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Dissing Congress

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DISSING CONGRESS

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> My Court is fond of saying that acts of Congress come to the Court with the presumption of constitutionality. That presumption reflects Congress's status as a coequal branch of government with its own responsibilities to the Constitution. But if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.[1] — Justice Antonin Scalia

The Supreme Court under Chief Justice Rehnquist's recent leadership has invalidated numerous federal laws, arguably departing from settled precedent to do so. The Rehnquist Court[2] has held that Congress exceeded its constitutional authority in five instances during the 2000-01 Term,[3] on four occasions during the 1999-2000 Term[4] and

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1. Antonin Scalia, Associate Justice, U.S. Supreme Court, Speaking at the Telecommunications Law and Policy Symposium (Apr. 18, 2000). *See A Shot from Justice Scalia*, WASH. POST, May 2, 2000, at A-22 (quoting passage but omitting second sentence). We transcribed the entire quotation, including the second sentence, from a videotape loaned to us by the *Law Review* of Michigan State University-Detroit College of Law. The *Law Review* was a cosponsor of the symposium at which Justice Scalia spoke.

2. Our argument focuses on the Rehnquist Court since the 1994-95 Term, following the retirements of Justices Brennan, Marshall, and Blackmun. In this Article, we refer to the "Rehnquist Court" to mean the Court in its last seven Terms, through 2000-01.

3. *See* Bd. of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (Title I of the Americans with Disabilities Act, as applied to the States; 5-4 vote); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (1996 funding restriction in Legal Services Corporation Act; 5-4 vote); Bartnicki v. Vopper, 121 S. Ct. 1753 (2001) (application of federal wiretapping statute to third parties' publication of intercepted conversations; 6-3 vote); United States v.

in a total of twenty-nine cases since the 1994-95 Term.[5] Commentators typically explain these decisions in federalism terms, focusing on the Court's use of its power to protect the States from an overreaching Congress.[6]

That explanation is incomplete and, in important respects, unpersuasive. The Rehnquist Court has not been as solicitous of states'

Hatter, 121 S. Ct. 1782 (2001) (Social Security tax as applied to Article III judges; 5-4 vote); United States v. United Foods, Inc., 121 S. Ct. 2334 (2001) (assessment imposed on private industry by Mushroom Promotion, Research, and Consumer Information Act; 6-3 vote).

4. *See* Dickerson v. United States, 530 U.S. 428 (2000) (congressional attempt to override "Miranda warnings"; 7-2 vote); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (regulation of sexually explicit channels on cable; 5-4 vote); United States v. Morrison, 529 U.S. 598 (2000) (the private right of action under the Violence Against Women Act; 5-4 vote); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act, as applied to the States; 5-4 vote). In this Article, we focus in particular on the decisions in *Kimel*, *Morrison*, and *Garrett* as reflecting a trend in the Court's developing methodology for considering the constitutionality of Congress's actions.

5. The remaining twenty cases in which the Court invalidated federal legislation since 1994 include the following ten cases which we will discuss in this Article: Alden v. Maine, 527 U.S. 706 (1999) (FLSA as applied to States; 5-4 vote); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Trademark Act as applied to the States; 5-4 vote); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Patent Act as applied to the States; 5-4 vote); Clinton v. City of New York, 524 U.S. 417 (1998) (line item veto; 6-3 vote); Printz v. United States, 521 U.S. 898 (1997) (Act requiring that local law enforcement officers conduct background checks; 5-4 vote); Reno v. ACLU, 521 U.S. 844 (1997) (Communications Decency Act; 7-2 vote); City of Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act; 6-3 vote); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Indian Gaming Regulatory Act; 5-4 vote); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (federal practice encouraging contractors to hire subcontractors based on race-conscious criteria; 5-4 vote); United States v. Lopez, 514 U.S. 549 (1995) (Gun-Free School Zones Act; 5-4 vote). The ten additional cases not discussed in this Article are: Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (Act prohibiting broadcast advertising of lotteries and casino gambling; 9-0 vote); E. Enter. v. Apfel, 524 U.S. 498 (1998) (Coal Industry Retiree Health Benefit Act; 5-4 vote); United States v. United States Shoe Corp., 523 U.S. 360 (1998) (Harbor Maintenance Tax; 9-0 vote); Babbitt v. Youpee, 519 U.S. 234 (1997) (Indian Land Consolidation Act; 8-1 vote); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (Cable Television Consumer Protection and Competition Act; 6-3 vote); Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604 (1996) (Federal Election Campaign Act; 7-2 vote); United States v. IBM Corp., 517 U.S. 843 (1996) (Section 4371 of the Internal Revenue Code; 6-2 vote); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (Federal Alcohol Administration Act; 9-0 vote); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (§ 27A(b) of Securities Exchange Act; 7-2 vote); United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) (Ethics in Government Act; 6-3 vote).

6. *See, e.g.*, Mitchell S. Lustig, *Rehnquist Court Redefines the Commerce Clause*, N.Y.L.J. 1, 4 (Aug. 28, 2000) ("[I]nstead of employing its activist tendencies in the name of economic due process, the new mantra of the Rehnquist Court appears to be the Tenth Amendment and States' Rights"); Tony Mauro & Jonathan Ringel, *Supreme Court Wrap-Up: U.S. Supreme Court 1999-2000 Term Review*, 161 N.J. L.J. 709 (Aug. 14, 2000) (reporting on the Court's aggressive policing of Congress as "part of a 35- to 40-year trend, one that stems from 'direct attacks on state sovereignty' "). *See generally* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643 (1996); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

rights as one might expect if it were operating primarily from a federalism perspective. Even apart from its highly controversial foray into Florida election law,[7] the Court in recent years has not been shy about invalidating state statutes or governmental actions based on its own conception of what federal power or federal limits require.[8] Moreover,

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7. *See* Bush v. Gore, 531 U.S. 98 (2000). Although a discussion of *Bush v. Gore* is beyond the scope of this Article, we note that one might view the Court as having decided the Florida election dispute at least in part in order to avoid having that dispute resolved by the United States Congress. *Bush v. Gore* would then constitute a sixth decision in the 2000 Term that had the result of expanding the role of the Court at the expense of Congress. *Compare* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650-53 (2001) (arguing that federal statutory intent and political question considerations strongly supported allowing the 2000 presidential election to be ultimately resolved by democratically elected branches of government), *with* John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 789-90 (2001) (arguing that Court's intervention saved the country from having election ultimately decided through a "destructive partisan struggle" on the floor of Congress).

8. In the 1999 Term, the Rehnquist Court struck down state statutes or government actions fourteen times, along with the four invalidated national laws mentioned in footnote 4, *supra*. Two or more of the Justices who most often vote to invalidate federal laws joined the majority in thirteen of those cases. We refer to Justices Rehnquist, Scalia, Thomas, O'Connor, and Kennedy as most inclined to challenge actively the work of Congress based on the separation of powers perspective adopted in this Article. The thirteen state law cases in which some or all of these Justices voted to invalidate state statutes include, for example: Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that New Jersey's public accommodations law, as applied to the Boy Scouts, violated the Boy Scouts' First Amendment right of expressive association; 5-4 majority included all five Justices identified above); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding that student-led, student-initiated invocations prior to football games, which were permissible under school district's policy, were impermissibly coercive under the First Amendment; 6-3 majority included Justices O'Connor and Kennedy); Troxel v. Granville, 530 U.S. 57 (2000) (invalidating a Washington grandparents' rights statute; 6-3 majority included Justices Rehnquist, Thomas, and O'Connor); Carmell v. Texas, 529 U.S. 513 (2000) (holding that a Texas statute altering the legal rules of evidence and requiring less evidence to obtain conviction was impermissible ex post facto law as applied to obtain a conviction; 5-4 majority included Justices Scalia and Thomas); Rice v. Cayetano, 528 U.S. 495 (2000) (holding that Hawaii Constitution's restrictions on eligibility to vote for specific state agency violated Fifteenth Amendment; 7-2 majority included all five Justices identified above); Hunt-Wesson, Inc. v. Franchise Tax Bd., 528 U.S. 458 (2000) (holding that California's rules for taxing its share of multistate corporations' income violated Due Process and Commerce Clauses by impermissibly taxing income outside State's jurisdictional reach; 9-0 majority included all five Justices identified above).

In the 2000 Term, in addition to intervening to resolve the Florida election dispute in *Bush v. Gore*, the Rehnquist Court struck down eleven state statutes or government actions along with the five national laws identified in footnote 3, *supra*. Two or more of the Justices who most often vote to invalidate federal laws joined the majority in all eleven of these decisions. *See, e.g.*, Cook v. Gralike, 531 U.S. 510 (2001) (holding that Missouri ballot regulation violated the Elections Clause of Article I; 9-0 vote); Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404 (2001) (invalidating Massachusetts smoking regulations on preemption and First Amendment grounds; 6-3 majority included all five Justices identified above); Ferguson v. City of Charleston, 532 U.S. 67 (2001) (holding that state hospital's urine testing and reporting program violated Fourth Amendment; 6-3 majority included Justices Kennedy and O'Connor); Good News Club v. Milford Central Sch., 121 S. Ct. 2093 (2001) (invalidating school's regulation of private Christian organization on free speech grounds; 6-3 majority included all five Justices identified above); Egelhoff v. Egelhoff, 532 U.S. 141 (2001) (holding that Washington statute regulating life insurance and retirement proceeds was preempted by ERISA; 7-2 majority included all five Justices identified above); Shafer v. South Carolina, 532 U.S. 36 (2001) (holding that state jury instruction in death penalty case vio-

while it is true that many federal laws invalidated since 1995 have involved assertedly unjustified intrusions on state interests, one cannot adequately understand this recent judicial activism toward Congress without employing a separation of powers perspective.

In acting repeatedly to invalidate federal legislation, the Court is using its authority to diminish the proper role of Congress. Structurally, the new activist majority has treated the federal legislative process as akin to agency or lower court decisionmaking; in doing so, the Court has undermined Congress's ability to decide for itself how and whether to create a record in support of pending legislation. Substantively, the Court has limited Congress's powers under the Commerce Clause[9] and Section 5 of the Fourteenth Amendment;[10] it may ultimately constrain Congress's power under the Spending Clause as well.[11] By diminishing Congress's capacity to address what Congress

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lated right to due process; 7-2 majority included Justices Rehnquist, Kennedy, and O'Connor).

This evidence that the five Justices referred to above have been so willing to invalidate state laws or policies casts doubt on whether the Rehnquist Court's activism in invalidating Congressional action can be best explained in federalism terms. One might well expect a Court that is protective of state sovereignty when Congress seeks to regulate States' conduct to adopt a comparably respectful position when the federal judiciary is asked to invalidate state action. *See generally* John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998). We do *not*, however, assume that the Court should necessarily use the same methodology when reviewing the constitutionality of state and federal legislation. *See infra* note 169 and text accompanying notes 58-65, 90-97. Whether the current Court's record of invalidating state governmental action reflects disrespect for the work of the political branches of state government is beyond the scope of this Article.

9. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). Between 1937 and 1995, the Court did not invalidate any federal legislation on the basis that Congress exceeded its power under the Commerce Clause. *Compare* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding federal statute as within Congress's Commerce Clause powers), *with* United States v. Lopez, 514 U.S. 549 (1995) (invalidating federal statute as not within Congress's Commerce Clause powers). Since 1995, the Court has invalidated two federal laws on the basis that Congress exceeded its power under the Commerce Clause, and additional laws may soon be declared unconstitutional on that basis. For further discussion, see *infra* Part I.

10. U.S. CONST. amend. XIV, § 5 (giving Congress the power "to enforce, by appropriate legislation, the provisions of this article"). Between 1883 and 1997, the Court did not invalidate any federal legislation on the basis that Congress exceeded its power under Section 5 of the Fourteenth Amendment. *Compare* The Civil Rights Cases, 109 U.S. 3 (1883), *with* City of Boerne v. Flores, 521 U.S. 507 (1997). Since 1997, the Court has invalidated five federal laws on the basis that Congress exceeded its power under Section 5 of the Fourteenth Amendment. For further discussion, see *infra* Part I.

11. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."). For an argument that the Court should reinterpret its Spending Clause jurisprudence to reflect stronger federalism principles, see Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995). The constitutional cases discussed at *infra* Parts II & III are not the only evidence of the Court's increasing irreverence towards Congress. For example, the decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), applied an especially stringent "sub-constitutional" clear statement rule to conclude that Congress had not intended to regulate certain state employ-

identifies as national problems, the Rehnquist Court is effectively using the Commerce Clause and Section 5 to circumvent the reasoning if not the holding in *Garcia v. San Antonio Metropolitan Transit Authority*.[12]

Justice Scalia himself has explained the Court's activism in separation of powers terms, maintaining that the Court's invalidation of federal legislation is appropriate because Congress has an "attitude."[13] Many of the invalidated statutes, however, were passed with broad bipartisan support by a legislature that was far from confrontational toward the Court, during periods in which Congress would have had little reason to think it was passing arguably unconstitutional legislation.[14] Moreover, there is evidence that even when Congress

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ees. Although the Court crafted that rule in federalism terms, its approach is consistent with the "disrespecting Congress" theme of this Article. The *Gregory* Court in 1991 imposed a new standard on Congress, demanding absolute congressional clarity in text from a 1974 statute enacted in a very different era of judicial expectations. In Part II, we discuss this phenomenon as part of a "crystal ball" problem. *See also* Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159, 172-74 (2001) (relying in part on Commerce Clause limits imposed on Congress in 1995 through the *Lopez* decision to hold that a 1972 provision of the Clean Water Act did not clearly authorize regulation of certain intrastate activities as substantially affecting interstate commerce).

12. 469 U.S. 528, 550 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), and holding that the Court has "no license to employ freestanding conceptions of state sovereignty" based on the Tenth Amendment when resolving conflicts between congressional authority and assertions of states' interests). For further discussion, see *infra* Part III.

13. *See supra* note 1. The *Washington Post* story and the complete version of his comments suggest that Justice Scalia was especially concerned about what he termed "legislative activism" in relatively recent years. His suggestion that the presumption of constitutionality may no longer be warranted, however, cannot be so readily cabined; it would seem to apply to the Court's treatment of the ADEA amendments of 1974 and the Americans with Disabilities Act of 1990, as well as the Violence Against Women Act of 1994. *See infra* Parts II and III.

14. *See, e.g.*, Bd. of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (5-4 decision invalidating private damages remedy for employment discrimination against state employers under the Americans with Disabilities Act of 1990); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (5-4 decision invalidating the private damages remedy under the Age Discrimination in Employment Act of 1967, as amended in 1974 to apply to the States); Alden v. Maine, 527 U.S. 706 (1999) (5-4 decision invalidating the private damages remedy under the Fair Labor Standards Act of 1938, as amended in 1974 to apply to the States); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (5-4 decision invalidating the private damages remedy under the Trademark Act of 1946, as amended in 1992 to apply to the States); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (5-4 decision invalidating the private damages remedy under the Patent Act of 1790, as amended in 1992 to apply explicitly to the States).

The aforementioned statutes were not of particularly recent vintage. The Fair Labor Standards Act and the ADEA were extended to the States in 1966 and 1974. *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 832, 29 U.S.C. § 203(s)(4) (modifying the definition of "employer" so as to remove the exemption of the States and their political subdivisions with respect to employees of hospitals, institutions, and schools); Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, section 6(a) (further extending FLSA to States); Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, section 28(a) (extending ADEA to States). The ADA was enacted in 1990, five years before the Supreme Court initiated the series of decisions described in Part I that substantially re-

passed legislation of doubtful constitutionality, it did so in a framework of respect rather than arrogance.[15] The Court has decided most of these cases on close votes, suggesting that reasonable people could disagree with respect to their constitutionality.[16]

In this Article, we identify two distinct methodologies employed by the Rehnquist Court that have resulted in growing disrespect for Congress — the "crystal ball" and the "phantom legislative history" approaches. Under the crystal ball approach, the Court effectively penalizes the enacting Congress for failing to create a detailed legislative record, even though such a record requirement could not reasonably have been anticipated at the moment of legislative deliberation and enactment.[17] Unlike private parties, who routinely must adjust their future conduct based on the Court's new teaching, Congress as a coequal branch is distinctive in its status and its relationship to the Court. This difference helps account for the presumption of constitutionality that traditionally attends congressional enactments. The crystal ball test, however, signals a marked departure from the longstanding precedent of asking whether a legislative record *could* have supported the current constitutional standard had it been known to the enacting Congress. It also results in the Court micromanaging the work of Congress by specifying how Congress should construct a proper legislative record.

Under the phantom legislative history approach, the Court expresses interest in considering legislative history when assessing constitutionality, but then establishes and applies a legal standard for re-

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configured its relations with Congress. Finally, although the Patent Act was not extended to the States explicitly until 1992, some courts had ruled that the original Patent Act had always covered the States. *See generally* Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627.

15. When Congress has been aware that its legislation raises close constitutional questions, it has often included expedited review clauses to provide that the legislation can reach the courts in the most efficient manner possible. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (providing expedited review of Telecommunications Act's "signal bleed" provision, requiring cable operators either to scramble sexually explicit channels in full or limit programming on such channels to certain hours; 5-4 decision found federal legislation to be unconstitutional); Clinton v. City of New York, 524 U.S. 417 (1998) (providing expedited review of Line Item Veto Act; 6-3 decision found federal legislation to be unconstitutional); Reno v. ACLU, 521 U.S. 844 (1997) (providing expedited review of Communications Decency Act; 7-2 decision found federal legislation to be unconstitutional). Although expedited review procedures may have become more common in recent years, they appear to trace back at least several decades. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (providing expedited review of the Federal Election Campaign Act of 1971; 8-1 decision found legislation to be unconstitutional).

16. Of the twenty-nine decisions invalidating federal laws since 1995, fourteen have been decided by 5-4 votes and six more were decided by 6-3 votes. *See supra* notes 3-5. Of the thirteen decisions we discuss in this Article, ten were decided by a 5-4 margin and two more by 6-3 votes. *See supra* notes 3-5.

17. For further discussion, see *infra* Part II.

view that even a detailed legislative record could not possibly satisfy.[18] The Court can be understood as transforming what had been considered proper factual questions within Congress's purview into legal questions for the Court's exclusive determination. The result is the Court taking greater power for itself, displacing Congress's proper factfinding role.

The Court's decision in *Board of Trustees v. Garrett*[19] underscores the existence of, and tension between, these two methodologies. On the one hand, the Court in *Garrett* demanded a depth and breadth of documentation to support the exercise of Section 5 authority that Congress could not possibly have foreseen in 1990 when it enacted the Americans with Disabilities Act ("ADA"). At the same time, by demanding a level of legislative factfinding that for practical reasons may be unattainable, the Court signaled that it is reserving the exclusive authority to determine when Congress has acted properly under Section 5.[20]

We do not wish to be understood as supporting every piece of legislation passed by Congress. The Court's targets since 1995 have included substantively "liberal" statutes protecting employees against status discrimination or substandard working conditions,[21] more traditionally "conservative" enactments promoting religious freedom or restricting sexually offensive speech;[22] and neutral laws addressing patent or trademark matters.[23] While the Rehnquist Court has not "dissed" Congress in every instance, its record of invalidations has been remarkably severe.[24] We are disturbed by the Court's emerging

18. For further discussion, see *infra* Part III.

19. 121 S. Ct. 955 (2001) (holding that the Americans with Disabilities Act's authorization of private employment discrimination actions for monetary damages against States is unconstitutional).

20. For further discussion, see *infra* Part IV.

21. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (invalidating the private damages remedy under the Fair Labor Standards Act of 1938, as amended in 1974 to apply to the States); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (invalidating the private damages remedy under the Age Discrimination in Employment Act of 1967, as amended in 1974 to apply to the States).

22. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating private damages remedy under the Religious Freedom Restoration Act); Reno v. ACLU, 521 U.S. 844 (1997) (invalidating the Communications Decency Act).

23. *See*, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (invaliding the private damages remedy under the Trademark Act of 1946, as amended in 1992 to apply to the States); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (invalidating the private damages remedy under the Patent Act of 1790, as amended in 1992 to apply explicitly to the States).

