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# Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is"

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# *Marbury* Ascendant: The Rehnquist Court and the Power to "Say What the Law Is"

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### I. Introduction

*Marbury v. Madison* announced that it is "emphatically" the power of the judiciary to "say what the law is."<sup>1</sup> Notwithstanding Chief Justice Marshall's confident exposition of judicial power, *Marbury*'s holding has done nothing to quiet doubts concerning the judiciary's authority to declare that the actions of more accountable, and more expert, institutions are contrary to governing law. Indeed, in academic circles, the debate about the efficacy and legitimacy of judicial review enjoys a renewed vigor.<sup>2</sup> As interesting as this debate has been, and continues to be, the true measure of the state of judicial power lies in the practice and pronouncements of the Supreme Court. By that light, judicial review could not be stronger. In the past six terms or so, the Rehnquist Court has "emphatically" asserted its power under *Marbury* to "say what the law is."

Two phenomena are particularly noteworthy in this regard, and they are the focus of this Article. The first is the marked decline in the deference the Court is willing to afford legislative enactments pursuant to Section 5 of the Fourteenth Amendment. Section 5 grants Congress the power to enact all "appropriate" measures to "enforce" rights under the Fourteenth Amendment, including the right to equal treatment under the law.<sup>3</sup> Although the Court has

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. See generally LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* (2001); RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 14-27 (2001) (reviewing contours of recent debates).

3. Section 1 of the Fourteenth Amendment provides, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or

traditionally deferred to any "rational" exercise of the Section 5 power, the Rehnquist Court has invalidated several exercises of the enforcement power as improper incursions into the Court's authority to declare the substance of constitutional rights. One of the means by which the Court has invalidated Section 5 enactments is by faulting Congress for failing to compile and present a "legislative record" demonstrating the "congruence and proportionality" of remedial or prophylactic legislation under Section 5.<sup>4</sup>

The second separation of powers phenomenon involves the Rehnquist Court's new approach to judicial review of executive agency interpretations of law. Executive agencies, whose "reasonable" or "permissible" interpretations of federal statutes have been entitled to strong judicial deference since *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>5</sup> will henceforth have to earn deference under a bifurcated deference principle. In the past two Terms, *Chevron's* broad domain has been significantly narrowed and its bright line deference rule diminished. In *Christensen v. Harris County*<sup>6</sup> and *United States v. Mead Corp.*,<sup>7</sup> the Court announced that *Chevron's* strong deference applies only in the limited circumstance in which the Court is convinced, by reference to a combination of the agency's statutory grant of authority and the formality of the proceedings that produced the specific rule in question, that

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immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of [this article]." U.S. CONST. amend. XIV, § 5. Similar enforcement provisions are contained in other Civil War Amendments. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XV, § 2. Unless discussing Section 5 specifically, this Article will refer to these provisions collectively as the "enforcement power."

4. There has been a steady flow of criticism in the commentary regarding what is referred to as "legislative record" review in Section 5 cases. See generally 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 (2001); William W. Buzbee & Robert A. Shapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001). The criticism began when the Court indicated in *United States v. Lopez*, 514 U.S. 549 (1995), that findings might aid judicial review of enactments pursuant to the Commerce Clause. See generally Harold J. Kent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731 (1996); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996).

5. 467 U.S. 837 (1984).

6. 529 U.S. 576 (2000).

7. 533 U.S. 218 (2001).

Congress has given the power to the agency to issue interpretations with the "force of law."<sup>8</sup> In all other cases, agencies must fight for judicial "respect" under *Skidmore v. Swift & Co.*,<sup>9</sup> which scales deference of an apparently weaker sort, based on factors such as the thoroughness of the agency's reasoning, the logic of the interpretation it has rendered, the consistency of the interpretation with prior pronouncements, and any other factors that might convince the court of the "persuasiveness" of the agency's interpretation.<sup>10</sup> *Chevron's* long reign as a uniform deference rule has now come to an end. The Court has officially authorized lower courts to exercise their independent judgment with respect to the vast majority of agency interpretations.

