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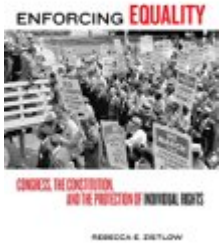
Rebecca E. Zeitlow. *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights.* New York: New York University Press, 2006. 264 pp. $45.00 (cloth), ISBN 978-0-8147-9707-5.



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Congress, the High Court, and Rights of Belonging

The title of Rebecca E. Zeitlow's sweeping and intelligent book is a little misleading. This is not a book about Congress's workings or about individual rights, but about Congress's ability, in its best moments, to protect "the rights of belonging," collective rights of groups to play an equal role in American life. What is more, the title never mentions the doppelganger in the text, the High Court, a subject occupying about half the pages. For Zeitlow's argument is that the Congress, a representative democratically elected body (facts assumed rather than proved, as it happens, for until well into the twentieth century, in large measure because of the rulings of the High Court, not the Congress, Congress did not represent people of color, women, Native Americans, immigrants, the young, and too often the poor) is a far more trustworthy protector of the rights of belonging than the High Court.

Zeitlow is convinced that "The insulation of federal courts from the political process arguably make those courts better suited to protect minorities because courts need not answer to the will of the majority" (p. 11). Congress, by contrast, "benefit[s] from the legitimacy of being politically accountable to the people" (p. 11). The open debate, the power to speak for the entire country, and the ability to revisit and revise earlier decisions more easily than courts, bound by precedent and ingrained conservatism, can manage.

I am not sure that I agree with either of these sweeping generalizations. On the one hand, federal judges and the Supreme Court justices have never been and today certainly are not isolated from the political process, from the moment of their nomination through their retirement. During their tenure, they have proven themselves very much aware of the mood of the country. On the other hand, the tyranny of the majority in Congress has proven itself remarkably willing to trample over individual and collective rights, beginning with the Seditious Libel Act, the Fugitive Slave Acts, the Chinese Exclusion Acts, the immigration limitation acts of 1920 and 1924, the Espionage, Sedition, and Smith Acts, and, on the negative side, the refusal to pass an anti-lynching act–the list is almost endless. I am not suggesting that Congress has not, as Zeitlow herself rehearses at great length, had its better days in Reconstruction for example, in the Second New Deal, and during the high tide of 1960s liberalism. But one could just as easily compose a list of the Supreme Court's great moments, when it (often in the face of congressional opposition or deadlock) protected the great rights of the people.

While much that Zeitlow writes is intended to fit into the ongoing dialogue among legal writers and political scientists about rights and institutions, indeed, entire chapters are literature reviews and commentary, the organization of the book and its first five chapters are historical. That history begins with James Madison's attempt to give to Congress a negative over state legislation, and ends with Congress's Religious Freedom Restoration Act (1993) attempt to override the High Court's rejection of the free exercise claim in Smith v.

Oregon (1990), a law that the Court controverted in City of Boerne v. Flores (1997). The evidence in these chapters is, by her own admission, selective, but the case for selectivity follows from her choice of "rights of belonging" over rights of individual liberty. Belonging meant inclusion, equality, and these issues are particularly sensitive to majority rule. Individual rights, often revolving about private property taken for public use (think taxes, for example), pits the Court, the defender of the privileged few, against the many. No better example can be found than the Fuller Court's aversion to any social engineering, including federal income taxes.

Thus Zeitlow finds herself agreeing with Mary Ann Glendon that the Court's emphasis on liberal rights is too focused on the individual and too adversarial, and should pay more attention to community and majority values. The emphasis on individual rights, perhaps inevitable when Courts consider cases brought by individuals, "inhibits dialogue over the fundamental values that underlie rights of belonging" (p. 163).

Yet are not collectives also collections of individuals? Might the "equality" that a community seeks to belong to the whole mean that individuals in the community have to sacrifice their own choices to the values of the majority of that whole, or even a vocal minority that is able to organize and finance itself and take power? Then the non-conformist has no rights. The dissenter has nowhere to go to protect his rights. The individualist has no friends except the courts.

To take a case in point, what happens when a powerful minority voice in the general populace dedicates itself to the election of members of Congress on the basis of a single issue, abortion rights, and Congress's majority, reflecting the wishes of this determined minority of voters (because only a small portion of those eligible to vote do so in congressional elections), decides to deny to women what the High Court has given them, the right to choose to end a pregnancy? Surely this is an individual right, and thus does not belong in Zeitlow's elegant defense of Congress and rights of belonging. In fact, nowhere in the book is abortion rights mentioned, nor Roe, nor choice, though many argue that this is the single most important domestic issue–the litmus test–in the election of members of Congress. What is more, there is no issue that so highlights the respective roles of the Supreme Court and the Congress in our system since 1973 than abortion rights.

It is hard to take issue with Zeitlow's grand conclusions on their face: "Congress's institutional advantages over courts as rights protectors include the legitimacy of democratic rule, the flexibility of legislatures for fashioning remedies, the transparency and accountability of congressional debate, and the involvement of political actors outside of Congress who fight for constitutional change" (p. 146). But what if Congress itself reflects malapportionment and denial of minority voting power? Then the Court must pronounce it so in Wesberry v. Sanders (1964) and Smith v. Allwright (1944). What if behind the open congressional debate there is hidden political dealing that denies to minorities their basic rights? Then the Court must speak in Shelly v. Kramer (1948) and Brown v. Board of Education (1954). What if the political actors outside of Congress are the lobbyists for constitutional change denying to individuals their basic rights? Then will the Court's voice in Texas v. Johnson (1989) and Roe v. Wade (1973) be silenced. And who would gain "rights of belonging" from that?

Whatever shortcomings may present themselves in Zeitlow's evidence, her book contributes to what is becoming a more and more important part of our constitutional inquiry. She fairly presents the counter arguments to her case, and she convinces me that the Court does not "have a monopoly over constitutional meaning" (p. 158), even if it claims the last word in the contest to define that meaning.

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