24. Since 1995, the Court has upheld the constitutionality of federal laws on several occasions. *See, e.g.*, Reno v. Condon, 528 U.S. 141 (2000) (9-0 decision holding that Driver's Privacy Protection Act, restricting States' ability to disclose a driver's personal information, is proper exercise of Congress's authority under Commerce Clause and Tenth Amendment); Miller v. Albright, 523 U.S. 420 (1998) (6-3 decision upholding constitutionality of statute

vision in which Congress has substantially diminished powers to conduct its internal affairs or to engage in factfinding and lawmaking that the judicial branch will respect.

In Part I, we trace the development of this recent judicial activism in which disrespect for Congress is a fundamental element. In Part II, we describe the Court's decisions in *Kimel v. Florida Board of Regents*[25] and *United States v. Morrison*[26] as examples of the crystal ball approach, and we discuss the implications of this methodology for the internal operations of Congress and for the exercise of federal legislative powers. In Part III, we consider *Kimel* and *Morrison* as also illustrating the phantom legislative history approach and discuss the significant implications of this methodology for the relationship between the courts and Congress. Finally, in Part IV, we invoke these two methods to help explain the contrast between the Court's asserted interest in legislative record building in the constitutional law setting and its simultaneous disdain for legislative history when construing statutes in nonconstitutional settings. Part IV also addresses how the Court's legislative history approach, especially in the Section 5 area, may actually threaten traditional federalism objectives regarding the role of Congress.

I. THE NEW JUDICIAL ACTIVISM

Since 1995, a new judicial activism has developed in which disrespecting Congress has become an important theme. Traditionally, respect for democracy, and in particular for the work of Congress as a coequal branch of government, has been a central tenet of judicial review for both liberals and conservatives alike.[27] Legal theorists have struggled from the Republic's inception to explain why judges should even have the power to review the constitutionality of legislative action, given what Professor Alexander Bickel termed the "counter-

governing citizenship of illegitimate children born abroad of American father and alien mother); United States v. Ursery, 518 U.S. 267 (1996) (8-1 decision holding that federal criminal law does not violate Double Jeopardy Clause). Even though most federal statutes are never challenged in litigation because they are clearly constitutional, Congress's record of failure before the Rehnquist Court is highly unusual.

25. 528 U.S. 62 (2000).

26. 529 U.S. 598 (2000).

27. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7-8 (1980) ("The tricky task has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule . . . ."); JAMES B. THAYER, JOHN MARSHALL 106 (1901) ("[I]t should be remembered that the exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors.").

majoritarian difficulty."[28] After its initial declaration that Congress could not require the Court to act unconstitutionally in *Marbury v. Madison*,[29] the Supreme Court did not conclude that Congress acted unconstitutionally until the infamous *Dred Scott*[30] case. Subsequently, as with the substantive due process decisions in the early twentieth century[31] and the Commerce Clause decisions overturning New Deal legislation in the 1930s,[32] the Court's aggressive incursions into federal legislative affairs often appeared improper in hindsight.[33]

The Court's decision in *Marbury* is typically the starting point in explaining the existence and validity of judicial review, particularly review of legislation enacted by Congress. The very fact that the Court should have the power to invalidate a federal statute was not something taken for granted before *Marbury*. Chief Justice Marshall's success in justifying the possible exercise of such a power signaled the beginning of a cottage industry examining that topic.[34] John Thayer, a leading nineteenth century voice on the subject, suggested that the way to resolve the tension between judicial review and democracy was

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28. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

29. 5 U.S. (1 Cranch) 137 (1803).

30. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). The Court in *Marbury* addressed only whether Congress could require the Court to act unconstitutionally, reasoning that it could not. *Marbury*, 5 U.S. (1 Cranch) at 180. Later, the Court adopted as a natural corollary that it had the authority to use the Constitution as a sword in invalidating acts of Congress. *Dred Scott*, 60 U.S. (1 How.) at 455. We are grateful to David Shapiro for highlighting this distinction for us.

31. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908) (overturning legislation that regulated employer's right to terminate employees); *see also* Lochner v. New York, 198 U.S. 45 (1905) (invalidating state legislation that regulated hours on job).

32. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (overturning legislation that regulated labor practices in coal industry); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (overturning legislation that regulated trade practices and certain minimum working standards).

33. Justice Holmes foresaw the problematic nature of the Court's social darwinism foray into public policy with his dissenting comment in *Lochner* that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. at 75. That quotation has been cited favorably on innumerable occasions in judicial decisions and law review articles. *See also* PETER H. IRONS, THE NEW DEAL LAWYERS 290-300 (1982) (giving short shrift to the Court's Commerce Clause jurisprudence of the 1930s); WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 231-37 (1963) (same).

34. *See generally* RAOUL BERGER, CONGRESS V. THE SUPREME COURT (1969); WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH (1995); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (7th ed. 1903); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775 (1994); W. F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201 (1915); Kent Greenfield, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79 (1993); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

for the courts to strike down legislation only when the legislative branch has made a "very clear" error.[35] As Chief Justice Rehnquist recently summarized the received wisdom in this area, "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."[36]

This respect for Congress has been regularly voiced by the Court since the New Deal,[37] and it was solidly embedded in legal doctrine by the mid-1970s through decisions under the Commerce Clause, Section 5 of the Fourteenth Amendment, and the spending power.[38] In

35. *See* John B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

36. United States v. Morrison, 529 U.S. 598, 607 (2000) (referring to United States v. Lopez, 514 U.S. 549, 567, 577-78 (1995) (Kennedy, J., concurring), and United States v. Harris, 106 U.S. 629, 635 (1880)). Of course, in *Morrison, Lopez,* and *Harris*, the Court overcame the presumption of constitutionality that attends Congressional enactments.

37. *See, e.g.*, R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (Rehnquist, J., majority opinion) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' Flemming v. Nestor, 363 U.S., at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing . . . . [T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."); United States v. Carolene Prods. Co., 304 U.S. 144, 152, 154 (1938) ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators . . . . [Our inquiry,] where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.").

38. While this Article focuses on Congress's powers under the Commerce Clause and Section 5, Congress's enumerated powers also include the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. The Supreme Court has broadly interpreted the spending power, like Section 5 and the Commerce Clause, for many decades. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (holding that federal statute conditioning receipt of highway funds on adoption of minimum drinking age is valid use of Congress's spending power); *see also* United States v. Butler, 297 U.S. 1, 66 (1936) (holding that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution"). The Court's new activism, however, may be triggering a reconsideration of the scope of Congress's authority under the spending power. An Eighth Circuit panel held that section 504 of the Rehabilitation Act of 1973 placed unconstitutionally broad and coercive conditions on the State's receipt of federal funds, although that decision was later reversed by the full circuit. *See* Bradley v. Ark. Dep't of Educ., 189 F.3d 745 (8th Cir. 1999), *rev'd en banc sub. nom.* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 1999). The Fourth Circuit has recently granted en banc review, presumably to address whether Congress was sufficiently explicit in section 504 when it applied its spending power as authority to waive States' sovereign immunity, suggesting that it too may be reconsidering the scope of Congress's authority under the Spending Clause. *See* Amos v. Md. Dep't of Pub. Safety & Corr. Servs., 178 F.3d 212, 230-31 (4th Cir. 1999) (Williams, J., dissenting), *vacated en banc by* 205 F.3d 687 (4th Cir. 2000). In addition, a district court in the Sixth Circuit recently held that Congress did not properly use its spending power authority to confer upon private individuals a right to enforce the terms of the Medicaid program against state officials. *See* Westside Mothers v.

Katzenbach v. McClung,[39] the Supreme Court unanimously held that Congress had an ample basis under the Commerce Clause upon which to find that racial discrimination at restaurants had a direct and adverse effect on interstate commerce.[40] The Court understood that Congress should be given broad discretion under its enumerated powers to engage in factfinding to determine which kind of legislation is necessary to serve the public good under the Commerce Clause.[41]

Two years later, in *Katzenbach v. Morgan*, the Supreme Court authored an equally strong opinion affirming the broad reach of Congress's powers under Section 5.[42] The Court held that Congress could regulate in the civil rights area under a lenient standard of review pursuant to its Section 5 powers. In a highly respectful statement, the Court in *Morgan* observed: "It is not for us to review the congressional resolution [of these competing considerations] . . . . It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[43] Similarly, in *South Carolina v. Katzenbach*,[44] the Court said that Congress could use "any rational means" to effectuate the constitutional prohibition of racial discrimination so long as it had laid or could have laid a sufficient factual basis for the legislation.[45]

Haveman, 133 F. Supp. 2d 549 (E.D. Mich. 2001); *see also* Garrett v. Univ. of Ala. Bd. of Trustees of the Univ. of Ala., 261 F.3d 1242 (11th Cir. 2001) (holding, with little explanation, that in light of Supreme Court's *Garrett* decision, Eleventh Amendment's immunity also applies for private actions brought under section 504).

39. 379 U.S. 294 (1964).

40. Justice Douglas, while joining the majority opinion, expressed his preference for a Section 5 justification for Congress's authority. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 280 (1964) (Douglas, J., concurring) ("[T]he right to be free of discriminatory treatment (based on race) in places of public accommodation — whether intrastate or interstate — is a right guaranteed against state action by the Fourteenth Amendment and . . . state enforcement of the kind of trespass laws which Maryland had in that case was state action within the meaning of the Amendment."). Justice Douglas's opinion also applied to *McClung*. *See Heart of Atlanta*, 379 U.S. at 279.

41. Justice Clark's opinion for the Court gave considerable deference to Congress's power to engage in factfinding:

> Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

McClung, 379 U.S. at 303-04.

42. 384 U.S. 641 (1966) (7-2 decision).

43. *Id.* at 653.

44. 383 U.S. 301 (1966) (8-1 decision applying Section 2 of Fifteenth Amendment).

45. *Id.* at 324. While the Court in *South Carolina* construed Section 2 of the Fifteenth Amendment, it was addressing the closely analogous issue of Congress's "appropriate" authority to implement antidiscrimination prohibitions of the Civil War Amendments as

The scope of Congress's Commerce Clause authority received a further nod in *Maryland v. Wirtz*, when the Court ruled that Congress had the power under that clause to apply the Fair Labor Standards Act ("FLSA") to state employees.[46] The Court recognized the Eleventh Amendment issues of proper relief that might arise in suits against the States but held that those issues did not preclude the Court from ruling that state employees could be covered by the FLSA. It applied the *McClung* holding, requiring Congress simply to provide a "rational basis for finding a chosen regulatory scheme necessary to the protection of commerce."[47]

This series of decisions understandably gave the Congress of the 1970s little pause for concern as it enacted legislation regulating the States. Congress in 1972 amended Title VII to cover state employees,[48] and two years later it amended the Age Discrimination in Employment Act ("ADEA") and the FLSA to cover state employees as well.[49] Each bill included controversial aspects, but there is no hint in the legislative record of either statute that Congress was concerned about its constitutional authority to provide for private monetary damage actions against states.[50] Both the Commerce Clause and Section 5 were understood to offer justifications for these extensions.

Although the Court's decisions of the 1970s and 1980s provide hints that deference to Congress might be eroding, nothing dramatic took place to alter the fundamental legal landscape. The decision in *National League of Cities v. Usery* was an attempt to reign in Congress's Commerce Clause powers under the Tenth Amendment.[51] Some commentators considered the *National League of Cities* decision

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against the reserved powers of the States. *Id.* at 308, 324. The language of Section 2 of the Fifteenth Amendment is virtually identical to the language of Section 5 of the Fourteenth Amendment. *Compare* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."), *with* U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

46. 392 U.S. 183 (1968). The vote was 6-2; Justice Marshall did not participate in the case.

47. *Id.* at 190 (quoting Katzenbach v. McClung, 379 U.S. 294, 303-04). By distinguishing the question of the scope of the Commerce Clause from the question of the limitations imposed on Congress by the Eleventh Amendment, the Court in *Wirtz* did not permit federalist impulses to derail its deferential approach to separation of powers issues under the Commerce Clause.

48. Pub. L. No. 92-261, 86 Stat. 103 (1972).

49. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a) (codified as amended at 29 U.S.C. § 201 (1994)) (amending FLSA); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a) (codified as amended at 29 U.S.C. § 630 (b) (1994)) (amending ADEA).

50. *See infra* notes 142-143 and accompanying text.

51. 426 U.S. 833 (1976).

to be a significant development at the time,[52] but the Court overruled itself fairly quickly in *Garcia v. San Antonio Metropolitan Transit Authority*.[53] The Court ultimately concluded that *National League of Cities* created an unworkable distinction between "traditional" and "nontraditional" governmental functions.[54] Further, even apart from its *Garcia* decision, the Court had ceased to find the distinction helpful. Both lower courts and the Supreme Court had declined to use that framework to invalidate federal legislation as improperly intruding upon the States.[55] Decisions such as *EEOC v. Wyoming*[56] and *Johnson v. City of Baltimore*[57] gave members of Congress little reason to believe that *National League of Cities* had substantially diminished their powers to regulate the States under the Commerce Clause.

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52. Scholars writing shortly after *National League of Cities* disagreed about the importance of that decision. *Compare* Laurence H. Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1075-76 (1977) ("The language of *National League of Cities* is indeed quite consistent with a protected state role premised on individual rights .... In broad outline, the argument would be that policy-based legislation by Congress that endangers the provision of certain traditional services ... is constitutionally problematic not because it strikes an unacceptable balance between national and state interests as such, but because it hinders and may even foreclose attempts by states or localities to meet their citizens' legitimate expectations of basic government services."), *with* Ruth Bader Ginsburg, *American Constitutional Law*, 92 HARV. L. REV. 340, 344-45 (1978) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)) ("Also extravagant is Tribe's treatment of *National League of Cities v. Usery* as a seed decision for a bold vision of federalism in service of individual rights .... For those lacking the intensely imaginative mind, *National League of Cities* is more securely explained as entirely apiece with, and a formidable addition to, a spate of recent decisions in which the autonomy of state and local governments in 'Our Federalism,' not individual rights against the state, is the overarching concern.").

53. 469 U.S. 528 (1985).

54. *Id.* at 531 ("Our examination of this 'function' standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.").

55. According to Professor Deborah Merritt:

> *National League of Cities* was a revolutionary opinion .... In fact, however, *National League of Cities* had a limited impact on the law. Although litigants raised tenth amendment claims in more than three hundred cases reported after *National League of Cities*, courts rejected most of those claims. The Supreme Court itself never relied upon *National League of Cities* to invalidate any other federal law. Instead, the Court progressively narrowed the effectiveness of its tenth amendment principles in a series of cases decided between 1976 and 1985.

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 11-12 (1988).

56. 460 U.S. 226 (1983) (holding that extension of the Age Discrimination in Employment Act to cover state and local governments was a valid exercise of Congress's powers under the Commerce Clause and was not precluded by virtue of the Court's Tenth Amendment decision in *National League of Cities*).

57. 472 U.S. 353 (1985) (holding that provision in federal civil service statute requiring most federal firefighters to retire at age fifty-five did not establish that age fifty-five was a bona fide occupational requirement under the ADEA for nonfederal firefighters).

A suggestion that congressional power might be eroding in the Section 5 setting occurred in *Fullilove v. Klutznick*,[58] in which the Court, without a majority opinion, sustained Congress's powers to create racial preferences under the Public Works Employment Act of 1977.[59] Two members of the Court (Justices Rehnquist and Stewart) concluded that Congress should be treated like state legislatures when it enacted racially conscious legislation.[60] Nonetheless, Chief Justice Burger, writing for himself and Justices White and Powell, sustained the federal legislation in *Fullilove* under a framework imbued with deference to Congress.[61]

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58. 448 U.S. 448 (1980). An earlier hint of the Court's discomfort with broad Congressional power under Section 5 can be seen in the Court's decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which the Court upheld the franchise extension to eighteen-year-olds in federal elections but struck down its application to state elections. The *Mitchell* opinion, however, was described as "a constitutional law disaster," because it created a distinction between federal and state elections that was supported only by the opinion of one member of the Court, Justice Black. *See* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 609 (1975). Four Justices voted to sustain the franchise provision in its entirety; four Justices voted to invalidate it in its entirety. Professor Sager described this splintered holding as "betraying a state of analytical disarray." *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1232 (1978). Justice Brennan, who authored *Katzenbach v. Morgan*, 384 U.S. 641 (1966), wrote an opinion in *Mitchell* in which he justified the voting rights extension under Section 5, but Chief Justice Burger and Justice Blackmun, who were not members of the Court when *Morgan* was decided, did not join the Brennan opinion. *Mitchell*, 400 U.S. at 229 (Brennan, J., concurring in part and dissenting in part). Justices Burger and Blackmun joined an opinion authored by Justice Stewart, arguing that Section 5 gave Congress power to do no more than "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause." *Id.* at 296 (Stewart, J., concurring in part and dissenting in part). The position taken by Justices Burger and Blackmun was short-lived; in subsequent cases, they joined opinions of the Court that were highly deferential to Congress's exercise of its Section 5 powers. *See infra* notes 63-64 and accompanying text.

59. Under this law, ten percent of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 448 U.S. at 453. Although the Supreme Court had applied strict scrutiny to racial preferences created by state government two years earlier in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Chief Justice Burger's lead opinion (for himself and Justices White and Powell) declined to impose such a rigorous test on the federal government. The concurrence by Justices Marshall, Brennan and Blackmun insisted that the correct legal standard when affirmative action programs are enacted by the federal or state government is intermediate scrutiny. *Fullilove*, 448 U.S. at 518.

60. *Id.* at 526-29. The other dissenting opinion in the case — authored by Justice Stevens — concluded that affirmative action can be constitutionally created by Congress, but that this particular program was not constitutional because of the inartful way that the categories of beneficiaries were defined. *Id.* at 537-41.

61. *Id.* at 472 ("A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment.") (omission in original).

The lead opinion held that the law could be justified under Section 5 (as well as the Commerce Clause). To reach that conclusion, the Chief Justice examined the legislative history of the Minority Business Enterprise provision, carefully noting that Congress "may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."[62] Moreover, the lead opinion did not require that the record demonstrate problems at the state level. Indeed, the Chief Justice was willing to extrapolate from evidence regarding federal procurement contracts that similar problems existed at the state and local government level.[63] Although federalism concerns had begun to surface with respect to some justices' understanding of the grant of power to Congress under Section 5,[64] the Court in this same period remained highly respectful of Congress's authority to enact "appropriate" legislation regulating the States.[65]

The Court also resisted an attempt to diminish Congressional authority under Commerce Clause jurisprudence in 1989 when it held in *Pennsylvania v. Union Gas Company*[66] that the Commerce Clause granted Congress the power to abrogate state sovereign immunity. The Court granted certiorari in *Union Gas* despite the fact that every Court of Appeals had concluded that Congress had the authority to

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62. *Id.* at 478.

63. *Id.*

64. The argument that Congress should be entitled to a more deferential standard than the States in the equality context did not command majority support from the Court in *Fullilove*. The liberal wing of the Court (Justices Brennan, Marshall, and Blackmun) thought that *Bakke* was incorrectly decided, and that remedial measures should pass muster under the standard imposed on the States or federal government under the Constitution. *Id.* at 517. Justices Rehnquist and Stewart also believed that there should be one constitutional standard in the equal protection context; under that uniform standard, the remedial program in *Fullilove* should be held unconstitutional, as the state remedial program had been in *Bakke*. *Id.* at 523.

When *Fullilove* was decided, Justices White and Powell joined Chief Justice Burger's opinion concluding that Congress was entitled to greater deference than the States. Combining Justices White, Powell and Burger with the liberal wing of the Court resulted in the Court upholding Congress's power to enact racial preference legislation.

As recently as 1990, the traditional line prevailed under Section 5 of the Fourteenth Amendment, with five members of the Court voting to uphold the policies of the Federal Communication Commission designed to favor minority broadcasting firms. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990). Justice Brennan authored the majority opinion, in which he emphasized that a lesser standard than strict scrutiny applied to the federal government when it created racial preferences for remedial purposes. Justices Burger and Powell were no longer members of the Court, but Justices White and Stevens joined the liberals to form a majority vote for that position.

65. *See* City of Rome v. United States, 446 U.S. 156, 180-82 (1980) (adopting, by a 6-3 margin, deferential stance toward Congress's judgment in 1975 that preclearance requirement of Voting Rights Act should be extended for another seven years as a constitutional method of enforcing Fifteenth Amendment); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (upholding, by a 9-0 vote, Congress's Section 5 authority to extend Title VII to state employers against Eleventh Amendment challenge).