This Article links the Section 5 cases and the *Mead* doctrine as parallel manifestations of the ascendancy of *Marbury's* core principle – that it is "emphatically" a judicial function to "say what the law is." The Rehnquist Court has newly asserted the primacy of its power to declare the meaning of the Constitution under Section 5, which grants Congress broad power to enforce constitutional rights. Similarly, the Court has taken back a substantial measure of the power to interpret governing law that it ceded in *Chevron*, which instructed courts to uphold reasonable agency interpretations of the statutes they are charged with enforcing. The Section 5 cases represent a departure from the model of judicial review applied to early enforcement enactments. Similarly, if *Chevron* was the "counter-*Marbury* for the administrative state,"<sup>11</sup> *Mead* is the Rehnquist Court's counter-*Chevron*. Under the Court's recent Section 5 precedents and the *Mead* doctrine, the power to render definitive constructions of law is of paramount concern.

The Rehnquist Court's "congruence and proportionality" standard for Section 5 enactments has been almost uniformly condemned by commentators, who view the approach as disrespectful of Congress's prerogative to find the facts underlying legislative enactments.<sup>12</sup> These critics argue that it is a

8. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

9. 323 U.S. 134 (1944).

10. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (finding agency interpretations persuasive, but not controlling).

11. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990). Prior to *Mead*, commentators increasingly had been calling for a reassessment of the scope of *Chevron* deference. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 835 (2001) ("The time is therefore propitious for taking stock of when *Chevron* deference properly starts and stops within the scheme of administrative review.").

12. *See supra* note 4 (noting recent commentary critical of record review in Section 5 cases). *But see* Neil Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1173 n.18 (2001) (asserting that "claims that the Rehnquist Court is disavowing traditionalist deference to legislative factfinding seem somewhat

mainstay of separation of powers that the Court will presume that the legislature had an empirical basis for believing that a legislative response was necessary to address a "real" harm or evil. This deference, like that afforded under *Chevron* to agency interpretations, is grounded upon the Court's appreciation of its position in the constitutional system, including its deficiencies as a finder of fact and its counter-majoritarian status.<sup>13</sup> Commentators view the heightened record review phenomenon as a radical departure from this principle and as a manifestation of an unwarranted distrust of Congress's motives. Specifically, the Court is viewed as masking core federalism concerns with Section 5 enactments behind a veil of factual review.

Because commentators uniformly view the Section 5 precedents as record-centric judicial review, rather than an assertion of judicial interpretive supremacy, none of the many recent critiques of record review has noted the connection between the *Mead* doctrine and the Court's approach under Section 5. Both phenomena originate in the Court's distrust of Congress. The Court's recent Section 5 jurisprudence is grounded upon a concern that Congress, which has the power to "enforce" constitutional guarantees, will instead seek to render substantive interpretations of the Fourteenth Amendment that are inconsistent with, or in the Court's view not warranted by, the Constitution. Similarly, the *Mead* doctrine is a manifestation of the Court's double-barreled skepticism regarding Congress's ability to (1) thoughtfully delegate the power to issue binding legal interpretations to agencies, and (2) act to overturn agency interpretations in ever-more-novel areas that are inconsistent with legislative purpose. Just as the judiciary is the final authority on issues of statutory construction, so too in the Court's opinion must it render the final decision on matters of constitutional construction. A presumption of congressional carelessness, or worse, accounts for *Marbury's* ascendance.

This Article takes the position that the Rehnquist Court's recent Section 5 precedents, properly conceptualized, are not principally instances of heightened judicial review of legislative factual predicates, but rather are broader assertions of the Court's power to interpret the Constitution. Section 5 vests Congress with primary responsibility for enforcing and administering the provisions of Section 1 of the Fourteenth Amendment. Just as agencies construe and interpret statutes in the course of administering them, so too does Con-

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overblown").

