congress apparently concluded that the potential appearance of state hostility to religion associated with an exclusionary policy, and the consequent harm to free speech and free exercise values, poses a greater risk than the potential appearance of state sponsorship of religion associated with an equal access policy. This conclusion is within the zone of reasonable interpretation contemplated under a rationality review.[161]

The Equal Access Act represents a reasonable accommodation of rights in conflict by the Nation's most broadly representative and accountable institution. Because, as the Supreme Court has recognized in another context, the Court has "no principled basis on which to create a hierarchy of constitutional values,"[162] the Court should respect Congress' choice in the Equal Access Act between competing constitutional values. Under the rights in conflict theory, the Court would do just that.

B. The Human Life Bill

One of the most heated political controversies of our day is the conflict between the "right to life" and the "right to choose" that

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160. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969).

161. The Act's consistency with external limitations also could be explained under the factfinding theory. *See supra* notes 51-59 and accompanying text. This theory would focus on Congress' determination that high school students are sufficiently mature to appreciate that an equal access policy does not indicate the sort of state approval of religion banned by the establishment clause. *See supra* note 150 and accompanying text. According to the theory, Congress' finding should receive judicial deference.

162. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982).

is embodied in the debate concerning abortion. The Human Life Bill[163] was a congressional attempt to resolve the conflict by overruling *Roe v. Wade*[164] through a declaration that fetuses were "persons" protected by the fourteenth amendment. Critics assailed this proposed legislation as "a serious challenge to the structure of our constitutional system"[165] and "a bold attempt by some members of Congress to usurp the function of the judiciary."[166] In spite of these criticisms, however, the Human Life Bill presents a close case under the rights in conflict theory. Ultimately, however, the Bill probably is beyond the outer boundaries of Congress' fourteenth amendment enforcement power.

In *Roe v. Wade*, the Court held that the fourteenth amendment due process clause does not protect the unborn against the deprivation of life, liberty, or property because fetuses are not "persons" within the meaning of the fourteenth amendment.[167] The Court expressly refused to decide when human life begins, explaining: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[168]

Proponents of the Human Life Bill have seized on the Court's expression of judicial abstention to argue that *Roe v. Wade* rested primarily on the Court's institutional self-restraint. These proponents contend that Congress, on the other hand, is free to use its superior "factfinding" abilities to decide that life begins at conception and to broaden the scope of the fourteenth amendment accordingly.[169] A congressional action expanding the reach of the due process clause to include fetuses despite the Court's contrary holding, these proponents argue, should stand on no different footing than a congressional action to expand the equal protection

163. The Human Life Bill has not been reintroduced in the current Congress, and apparently is dormant. The most recent version of the bill was S. 26, 98th Cong., 1st Sess., 129 CONG. REC. S225 (daily ed. Jan. 26, 1983).

164. 410 U.S. 113 (1973).

165. Emerson, *supra* note 11, at 130.

166. Kolb, *The Proposed Human Life Statute: Abortion as Murder?*, 67 A.B.A. J. 1123, 1126 (1981).

167. 410 U.S. at 157-58.

168. *Id.* at 159.

169. *See* Galebach, *supra* note 11, at 6-10.

clause to protect certain voters from English literacy requirements despite the Court's previous refusal to recognize such broad protection.[170]

In retrospect, the Court's reliance on concepts such as "viability," which are subject to technological change, gave its opinion in *Roe v. Wade* a contingent nature that invited responses such as the Human Life Bill. Proponents of the bill have attempted to refute the Court's assertions concerning viability by proffering new medical evidence suggesting that fetuses should be regarded as human beings.[171] Although this evidence is relevant to whether fetuses can be regarded as human beings, the question left open in *Roe v. Wade* obviously implicates vexing moral issues that cannot be reduced to any mechanical exercise of congressional "factfinding."[172] In addition, even a finding that fetuses should be regarded as human beings does not necessarily support the conclusion that they are "persons" protected by the fourteenth amendment. Ultimately, however, if corporations are "persons" entitled to the protections of the fourteenth amendment,[173] an argument that Congress could not rationally interpret the amendment to include fetuses as well seems difficult to support.

The inclusion of fetuses within the reach of the fourteenth amendment would have profound consequences. It could affect a wide range of issues in the criminal law and the law of torts, trusts, inheritance, and other areas.[174] Contrary to the assumption of the bill's proponents, however, it would not automatically overturn the Court's further holding in *Roe v. Wade* that women have a constitutional right to terminate their pregnancies.[175] That holding

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170. *See Morgan*, 384 U.S. 641 (1966); *supra* notes 15-27 and accompanying text.

171. *See, e.g., The Human Life Bill: Hearings on S. 158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 9 (1981) (testimony of Dr. Hymie Gordon); *The Silent Scream*, film produced by Dr. Bernard Nathanson, shown on *Nightline*, ABC Television (Feb. 12, 1985).

172. The Court's holding in *Mitchell* that Congress could not extend the right to vote to eighteen-year-old citizens, *see* 400 U.S. 112 (1970), also might be invoked as authority to prohibit an apparently analogous extension of fourteenth amendment rights to the unborn. The result in *Mitchell*, however, is explained more accurately as an expression of external rather than internal limitations. *See infra* note 178.