66. 491 U.S. 1 (1989).

abrogate states' immunity from suit when legislating pursuant to the plenary power granted it by the Constitution, such as the Commerce Clause.[67] As in the Equal Protection Clause context, Justice White added the fifth vote in *Union Gas* to create a majority for that position, although no opinion garnered the majority support of the Court. Justice White's separate opinion did not explain his rationale for concluding that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States.[68]

Given this constitutional landscape, Congress again had little reason to doubt the constitutionality of its work as it passed the Americans with Disabilities Act ("ADA") in 1990.[69] The ADA equally regulated the private and public sectors. It was widely understood to increase the regulation of the *private sector*, because section 504 of the Rehabilitation Act[70] already regulated the public sector. Hence, little thought was given to whether the ADA could constitu-

67. *Id.* at 15. The rationale for these conclusions was founded in the Court's decision in *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), which held that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." *Id.* at 191. Over seventy years before *Parden*, the Court held that the grant of jurisdiction to federal courts under Article III did not itself abrogate state sovereign immunity as embodied under the Eleventh Amendment. *See* Hans v. Louisiana 134 U.S. 1, 9-10 (1890) (holding that Eleventh Amendment bars claim in federal court alleging state violation of Contracts Clause).

68. 491 U.S. at 57 (White, J., concurring) ("I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning."). Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, dissented on the Eleventh Amendment issue. Justice Scalia distinguished the Section 5 context from the Commerce Clause context by noting that the Section 5 abrogation principles could not be applied to "antecedent provisions of the Constitution." *Id.* at 42. In other words, the Fourteenth Amendment could abrogate sovereign immunity because it was ratified after the Eleventh Amendment, but the Commerce Clause could not abrogate sovereign immunity because it was ratified before the Eleventh Amendment. Justice Scalia and the other members of the current conservative majority have argued in more recent cases, however, that sovereign immunity did not become embedded in the Constitution through the ratification of the Eleventh Amendment. *See* Alden v. Maine, 527 U.S. 706, 712-27 (1999). The narrow and awkward language of the Eleventh Amendment could not be understood to have created on its own such a sweeping sovereign immunity. Rather, the new understanding of sovereign immunity is that it was always a part of the Constitution as an implied principle. Under this view, the ratifiers of the Constitution were aware of sovereign immunity principles when they granted Congress power under the Commerce Clause, just as later framers were aware of sovereign immunity principles when they granted Congress power under Section 5 of the Fourteenth Amendment. Justice Scalia's chronological argument in *Union Gas*, distinguishing Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment, is no longer consistent with the more recent position taken by the Court majority, of which he is a part.

69. 42 U.S.C. §§ 12101-12213 (1994). Congress would have reasonably thought it had authority to regulate the States pursuant to its Commerce Clause and Section 5 authority.

70. 29 U.S.C. §§ 701-797 (1994 & Supp. IV 1998) (requiring entities that receive "federal financial assistance" not to discriminate on the basis of disability).

tionally provide for private damage actions against the state.[71] Similarly, Congress extended the patent and copyright laws to the States in bipartisan and noncontroversial legislation in 1992.[72] Finally, the Gun-Free School Zones Act[73] and the Violence Against Women Act[74] were part of omnibus crime bills opposed by the gun lobby. Although each bill attracted policy-based opposition, the constitutionality of the two provisions was not seriously challenged.[75]

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71. Although the Attorney General testified about the ADA on a couple of occasions, he was never asked about the constitutionality of ADA Title II during these hearings. *See generally Hearings Before the Committee on Labor and Human Resources and the Subcommittee of the Handicapped on S. 933*, 101st Cong. (1989). For discussion of the Attorney General's testimony, see Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. OF EMP. & LAB. L. 377, 384 (2000). The constitutionality of ADA Title II did not arise as an issue at any of the hearings held by Congress or in any of the reports prepared by Congress on the ADA.

72. Congress considered the two bills concurrently. *See generally* S. REP. No. 102-280 (1992). The Senate Report reflects awareness that the Eleventh Amendment posed constitutional questions concerning the validity of these bills but also an understanding that the most important factor was whether Congress was *explicit* in regulating States based on the Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). *See* S. REP. No. 102-280, at 5-8. The patent and trademark laws only stated that they covered "whoever" infringed a patent or trademark. Some lower courts had held that that language was not sufficiently precise to make the States subject to regulation. *See, e.g.*, Jacobs Wind Elec. Co. v. Florida Dep't of Transp., 919 F.2d 726 (Fed. Cir. 1990); Chew v. California, 893 F.2d 331 (Fed. Cir. 1990). Congress therefore amended these laws in 1992 to make coverage of the States explicit. No one appeared to question the constitutionality of these measures.

73. The Gun-Free School Zones Act was part of the Crime Control Act of 1990 that President Bush signed into law on November 29, 1990. Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844-45 (codified at 18 U.S.C. § 922(q)(1)(A) (1998)).

74. The Violence Against Women Act was part of the Violent Crime Control and Law Enforcement Act of 1994 that President Clinton signed into law on September 13, 1994. Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1941-42 (codified at 42 U.S.C. § 13981 (1999)); *see also* Legislative History of Violence Crime and Law Enforcement Act of 1994, *reprinted in* 1994 U.S.C.C.A.N. 1839.

75. The legislative history for the Gun-Free School Zones Act is sparse. It was discussed at one House subcommittee hearing where Representative William Hughes, chair of the Subcommittee on Crime of the House Judiciary Committee, asserted that the legislation would reflect "a major departure from a traditional federalism concept which basically defers to State and local units of government to enforce their laws." House Hearings on H.R. 3757, at 14. Although both the House and Senate sponsors of the bill made fairly lengthy floor statements about it, neither of them commented on the constitutionality of the measure. *See* 136 Cong. Rec. S175959 (1990) (statement of Sen. Kohl); 136 Cong. Rec. S766 (1990) (same); 135 Cong. Rec. E3988 (1989) (inserted statement of Rep. Feighan). Despite signing the bill, President Bush did state that the Gun-Free School Zones Act provision "inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress." Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. of Pres. Doc. 1944, 1945 (Nov. 29, 1990). The President did not refer to his concerns as constitutional; given his oath to uphold the Constitution, one can presume he would not have signed the bill if he had genuine constitutional concerns.

The Violence Against Women Act's ("VAWA") civil remedy provision received comparatively more examination by Congress. The Act was passed in 1994, after the Supreme Court had granted certiorari to consider the constitutionality of the Gun-Free School Zones Act, but before the Court rendered its decision in *Lopez*. Although the Fifth Circuit had

Most of the statutes in this time period that Congress knew raised constitutional questions — the Telecommunications Act,[76] the Communications Decency Act,[77] and the Religious Freedom Restoration Act,[78] for example — related to tugs of war between the courts and Congress regarding the scope of the First Amendment's protections for free speech and religious liberty.[79] Jurists and scholars have dis-

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ruled that the Gun-Free School Zones Act was unconstitutional, *see* United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), Congress saw little need to defend the constitutionality of VAWA's civil remedies provision. As the Fifth Circuit itself noted in its opinion, it was the first appellate court to be asked to consider the constitutionality of the Gun-Free School Zones Act. *Id.* at 1345. There was no developing trend in the appellate courts that might have alerted Congress to a shifting constitutional law standard in the Commerce Clause area. More generally, it is unrealistic to expect members of Congress to be aware of lower court decisions on a seemingly distinct topic (guns at school as compared to violence against women) and therefore to make last minute adjustments to pending legislation in light of possible future constitutional law developments. *See also* Robert Katzmann, *Bridging the Statutory Gulf: A Challenge of Positive Political Theory*, 80 GEO. L.J. 653, 662 (1992) (finding that most lower court decisions are not noticed even by committee leaders and their staffs, much less by members in general). Not surprisingly, the *Lopez* Fifth Circuit decision was not mentioned at any VAWA hearing.

During the several year period when VAWA was under consideration in Congress, members were given little reason to be concerned about VAWA's constitutionality. The principal statements questioning VAWA's constitutionality consisted of a letter from the Department of Justice, authored in October 1990, that questioned the constitutionality of a predecessor to VAWA, as well as testimony by attorney Bruce Fein, who stated in 1993 that "the bill in my judgment skates close, if not over, a constitutional line." Crimes of Violence Motivated by Gender, Hearing Before the Subcommittee on the Judiciary, House of Representatives, 103d Cong., Nov. 16, 1993, at 26 [hereinafter "1993 VAWA Hearings"]. Fein, however, did not question Congress's constitutional authority to enact legislation in this area; rather, he questioned whether Congress's findings were factually sufficient to justify the bill. *Id.* In that regard, Professors Cass Sunstein and Burt Neuborne testified that VAWA was a valid exercise of the Commerce Clause and Section 5. *See* Violence Against Women: Victims of the System, Hearing Before the Committee on the Judiciary, United States Senate, 102d Cong., April 19, 1991, at 87-88, 94-99, 103-07, 112-25; [hereinafter "1991 VAWA Hearings"]; 1993 VAWA Hearings at 42-47, 51, 56-68 (reprinting their 1991 testimony). When asked at the 1991 Hearings the level of proof necessary to make clear the constitutional bases for the law, Sunstein responded: "Fortunately for the equal protection issue as well as for the Commerce Clause issue, the standard of review is the rational basis test. So you don't need a whole lot." 1991 VAWA Hearings, at 125. Similarly, Sally Goldfarb, Senior Staff Attorney of the NOW Legal Defense and Education Fund, testified that both Section 5 and the Commerce Clause were alternative constitutional bases for VAWA. *See* 1993 VAWA Hearings at 13. Finally, James P. Turner, Acting Assistant Attorney General in the Justice Department's Civil Rights Division, testified at the 1993 hearings that both Section 5 and the Commerce Clause provided constitutional bases for VAWA. *Id.* at 96-108. The constitutional focus at these hearings (insofar as there was one) was whether Congress had engaged in sufficient factfinding to meet the "substantial effects" test, not whether the "substantial effects" test was the proper constitutional standard for Congress to use in assessing the scope of its powers. As we discuss below, the evidentiary question of whether gender-based crimes have a substantial effect on interstate commerce was not the basis on which the Court subsequently invalidated VAWA in *Morrison*. *See infra* Part III.

76. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

77. *See* Reno v. ACLU, 521 U.S. 844 (1997).

78. *See* City of Boerne v. Flores, 521 U.S. 507 (1997). An example from a slightly earlier period is *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating federal flag burning statute).

agreed over the constitutionality of congressional limitations in these areas throughout our history, including the 1990s.[80]

Beginning in 1995, however, a series of Supreme Court decisions dramatically altered the separation of powers landscape. As Justice Scalia intimated in his recent speech, the Court has weakened the presumption that federal legislation is constitutional.[81] The first major indication that the presumption might be eroding occurred in 1995 in *United States v. Lopez*.[82] A bipartisan Congress had passed the Gun-

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79. Another statute involving anticipated constitutional controversy was the Line Item Veto Act. *See* Clinton v. City of New York, 524 U.S. 417 (1998). That statute, however, raised pure separation of powers issues unrelated to federalism. Again, the statute was highly popular in Congress, although members recognized concerns as to its constitutionality. In recognition of this constitutional doubt, Congress created an expedited review procedure while the bill was in Conference to have the statute's constitutionality tested quickly in court. In contrast to the many statutes reviewed at *supra* notes 72-77 and accompanying text, the legislative history of the Line Item Veto Act is replete with discussion of the constitutionality of the measure and the best mechanism to have the constitutionality assessed. *See, e.g.*, H.R. REP. NO. 104-491, § 3, *reprinted in* 142 CONG. REC. 6016, 6017 (1996) (setting forth expedited judicial review procedure); 141 CONG. REC. 8420 (1995) (remarks of Sen. Exon, bill supporter, recognizing constitutional questions); 142 CONG. REC. 6504-21 (1996) (remarks of Sen. Byrd, discussing constitutional problems at length); *id* at 6535-38 (remarks of Sen. Levin questioning constitutionality); *id*. at 6540-42 (remarks of Sen. Bumpers questioning constitutionality).

One further constitutional controversy that arose during the 1990s involved limitations on the processes or mechanisms by which Congress may use its Article I powers to regulate the States. Without questioning Congress's authority to regulate directly, the Court held that Congress was prohibited by the Tenth Amendment from "commandeering" state legislative processes to regulate radioactive waste disposal on an indirect basis, and likewise was barred from commandeering a state's executive branch officials to regulate indirectly the purchase of handguns. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). We regard these two decisions as relying primarily though not exclusively on considerations of federalism, i.e., that Congress could not "blur state legislative [or executive] accountability to the state's residents by coercing the state's legislature [or executive] to act in accordance with a federally established agenda." DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 68 (1995). Their detailed treatment is beyond the scope of this Article. *See* SHAPIRO at 111-15 (discussing *New York*); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*?, 112 HARV. L. REV. 2180 (1998) (discussing *Printz*).

80. At the RFRA hearings, Representative Henry Hyde expressed concern about whether Congress had the power to "restore" earlier Supreme Court jurisprudence through a legislative act. *See* Religious Freedom Act of 1991, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 102d Cong., May 13-14, 1992, at 95. Relying on the Supreme Court's decision in *Katzenbach v. Morgan*, Professor Douglas Laycock reassured Congress that it did have the power to enact RFRA under Section 5 because its enforcement powers "go beyond what the Court may do under the Fourteenth Amendment." *Id*. at 397. Nonetheless, Professor Ira Lupu testified that RFRA suffered from constitutional problems and urged Congress to defer enacting such legislation until it was able to read the Court's decision in a pending case — *New York v. United States*. *Id*. at 399. Professor Lupu, however, also informed Congress that factfinding "would buttress the case for constitutionality of the bill under Section Five." *Id*. at 399. For further discussion of RFRA and its legislative history, see Ruth Colker, City of Boerne *Revisited*, 70 U. CINC. L. REV. (forthcoming Winter 2001).

81. *See supra* note 1 and accompanying text; *see also supra* note 13.

82. 514 U.S. 549 (1995). Earlier hints of a changing presumption can be found in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (limiting Congressional regulation of state govern-

Free School Zones Act of 1990, making it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[83]

Congress had little reason to question its constitutional authority to enact such legislation under the Commerce Clause. As discussed above, Congress under existing precedent merely needed to establish that there was a "rational basis" for concluding that a regulated activity sufficiently affected interstate commerce.[84] The relevant legal question would have been: "Could Congress rationally have found that violent crime in school zones, through its effect on the quality of education, significantly (or substantially) affects interstate or foreign commerce?"[85]

Although Congress did not include detailed findings in the 1990 Act's legislative history demonstrating a substantial connection between gun-related violence and interstate commerce, one certainly could find support for such a conclusion in the testimony, reports and studies that had been generated both inside and outside of Congress.[86]

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ment under the Age Discrimination in Employment Act), and *New York v. United States*, 505 U.S. 144 (holding that the Low-Level Radioactive Waste Policy Amendments Act was inconsistent with the Tenth Amendment because it commandeered state power).

83. 18 U.S.C. § 922(q)(1)(A).

84. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). As Justice Souter stated in dissent in *Lopez*:

> The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993). In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.

Lopez, 514 U.S. at 604 (Souter, J., dissenting).

85. *See Lopez*, 514 U.S. at 618 (Breyer, J., dissenting) (internal quotation marks omitted).

86. *See, e.g., Hearing on H.R. 3757 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 101st Cong. 44 (1990) (testimony of National Education Association that school violence contributes significantly to dropout rate and fear of such violence undermines schools' ability to retain qualified teachers and administrators); Joseph F. Sheley et al., *Gun-Related Violence in and Around Inner-City Schools*, 146 AMER. J. DISEASES CHILD. 677 (1992) (survey-based study involving over 1600 students finds that violence is brought into schools from outside, and interventions in community and social structures are the only feasible means of addressing problem). Justices Breyer, Stevens, Souter, and Ginsburg marshaled such evidence in their dissent. They argued that:

> reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious .... Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem.... Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education.

Lopez, 514 U.S. at 619-622 (Breyer, J., dissenting).

If one were operating under the presumption that Congress has acted constitutionally, such material might have passed muster. The *Lopez* Court, however, began to shift that presumption by viewing the cup as half empty rather than half full. It quoted all the caveats found in prior majority opinions about the limited scope of Congress's authority, despite the fact that these prior opinions had all upheld Congressional authority.[87] For the first time in many decades, the Court ruled that Congress had exceeded its authority under the Commerce Clause.

Lopez initially was regarded by many observers as a relatively modest change, given the lack of explicit legislative findings to support the federal legislation at the time of passage and the narrow scope of the statute in question.[88] But the Court in *Lopez* had taken an important step in developing its new version of judicial activism, under which Congress was accorded less respect for its handiwork. The decision in *United States v. Morrison*,[89] discussed in detail below, reflects the dramatic nature of the *Lopez* holding. The *Morrison* Court struck down a post-*Lopez* statute with a lengthy legislative history and broad statutory coverage.

The second major indication of change in 1995 came shortly after the *Lopez* decision. In *Adarand Constructors, Inc. v. Pena*,[90] the Court declared that Congress must abide by the same constitutional standards as the States in the equal protection context, despite the differing textual support for equality rules in the federal and state settings.[91] The principle of "congruence" between the rules that applied to the federal government and the States overrode the principle of respect for Congress as a coequal branch of government.[92]

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87. *See Lopez*, 514 U.S. at 556-58 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824); NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937); United States v. Darby, 312 U.S. 100, 119-20 (1941); Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

88. *See, e.g.*, Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 693 (1996) ("As a practical matter, *Lopez* has deprived Congress of very little power."); Nagel, *supra* note 6, at 661 ("Those who perceive in [the *Lopez*] decision much to fear or much to hope for are, I think, not only seeing *Lopez* and the Court's overall record inaccurately, but they are looking for the future in the wrong place.").

89. 529 U.S. 598 (2000).

90. 515 U.S. 200 (1995).

91. As the Court's opinion explained:

> Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

Id. at 213 (emphasis added).

92. Justice O'Connor cited three propositions that led her to the conclusion "that any person, of whatever race, has the right to demand that any governmental actor subject to the

In dissent, Justice Stevens took aim at what he called the Court's "extraordinary proposition" "that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due to a state legislature."[93] He noted that the distinction between how the States and how Congress should be treated by the courts is explicitly embedded in the Constitution

> The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.[94]

In response, Justice O'Connor stated:

> But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a coequal branch of the Government. It is true that various Members of this Court have taken different views of the authority [Section] Five of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. . . . We need not, and do not, address these differences today.[95]

Justice O'Connor's response, however, was not satisfactory at the structural level, because she offered no textual or historical support for the notion that the framers of the Constitution intended Congress and the States to abide by the same standards in the equality context. Congruence between the federal and state constitutional standards may have been convenient, but she failed to show how it was constitutionally grounded.[96] Rather than using the Eleventh Amendment to

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Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.* at 224. Those three propositions were: (1) skepticism ("[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination"), *id.* at 223; (2) consistency ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"), *id.* at 224; and (3) congruence ("equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"), *id.* at 224. For the derivation of the congruence proposition, she cited *Buckley v. Valeo*, 424 U.S. 1, 93 (1976), a case that involved the application of equal protection principles to the electoral process in a nonracial context. *Id.* at 224.

93. *Id.* at 253 (Stevens, J., dissenting).

94. *Id.* at 255.

95. *Id.* at 230-31.

96. States are required to abide by the principle of equal protection through the explicit text of Section 1 of the Fourteenth Amendment. By contrast, Congress has by implication been understood as required to abide by the principle of equal protection through a broad

limit the nature of the relief that might be imposed on state governments, or the Tenth Amendment to limit how far Congress may intrude into the affairs of state government, the *Adarand* Court directly withdrew from Congress powers to enact legislation under Section 5 of the Fourteenth Amendment. The *Adarand* decision has had a major impact in the voting rights area, because such a strict standard of review has undermined meaningful enforcement of the Voting Rights Act by the United States Department of Justice.[97]

The next major indications of change in the separation of powers framework arose in 1996 and 1997 through the decisions in *Seminole Tribe v. Florida*[98] and *City of Boerne v. Flores*.[99] Although the *Seminole Tribe* case involved an obscure struggle over negotiations under the Indian Gaming Regulatory Act, it resulted in a pathbreaking determination. The Court held that, notwithstanding Congress's clear intention to abrogate the States' sovereign immunity, the Indian Commerce Clause (which is akin to the Interstate Commerce Clause) does not grant Congress that power.[100] This conclusion was inconsistent with the Court's *Pennsylvania v. Union Gas*[101] decision seven years earlier, in which it had held that the Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity. *Seminole Tribe* overruled *Union Gas*, depriving Congress of an important tool for regulating the States. In the future, Congress would have to look outside the Commerce Clause when it wished to pass

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reading of the Due Process Clause of the Fifth Amendment. This implied requirement is particularly difficult to discern and apply, however, because Congress also has the explicit power to enforce the equality provisions of Section 1 of the Fourteenth Amendment through its Section 5 powers. For further discussion of Congress's role in the equal protection context, see Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 662-64 (2000).