13. The familiar rationality standard, which severely limits the scope of judicial review of legislative judgments, is rooted in this deference principle. The stated reasons for such restraint vary, from a recognition that legislators "enjoy a familiarity with local conditions which this Court cannot have" to the recognition that the judiciary should not assume "a legislative role . . . for which the Court lacks both authority and competence." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31, 41 (1973).

gress place its construction on the rights set forth in the Constitution when it exercises its express enforcement power under Section 5. The "congruence and proportionality" standard is not utilized to measure whether there is substantial evidence to support Congress's factual predicate. Recent Section 5 legislation demonstrates that Congress has the capacity to compile voluminous records. In recent Section 5 cases, the Court acknowledged that Congress has the power to construe constitutional rights more expansively than the judiciary. Having made that concession, however, the Court is unable to conceive of a principled method for reviewing Congress's interpretations of constitutional rights. What invariably results is the rejection of Congress's construction for failure to satisfy a *judicial* predicate, which is based upon the Court's narrow interpretation of constitutional rights and concomitantly broad interpretation of the principle of stare decisis.<sup>14</sup> This Article hopes to demonstrate that it is this doctrinal shift in application of the deference principle, not mere heightened record review, that accounts for Congress's abysmal recent record under Section 5.

If Congress shares the enforcement power under the Fourteenth Amendment with the Court, as the text of Section 5 plainly contemplates, its constructions should receive some degree of judicial deference. The difficulty, as the Court has acknowledged and emphatically demonstrated, lies in drawing the line between enactments that fill enforcement gaps in the Constitution and those that purport to change the substantive meaning of the text. The Court should have more than a passing familiarity with this dilemma. *Chevron* itself was a compromise between proponents of judicial supremacy and advocates for a deference principle that would afford weight to the reasonable interpretations of more expert, more accountable executive agencies. The Court's traditional model for reviewing the enforcement powers under the Civil War Amendments adopted a similar compromise, based upon the same appreciation of differing institutional accountability and competence. Under each deference principle, whether the Court would have resolved complex tensions differently if the matter had been taken up first in the courts was beside the point. So long as the interpretation was reasonable and the end was legitimate, the construction was to be upheld.<sup>15</sup>

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14. See *infra* Part V.C.1 (discussing Court's broad view of stare decisis).

15. Other commentators have noted the Section 5/*Chevron* analogy. See David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 65-66 (using *Chevron* and Dormant Commerce Clause to demonstrate that deferential review does not undermine judicial supremacy). This Article goes a step further by proposing a model for reviewing the reasonableness of Section 5 enactments based on the new *Mead* model for review of agency constructions of law.

Just as the *Chevron* compromise has come somewhat undone, so too has the Court begun to revisit its early model of review under Section 5. But, although agencies do not interpret law under any constitutional grant, the model under *Mead* is far more forgiving than the model the Rehnquist Court has adopted for Section 5. After *Mead*, strong *Chevron* deference still applies where a court is satisfied that Congress adequately expressed its intent to empower the agency to issue binding interpretations. Even when Congress has not made an express delegation, the Court remains willing to consider whether the agency's construction of governing law is "persuasive," based upon consideration of the thoroughness, consistency, and validity of the agency's reasoning. Under Section 5, by contrast, the Rehnquist Court seems disinclined to defer ever to Congress's construction of rights. Under Section 5, there is no room for filling enforcement gaps with legislative constructions, no matter how persuasive they may be.

At present, the Court has no principled method by which to review Section 5 legislation. It has chosen judicial supremacy over all else, despite its continuing assurances that Congress has the authority to render extra-judicial interpretations of constitutional rights. This Article urges the Court to consider its recently announced approach to review of agency interpretations of federal law as a model for review of Congress's Section 5 enactments. Although it has not done so consciously, the Court already has laid the groundwork for doing just that. The recent Section 5 precedents set forth a two-step inquiry that parallels the familiar two-step inquiry under the Court's *Chevron* model. At Step One, the Court asks, as it does under *Chevron*, whether the governing law, in this case its own precedents, speaks to the precise question at issue. When the governing law is not clear, the Court proceeds, as under *Chevron*, to Step Two. There the Court eschews the traditional inquiry as to whether Congress's construction is reasonable or rational and instead asks whether it is "congruent and proportional" with respect to the right Congress is permitted to enforce or remedy. This is the point at which the Court uniformly refuses to consider whether an interpretation that differs even slightly from its own is entitled to weight or any degree of deference. It refuses, at this point, to engage in a *Skidmore*-type evaluation of Congress's interpretation, based upon the predicate Congress put forward in support of that interpretation.