173. *See, e.g.*, Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 154 (1897).

174. *See* Parness & Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (1982).

175. *See* 410 U.S. at 154.

would be affected differently than the holding concerning the constitutional status of fetuses because it involves external rather than internal limitations. Quite simply, the internal limitations on Congress' power to extend fourteenth amendment protections to fetuses are analytically distinct from the external limitations on Congress' ability to override *other* Court-articulated rights, such as the right to privacy.

Because the Human Life Bill, at least on its face, represents a congressional accommodation of conflicting constitutional rights, deferential standards arguably should apply both to internal limitations and external limitations. Even under these deferential standards, however, the Human Life Bill stands on a different footing than accommodations involving true conflicts between constitutional rights. The Court framed the issue in *Roe v. Wade* not as a conflict between competing rights, but as a conflict between women's privacy rights and states' interests in protecting maternal health and potential life.[176] The legal context in which such disputes find their way to Congress is crucial to the extent of Congress' revisory power. The Court's holding that fetuses are not "persons" protected by the fourteenth amendment, therefore, necessarily circumscribes congressional action in this area. To uphold the Human Life Bill, the Court would have to defer *both* to Congress' judgment that fetuses are "persons" protected by the fourteenth amendment *and* to Congress' judgment that fetuses' rights to life take constitutional priority over women's rights to privacy.

Such deference clearly would represent a dramatic delegation to Congress of the Court's constitutional authority. Consequently, the Court probably would not uphold an enactment such as the Human Life Bill as a rational interpretation of the fourteenth amendment. In light of the parameters set by the Court in *Roe v. Wade*, the Human Life Bill simply would go too far. To allow Congress simultaneously to create a new species of constitutional rights and to balance those rights against Court-articulated rights would be to cede revisory authority without apparent limit. If the Court allowed Congress to do so, Congress often would be able to

176. *See id.* at 152-62.

translate its regulatory interests into individual rights.[177] The intuition embodied in the ratchet footnote, as well as prudential concerns about the institution of judicial review, counsel against the concession of such power to Congress.

This analysis suggests that, in evaluating whether congressional accommodations of conflicting constitutional claims represent rational interpretations of the fourteenth amendment, the Court should examine the nature of the opposing interests closely. In principle, the Court should recognize a distinction between enactments that expand the scope of Court-articulated rights, even at the expense of other rights, and enactments that create entirely new categories of constitutional rights that are in conflict with existing rights. The Equal Access Act is an example of the former, while the Human Life Bill is an example of the latter. Such a distinction would allow the Court to give Congress' enforcement power its due without thereby abdicating the Court's own constitutional role.[178]

VI. CONCLUSION

One hundred and fifty years ago, de Tocqueville observed the peculiarly American phenomenon that nearly all questions of politics eventually are decided as questions of law.[179] This phenomenon

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177. The manner in which Congress could translate regulatory interests into individual rights is demonstrated by the "peaceful parks" example posed earlier in this Article. *See supra* note 123. Faced with such a deferential judicial stance, Congress could declare that individuals have a constitutional right to peaceful parks, and then balance that right against other individuals' rights to demonstrate in public parks. In this manner, Congress effectively could overrule or dilute Supreme Court constitutional decisions that, in Congress' view, accorded too little weight to opposing regulatory interests.

178. In retrospect, this distinction may explain *Mitchell*, the only recent case in which the Court struck down an exercise of Congress' enforcement power. *See* 400 U.S. 112 (1970); *supra* notes 9-10 and accompanying text. In *Mitchell*, Congress sought to grant eighteen-year-old citizens the right to vote, in effect creating a new "suspect class." In doing so, Congress sought to override the constitutional grant of power to the states to set voting qualifications. *See* 400 U.S. at 280-81. The right that Congress created was not anchored in previous Court decisions. The interest that Congress overrode, on the other hand, was protected explicitly by the text of the Constitution. *See* U.S. CONST. art. I, § 4, cl. 1. Under the distinction posed here, the congressional enactment challenged in *Mitchell* would not pass a rationality review because it resulted both in the creation of an entirely new constitutional right and in a balancing of that new right in a way that subordinated explicit, Court-articulated rights.

179. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (1945).

is even more pronounced today, and it has become increasingly difficult to defend as a commitment to the rule of law or to the rights of minorities, as the realm of constitutional law threatens to overwhelm the domain of democratic self-government.[180] The as yet unexplored reaches of Congress' power to enforce the fourteenth amendment provide a vehicle for overcoming this constitutional malaise. Today, when constitutional rights touching upon religion, privacy, association, and discrimination overlap at every turn, an enhanced congressional role in adjudicating these disputes seems especially desirable. Measures such as the Equal Access Act and the Human Life Bill may be criticized roundly as illegitimate politicizations of law. Today's larger problem, however, is not the politicization of law but the legalization of politics. Although such measures may or may not represent valid exercises of Congress' authority under the rights in conflict theory, that theory, as outlined in this Article, presents a promising response to today's problem.

180. *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).