97. *See generally* Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993) (holding that nonminority appellants have stated a valid equal protection claim under strict scrutiny by alleging that the state adopted a racially segregated reapportionment scheme to comply with the Voting Rights Act). In *Bush*, Justice O'Connor wrote her own concurrence, emphasizing that compliance with the Voting Rights Act might constitute a compelling interest sufficient to withstand strict scrutiny, but in each of these three cases she failed to find such an interest met. *See generally* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2276 (1998); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1219 (1996).

98. 517 U.S. 44 (1996).

99. 521 U.S. 507 (1997).

100. The Commerce Clause in full provides Congress with the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

The Court also held in *Seminole Tribe* that the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), may not be used to enforce the statutory requirements against a state official. *Seminole Tribe*, 517 U.S. at 73. That ruling may ultimately prove highly significant in the reshaping of the relationship between the judicial and legislative branches, but discussion of that possibility is beyond the scope of this Article.

101. 491 U.S. 1 (1989).

legislation that subjected the States to suits for damages by private citizens.

One presumptive source of authority was Section 5, because the Court had consistently approved civil rights legislation justified under that authority.[102] The Supreme Court's decision in *City of Boerne*, however, suggested that deferential review of Congress's work pursuant to Section 5 was no longer the norm. Congress had enacted the Religious Freedom Restoration Act ("RFRA") of 1993 in direct response to the Court's decision in *Employment Division v. Smith*.[103] In *Smith*, the Court had held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. Congress was unhappy with that decision and passed RFRA to "restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[104] Both in the title of the statute and in the purpose section,[105] Congress openly asserted that it wished to "restore" the constitutional law of free exercise to where that constitutional standard had been before the *Smith* decision, in contravention of Congress's role as circumscribed beginning with *Marbury v. Madison*.[106]

Given the unusual circumstances of RFRA, the Court could have ruled that Congress violated *Marbury* by attempting to dictate the meaning of the Constitution. Indeed, not one member of the Court concluded that Congress had the power to "restore" the law of free exercise by invoking its Section 5 powers.[107] Even Justices Stevens and Ginsburg, who rarely conclude that Congress has exceeded its authority, agreed that RFRA was unconstitutional.[108]

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102. *See* Fizpatrick v. Bitzer, 427 U.S. 445 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1966) (discussed at *supra* notes 42-43 and accompanying text).

103. Employment Div. v. Smith, 494 U.S. 872 (1990).

104. *City of Boerne*, 521 U.S. at 515 (quoting 42 U.S.C. § 2000bb(b)(1) (1994)).

105. 42 U.S.C. § 2000bb(b)(1) (1994).

106. 5 U.S. (1 Cranch) 137, 176 (1803).

107. Congress sought to justify RFRA under its Section 5 powers as permissible enforcement legislation. Nonetheless, no member of the Court disagreed with the proposition that the legislation was flatly inconsistent with *Smith*. Justice O'Connor dissented (with Justice Breyer) by arguing that *Smith* itself was wrongly decided and should be reconsidered. *City of Boerne*, 524 U.S. at 544-45. Justice Souter dissented separately, arguing that the writ of certiorari should be dismissed as improvidently granted, and the case should be set down for reargument on the question of whether *Smith* was correctly decided. He, too, saw the decision in the case as hinging on the merit of the *Smith* decision. *Id.* at 565-66.

108. Justices Ginsburg and Stevens joined the majority opinion; Justice Stevens also authored a separate opinion in which he concluded that RFRA violated the Establishment Clause. *See id.* at 536. (Stevens, J., concurring). Apart from relying on *Marbury*, the Court could have invalidated RFRA by following another, comparably cautious, mode of analysis under Section 5. In *Katzenbach v. Morgan*, the Court had made clear that Section 5 confers upon Congress powers to enforce equal protection guarantees but not to "restrict, abrogate, or dilute these guarantees," or otherwise to act inconsistently with "the letter and spirit of

Justice Kennedy's opinion for the Court, however, did not merely hold that RFRA was unconstitutional in *Marbury* terms; it set forth a new framework for considering the constitutionality of Congress's actions under Section 5. For the first time since 1883, the Court ruled that Congress exceeded its Section 5 authority.[109] Although the majority's opinion in *Boerne* was loaded with qualifications and caveats,[110] this new framework imposed on Congress a much higher burden of proof in establishing the constitutionality of its actions under Section 5. First, the Court emphasized the difference between "remedial" and "substantive" legislation, concluding that Congress could only enact legislation that reflects "proportionality or congruence between the means adopted and the legitimate end to be achieved."[111] It couched that distinction in terms that are deferential to Congress, yet, as future decisions reflect, the deferential language has turned out to be largely rhetorical.[112]

Second, and of particular relevance here, the Court emphasized the importance of a legislative record to support the need for the remedial legislation. Again, it framed the test in conventional terms, asking if Congress had used "reasonable means" to exercise its remedial or preventive power.[113] The application of this standard, however, was far more rigorous than it had been in prior cases. The Court chided Congress for producing a legislative record that "lacks examples of modern instances of generally applicable laws passed because of religious bigotry."[114] Yet even the majority's own recitation of the legislative history reflects that Congress gave careful consideration to

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the constitution." 384 U.S. 641, 651 & n.10. It is possible to argue that Congress's Section 5 powers, recognized in *Kimel v. Florida Board of Regents* as "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," 528 U.S. 62, 81 (2000), do not apply to the same extent in the free exercise area, because the Establishment Clause acts as a ceiling on free exercise protection. For further discussion of this argument, see Colker, *supra* note 80.

109. Not since the controversial decision in *The Civil Rights Cases*, 109 U.S. 3 (1883), in which the Court held that Congress lacked the constitutionality authority to regulate the private sector under the Thirteenth or Fourteenth Amendments, had the Court struck down civil rights legislation. The *Adarand* decision, although not involving traditional civil rights legislation, may have foreshadowed the willingness of the Court to invalidate legislative action taken pursuant to Section 5 of the Fourteenth Amendment.

110. Justices Ginsburg and Stevens joined the *Boerne* majority opinion. Given their subsequent positions in Section 5 cases, it is possible they did not appreciate how the opinion subtly created a basis for new limitations on Congress's powers.

111. *City of Boerne*, 521 U.S. at 533.

112. The majority said: "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed." *Id.* at 519-20. We discuss the phantom nature of this requirement at *infra* Part III.

113. *City of Boerne*, 521 U.S. at 529.

114. *Id.* at 530. The examples were purportedly more than forty years old. *Id.*

the problem of religious discrimination before enacting legislation.[115] While Congress may have overreached in fundamental terms by in effect declaring that the Court's constitutional interpretation was unlawful, the legislative record supporting RFRA was no weaker than the legislative record of other statutes that the Court had upheld under Section 5 in prior years.

In a revealing statement, the Court noted that "[t]his lack of support in the legislative record, however, is not RFRA's most serious shortcoming."[116] It would have been more appropriate for the Court not to list RFRA's legislative history as a shortcoming at all, but rather simply to conclude that RFRA exceeded Congress's enforcement authority. Instead, the Court started down the path toward what we describe as a phantom legislative history requirement — a requirement that the Court finds unmet irrespective of Congress's diligence.

Thus, through decisions in two different areas of the law — Commerce Clause and Section 5 of the Fourteenth Amendment — the Court has substantially altered the relationship between the courts and Congress. Beginning in 1995, a longstanding presumption of deference toward the work of Congress has been peeled away.

II. CRYSTAL BALLS

Although the new activist majority has often disdained legislative history when engaging in traditional statutory interpretation,[117] it has made legislative history relevant when considering the constitutionality of legislation under Section 5 and the Commerce Clause. As originally stated in the Commerce Clause context in *Katzenbach v. McClung*, the existence of legislative history that rationally supports an asserted burden on interstate commerce was supposed to put an end to the Court's own investigation into the question of whether Congress was entitled to regulate, because the Court would defer to Congress's findings.[118] While congressional hearings did not obviate the Court's responsibility to determine for itself whether a measure was constitutional, the Court was not *requiring* Congress to engage in substantial factfinding as part of its daily work before enacting legislation. Indeed, as recently as 1980, a lead opinion of the Court empha-

115. *See id.* at 530-31 (reviewing testimony by eleven witnesses at three congressional hearings concerning history of religious persecution in the United States, including accounts of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, and descriptions of zoning regulations and historic preservation laws that have adverse effects on churches and synagogues).

116. *Id.* at 531. The Court elaborated in the following paragraph, that "[r]egardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning." *Id.* at 532.

117. *See infra* Part IV.

118. *See supra* text accompanying notes 39-41.

sized that Congress "may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."[119] The decision whether to create a legislative record was the prerogative of Congress, not the courts.

With its decisions in *Lopez* and *City of Boerne*, however, the Court began to suggest that, when considering a statute's constitutionality, it wanted to find evidence in the legislative history at the time of passage. In *Lopez*, the Court first made the boilerplate statement derived from *McClung* that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[120] Yet the Court then emphasized the usefulness of such findings when "no such substantial effect was visible to the naked eye."[121] One wonders why the Court should stop at what is obvious to the "naked eye." Moreover, in considering the visibility of an effect on commerce, the *Lopez* Court would not go beyond the legislative record that was compiled by the enacting Congress. In particular, the Court refused to consider prior federal enactments or congressional findings on the subject of firearms regulations, because they did not speak to the precise statute before the Court.[122]

Then, in *City of Boerne*, the Court invoked its somewhat amorphous distinction between remedial and substantive legislation to increase the burden on Congress. Once again, the Court recited the traditional statement about deference to congressional factfinding.[123] Yet the *Boerne* Court proceeded to rely on Congress's failure to identify specific, constitutionally cognizable misconduct by the States in the legislative history accompanying RFRA.[124]

In cases following *City of Boerne*, the Court has engaged in broader examination of the legislative record to determine whether the enacting Congresses adequately justified their constitutional authority to regulate.[125] Not surprisingly, Congress has lacked a good enough crystal ball to have created the requisite, precise legislative histories. Although hints of this development can be found in *Lopez* and *City of Boerne*, it is far more obvious in *Kimel v. Florida Board of*

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119. Fullilove v. Klutznick, 448 U.S. 448, 478 (1980).

120. United States v. Lopez, 514 U.S. 549, 562 (1995).

121. *Id.* at 563.

122. *Id.*

123. City of Boerne v. Flores, 521 U.S. 507, 517 (1997) ("All must acknowledge that Section 5 is a 'positive grant of legislative power' to Congress . . . .") (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

124. *Id.* at 530-31.

125. *See, e.g.*, Bd. of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001); United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

Regents[126] and *United States v. Morrison*.[127] In each case, the Court sought and was unable to find support in the legislative record under a legal standard that was unknown at the time the statute was enacted.

A. *Kimel*

The issue in *Kimel* was whether Congress properly abrogated the States' sovereign immunity when it subjected states to monetary damages suits by their employees as part of the 1974 amendments to the Age Discrimination in Employment Act ("ADEA"). When Congress amended the ADEA in 1974, it could have thought that such action was permissible under the Commerce Clause given the 1968 decision in *Maryland v. Wirtz*[128] upholding the Fair Labor Standards Act as constitutionally regulating state employees under that clause. Because employment matters historically have been understood to affect interstate commerce substantially, Congress would not have paused to wonder whether the statute could be justified under the existing constitutional test. Moreover, even if members of Congress had stopped to consider the constitutionality of authorizing private damages actions against the States, they would have seen no reason to pepper the legislative history with explanations of that justification. At most, a member of Congress who was familiar with the legal requirements of the time would have thought it important that one *could* find a justification for Congress's actions, not that the record needed to support such justifications with detailed findings.

Although members of Congress in 1974 might well have justified abrogating states' immunity from private damages actions in Commerce Clause terms, that justification was not available after *Seminole Tribe v. Florida*.[129] Accordingly, the petitioners and the United States in *Kimel* relied on Section 5 as an alternative justification for Congress's extension of ADEA monetary liability to the States.[130] The Court agreed that a Section 5 justification was available in theory, but then applied its "congruence and proportionality" test from *City of*

126. 528 U.S. 62 (2000).

127. 529 U.S. 598 (2000).

128. 392 U.S. 183 (1968).

129. The *Kimel* Court took the Commerce Clause justification entirely off the table with the statement: "Under our firmly established precedent . . . if the ADEA rests solely on Congress's Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers." 528 U.S. at 79. Although the Court's reference to this precedent as "firmly established" is questionable, given the fractured nature of the Court's views in this area and the recent vintage of the *Seminole Tribe* decision, the Court correctly observed that the Commerce Clause justification was not available in the year 2000 to justify the extension of ADEA damages liability to the States in 1974.

130. *See* Brief for Petitioners, J. Daniel Kimel et al., at 21-44, *Kimel* (Nos. 98-791, 98-796); Brief for the United States at 17-49, *Kimel* (Nos. 98-796, 98-791).

Boerne to determine whether the ADEA's extension to the States could be justified under Section 5.[131] It concluded that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[132]

Despite this sweeping statement of unconstitutionality, the Court went on to note:

> That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. *One means by which we have made such a determination in the past* is by examining the legislative record containing the reasons for Congress' action.[133]

The Court used the phrase "one means" to describe this inquiry, but it was, in fact, the *only* means used to assess whether ADEA extension was reasonably prophylactic legislation. The Court examined the ADEA legislative record to determine whether Congress had identified patterns or practices of age discrimination by state employers. Justice O'Connor, writing for the majority, found no such evidence had been presented in congressional hearings or elsewhere in the legislative history.[134] Because Congress lacked a reasonable evidentiary basis for believing prophylactic legislation was needed to address States' misconduct, the ADEA was not a valid exercise of Congress's Section 5 powers.

The *Kimel* Court's tone in examining the legislative history was deeply skeptical.[135] The majority dismissed petitioners' arguments from the legislative record as no more than "isolated sentences" that were "cobble[d] together from a decade's worth of congressional reports and floor debates."[136] The Court concluded that the extension of the ADEA to millions of state government employees was "an unwarranted response to a perhaps inconsequential problem."[137] In deter-

131. *Kimel*, 528 U.S. at 80-81.

132. *Id.* at 86 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

133. *Id.* at 88 (emphasis added).

134. *Id.* at 87-89.

135. For related discussion of *Kimel*'s approach toward Congress and its exercise of Section 5 powers, see James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999-2000 Term*, 16 LAB. LAW. 151, 170-79 (2000).

136. *Kimel*, 528 U.S. at 90.

137. *Id.* at 89.

mining that age discrimination by state employers in the early 1970s was "perhaps inconsequential," the Court expressly challenged a key legislative proponent's floor statements describing employment discrimination against the elderly,[138] and a California legislative study documenting age discrimination by public agencies.[139]

Kimel's skeptical scrutiny of the ADEA legislative record signals a dramatic change in perspective. The Court in prior decades had sustained Section 5 legislation without expecting Congress to produce the kind of legislative findings demanded in *Kimel*.[140] Even in *City of Boerne*, where Congress's creation of new substantive rights under the Fourteenth Amendment triggered a closer review of the RFRA legislative record, the Court noted that legislative findings are not typically required in the Section 5 setting.[141]

The 1974 legislative record admittedly contains few detailed findings of arbitrary age discrimination by state employers. That, however, is hardly surprising: we have shown that the Court's Section 5 decisions at the time did not encourage — much less demand — the creation of such a record. Further, the ADEA extension was but a small part of a larger statute dealing with wage and hour matters.[142] In this regard, the ADEA legislative record addressing unconstitutional discrimination by state employers is at least comparable to the record made two years earlier that supported extending Title VII's ban on gender discrimination to the States.[143]

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138. *See id.* (questioning validity of Senator Bentsen's statements on the floor that state and local governments were discriminating against the elderly in their employment practices).

139. *See id.* (questioning findings on age discrimination in public agencies reported to the House in a study commissioned by California legislature).

140. *See* Maher v. Gagne, 448 U.S. 122, 132 (1980) (upholding Congress's power to require states to pay attorneys' fees in certain circumstances with no reference to congressional findings of a pattern of unconstitutional state conduct); Katzenbach v. Morgan, 384 U.S. 641, 652-56, 669 & n.9 (1966) (upholding congressional invalidation of state statutes that required literacy in English as a condition of voting, based on hypothesized discrimination against Spanish-speaking minority which dissent noted was without any support in legislative record).

141. *See* City of Boerne v. Flores, 521 U.S. 507, 531-32 (1997).

142. *See* Pub. L. No. 93-259, § 28(a) (1)-(4), 88 Stat 55, 78-80 (1974) (featuring twenty-nine sections, of which twenty-eight address FLSA wage and hour issues). Indeed, the legislative history suggests that the omission of government workers from the ADEA seven years earlier was due primarily to the fact that most government employees were not covered by the FLSA at that time, and responsibility for ADEA enforcement was to be carried out by the same agency personnel who enforce the FLSA. *See* SEN. REP. NO. 93-690, at 55 (1974).

143. *Compare, e.g.*, Hearings on H.R. 3651 et al. Before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 166-69 (1967) (reprinting summary of findings from study commissioned by California legislature that recites specific examples of arbitrary and intentional age discrimination by government employers), *with* Hearings on H.R. 1746 Before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 468-69 (1971) (reprinting statement of the League of Women Voters, asserting that "[p]ersistent and distinct [sex] discriminatory practices have been found in state and local personnel systems"). *See generally* H. R. REP. No.

The absence of a detailed record for fifty States as employers does not mean Congress acted without rational foundation in 1974. The voluminous legislative findings of arbitrary discrimination by private employers were less than a decade old when Congress extended coverage to the States, and half the States still had no age discrimination laws at all for public employers.[144] The Court could have developed a set of reasonable arguments to justify the 1974 extension to state employees based in part on the widespread evidence available to Congress about private sector age discrimination. Yet the Court in *Kimel* asserted that the ADEA private sector findings were simply irrelevant to the posited existence of arbitrary discrimination by state employers.[145]

This cursory dismissal of a detailed legislative record shows again how far the newly activist Court has traveled. In the 1960s and 1970s, when Congress enacted the ADEA and extended its protections to public employees, arbitrary age discrimination was a pervasive presence in the white collar workforce, principally among professionals, managers, and bureaucrats.[146] These occupational categories are

92-238 (1971) (containing no discussion of state employers engaging in sex discrimination); 117 CONG. REC. 31958-85, 32088-114 (1971) (containing no discussion in House floor debate of state employers engaging in sex discrimination); 118 CONG. REC. 4907-49 (1972) (containing no discussion in Senate floor debate of state employers engaging in sex discrimination). *See also* Trans World Airlines v. Hardison, 432 U.S. 63, 74 n.9 (1977) (discussing minimal legislative record that accompanied 1972 extension of Title VII to include ban on religious discrimination).

144. *See* Brief for Respondents appendix at 1a-25a, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Nos. 98-791, 98-796) (reporting that twenty-four States had no age discrimination laws applicable to public employers when Congress extended the ADEA).

145. *Kimel*, 528 U.S. at 90-91 (dismissing argument that Congress found substantial age discrimination in private sector as "beside the point" and "doubt[ing] whether the findings Congress did make with respect to the private sector could be extrapolated to support a finding of *unconstitutional* age discrimination in the public sector").