If *Marbury* means anything, it is that when the Court has spoken directly to the *precise* issue under consideration, Congress lacks power under Section 5 to codify a change in substantive law. Although a direct conflict in legislative and judicial interpretations on the same issue is certainly possible,<sup>16</sup> it is

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16. See *City of Boerne v. Flores*, 521 U.S. 507, 532-35 (1997) (finding that Section 5



likely to be increasingly rare. The Rehnquist Court, to a degree greater than its predecessors, prefers to settle as little as possible in constitutional cases.<sup>17</sup> This means that enforcement gaps under the Equal Protection Clause and other provisions will abound. Where Congress acts to fill these gaps, the Court has several options in fashioning judicial review, ranging from strong deference to Congress's reasonable constructions to the Court's current model of judicial supremacy.

Just as the *Chevron* deference principle has been worn down by hard experience, there may be good reasons now to reject the strong deference signaled in the Court's early enforcement precedents. Nevertheless, there ought to be room for some deference. If any agency construction – even the least formal – is entitled to some weight based on its merits, by what rationale are all congressional constructions destined to fail insofar as they do not adhere to some broad principle of *stare decisis*? The Court revived *Skidmore* precisely because it did not view the choice for reviewing courts as either strong deference or no deference at all to agency constructions. The same logic applies under Section 5, where a *Skidmore*-type approach would respect legislative expertise and accountability, while retaining the judicial power to "say what the law is." The Court should consider deferring to Congress's interpretations not solely when they hew narrowly to precedent, but also when the logic, care, and consistency of those interpretations have the "power to persuade."

This Article proceeds in five major parts. Part II explains the origins, practice, and philosophy of judicial deference to legislative judgments, with particular attention paid to the review of legislative evidence. This Part gives substantial attention to the phenomenon of record review, chiefly to place the matter of "legislative record review" in context during the subsequent discussion of the enforcement power. Parts III and IV discuss, respectively, the Rehnquist Court's review of enactments under Section 5 and its revised approach to judicial review of agency interpretations of law. Part V links these two approaches and uses the Court's model for reviewing agency interpretations as a means of conceptualizing, as well as critiquing, its review of Section 5 enactments. Part VI concludes by suggesting that the Court review Section 5 enactments as it does agency interpretations of governing law and thereby open itself to persuasion, deference, and, ultimately, a critical dialogue with Congress concerning the meaning of the Constitution.

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enactment created far more stringent prohibitions on state conduct than did judicial interpretation of constitutional guarantee that Congress was purporting to enforce).

17. See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (positing that current Supreme Court is "minimalist" in that it tends to leave most difficult and divisive issues undecided).

## II. Judicial Deference to Legislative Predicates

Much of the debate concerning the Court's recent "legislative record" requirement in Section 5 cases focuses on the Court's traditional deference to legislative factfinding. Commentators argue that the Court has effected a radical re-ordering of the separation of powers by subjecting legislative predicates to heightened review. In fact, the history of the deference principle as applied to Congress's factual predicates is a rather complicated matter. To be sure, there are statements in the cases that Congress is not required to create a record at all and that courts will not second-guess disputed factual predicates.<sup>18</sup> But judicial resort to legislative records is neither expressly forbidden by the Constitution nor unheard of in practice. For the Rehnquist Court, heightened record review is rooted in judicial distrust, and both are particularly manifest when the Court considers the legislative enactment "novel" in terms of context and past practice and appears to diminish the Court's power to exercise independent judgment as to constitutional meaning.

### A. Ordinary Record Review

Historically, the record supporting government action has not been a central aspect of constitutional adjudication. This is not to say that facts have not been important.<sup>19</sup> Rather, it is to suggest that even when we might expect the underlying factual record to be of particular interest – as, for example, when the Court doubts the motives of government – the Court has not typically focused on the legislative record to resolve questions of constitutional rights and powers. This has been true, as we shall see, in most cases implicating express legislative powers, including the few early enforcement cases to come before the Court. The current emphasis on legislative records in the enforcement context is a manifestation of the changed dynamic of judicial review in constitutional adjudication.