146. *See generally* Employment Problems of Older Workers: Hearings on H.R. 274 et al., Before the House Committee on Education and Labor, 89th Cong., (1965) (containing nine days of testimony and submissions); Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., (1967) (containing three days of testimony and submissions); Hearings on H.R. 3651 et al., Before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong. (1967) (containing twelve days of testimony and submissions); *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965); H.R. REP. No. 90-805, at 2 (1967) (discussing scope of congressional concern for problems of age discrimination in employment). ADEA litigation typically involved mid-level professionals, salesmen, and managers. *See, e.g.*, United Air Lines v. McMann, 434 U.S. 192 (1977) (involving airline pilot); Price v. Md. Cas. Co., 561 F.2d 609 (5th Cir. 1977) (involving insurance salesman); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *aff'd in part, rev'd in part, and remanded*, 608 F.2d 1369 (2d Cir. 1979) (involving clothing designer); Coates v. Nat'l Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977) (involving engineer). Union strength in the private sector meant that collectively bargained seniority systems provided substantial protections to millions of older blue collar employees.

equally if not more prevalent for public employers,[147] and it would surely have been reasonable for Congress to conclude that state employers mistreated their older workers in many of the same ways as private employers.

It is worth emphasizing the crystal ball nature of the Court's decision. The 1974 Congress was acting pursuant to a settled understanding under which civil rights legislation could be justified based on both Section 5 and the Commerce Clause. There simply was no reason in 1974 to generate a lengthy legislative record demonstrating that state and local governments were unconstitutionally discriminating against their employees on the basis of age. The fact that it took the Court twenty-six years to evolve to the position that the ADEA was unconstitutional in subjecting states to monetary damages suits by their employees says more about ideological changes on the Supreme Court than "attitudinal" changes in Congress.

As a policymaking body, Congress legislates repeatedly in areas of national concern such as age discrimination in employment. Committees and members draw on their institutional and individual experiences to justify more efficient lawmaking without resorting to redundant hearings or extended debate. To regard the brief 1974 legislative history as the entire "record" underlying the ADEA's extension "is essentially . . . [to] treat Congress as if it were a lower federal court," and thereby to "erect an artificial barrier to full understanding of the legislative process."[148] By creating a rigid and narrow requirement for how Congress must justify ADEA extension in the 1974 legislative record, the Court required a degree of legislative omniscience that is highly troubling as a matter of constitutional discourse between the branches.

B. *Morrison*

The crystal ball methodology is also apparent in *Morrison.* The issue in *Morrison* was the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. This provision is part of the Violence Against Women Act of 1994, enacted by Congress a year before the Supreme Court decided

147. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226 (1983) (involving mid-level manager in state agency); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) (involving public school teacher). In 1979, state and local governments employed nearly 2.8 million administrators, professionals, technicians, paraprofessionals, and office/clerical workers, comprising 60.9% of their combined workforce. In 1997, these five categories of white collar workers comprised 63.3% of the state and local government workforce, a total of 3.3 million employees. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1999, at 339 (119th ed. 1999); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1981, at 308 (102d ed. 1981).

148. Fullilove v. Klutznick, 448 U.S. 448, 502 (1980) (Powell J. concurring).

Lopez. Christy Brzonkala brought suit against Antonio Morrison and James Crawford after university officials took no punitive action against the men despite allegations that they had raped her and used sexually offensive language. The Fourth Circuit, on a divided vote en banc, held that Congress lacked constitutional authority to enact § 13981's civil remedy under either the Commerce Clause or Section 5 of the Fourteenth Amendment.[149]

The Supreme Court began its investigation of the constitutionality of § 13981 with boilerplate language about deference to Congress.[150] Nonetheless, the Court soon turned to an excerpt from the decision in *NLRB v. Jones & Laughlin Steel Corp.*[151] that it had also quoted in *Lopez*: The interstate commerce power should not be "extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."[152] That quotation, however, ignores the thrust of the opinion in *Jones & Laughlin*, which was pivotal in returning the Court to its posture of deference to congressional action. The *Jones & Laughlin* Court had found two prior decisions not to be "controlling" authority, in order to conclude that Congress had acted lawfully when it created a comprehensive national system for regulating labor-management relations. The Court's holding there was more consistent with a different statement in its majority opinion — "The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' "[153] — than with the minor caveat quoted by the Court in both *Lopez* and *Morrison*. Yet, the *Morrison* Court amplified its rationale from *Lopez* by making the Court, not Congress, the appropriate authority to determine what kind of legislation is needed to protect the national interest.

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149. Brzonkala v. Virginia Polytechnic & State Univ., 169 F.3d 820 (4th Cir. 1999) (6-4 decision in which four members of the court joined Judge Luttig's opinion, Judge Neimeyer concurred separately, and three members joined Judge Motz's dissent). Unlike *Lopez*, the *Morrison* case dealt with Congress's authority to enact a civil rather than a criminal remedy. Section 13981(a) stated that Congress had authority to enact this provision under Section 5 and the Commerce Clause. For a thoughtful discussion of the *Morrison* Court's Section 5 holding in more traditional federalism terms, see Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 473-86 (2000).

150. United States v. Morrison, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

151. 301 U.S. 1, 37 (1937).

152. *Morrison*, 529 U.S. at 608 (quoting United States v. Lopez, 514 U.S. 549, 556-57 (1995) (quoting *Jones & Laughlin*, 301 U.S. at 37)).

153. *Jones & Laughlin*, 301 U.S. at 36-37 (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870)).

Like the 1974 Congress extending ADEA coverage to public employment, the 1994 Congress would have had little reason to doubt the constitutionality of its work in creating for women a private right of action against perpetrators of violence. The Court, however, held § 13981 to the test that it formulated in *Lopez*; indeed, it expanded the nature of that test. First, the Court asserted that there must be proof that the regulated activity was economic in character and recast its prior decisions under that previously unannounced principle.[154] Second, the Court noted, as it had in *Lopez* for the first time, that a jurisdictional element — such as a requirement that the gun crossed state boundaries in interstate commerce — may establish that Congress acted pursuant to its commerce powers.[155] The 1994 Congress had no reason to foresee that an explicit jurisdictional element might be sufficient to establish valid Commerce Clause authority; thus, that element was lacking from the legislation. Finally, the Court observed that "express congressional findings" in the legislative history could demonstrate constitutionality.[156] It repeated the *Lopez* "naked eye" standard: that legislative findings can save legislation when the effect on interstate commerce is not visible to the naked eye.[157]

As in *Kimel*, the *Morrison* Court treated Congress like a lower court, refusing to extrapolate from its findings to fit the proper constitutional standard. The legislative record contained substantial evidence of unconstitutional gender bias in twenty-one States.[158] The Court expressed concern that such findings, from only twenty-one of the fifty States, were not sufficient as evidence of a national problem.[159]

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154. *Morrison*, 529 U.S. at 609-11. See *infra* text accompanying notes 162-166 for further discussion of this point.

155. *Id.* at 611-12. Some prior laws enacted pursuant to the Commerce Clause, such as Title II of the Civil Rights Act of 1964, had included a jurisdictional requirement. *See* 42 U.S.C. § 2000a(b) (1994) ("Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action."). Others, however, had not, such as the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1994).

156. *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562 (quoting Brief for the United States at 5-6, *Lopez* (No. 93-1260))).

157. *Id.* (quoting *Lopez*, 514 U.S. at 563).

158. *Id.* at 629-31 (Souter, J., dissenting) ("Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment.").

159. *Id.* at 626 (observing that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all states, or even most states"); *see id.* at 666 (Breyer, J., dissenting) (pointing to documented constitutional violations by twenty-one States, adding "[t]he record nowhere reveals a congressional finding that the problem 'does not exist' elsewhere.").

Unlike *Lopez*, the Court was not faced with an empty congressional record in *Morrison*. As the Court acknowledged, there was evidence of the "serious impact that gender-motivated violence has on victims and their families."[160] Congress found that gender-motivated violence affected interstate commerce:

> [B]y deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce . . . [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products.[161]

This evidence, however, was not the right *sort* of evidence because it followed the "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce."[162] The Court criticized Congress's attempt at record building as flowing from a flawed "method of reasoning."[163]

Although the *Morrison* Court found this evidence unworthy, it was arguably precisely the type of evidence approved by the Court in the past. In *Katzenbach v. McClung*, the Court deferred to a legislative record that included anecdotal discussion of the costs associated with racial segregation as well as evidence regarding race-based differentials in family expenditures based on the reduced mobility of black families.[164] Congress in 1994 had compiled a far weightier record iden-

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160. *Id.* at 614.

161. H.R. CONF. REP. No. 103-711, at 385 (1994), *reprinted in Morrison*, 529 U.S. at 614. Nor was the evidence of a national problem limited to the mathematical minority of states referred to by the Court above. For instance, the record included a letter signed by the attorneys-general from thirty-eight states, requesting Congress to enact VAWA because "the problem of violence against women is a national one, requiring federal attention." *See* Letter from Robert Abrams et al., Attorney General of New York, to Jack Brooks, Chair House Judiciary Committee, *reprinted in Crimes of Violence Motivated by Gender: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103d Cong. 34-36 (1993).

162. *Morrison*, 529 U.S. at 615. Congress could perhaps have done a more artful job in explaining why § 13981 and its national antidiscrimination protections were appropriate when it created its legislative record. *See* Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206, 1214 (1998) (arguing that there is "a loss in our failure to articulate national values other than commerce" in judicial review of congressional action). Even under Professor Merritt's approach, the Court could offer instructions to Congress on what type of evidence *might* support its authority to regulate social problems. The Court, however, did not walk down that path. Instead, it took away the power from Congress altogether with the assertion that these matters "can be settled finally only by this Court," seemingly without opportunity for input from Congress. *Morrison*, 529 U.S. at 614 (internal citation omitted).

163. *Morrison*, 529 U.S. at 615.

164. *See Civil Rights — Public Accommodations, Hearings on S. 1732 Before the Senate Committee on Commerce*, 88th Cong., App. V, pp. 1383-1387 (1963) (documenting "illustrative examples, as reported in newspapers and periodicals, of economic impact resulting from resistance to segregation practices"); H.R. Rep. No. 88-914, pt. 2, at 9-10 (1963) (additional views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon.

tifying (in anecdotal and systemic terms) the costs associated with gender-based violence, including costs stemming from reduced mobility by women.[165]

The Court rewrote the Commerce Clause test from a "substantial effect on interstate commerce" to an "economic activity" test. The Court did so by reexamining and even reshaping the language and holding in *Lopez*, emphasizing that the economic aspect of the regulated activity was central to holdings in prior decisions that Congress had *not* exceeded its power under the Commerce Clause.[166] Congress thought it needed to document the effect on interstate commerce when it really needed to document that the activity being regulated was economic in nature. Once again, this is a crystal ball problem — the Court not deferring to its coequal branch because the enacting Congress had failed to create a legislative record that could satisfy a hitherto unannounced legal standard.

C. *Implications*

The Court's approach represents a serious challenge to the way Congress legislates. The Court is in effect directing Congress to hold focused hearings and to gather comprehensive evidence that will provide ample support for the existence of a national problem addressable under Congress's enumerated powers. The Court's new heightened review of the legislative record has transformed Congress's role

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James E. Bromwell) (documenting the cost of an illustrative trip from Washington, D.C., to Miami, Florida, and from Washington, D.C., to New Orleans, Louisiana, showing location of hotel-motel accommodations of "reasonable" quality readily available to Negroes); H.R. Rep. No. 88-914, pt. 2 at tbl. II (documenting the average family expenditure for admissions, food eaten away from home, and automobile operations, for three income classes, large, northern and southern cities, by race, 1950).

165. *See Morrison*, 529 U.S. at 631-33 (Souter, J., dissenting) (reciting results from numerous studies, including a sharp reduction in women participating in commercial activities alone in evening due to fear of rape).

166. *Lopez* seemed to view the substantial effects test as key. *See* United States v. Lopez, 514 U.S. 549, 559 (1995) ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the *regulated activity* 'substantially affects' interstate commerce." (emphasis added)). But in *Morrison*, the Court stated that "the pattern of analysis is clear . . . Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." 529 U.S. at 610 (emphasis added). By contrast, the Court noted that when the regulated activity is noneconomic in character, it is unlikely to find that Congress acted within its commerce powers. Hence, "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case . . . . *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.* at 610; *see* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New 'On the Record' Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 341-44 (2001) (discussing how *Morrison* decision converted *Lopez* into an economic activity test).

from a coequal branch warranting judicial deference to an entity charged with extensive factfinding responsibilities.

One possible response, of course, is to ask what is so bad about such a dynamic between the branches. Since *Lopez* was decided, a number of legal scholars have maintained that the requirement of adequate legislative findings can promote more thoughtful national laws and enhance interbranch cooperation.[167] "[I]f carefully applied and thoughtfully limited, [the *Lopez* decision] could promote a meaningful dialogue between judiciary and legislature concerning just where the difficult-to-draw lines should exist concerning important constitutional values of personal equality and federalism."[168]

Such arguments presuppose a basic judicial faith in the enterprise of building a legislative record. By emphasizing the importance of detailed and comprehensive legislative history as a justification for congressional power, the Court presumably seeks to add new value to the exchanges between itself and Congress on public policy matters and to improve the quality of those federal laws that *are* enacted by Congress as appropriate national solutions. The fact that the Court has found Congress's efforts thus far uniformly unsatisfactory could simply mean that Congress must do more to adapt to the new rigor associated with legislative record building. Yet it is also possible that the Court's crystal ball approach reflects a different, less constructive attitude regarding Congress and its methods of legislating.

While we agree that it is generally a positive development for Congress to create a record in support of legislation, we do not believe the Court should be micromanaging when and how that record is developed.[169] It is not enough to insist that the Court intrude into

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167. *See, e.g.* Philip P. Frickey, *Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 697 (1996); Barry Friedman, *Legislative Findings and Judicial Signs: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 760 (1996); Jackson, *supra* note 79, at 2237, 2240; Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 947 (1999). These proceduralist arguments, often advanced by advocates of a liberal legal process approach (Frickey, Friedman, Jackson), are distinct from substantive arguments that the Court's new conservatism is right on the merits. *See, e.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995); Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 746 (1996).

168. Frickey, *supra* note 167, at 729; *see also* Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 734 (1996) ("Required findings represent a less intrusive step than full-fledged review, and — despite the drawbacks — may facilitate a collaborative effort to develop constitutional principles in contexts in which independent judicial rules are normatively unattractive.").

169. The Constitution, of course, does require Congress to keep a record of its proceedings. *See* U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."). Were Congress to fail to comply with that requirement entirely, we would agree that intervention

Congress's affairs in a way that is "carefully applied and thoughtfully limited."[170] The kind of intrusion that began in *Lopez* is inherently problematic, because telling Congress how to perform its information-gathering functions misunderstands and subverts the legislative process in four significant ways.

1. *The Rich Informality of Information-Gathering*

The Court's approach fails to appreciate the skill and sophistication that Congress brings to the information-gathering process. Congress educates itself not just through structured record evidence but through a range of informal contacts — including local meetings with constituents, ex parte contacts between members (or staff) and lobbyists, and exchanges with executive branch representatives.[171] This institutional virtue, the capacity to gather and evaluate information in both structured and informal settings, contributes to a distinctive Section 5 role for Congress. When it enacted the ADEA, Congress amassed a powerful record illustrating the pervasive nature of age-based stereotypes and discriminatory generalizations in the American workplace.[172] Its statutory response, which seeks to prohibit and deter such arbitrary employer conduct, applies in the public sector not only to laws enacted by state legislatures but also to more individualized and even routine decisionmaking by personnel managers, supervisors and government agencies.[173] More than three decades after the

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is appropriate. But if Congress does not regulate in the area of suspect classes or fundamental rights, if it keeps a record of its proceedings, and if the record discloses a rational basis for legislative action, then we believe the Court should have little further role in monitoring the constitutional quality or quantity of that record.

170. Frickey, *supra* note 167, at 729.

171. *See* JOSEPH M. BESETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 50-51, 152, 178 (1994) (discussing importance of informal information-sharing by lobbyists and executive branch officials); WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS 327-28 (9th ed. 1997) (reporting that most lobbyists regard personal presentation of their issue to a single legislator as more effective than testifying at committee hearing); Allen Schick, *Informed Legislation: Policy Research Versus Ordinary Knowledge*, *in* KNOWLEDGE, POWER AND THE CONGRESS 99 (William H. Robinson & Clay H. Wellborn eds., 1991) (observing that "advice and ideas flow in [to Congress] from diverse sources" including constituent complaints, local news items and editorials, government agency reports, and private meetings with lobbyists and others who have privileged access, as well as expert testimony at committee hearings, and that "[a]ll these sources are grist for the legislative mill"); *see also* Bryant & Simeone, *supra* note 166, at 384-87 (describing Congress's less formal information-gathering channels, and explaining that "absent circumstances indicating corruption or bribery, these kinds of off-the-record communications are not only legally permissible but constitutionally protected").

172. *See supra* note 146 (citing to extensive legislative record).

173. *See, e.g.*, Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 691 (8th Cir. 1983); Johnson v. Mayor & City Council, 637 F. Supp. 903, 907 (D. Md. 1986). State legislative rules sanctioning the arbitrariness of mandatory retirement have survived rational basis review, but the Equal Protection Clause need not as a result permit individual state employers to

ADEA's enactment, common sense and social science research support Congress's initial conclusions that arbitrary stereotypes and generalizations — not hostile or negative feelings towards older people — are at the root of unequal treatment in the workplace.[174] The Court in *Kimel* was unwilling to accord meaningful recognition to Congress's special legislative competence in identifying this threat to equality and then acting to limit its consequences.

The recent *Garrett* decision highlights the Court's unwillingness to recognize or respect how Congress educates itself about matters of public concern. In developing comprehensive legislation to protect individuals with disabilities from public and private discrimination, Congress relied not only on extensive direct testimony and decades of prior legislative experience regulating on this same subject,[175] but also on a Task Force that it created specifically to assess the need for new national disability discrimination legislation.[176] Yet when it concluded that Congress did not adequately document the existence of disability discrimination in state employment, the Court questioned the relevance of the evidence compiled from all fifty States by this Task Force, because the evidence of disparate treatment by state officials was submitted to the Task Force rather than directly to Congress.[177] In addition, the Task Force and various Congressional committees collected evidence about discrimination by cities and counties as well as states. The Court, however, refused to extrapolate from this evidence of discrimination by units of local government, because principles of sovereign immunity do not apply to these units of local government.[178]

At the time it enacted the ADA, Congress had little reason to foresee any constitutional requirement for detailed record building, given that *Seminole Tribe* and *City of Boerne* were six or more years in the future. But even if it had anticipated a need for more extensive evidentiary support, Congress in 1990 could not possibly have fore-

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invoke such stereotypes and generalizations whenever they fix terms and conditions of employment for older workers.

174. *See* Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 618-20, 677-84 (1997). *See generally* Linda H. Krieger, *The Contents of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Barbara F. Reskin, *The Proximate Causes of Discrimination: Research Agenda for the Twenty-First Century*, 29 CONTEMP. SOC. 319 (2000).

175. *See Garrett*, 121 S. Ct. at 976-77, at Appendices A and B (Breyer, J. dissenting) (listing thirteen congressional hearings on ADA during 101st Congress (1989-90) and nine prior federal statutes, enacted between 1948 and 1988, addressing discrimination against individuals with disabilities by public and private entities).

176. *See id.* at 977-93, Appendix C (Breyer, J., dissenting) (listing submissions made to Task Force on Rights and Empowerment of Americans with Disabilities by individuals and organizations from fifty States).

177. *Id.* at 966.

178. *Id.* at 965.

seen that its historic methods of educating itself outside the formalities of the hearing room, or its reliance on evidence of discrimination engaged in by closely analogous government actors at the local level, would be excluded from consideration when that record was being reviewed.

2. *Political Accountability*

The Court's approach is further flawed in that it overlooks the important democracy-based aspects of information gathering. When Congress builds a legislative record in the context of its political relationship to the electorate, it is not only (or even primarily) seeking to compile an evidentiary foundation for purposes of judicial review. In addition, Congress seeks to inform the public (and key interested subgroups), thereby helping to shape public discourse.[179] It also tries to respond to agendas promoted by these same interest groups, thereby reacting constructively and responsibly to the problems that groups identify. There are, in short, political dimensions when members of Congress promote, or oppose, a given legislative proposal. The business of trying both to influence and to anticipate the public makes for messy and unpredictable legislative history. At the same time, this dynamic and regularly recorded tension between Congress and its constituencies contributes importantly to the legitimacy of the lawmaking process, and helps explain the presumption of judicial deference to the final product. The Court's insistence on a type of pristine "substantial evidence" approach slights another of Congress's distinctive institutional virtues — the politically accountable nature of its record building enterprise.

This fact — that congressional record building leading to legislative enforcement is democratic whereas judicial review, especially strict scrutiny review of statutes, is the opposite[180] — points toward an additional weakness in the Court's recent Section 5 jurisprudence. When the Court in earlier ADEA decisions eschewed heightened

179. *See, e.g.*, BESETTE, *supra* note 171, at 57-63 (discussing importance of bargaining among members and interested groups as factor in congressional policymaking); *id* at 236-45 (discussing use of political rhetoric as form of civic instruction in development of deliberative majorities); KEEFE & OGUL, THE AMERICAN LEGISLATIVE PROCESS 339-40 (8th ed. 1993) (discussing ways in which members of Congress influence lobbyists on policy matters); Bryant & Simeone, *supra* note 166, at 384, 387-88 (discussing the informing function of Congress).

180. *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (contrasting legislature's "broad discretion to classify" under "traditional equal protection principles" with the judiciary's closer scrutiny of laws that classify based on alienage); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (suggesting that "prejudice against discrete and insular minorities [may] tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may [therefore] call for a correspondingly more searching judicial inquiry").

scrutiny and upheld statutes that mandatorily retired police officers, judges, and foreign service employees, it was effectively deferring to legislative limits placed on groups with adequate access to the political process.[181] This deference reflected in part the Court's understanding that its own role under Section 1 of the Fourteenth Amendment[182] is fundamentally antidemocratic and should be invoked with caution.

It is quite another matter, however, for the Court to apply such reservations to Congress's politically accountable role under Section 5. Yet that is what the *Kimel* Court in essence did by prohibiting Congress from authorizing private damages actions to prevent or deter arbitrary state conduct against older persons who are not sufficiently "discrete and insular" to warrant strict scrutiny protection from the judiciary. In contrast to the Court, Congress is not an unaccountable "superlegislature"[183] when it engages in broad-based factfinding regarding the existence of arbitrary age discrimination in the national workplace. Assuming that evidence of discrimination and lack of political access are not sufficiently stark to warrant heightened scrutiny under Section 1, it should not follow that Congress is precluded constitutionally from extending important protection against government discrimination under Section 5.

3. *Opportunity Costs*

Redirecting Congress's way of doing business also imposes substantial opportunity costs on the legislative enterprise. Enactment of federal legislation is a complex process that requires investing considerable institutional resources and negotiating politically sensitive internal procedures. The implicit message in the Court's crystal ball approach is that Congress should simply do things better next time. Such a message, however, fails to acknowledge how resource-intensive the next time is likely to be. Consider, for example, how often important substantive provisions are enacted as part of larger bills under consideration by Congress. The Violence Against Women Act and the Gun-Free School Zones Act each were part of omnibus crime bills. Similarly, the extension of the ADEA to the States was part of a much larger revision of the FLSA in 1974. It is highly unlikely that extensive hearings and lengthy reports will be produced on every aspect of such

181. *See* Gregory v. Ashcroft, 498 U.S. 1079 (1991) (state judges); Vance v. Bradley 440 U.S. 93 (1979) (foreign service employees); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (police officers).

182. Section 1 provides in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

183. The term "superlegislature" was used by Justice Harlan in expressing concern about the Court's extension of its Section 1 authority. Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting). *See* Post & Siegel, *supra* note 149, at 463-64 (discussing tensions between roles of Court and Congress under Fourteenth Amendment).

large bills. Guided by its sense of which provisions are especially complicated or controversial, Congress makes decisions about how to allocate its limited resources. With no strong outcry from the minority party that any of these measures unconstitutionally impinges on states' sovereignty, one should hardly expect that Congress will devote extensive resources to documenting their constitutionality. Yet the Court discusses each measure as if Congress's sole focus during legislative debate were on these discrete provisions embedded in larger pieces of legislation.

By insisting that Congress take more time to build a lower court or agency-type record in Section 5 and Commerce Clause settings, the Court restricts the amount of other legislative work that Congress can accomplish.[184] That structural constraint on Congress's legislative capacity may be viewed as a positive policy development by some, but it is *not* policy-neutral. The Court's effort to dictate, and thereby to restrict, Congress's agenda is a further manifestation of disrespect.

4. *Normative Ramifications*

Finally, and implicit in our descriptive account of the Court's insensitivity to the nature of congressional operations, this crystal ball approach raises larger normative issues. As a general matter, both litigants and citizens planning future conduct under our rule-of-law regime are remitted to the crystal ball due to the possibility that a court will reverse or modify a prior interpretation after they have acted. Congress, historically and institutionally, has enjoyed a different status when its actions are subjected to judicial review. The legislation Congress enacts is presumed to be legitimate as the product of a coequal branch that formulates national policy under independent sources of constitutional law. For private parties, the crystal ball problem would be solved in theory if the Court's decisions were not retroactive. That result, however, would not address the problem of judicially invalidated exercises of congressional authority. The Court's changing rules do not simply adjust the prospective behavior of private individuals; they erode the processes and powers of a constitutional partner.

It is a commonplace to observe that legislatures and courts make law in quite different, though comparably legitimate, ways. While the

184. *See* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 26 (1994) (maintaining that "the opportunities for Congress to act are limited in predictable ways by the finite quantity of temporal and political resources and by substantial logistical and procedural constraints... [and] in unpredictable ways by the ebb and flow of public attention, interest group commitment, and intensity of member preferences[, the result being that] when Congress devotes more time to one legislative item, it sacrifices the opportunity to address other items on the legislative agenda").

Court responds only to discrete cases or controversies, Congress plays a more proactive role on a broad policymaking stage. In fulfilling its legislative responsibilities, Congress relies on a special institutional competence that stems in important respects from being unconstrained by the agendas or evidentiary presentations of individual litigants. As indicated above, Congress has the capacity to recognize and act upon "legislative facts,"[185] including policy-related facts that are not part of any formal record, and also to consider a range of politically sensitive enforcement options and techniques in its effort to produce an effective accommodation of competing interests.[186] These strategies reflect Congress's more general ability to draw upon the extra-record knowledge, experience, and judgment of its collective membership as the foundation for legislative action.[187]

In its Section 5 and Commerce Clause decisions, the Rehnquist Court has effectively sought to reshape these lawmaking processes by imposing an "adjudicatory fact"[188] model based on its own institutional experiences. Traditionally, the Court has been attentive to Congress's expertise and judgment in perceiving and reporting the pervasiveness of discriminatory practices or the substantiality of interstate commerce effects. By contrast, the level of precision and detail in the formal legislative record that the current Court requires is more akin to the factual predicate needed to support a class action claim for constitutional relief. Even if it were a roadmap to constitutional validation for future statutes, this new approach would raise serious separation of powers concerns. In undervaluing, if not ignoring, essential elements of the legislative enterprise, the Court's approach cannot help but impede Congress's ability to fulfill its distinct responsibilities.

In the end, the Court in *Kimel* and *Garrett* demanded that Congress *prove* something to justify its exercise of Section 5 powers against the States, a considerable departure from expectations of

185. *See generally* Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942) (distinguishing between "legislative facts," which "inform . . . legislative judgment . . . [when an agency] wrestles with a question of law or policy" and "adjudicative facts," which "concern only the parties to a particular case").

186. *See* David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551-58 (1988) (discussing the distinctive institutional qualities of courts and legislatures, and emphasizing that legislatures are better able than courts to control their own agendas, to investigate issues in detail, to develop imaginative remedies, and to monitor results and revise solutions).

187. *See* Archibald Cox, *The Supreme Court, 1966 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 105 (1966) (discussing distinctive legislative capacity to act on basis of members' expertise and experience without relying on formal record evidence).

188. *See* Davis, *supra* note 185. *See generally* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. (forthcoming 2001) (critiquing Court's reliance on concept of a "legislative record" in light of administrative law principles).

Congress under the civil rights cases of the 1960s and 1970s.[189] Indeed, the earlier decisions suggest both that Congress should play a positive role in strengthening the antidiscrimination norms of the Fourteenth Amendment[190] and that Congress's legislative efforts can support the Court's own evolving approach to understanding and enforcing those norms outside the racial setting.[191] The Court in the last decade has largely abandoned this deferential stance, replacing it with a more constrained vision in which Congressional factfinding and support for antidiscrimination laws are subject to searching, skeptical review. Congress's unsurprising inability to keep pace with such a remarkable change in perspective has produced a troubling shift in the balance of power between the branches.

III. PHANTOMS

Even when legislation enacted by Congress seems to be supported by considerable legislative findings, the Court has not been satisfied. It appears at times that the Court has transformed questions of fact for Congress into questions of law for the Court's determination. In this regard, the Court's rigorous approach to the legislative history may be windowdressing for a phantom legislative record requirement.

A. *Kimel*

The crystal ball assessment of the *Kimel* decision is in some ways a benign portrayal of the Court's analysis, because it accepts at face value that the Court would entertain a suitably justified congressional response to the problem of age discrimination. A phantom analysis of *Kimel's* holding is less flattering in that it questions the genuineness of the Court's assertion. Despite its claims of purported deference to

189. Similarly, the Court in *Lopez* and *Morrison* required Congress to establish far more in the way of a nexus to commerce than had been demanded in Commerce Clause jurisprudence of the late 1930s and the 1960s.

190. *See* Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966) (holding that to construe Section 5 as requiring prior judicial invalidation of the state conduct being regulated by Congress "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment," and that Congress's power under Section 5 goes beyond "merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment"); Cox, *supra* note 187, at 118-21 (1966) (suggesting that equal protection standards may at times be enforced more effectively by Congress than by the courts); Post & Siegel, *supra* note 149, at 498-500 (discussing historical development and importance of Court's Section 5 approach in *Morgan*).

191. *See* Post & Siegel, *supra* note 149, at 520 (recounting how Court's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973), relied on congressional legislation in gender discrimination area to inform and support its emerging view that sex-based classifications require intermediate scrutiny under Section 1); *id.* at 504 (discussing how Court viewed antidiscrimination statutes of 1960s as implementing the equality norms of the Fourteenth Amendment, and this view allowed Court readily to approve Congress's extension of Title VII to the States as appropriate Section 5 legislation in late 1970s).

Congress's factfinding, a phantom assessment suggests that no amount of factfinding by Congress could pass muster.

The decision in *Kimel* can be viewed as fitting the phantom category, because the Court has implicitly suggested that Congress does not have the authority to enact any legislation under Section 5 to protect groups that are entitled only to rational basis review under Section 1 of the Fourteenth Amendment.[192] Congress lacks such authority once the Court has restricted the "congruence and proportionality" test from *City of Boerne* to mean that Congress's legislative powers under Section 5 are no greater than the Court's power to invalidate state action under Section 1.[193]

In *City of Boerne*, the Court held that there is an important distinction between remedial legislation and legislation that results in a "substantive change in the governing law." It created the "congruence and proportionality" test to evaluate whether legislation was appropriately limited to Congress's remedial authority. The Court recognized that the distinction "between measures that remedy or prevent unconstitutional actions and measures that make substantive change in the governing law is not easy to discern,"[194] but it fashioned its new approach in an arguably deferential framework when it stated that "Congress must have wide latitude in determining where [the distinction] lies."[195]

With hindsight, one can see that the *City of Boerne* test left Congress little room to enact legislation to protect nonsuspect groups or to enforce nonfundamental rights[196] despite the purported deference to Congress. RFRA failed the congruence and proportionality test because the statute banned far more conduct than would be unconstitutional under the lenient standards applied in the free exercise

192. Throughout this section, we use terms like "implicitly suggested," because we acknowledge that our argument does not directly follow from the language of the Court's decision. Our argument here is based on speculation and inference rather than on the plain language of the majority opinion.

193. In *City of Boerne*, the Court held that Congress may enact remedial, but not "substantive," legislation under its Section 5 powers. City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause.").

194. *Id.*

195. *Id.* at 520.

196. The Court's decisions in *Kimel* and *Garrett* assessed congressional enforcement of nonsuspect classes under Section 1's Equal Protection Clause. The Court's decisions from the 1999 Term invalidating patent and trademark laws that regulated the States each involved Congress enforcing nonfundamental property rights under Section 1's Due Process Clause. The Court in those cases did not go so far as to say that Congress has no authority whatsoever to protect nonfundamental rights under Section 1. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999). Rather, it stated that: "Congress came up with little evidence of infringing conduct on the part of the States." *Id.* at 640.

area for neutral legislation.[197] The Court suggested that legislation must be limited to situations in which there was evidence that the banned conduct had "been motivated by religious bigotry."[198] Broader legislation would have to be justified under strict or intermediate scrutiny.[199] No amount of legislative factfinding would appear to be able to cure this defect in the legal standard.[200]

The decision in *Kimel* clarified the narrow nature of Congress's power to enact legislation when dealing with nonsuspect groups or nonfundamental rights. As in *City of Boerne*, the Court compared the scope of the actions that were made unlawful under the federal legislation with the Court's prior holdings concerning what kind of conduct has been found to be unconstitutional in the subject area. Assessing its previous decisions, the Court concluded that the "Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, *even if it 'is probably not true' that those reasons are valid in the majority of cases.*"[201] The Court's earlier deference to state legislative judgments was hardly the virtual invitation to arbitrary treatment that *Kimel* described.[202] Measured against

197. "Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation." *City of Boerne*, 521 U.S. at 534.

198. "In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry." *Id.* at 535.

199. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that laws of general applicability which created an incidental burden of religious exercise were not unconstitutional absent direct evidence of religious animus).

200. As the Court stated:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

City of Boerne, 521 U.S. at 532.

201. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) (emphasis added); *see id.* at 83-84 (discussing Gregory v. Ashcroft, 501 U.S. 452, 470-73 (1991) (holding that mandatory retirement of state judges is not violative of Equal Protection Clause); Vance v. Bradley, 440 U.S. 93, 98-112 (1979) (holding that mandatory retirement of foreign service employees does not violate equal protection component of Fifth Amendment); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314-17 (1976) (holding that mandatory retirement of state police does not violate Equal Protection Clause)).

202. *See, e.g.*, *Vance*, 440 U.S. at 101, 103 (relying on critical foreign policy role played by foreign service employees, and also hazards and wear and tear of extended overseas duty, in upholding mandatory retirement); *Murgia*, 427 U.S. at 314-15 nn.7-8 (relying on arduous physical challenges facing uniformed police in upholding mandatory retirement). Lower courts have rightly understood that they can invalidate age discrimination by state agencies on rational basis grounds after *Murgia* and *Vance*. *See, e.g.*, Gault v. Garrison, 569 F.2d 993, 996-97 (7th Cir. 1997) (invalidating mandatory retirement of public school teachers); Indus. Claim Appeals Office v. Romero, 912 P.2d 62, 66-70 (Colo. 1996) (invalidating state's refusal to pay workers' compensation benefits for permanent total disability beyond age sixty-five).

this *Kimel* test, however, it is not surprising that a broad ban on age discrimination in public employment "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[203]

Although the *Kimel* Court claimed to leave room for Congress to enact remedial legislation for a group that only receives rational basis treatment under Section 1,[204] it is hard to imagine what kind of evidence could have justified such prophylactic legislation. The Court noted that Congress "never identified . . . any discrimination whatsoever that rose to the level of constitutional violation."[205] Because the States have the power (according to the Court) to draw age-based lines "even if it 'is probably not true' that those reasons are valid in the majority of cases,"[206] the examples of state line-drawing on the basis of age were not — and seemingly could not have been — evidence of unconstitutionally arbitrary state action. Accordingly, Congress "has no reason to believe that broad prophylactic legislation was necessary in this field."[207]

Having determined that there was no evidence in support of the need for *any* legislation, the Court did not have to consider the question of what would be the permissible language of legislation that proportionally responded to such a problem. Given its statement about the constitutional power of states to create and apply age-based distinctions, the Court probably would have required that the Congressional response include evidence of animus as well as arbitrariness. That is an unlikely legislative response for several reasons. First, because age discrimination is fundamentally about arbitrary stereotypes, not invidious hostility to old people,[208] Congress is unlikely to be able to find substantial evidence addressing the presence of animus. Second, Congress would be hard-pressed to amass such animus-related evidence (even if it existed) against a politically potent constituency of public employers when it has never done so against private employers in the first place. Finally, an animus standard is not the kind of response we expect from Congress when it legislates in the civil law area. Congress in its prophylactic role seeks to articulate broad standards that can apply to classes of individuals; an animus

203. *Kimel*, 528 U.S. at 86.

204. "That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Id.* at 88.

205. *Id.* at 89.

206. *See supra* note 201.

207. *Kimel*, 528 U.S. at 91.

208. *See supra* note 174 (discussing findings of legal and social science scholars).

standard is more individualized and not likely to bar more conduct than is already barred under background constitutional norms. It makes little sense for Congress to invest its legislative capital on merely repeating what is already unconstitutional under existing law.

The *Kimel* decision may thus be understood as holding that Congress has no power to enact remedial legislation under Section 5 for a group that is only subject to rational basis scrutiny, because it is highly unlikely that any such legislation would merely ban conduct that was "irrational" for Section 1 purposes. The "proportionality and congruence" test has arguably come to mean that Congress's powers under Section 5 are coextensive with the Court's authority to declare government conduct unconstitutional under Section 1. Moreover, the Court strongly implied that there is no such thing as unconstitutionally irrational age discrimination at the hands of the States.

The *Garrett* decision is more explicit in its suggestion that Congress's powers under Section 5 extend no further than the Court's authority to declare government conduct unconstitutional. In their separate concurrence, Justices Kennedy and O'Connor stated:

> If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist.[209]

But "confirming judicial documentation" would only be required if Congress's Section 5 authority is coextensive with the Court's authority under Section 1.

In the suspect class area, a rule limiting Congress's authority to remedying actual violations of Section 1 would still leave Congress with the authority to enact legislation prohibiting conduct that would be unconstitutional under strict scrutiny review. In *Kimel*, the Court suggested that broad restrictions on discrimination can be enacted for groups entitled to heightened scrutiny.[210] In the nonsuspect class area,

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209. Bd. of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 968-69 (2001) (Kennedy, J., concurring).

210. "The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 528 U.S. at 86. By implication, such broad restrictions would be permissible if the applicable standard were heightened scrutiny.

The Court was careful to distinguish its holding about the ADEA from possible application to Title VII of the Civil Rights Act of 1964. Hence, the Court said: "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.' " *Id.* at 83. It is also helpful to remember that the *Kimel* decision was written by Justice O'Connor, who has been a strong supporter of equality rights for women in her decisions as a member of the Court. *See, e.g.*,

however, such a rule would preclude Congress from enacting prophylactic legislation subjecting the States to private damages actions, because it is hard to imagine that Congress could enact legislation that did no more than bar conduct already unconstitutional under rational basis review. In the few instances where the Court has struck down legislation under rational basis review, it has written fact-intensive decisions that emphasize the evidence of animus and irrationality in the record.[211] Those types of decisions are not well suited to legislative rulemaking; they are best decided on a case by case basis in the judicial arena under a constitutional law standard.

The above interpretation of *Kimel* would have substantial ramifications. Not only would Congress lack the power to authorize private damages actions against the States pursuant to the Commerce Clause following *Seminole Tribe*, but it would have comparably diminished authority to regulate the States pursuant to Section 5, except when protecting groups or enforcing rights entitled to heightened scrutiny under Section 1. On this reading of *Kimel*, Congress would be wasting its time if it tried to re-enact recently invalidated legislation by holding more hearings and narrowing the scope of statutory coverage. Congress might as well leave these problems to the courts under rational basis review.

B. *Morrison*

The phantom aspect to the decision in *Morrison* is more apparent than in *Kimel*, because the Court is relatively clear in transforming a question of fact (for Congress's determination) into a question of law (for the Court's determination) while giving lip service to the notion that it might defer to Congress's findings. The Court in *Morrison* strongly suggested that Congress lacks the authority to enact any "noneconomic" legislation under the Commerce Clause. Congress does not have this authority because the Court has reshaped the "substantial effect on interstate commerce" test from *Lopez* to mean that, irrespective of the record compiled, Congress's legislative authority under the Commerce Clause does not include the power to enact noneconomic legislation.