Ordinary record review applies in most instances in which Congress exercises its express powers. The ordinary presumption, drawn from the mere existence of the enactment, is that facts exist in support of the exercise of legislative power. Congress is under no obligation to make factual findings

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18. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.").

19. See David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 547 (1991) (discussing Court's interpretation of empirical research and its role in "constitutional law-making"); see also David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 664-71 (1994) (proposing new rules for measuring legislative facts in constitutional adjudication).

or to support its position with empirical evidence; its efforts in that regard may "aid" judicial review, but they are not mandatory. When there exist facts contrary to those relied upon by the legislature – when the matter is at least debatable – the deference principle gives the legislature the benefit of the doubt. Indeed, even when there are no facts to review, a court must uphold the legislature's judgment if *any* state of facts, whether known to the legislature or not, support its choice. Democratic deliberation is generally presumed,<sup>20</sup> and factual mistakes are to be corrected electorally rather than in the courts. Courts will uphold Congress's judgment that its enactment is within an express grant of power so long as the judgment is not irrational.

*1. Deference to "Reasonable" Legislative Choices and "Rational"  
Factual Predicates*

Article I, which enumerates Congress's affirmative powers,<sup>21</sup> vests in Congress the power to choose any means "necessary and proper" to carry out its enumerated powers.<sup>22</sup> Early doctrine stressed that judicial review in this realm should be limited to whether Congress's end was "legitimate" and within "the letter and spirit of the constitution."<sup>23</sup> This early conception of judicial review granted Congress sweeping constitutional authority to choose the appropriate means for addressing matters that fell within its affirmative powers and neither invited nor entertained challenges to legislative predicates. So long as Congress's chosen means did not run afoul of some other constitutional prohibition, the courts were to defer to Congress, given its clearer representative mandate and factfinding expertise. To interfere with Congress's choices, the Court declared, "would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."<sup>24</sup>

Despite these early pronouncements, the Court demonstrated that it was indeed highly prone to tread on the legislative prerogative. Its early Commerce Clause jurisprudence is, in retrospect, a window into the present debate concerning review of enforcement legislation. The Court fell into disrepute when, from the 1880s to the 1930s, it moved away from presumptive legislative

20. This presumption can be rebutted in extraordinary circumstances. See *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (refusing to apply intermediate scrutiny to municipality's exclusion of group home for mentally disabled, but invalidating choice based on municipality's motive of "bare" animus toward disabled persons).

21. See U.S. CONST. art. I, § 8.

22. See *id.* art. I, § 8, cl. 18 ("Congress shall have the Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

23. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

24. *Id.* at 423.

power and began to rely upon arbitrary and formalistic categories of commercial activity in delineating the scope of the commerce power.<sup>25</sup> During the now-infamous *Lochner* era,<sup>26</sup> the judiciary strayed from the original deference principle, finding numerous pieces of social and economic legislation to be in violation of the Due Process Clause. In *Lochner v. New York*<sup>27</sup> itself, for example, the Court, while maintaining that it was not "substituting the judgment of the court for that of the legislature,"<sup>28</sup> confidently held that legislation regulating bakers' wages and hours was an irrational exercise of the legislative power. Its conclusion was based on the "common understanding," informed by an absence of empirical evidence to the contrary, that the trade of baker was not an unhealthy one.<sup>29</sup>

Recognizing the drag on its legitimacy from such interference, the Court eventually stepped back into line in the 1930s and 1940s, deferring once again to reasonable legislative determinations.<sup>30</sup> Rather than rely on arbitrary rules of categorization or notions of judicial common sense, the Court reverted to presumptive rules in favor of the legislative branch. Congress's judgment as to the exercise of its spending power, for example, was to be upheld "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."<sup>31</sup> The Court once again treated such legislative judgments as matters of degree, with which the courts were not authorized to interfere except in the most extraordinary cases.<sup>32</sup> The deference principle, so modified, respected all manner of judgments rendered pursuant to Congress's affirmative powers.

Beginning in the 1960s, this judicial deference to reasonable legislative judgments sustained a number of enactments under Congress's enforcement

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25. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (drawing distinction between "commerce" and "manufacture").