United States v. Virginia, 518 U.S. 515 (1996); Casey v. Planned Parenthood, 505 U.S. 833 (1992).

211. For example, in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court was influenced by direct evidence of animus against individuals with mental retardation. Similarly, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court was influenced by evidence of animus against gay men and lesbians that purportedly motivated the statewide initiative. Nonetheless, the *Garrett* Court questioned whether evidence of "mere negative attitudes or fear" is enough to demonstrate a constitutional violation for a nonsuspect class. *See Garrett*, 121 S. Ct. at 964.

In retrospect, one can see how the Court in *Lopez* was beginning to draw a distinction between the regulation of economic and noneconomic activity. For example, the Court rationalized its earlier decision in *Wickard v. Filburn*[212] by noting that although *Filburn* "is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," it is distinguishable from *Lopez* because it "involved economic activity in a way that the possession of a gun in a school zone does not."[213] The Court also hinted that the determination of whether a statute regulates economic activity can be made through an examination of the plain language of the statute rather than through an assessment of the legislative record.[214] In other words, this determination could be made by the Court rather than by Congress.[215]

In *Morrison*, the Court signaled even more strongly that activity must be economic to be regulated under the Commerce Clause, and that whether the activity was economic was for the Court to determine. It stated that Congress may not legislate in the areas of "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce,"[216] irrespective of how much legislative history it compiles. Similarly, the Court suggested that Congress may not regulate under the Commerce Clause in the areas of family law, marriage, divorce, and child rearing.[217] In other words, the Court countenanced the possibility that Congress could gather evidence demonstrating that "noneconomic" activity has a substantial effect on commerce but then concluded that no amount of legislative factfinding on the part of Congress could satisfy the Court's standards.[218] It transformed the Commerce Clause test into a question of

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212. 317 U.S. 111 (1942).

213. United States v. Lopez, 514 U.S. 549, 560 (1995).

214. The Court stated:

> Section 922(q) is a criminal statute that by its *terms* has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Second 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561 (emphasis added).

215. Nonetheless, the *Lopez* decision was equivocal on this issue, because the Court then proceeded to examine whether the statute contained a jurisdictional element of an interstate commerce requirement and whether the legislative record demonstrated an effect on interstate commerce. *Id.* at 561-63.

216. United States v. Morrison, 529 U.S. 598, 617 (2000). The Court referenced the improper Congressional regulation of criminal conduct in *Morrison* even though the provision at issue was a civil remedy provision.

217. *Id.* at 615-16.

218. These possible exclusions might all be advanced as plausible under a reinvigorated Tenth Amendment. (The Eleventh Amendment is not relevant to the decision in *Morrison*, because Brzonkala was suing only private parties in the part of the lawsuit reviewed by the

law rather than a question of fact with the following statement: "Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[219] The Court could simply look at the subject matter which was being regulated and decide for itself whether the subject matter was economic in character, harking back to the days when the Court used to conclude that only certain industries could be regulated under the Commerce Clause.

C. *Implications*

The implications of the emerging phantom methodology are substantial. In separation of powers terms, Congress's powers under Section 5 and the Commerce Clause have been seriously eroded. Indeed, the Court has withdrawn more power from Congress than it was able to achieve under the short-lived *National League of Cities* standard.

1. *Section 5*

Section 5 of the Fourteenth Amendment is a constitutional provision that explicitly grants power to Congress to regulate the States. Whereas Section 1 acts negatively upon the States and inherently grants authority to the judiciary to monitor compliance with those limitations, Section 5 grants authority to Congress. Because the Fourteenth Amendment was ratified in an era of distrust of both the States and the judiciary, the historical evidence suggests that the framers of Section 5 did not intend to limit the scope of Congress's powers to situations that the judiciary had already declared a violation of Section 1.[220] Even if one does not accept this historical evidence, the text of the

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Supreme Court.) The Court, however, reached its conclusions in *Morrison* by revamping the meaning of the term "commerce" and how Congress can establish that activity has a substantial effect on commerce.

219. *Id.* at 614, quoting *Lopez*, 514 U.S. at 557 n.2. (1995) (quoting Justice Black's concurrence in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964)). Although the statement from *Lopez* was a quotation from Justice Black's concurrence in Heart of Atlanta Motel, the Court's reliance is wholly inapt. Justice Black made his statement in the context of trying to determine whether Title II of the Civil Rights Act of 1964, which he had already concluded was facially constitutional, could be constitutionally applied against the defendants in the particular case under review. The Heart of Atlanta Motel had argued that Title II could not constitutionally reach its activities, because those activities were intrastate in nature. The "as applied" aspect to the lawsuit, Justice Black explained, was a judicial rather than a legislative question. Justice Black, however, clearly recognized Congress's important policy role in deciding what activities to regulate under the Commerce Clause. As he stated in the phrase preceding the quotation: "The choice of policy is of course within the exclusive power of Congress." Heart of Atlanta Motel, 379 U.S. at 273 (Black, J., concurring). The current Court, by contrast, seems prepared to take those policy choices away from Congress by shrinking the scope of the Commerce Clause.

220. For further discussion of this argument, see Colker, *supra* note 96, at 663.

Fourteenth Amendment clearly calls for a different role for the States and Congress. The effect of the Court's recent Section 5 jurisprudence, however, may be to eradicate Congress's distinctive Section 5 role by limiting it to banning conduct that the courts would otherwise declare unconstitutional. No amount of factfinding by Congress seems sufficient to give it authority to determine what prophylactic measures are needed to guarantee the equal protection of the laws.

With its decision in *Kimel*, the Court effectively invited challenges to core civil rights legislation, and states are lining up to claim additional Eleventh Amendment immunities. The *Garrett* decision now precludes private employment discrimination actions for monetary damages against states under ADA Title I. One can expect future challenges to private actions for monetary damages against the States under ADA Title II.[221] In addition, the constitutionality of abrogation under the Equal Pay Act and the Family and Medical Leave Act ("FMLA") is being litigated in the lower courts.[222] Congress's Section 5 authority under the Equal Pay Act was recently upheld by the Eleventh Circuit as a congruent and proportional response to the problem of wage discrimination.[223] Although the Court acknowledged that Congress had made no findings with respect to wage discrimination in the public sector, it opined that "such [absence of] findings [is] not fatal because gender discrimination is a problem of national import."[224] Congress, of course, thought that age discrimination and disability discrimination were also problems of national import, but the courts of appeals may be forgiven for absorbing from *Kimel* and *Garrett* the teaching that the judiciary alone should decide which forms of status discrimination engaged in by state employers are important enough to warrant Section 5 protection.

While the Equal Pay Act has fared well in the lower courts,[225] the FMLA has not. Six circuits and a number of district courts have con-

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221. Prior to *Kimel* and *Garrett*, two circuits had held that Congress exceeded its Section 5 enforcement powers when it enacted ADA Title II, which prohibits discrimination in the services, programs or activities of a public entity. *See* Alsbrook v. City of Moumelle, 184 F.3d 999, 1009-10 (8th Cir. 1999) (en banc); Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698, 703-07 (4th Cir. 1999). The *Garrett* Court expressly declined to reach this issue. *See* Bd. of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 960 n.1 (2001).

222. For further discussion, see Brian Ray, Note, *"Out the Window?": Prospects for the EPA and FMLA After* Kimel v. Florida Board of Regents, 61 OHIO ST. L.J. 1755 (2001).

223. Hundertmark v. Fla. Dept. of Transp., 205 F.3d 1272 (11th Cir. 2000).

224. *See id.* at 1276. The Seventh Circuit also issued a post-*Kimel* decision upholding Congress's Section 5 authority under the Equal Pay Act. Varner v. Ill. State Univ., 226 F.3d 927 (7th Cir. 2000), *cert denied* 121 S. Ct. 2241 (2001). That court likewise downplayed the absence of legislative findings involving wage discrimination by state employers, because "the historical record clearly demonstrates that gender discrimination is a problem that is national in scope." *Id.* at 935.

225. Apart from *Hundertmark* and *Varner*, see Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000). Lower court cases upholding the Equal Pay Act that were decided after *Boerne* but before *Kimel* include *O'Sullivan v. Minnesota*, 191 F.3d 965 (8th Cir. 1999);

cluded that application of the FMLA to the States exceeded Congress's enforcement powers under Section 5; many of these cases have been decided since *Kimel*.[226] These recent cases found a lack of congruence and proportionality based in part on Congress's failure to identify "widespread and pervasive evidence of gender-based leave discrimination in the workplace."[227] One should expect the Supreme Court in the next several years to rule on the constitutionality of abrogating states' immunity under each of these civil rights statutes and perhaps under the religious discrimination provisions of Title VII as well.

2. *Commerce Clause*

The long-term Commerce Clause implications of the *Morrison* decision are not entirely clear. Defendants are currently challenging the constitutionality of criminal laws that purportedly regulate non-economic behavior. The Sixth Circuit recently concluded that the Hobbs Act, which makes it a federal crime to engage in robbery or extortion affecting interstate commerce, could not reach the actions of an individual who stole the receipts of a restaurant's business from the home of the restaurant owner.[228] Citing the language from *Morrison* regarding the need for a distinction between what is "truly national and what is truly local," the court found that "upholding federal jurisdiction over [the defendant's] offense would, in essence, acknowledge a general federal police power with respect to the crimes of robbery and extortion."[229] By interpreting the statute to require a *substantial* effect on interstate commerce, even without a rigorous jurisdictional provision, the Sixth Circuit avoided invalidating the statute as uncon-

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Anderson v. State University of New York, 169 F.3d 117, 118 (2d Cir. 1999), *vacated*, 120 S. Ct. 929 (2000); and *Ussery v. State of Louisiana*, 150 F.3d 431, 437 (5th Cir. 1998). It is worth noting that the circuits heavily favored the validity of ADEA abrogation during this pre-*Kimel* period as well. In addition, the Eleventh Circuit ruled that the ADA's abrogation of sovereign immunity was constitutional, a position rejected in *Garrett*. *See* Garrett v. Bd. of Trustees of the Univ. of Ala., 193 F.3d 1214, 1218 (11th Cir. 1999).

226. *See* Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001); Hale v. Mann, 219 F.3d 61 (2d Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559 (6th Cir. 2000); Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223 (3d Cir. 2000); Townsel v. Missouri, 233 F.3d 1094 (8th Cir. 2000); Philbrick v. Univ. of Conn., 90 F. Supp. 2d 195 (D. Ct. 2000). For pre-*Kimel* decisions invalidating FMLA abrogation, see, for example, *Kilvitis v. County of Lozerne*, 52 F. Supp. 2d 403, 408, 419 (M.D. Pa. 1999); McGregor v. Goord, 18 F. Supp. 2d 204, 209 (N.D.N.Y. 1998); *Thomson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574, 577 (S.D. Ohio 1998).

227. *Philbrick*, 90 F. Supp. 2d at 201; *see Hale*, 219 F.3d at 68-69; *Kazmier*, 225 F.3d at 528-29; *Chittister*, 226 F.3d at 228-29.

228. United States v. Wang, 222 F.3d 234 (6th Cir. 2000).

229. *Id.* at 240.

stitutional.[230] Lower courts are examining other federal statutes to determine if they require a sufficient effect on interstate commerce as a jurisdictional element.[231]

Congress is searching for ways to get around the *Morrison* decision. It seems to have given up on the possibility of holding sufficient hearings for legislation to pass muster under the new Commerce Clause standard. Instead, it is seeking to amend federal criminal laws to contain an explicit jurisdictional element. It has already amended the Gun-Free School Zones law to include a jurisdictional element.[232] A bill has been introduced in the House of Representatives which would provide a jurisdictional element to the Violence Against Women Act.[233]

Although this turn of events may enable Congress to continue to exercise its authority under the Commerce Clause, there is an unfortunate price for our system of government. A distinctive strength of the legislative branch is the ability to think on a broad policy level about problems of national concern and to hold wide-ranging hearings to learn more about these problems. The increased tendency over the last two hundred years for Congress to hold hearings is an encouraging development, made possible largely by improvements in transportation and technology. In reviewing constitutionality under the Com-

230. The Hobbs Act criminalizes certain conduct that "obstructs, delays, or affects commerce" and does not use the adverb "substantially" to modify "affects." *See* 18 U.S.C. § 1951(a). Although the Sixth Circuit had consistently permitted the effect on commerce to be de minimis when the criminal acts were directed at businesses, *see, e.g.*, United States v. Valenzeno, 123 F.3d 365, 368 (6th Cir. 1997), it declined to apply such a low jurisdictional prerequisite to criminal acts directed at private citizens, *Wang*, 222 F.3d at 239.

231. The Child Support Recovery Act of 1992, 18 U.S.C. § 228 ("CSRA"), has come under attack as exceeding Congress's authority under the Commerce Clause. Until it was amended in 1998, the Act made it a criminal offense, punishable by up to two years' imprisonment, "willfully [to] fail[] to pay a past due support obligation with respect to a child who resides in another State." 18 U.S.C. § 228 (a) (1994). In a decision recently reversed en banc, the Sixth Circuit panel found the CSRA unconstitutionally overinclusive because "it predicates criminal jurisdiction not on flight across state lines, but on simple diversity of residence." United States v. Faase, 227 F.3d 660 (6th Cir. 2000), *rev'd en banc* 2001 WL 1058237 (6th Cir. Sept. 14, 2001). In 1998, CSRA was amended by the Deadbeat Parents Punishment Act to require as a prerequisite to jurisdiction that an individual have traveled in interstate commerce with the intent to evade a support obligation. 18 U.S.C. § 228 (a)(2) (2000). In a case involving prosecutions under both the 1992 and 1998 versions of CSRA, a trial court in the Second Circuit concluded that the Act violated Congress's authority under the Commerce Clause. United States v. King, 2001 WL 111278, No. S1 00 CR. 653 (RWS) (S.D.N.Y. Feb. 8, 2001). This decision relied heavily on the reasoning in the *Faase* panel decision and was inconsistent with the Second Circuit's own precedent. *See* United States v. Sage, 92 F.3d 101 (2d Cir. 1996) (upholding CSRA as within Congress's authority).

232. *See* Pub. L. 104-208, § 101(f) (1996) (amending § 657 to substitute "discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place" for "discharge a firearm at a place").

233. *See* H.R. 429, 107th Cong., 1st Sess. (2001) (Violence Against Women Civil Rights Restoration Act of 2001) (introduced by Rep. Conyers on February 6, 2001, and cosponsored by eighty-nine members of Congress).

merce Clause, however, the Court is sending Congress the message simply to focus on whether the text explicitly demonstrates that an activity is economic in nature and involves interstate commerce. Similarly, in the Section 5 area, Congress should not even bother to consider remedial legislation for groups not historically accorded heightened scrutiny.

3. *Circumventing* Garcia

When the Supreme Court decided *Garcia* in 1985, then-Associate Justice Rehnquist's forecast was clear: " I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."[234] Justice O'Connor's dissent stated somewhat less boldly: "I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility."[235]

At the time those predictions were penned, most observers thought that the Court intended again to revisit its Tenth Amendment jurisprudence and return to a standard similar to that set forth in *National League of Cities*. Instead, it has relied on the Eleventh Amendment and the Commerce Clause, directly withdrawing power from Congress without necessarily handing it to the States. The similarity in rhetoric between *National League of Cities* and *Morrison* is striking. But the Court's new strategy has permitted further intrusions into Congress's powers than would a return to the *National League of Cities* standard under the Tenth Amendment.

In *National League of Cities*, the Court stated that Congress "may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[236] In order to determine whether such inappropriate action was taking place, the Court focused on whether the federal law was interfering with a fundamental attribute of state sovereignty.[237] The Court was faced with the question whether the extension of the minimum wage and maximum hour protections to state employees who worked in jobs such as fire prevention, police protection, sanitation, public health and parks and recreation violated the Tenth Amendment. Ruling for the States,

234. Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 550 (1985) (Rehnquist, J., dissenting).

235. *Id.* at 589 (O'Connor, J., dissenting).

236. National League of Cities v. Usery, 426 U.S. 833, 842 (1976).

237. *See id.* at 845-46 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868) ("The question we must resolve here, then, is whether these determinations are 'functions essential to separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them.")). In prior decisions, the Court had observed that Congress could not, for example, determine where a state should "locate its own seat of government." *Id.* at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 565 (1911)).

the Court found that direct regulation of the hours and compensation of these state employees involved a "forced relinquishment of important governmental activities,"[238] thereby interfering with "traditional aspects of state sovereignty."[239] The *National League of Cities* decision seemingly required future courts to distinguish between situations in which Congress was and was not regulating traditional aspects of state sovereignty. As we discussed in Part I, however, *National League of Cities* had a minimal effect on the law. Although the decision created a traditional/nontraditional state function distinction, few activities appeared to fit on the "traditional" side of the ledger.[240]

The *Lopez* decision in effect signaled a reconfiguration of the distinction between traditional and nontraditional state functions. The Justice Department had argued that it could regulate firearms in a local school zone, because preventing crime can have an impact on the nation's economic well-being. The Court responded:

> [U]nder the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of section 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.[241]

Scholars were relatively muted as to the importance of *Lopez* when it was decided.[242] The *Morrison* decision, however, revealed that *Lopez* effectively created what *National League of Cities* could not — a traditional state function test that the Court was willing to apply in future cases. Seizing on the language from *Lopez* in which the Court suggested that Congress may not regulate traditional state functions under the Commerce Clause, the Court stated: "We accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."[243]

This decision could not directly overrule *Garcia*, because the FLSA — the statute at issue in *Garcia* — was clearly of an economic

238. *National League of Cities*, 426 U.S. at 847.

239. *Id.* at 849.

240. *See supra* text accompanying notes 53-57.

241. United States v. Lopez, 514 U.S. 549, 564 (1995).

242. *See, e.g.*, SHAPIRO, *supra* note 79, at 141 (anticipating — in a postscript to his 1994 lectures on federalism — that "the impact of the [*Lopez*] decision on broader questions of federal power will be limited"); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 676 (1995) (describing the *Lopez* decision as imposing only a "minor restraint on congressional power").

243. United States v. Morrison, 529 U.S. 598, 617-18 (2000).

character. But there was less need to overrule *Garcia* directly, because the Court in the previous Term had already invalidated the application of the FLSA to damage suits by private parties against the States.[244] The *Morrison* decision, however, did allow the Court to withdraw Congress's power in areas that are both "noneconomic" and "traditional state functions." Future courts will have to wrestle with both of these standards.

While the traditional/nontraditional distinction proved elusive to the Court in an earlier era, this Court may be more willing to police a similar distinction through an economic/noneconomic test. We have yet to see whether even more calibrated legislative factfinding or new jurisdictional elements will allow Congress to continue to find ways to legislate in these areas. What the *Morrison* decision and its progeny may reveal is that a standard akin to the traditional/nontraditional state function test can be a workable distinction for a Court determined to withdraw authority from Congress.

IV. LEGISLATIVE HISTORY AND THE ROLE OF CONGRESS

A. *Legislative History in Two Settings*

We have identified two somewhat contradictory trends that can be seen in the Rehnquist Court's most recent decisions. On the one hand, the Court is suggesting that it is quite interested in examining the legislative record in the Commerce Clause and Section 5 contexts, although it wants Congress to amass more detailed documentary support under an evolving constitutional law standard. On the other hand, the Court is suggesting that it should make critical jurisdictional determinations and that no amount of factfinding by Congress will affect its analysis of these legal questions. Both of these themes can be seen in the same cases, suggesting that the Court is still sorting out for itself which mode of analysis is the most appropriate.

These seemingly conflicting approaches can perhaps be better understood if one also examines the same Court's approach to legislative history in a pure statutory review setting. Key members of the new activist majority have expressed a persistent lack of faith in the reliability of legislative history when construing the meaning of federal statutes.[245] This hostility stems from a belief that such history is at best un-

244. Alden v. Maine, 527 U.S. 706 (1999).

245. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia J., concurring) ("It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind."); Bank One Chi. v. Midwest Bank &

representative of the Congress as a whole and at worst susceptible to strategic or insincere manipulation by its drafters.[246] Justices Scalia and Thomas, the leading textualists on the Court, have been especially emphatic in contending that courts should not view committee reports, hearing testimony, or floor debate as informative for members in general, much less as reflective of an institutional understanding as to the basis for particular legislation.[247]

Spurred by these textualist reservations, the Court in the 1990s has become more focused on parsing the literal terms of each statute while minimizing the role of legislative intent.[248] By the mid 1990s, the Court was invoking legislative history in statutory cases far less often than it had a decade earlier.[249] This decline in use persisted through the late 1990s, particularly in opinions authored by the very Justices who have identified the importance of the legislative record when reviewing the constitutionality of Congress's work.[250]

Trust Co., 516 U.S. 264, 279-81 (1996) (Scalia, J., concurring) (referring to "the fairyland in which legislative history reflects what was in Congress's mind" and dismissing it as "fiction of Jack-in-the-Beanstalk proportions to assume that more than a handful of . . . members . . . were . . . aware of the drafting evolution that the Court describes"); Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 462 n.2 (1999) (Thomas, J. and Scalia, J., concurring) (observing that "the history of rejected legislative proposals . . . is irrelevant for the simple reason that Congress enacted the Code, not the legislative history predating it"). In each of these quotations, the focus is on the *reliability* of legislative history as reflecting institutional preferences or understandings, not the constitutional *legitimacy* of a court's invoking it. *See also* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia & Thomas, JJ., concurring in part and concurring in the judgment) (rejecting Court's use of legislative history as a tool for interpreting Mine Safety and Health Act); Negonsott v. Samuels, 507 U.S. 99, 100 n.** (1993) (Justices Scalia and Thomas rejecting the Court's use of legislative history as a tool for interpreting the Kansas Act); Pub. Citizen v. United States Dept. of Justice, 491 U.S. 440, 470-73 (1989) (Kennedy, J., concurring in the judgment) (rejecting Court's use of legislative history as a tool for interpreting Federal Advisory Committee Act).

246. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). *See generally* Brudney, *supra* note 184, at 47-56; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640-49, 651-53 (1990); Kenneth A. Shepsle, *Congress Is a "They" Not an "I": Legislative Intent as Oxymoron*, 12 INT'L. REV. L. & ECON. 239 (1992).

247. *See supra* notes 245-246.

248. *See generally* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351 (1994); Richard J. Pierce, *New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995).

249. *See, e.g.*, Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 212-220; Patricia M. Wald, *Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

250. Professor Tiefer deftly discusses seventeen opinions since 1995 in which legislative history has been invoked by the majority over objections from Justices Scalia and Thomas. *See* Tiefer, *supra* note 249. Although we agree with Professor Tiefer that legislative history was important in those opinions, we are not persuaded that they signify a trend toward increased use of legislative history. Almost all of the seventeen cases discussed by Professor Tiefer were authored by Justices Stevens, Souter, or Breyer — Justices who have expressed comparable respect for Congress's record in the context of constitutional review. While not

The disfavored status of legislative history in statutory interpretation is well illustrated in two relatively routine cases decided during the 1999-2000 Term interpreting, respectively, the Fair Labor Standards Act Amendments of 1985[251] and the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO").[252] Each statute was accompanied by a rich legislative record, cited by the Court in prior opinions[253] and invoked by the litigants in their briefs to the Court.[254] Nonetheless, Justice Thomas's majority opinion in each case was notably silent with respect to the legislative history, instead relying exclusively on formal language arguments or analysis of the surrounding common law.[255]

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as rhetorically intense on this matter as Justices Scalia and Thomas, Justices O'Connor and Kennedy regularly join (and sometimes write) statutory majority opinions rejecting legislative history. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (O'Connor, J., majority opinion) (holding that ADA legislative history should not be considered because text is clear on its face, despite dissent's extensive reliance on that history); United States v. Gonzales, 520 U.S. 1, 6 (1997) (O'Connor, J., majority opinion) (declining to resort to legislative history because of "straightforward statutory command," although court of appeals and dissent invoked different aspects of that history); Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1311 (2001) (holding that Federal Arbitration Act legislative history should not be considered because Court's conclusions were "directed by the text," although dissent invoked detailed discussion of that history; majority opinion by Justice Kennedy); Boggs v. Boggs, 520 U.S. 833, 869 (1997) (Kennedy, J., majority opinion) (deciding ERISA controversy without reference to legislative history, although dissent relies in part on excerpts from that history).

Of course, Justices O'Connor and Kennedy also rely on legislative history in some of their statutory majority opinions, and the fact that Justices Scalia and Thomas on occasion join those opinions serves as a reminder that principled methodological stances have their limits. *See, e.g.*, Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (O'Connor opinion holding FDA lacks authority to regulate tobacco products as customarily marketed, and relying heavily on legislative history; Scalia and Thomas join majority).

In any event, we have shown that two arguably conflicting strains can be found in the Court's recent constitutional opinions: one creates a greater role for legislative history in the constitutional law context while the other suggests that Congress may have no proper role whatsoever in determining the scope of its authority. It is too early to predict which of these two trends will dominate the Court's methodology in the future (if one comes to predominate at all).

251. *See* Christensen v. Harris County, 529 U.S. 576 (2000) (determining whether employer's compensatory time policy violated the FLSA).

252. *See* Beck v. Prupis, 529 U.S. 494 (2000) (determining the meaning of the phrase "injured . . . by reason of" a "conspiracy").

253. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 242, 245-48 (1989) (relying on legislative history to support a broad construction of RICO provisions); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 486-93 (1985) (same); Rusello v. United States, 464 U.S. 16, 23-29 (1983) (same); United States v. Turkette, 452 U.S. 576, 586-87, 591-93 (1981) (same); Moreau v. Klevenhagen, 508 U.S. 22, 26-27 (1989) (closely reviewing legislative history of 1985 FLSA amendments).

254. *See, e.g.*, Brief for Petitioner, *Christensen*, 1999 WL 1204475, at **9-10, *29; Brief for the United States as Amicus Curiae, *Christensen*, 1999 WL 1128266, at **12-13, *17; Brief for Petitioner, *Beck*, 1999 WL 543861, at *32, *34, *37.

255. In *Christensen*, the Court relied on formal language arguments and refused to defer to an Opinion Letter by the Department of Labor that supported the petitioner's position.

How does one reconcile this disdain for legislative history in the statutory setting with the emphasis on legislative history's importance by many of the same Justices when assessing congressional enactments under the Commerce Clause and Section 5? The new textualists, especially Justice Scalia, have explained that they are wary of legislative history in the statutory context because "it is much more likely to produce a false or contrived legislative intent than a genuine one."[256] In the instant constitutional law setting, these Justices have found it more difficult to disavow record evidence regarding legislative intent. Ironically, however, their reliance on the legislative record in search of justifications for congressional action is susceptible to some of the same abuses as they perceive in the pure statutory setting.[257] With the Court's new requirements, as amplified in the recent *Garrett* decision, that Congress act as a quasi-judicial entity and marshall evidence of arguable constitutional law violations by the States in the Section 5 context, the Court is effectively requiring Congress to adopt a more strategic posture. Rather than perform as neutral gatherers of the facts, Congressional committees must become advocates, culling the almost limitless record of state conduct to focus on incidents and practices that have the greatest potential for establishing unconstitutional intent.

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529 U.S. at 582-88. No reference whatsoever was made to the legislative history. In *Beck*, Justice Thomas interpreted the phrase "injured by reason of a conspiracy" by looking exclusively to the common-law of civil conspiracy. 529 U.S. at 500-01 (quoting Morissette v. United States, 342 U.S. 246, 263 (1952)) (justifying that theory of interpretation by stating that when Congress uses language with a settled meaning at common law the Court presumes that Congress "knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken . . . unless otherwise instructed"). It is a mark of how textualist norms now set the standard that the dissent in each case addressed only the majority's own reasoning; there were no references at all to legislative history. *See Christensen*, 529 U.S. at 592-96 (Stevens, Ginsburg, and Breyer, JJ., dissenting) (disputing majority's refusal to defer to Department of Labor but never discussing legislative history); *Beck*, 529 U.S. at 508-12 (Stevens and Souter, JJ., dissenting) (disputing majority's interpretation of the common law and referring instead to the "plain language" of the statute). For discussion of how the legislative history accompanying these two statutes might have influenced judicial analyses and outcomes, see Brudney, *supra* note 135, at 184-85, 199.

256. SCALIA, *supra* note 246, at 32. The textualists also want to send Congress a message that it should draft statutory language with greater care and precision and not use legislative history as a means to avoid or finesse politically contentious matters. Increased attention to the clarity of text will, in their view, offer clearer guidance to the executive and judicial branches than reliance on legislative history. *See generally* ROBERT A. KATZMANN, COURTS AND CONGRESS 60 (1997); Brudney, *supra* note 184, at 16.

257. The Court's severest critics of legislative history accompanying statutes, Justices Scalia and Thomas, have relied extensively on *The Federalist* and on debating history that accompanies constitutional text. For a thoughtful discussion of the problems with this position, see William N. Eskridge Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301 (1998). The legislative history at issue here is neither purely statutory nor purely constitutional: rather, it involves the constitutionality of a statutory product.

Even for those who reject Justice Scalia's conception of legislative history as systemically strategic or unreliable,[258] this new role for Congress is troubling. Factfinding in the legislative arena differs in its procedures and objectives from factfinding in the courts. Congress collects evidence and builds a record in an effort to consider broad policy issues and formulate appropriately general responses, not to adjudicate discrete matters of individual justice. Transforming this information-gathering process into a kind of judicial branch activity invites strategic behavior that diminishes Congress as a lawmaking body.

Still, to understand why the Rehnquist Court has encouraged such heavy reliance on legislative record building as part of its new jurisprudence under the Commerce Clause and Section 5, it is helpful to recognize the limited nature of the options available to the Court. When faced with the question of determining the proper scope of Congressional authority, the Justices essentially have three choices available. First, they can defer to Congress to delineate the proper scope of its own authority, so long as its determination is a reasonable one. Second, they can construct a more rigorous test under which the Court would allow Congress to define the scope of its authority but review that determination with care. Because Congress need not articulate the authority for its action in the legislation itself, the only place to look for Congress's understanding of its authority would be in the legislative history of the statute. Third, they can determine the proper scope of Congress's authority for themselves and give Congress no role in making that determination.

From the New Deal era until 1995, the Court basically adopted the first perspective. It presumed the constitutionality of Congress's actions but sometimes perused the legislative history for evidence of reasonableness. Since 1995, one might describe the new activists as being torn between the second and third perspectives. They have found themselves reluctantly surveying the legislative history to determine whether Congress had rigorously pronounced and justified its authority to enact legislation.[259] But they also have made statements in favor

258. *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861-69 (1992) (responding to various criticisms of the use of legislative history); Brudney, *supra* note 184, at 40-66 (responding to constitutional and practical arguments for devaluing legislative history); Eskridge, *supra* note 257, at 1310-19 (critiquing textualist attacks on legislative history as exaggerated or misplaced).

259. Chief Justice Rehnquist authored the opinion for the Court in *Lopez* in which he acknowledged that the Court should examine legislative history as a factor in its determination of constitutionality. *See* United States v. Lopez, 514 U.S. 549, 562 (1995) ("Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce . . . ."). Similarly, Justice Kennedy authored the opinion for the Court in *City of Boerne* in which he examined the legislative record to determine if RFRA constituted proper remedial, preventive legislation. *See* City of Boerne v. Flores, 521 U.S. 507, 529-33 (1997); *see also* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799 (1996) (suggesting that federalism should be enforced by "po-

of the third perspective, under which they can find legislative history as irrelevant in the constitutional setting as they do in the statutory context. From either perspective, the new activists' distinctly unsympathetic approach toward legislative history in the Section 5 and Commerce Clause settings comports with the views expressed by many of the same Justices when resolving disputes over statutory meaning.[260]

When one tries to reconcile the Court's attitudes regarding statutory and constitutional interpretation, one can see that the new activists may be vacillating between the crystal ball and the phantom approaches in the constitutional setting. The crystal ball approach is appealing because it is consistent with the traditional sense that some deference toward Congress is appropriate. But the phantom approach allows these justices explicitly to ignore legislative history in both the constitutional and statutory settings, creating a form of judicial consistency. As discussed above, however, this move greatly increases the power of the judiciary at the expense of a coequal branch of government.

B. *Implications for Federalism*

In addition to posing challenges with respect to judicial consistency, the Rehnquist Court's emphasis on a certain type of legislative record also raises troubling issues from a federalism perspective. The problem is starkly presented in the recent *Garrett* decision. In that case, Congress had created a task force to gather evidence from all fifty States relative to the need for national legislation to protect individuals with disabilities. The Court found, however, that factfinding by

licing Congress's deliberative processes and its reasons for regulating"); *supra* note 167 (surveying academics who contend that it is appropriate for Court to review congressional legislative history as part of its inquiry under the Commerce Clause or Section 5).

260. Justice Scalia's and Justice Thomas's broad-based hostility to legislative history is well documented. *See, e.g.*, *supra* notes 245-246. Justice O'Connor often minimizes the value of legislative history when interpreting the language of certain antidiscrimination statutes. She refused to examine legislative history to determine whether the ADEA intended to cover state court judges. *See* Gregory v. Ashcroft, 501 U.S. 452, 467 (1991) ("We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included. This does not mean that the Act must mention judges explicitly, although it does not . . . . Rather, it must be plain to anyone reading the Act that it covers judges."). More recently, she did not consider the legislative history of the Americans with Disabilities Act relevant to determining whether Congress intended the term "disability" to include conditions whose symptoms may be ameliorated through the use of mitigating measures. *See* Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). Similarly, Justice Kennedy refused to give weight to a key conference report when interpreting the term "subterfuge" under the ADEA. *See* Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989). Justice O'Connor authored, and Justice Kennedy joined, the majority opinion in *Kimel*, in which the Court skeptically assessed the ADEA's legislative history. *See also* Buzbee & Schapiro, *supra* note 188 (arguing that the Court's treatment of legislative record in recent Section 5 and Commerce Clause cases reflects unacknowledged motives of congressional distrust).

this task force documenting instances of discrimination was not sufficient for Section 5 purposes, because Congress had not itself engaged in the factfinding and the factfinding did not rise to the level of uncovering what were clearly constitutional violations.

If future Congresses were to conform their conduct to *Garrett*, they could try to conduct factfinding that would meet the Court's newly crafted standard. Congress would presumably have to gather all the information itself through its own committee hearings, without reliance on state or local-level organizations or people who live in the respective States to gather information themselves. Congress also would have to insist that the testimony was so stark that the published hearings could be tantamount to evidence usable in future constitutional litigation against the States.[261] Such a combative relationship between Congress and the States, however, is scarcely consistent with the dignity deemed appropriate for state sovereignty[262] and would certainly be destructive to our sense of national unity. Indeed, one of the ironies of the Court's new jurisprudence is that in a post-*Garcia* world, Congress is more reluctant than ever to treat states in confrontational or adversarial terms. Yet without such an aggressive approach, Congress is disabled from exercising its "appropriate" Fourteenth Amendment power to hold states monetarily responsible for their unlawful discriminatory conduct.

Faced with this seemingly unpalatable option, Congress could decide to use its remaining intact power — the Spending Clause — to force states to consent to suits for money damages.[263] This approach, however, is also not without difficulties. To begin with, it may be impractical because the spending power has insufficient substantive limitations to serve as a precise regulatory mechanism. Moreover, reliance on the spending power may be such a blunderbuss approach that it will effectively "commandeer" aspects of state government.[264] It seems

261. *See* Bd. of Trustees of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 967 (2001) (requiring Congress to document that there is a "pattern of discrimination by the States which violates the Fourteenth Amendment"); *see also id.* at 969 (Kennedy and O'Connor, JJ., concurring) (requiring there to be "documentation of patterns of constitutional violations committed by the State in its official capacity").

262. *See* Alden v. Maine, 527 U.S. 706, 709 (1999) ("Federalism requires that Congress accord States the respect and dignity due them as residuary sovereigns and joint participants in the Nation's governance.").

263. *See supra* note 11 (discussing Spending Clause). The Senate Health, Education, Labor, and Pensions Committee recently approved a bill that would require states to abide by the ADEA as a condition of receiving federal funds. *See* Daily Lab. Rep., Sept. 14, 2001, at A-1 (discussing S.928).

264. In *New York v. United States*, 505 U.S. 144, 176 (1992), the Supreme Court stated that Congress may not simply "commandeer [ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *See supra* note 79 (discussing *New York v. United States*). Professor Baker has argued that statutes should be presumed to be unconstitutional under the Spending Clause if the statute cannot be char-

far less preferable as a matter of comity for Congress to determine that entire programs will cease to receive financial assistance if discrete civil rights problems are not corrected than merely requiring the States to compensate identified victims of discrimination for the injury they suffered.[265]

Finally, Congress could greatly increase its funding of federal agencies charged with enforcing the various laws that impose substantive standards for the States to follow, in light of the fact that individuals will no longer be able to bring suits for money damages. This move, however, would require a major shift from the broad federal legislative trend since the 1960s favoring private enforcement of civil rights and related laws.[266] In order to reduce the financial and substantive concerns associated with reliance on prosecution by federal agencies, Congress has crafted fee-shifting and compensatory damages provisions that encourage private attorneys to bring cases on behalf of aggrieved individuals. A dramatic enlargement of the federal government's enforcement role would create enormous fiscal burdens while raising serious questions about the effectiveness of such an approach.[267] Such a change also would threaten federalism values by providing for a more aggressive and adversarial national government presence in the fifty States.

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acterized as "reimbursement spending" and Congress is seeking to use the Spending Clause to engage in direct regulation that would otherwise be impermissible under *New York v. United States*. *See* Baker, *supra* note 11, at 1963-64.

265. *Compare* section 504 of the Rehabilitation Act of 1973 (conditioning receipt of federal financial assistance on the provision of nondiscrimination on the basis of disability), *with* Title I of the Americans with Disabilities Act of 1990 (creating private damages remedy for victims of employment discrimination at state entities). Congress enacted section 504 of the Rehabilitation Act, requiring nondiscrimination on the basis of disability in programs or activities receiving federal financial assistance. Pub. L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394, codified at 29 U.S.C. § 794 (1994). This law was enacted pursuant to Congress's spending powers. Although the Rehabilitation Act was controversial, and twice vetoed by President Nixon when it was first passed by Congress, no one questioned the constitutionality of Congress's authority to impose requirements on the States (and other entities) through the spending power. *See, e.g.*, The President's Memorandum of Disapproval, Oct. 27, 1972, *reported in* 8 Weekly Comp. Pres. Docs. 1577, 1579 (1972) (vetoing Rehabilitation Act because it was fiscally irresponsible and would jeopardize executive branch enforcement goals).

266. *See, e.g.*, Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1021-22 (2000) (noting that presently under the FLSA, private lawsuits outnumber civil actions brought by the United States by a 10:1 ratio).

267. *See id.* at 1022-23 (arguing that federal bureaucracies may respond far less rapidly and flexibly than private attorneys to shifting demands for enforcement action, and that "Congress may reasonably doubt that federal government resources are wisely used to pursue litigation against state agencies when a private rightholder's interest is great but the public interest may be small").

CONCLUSION

Half a century ago, Justice Jackson dryly observed with respect to himself and his colleagues: "We are not final because we are infallible, but we are infallible only because we are final."[268] The Rehnquist Court has in our view become excessively critical of Congress and the fallibility of its lawmaking processes in recent Commerce Clause and Section 5 decisions. Although the Court has often framed its invalidation of federal laws in states' rights terms, we believe these invalidations must also be understood as a threat to separation of powers.

The repeated abrogation of federal statutes — including statutes expressly supported by the States themselves[269] — has resulted in a considerable transfer of power to the judiciary. Respect must be earned, and it is easy to ridicule Congress by saying that it has not earned this Court's good opinion. But ours is a system of government in which Congress is expected to engage in broad-based thinking on matters of concern to the nation. States are well able to protect their own interests as participants in this national political process,[270] and it is neither necessary nor prudent for the Court to insist repeatedly on a redistribution of authority at Congress's expense. In doing so, the current Court has conveyed the message that Congress is suspect in the powers it exercises and the manner in which it exercises them. That is not a message we should countenance the Court sending to this or any future Congress.

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268. Brown v. Allen, 344 U.S. 443, 540 (1952) (Jackson, J., dissenting).

269. *See supra* notes 161, 176 (discussing widespread support for VAWA and ADA from state officials and state-level organizations).

270. *See supra* Part II.C.3 and notes 161, 176 (noting that States were amply represented and actively participated in various congressional enactments extending coverage). *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).