26. The *Lochner* era is commonly understood to extend from the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), until the repudiation of *Lochner*, which began in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

27. 198 U.S. 45 (1905).

28. *Lochner v. New York*, 198 U.S. 45, 56-57 (1905).

29. *Id.* at 57-58.

30. See *Wickard v. Filburn*, 317 U.S. 111, 127 (1942) (holding that farmer's production of wheat for home consumption fell within Congress's regulatory power); *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32 (1937) (upholding National Labor Relations Act).

31. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

32. See, e.g., *Wickard*, 317 U.S. at 123 n.24 ("Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution . . .").

powers.<sup>33</sup> The breadth of Congress's remedial and enforcement powers extended even to state practices that, although invidious, had not yet been held unconstitutional. So long as such enactments were consistent with "the letter and spirit of the constitution,"<sup>34</sup> the Court upheld them. It is with caution that this Article categorizes these early enforcement precedents as examples of ordinary record review. As we shall see, it is certainly the case that the Court applied a deferential "reasonableness" standard. Less clear, however, is the significance of the "legislative record" in these cases.

In *South Carolina v. Katzenbach*,<sup>35</sup> the Court upheld various provisions of the Voting Rights Act of 1965 as "appropriate" enactments under Section 2 of the Fifteenth Amendment.<sup>36</sup> The "historical experience" of the country and the Court, with rampant voting rights discrimination, undoubtedly had a profound influence on the Court.<sup>37</sup> The Court noted that Congress, before it enacted the voting rights measures, had explored the problem with "great care."<sup>38</sup> The Court was satisfied that Congress had rationally concluded that its past remedial measures had failed to put an end to the "pervasive evil" of discrimination.<sup>39</sup> South Carolina argued that the suspension of literacy tests, one of the many prophylactic measures set forth in the Act, was beyond Congress's power as the Court had held that literacy tests were not per se unconstitutional.<sup>40</sup> But the Court concluded that literacy tests, although not per se unconstitutional, had been used intentionally to deny the franchise to African American citizens. According to the Court, Congress had reasonably determined that a ban was necessary and had "permissibly" rejected the alternative of requiring a complete re-registration of voters.<sup>41</sup>

In *Katzenbach v. Morgan*,<sup>42</sup> the Court noted that Congress had gained a "specially informed legislative competence" as a result of its work on the

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33. For example, the Court recognized Congress's plenary power under the Thirteenth Amendment "to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

34. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

35. 383 U.S. 301 (1966).

36. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

37. *Id.*

38. *Id.*

39. *Id.* at 309.

40. *Id.* at 333; see also *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 52-53 (1959) (finding that literacy tests may be constitutional).

41. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

42. 384 U.S. 641 (1966).

Voting Rights Act.<sup>43</sup> The Court again emphasized that, when reviewing enforcement legislation, courts were not to second-guess Congress's considered judgments or the weight Congress accorded to competing considerations. *Morgan* upheld Section 4(e) of the Voting Rights Act of 1965, which prohibited enforcement of state statutory requirements for literacy in English to determine eligibility for the franchise, as "appropriate" legislation pursuant to Section 5. The State of New York, which had such a law, argued that Congress lacked the power under Section 5 to prohibit English literacy laws unless a court had expressly held that such laws violate the Fourteenth Amendment. The Court had no trouble rejecting New York's argument, either as a textual or historical matter. Congress, the Court said, was not limited under Section 5 to "merely informing the judgment of the judiciary."<sup>44</sup> Rather, "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>45</sup> So long as the Court could perceive some basis upon which Congress predicated its judgment that the use of literacy tests constituted invidious discrimination in violation of the Equal Protection Clause, Congress's judgment would not be disturbed.<sup>46</sup> State intransigence with respect to voting rights provided all the basis that was needed.

In *South Carolina v. Katzenbach*, the Court had established that Congress was not required to hew precisely to the Court's own view of constitutionality when exercising its enforcement power. Many years later, in *City of Rome v. United States*,<sup>47</sup> the Court reaffirmed that Section 2 of the Fifteenth Amendment granted Congress a significant measure of discretion to fill gaps in the enforcement of constitutional rights. In *City of Rome*, the Court upheld Section 5 of the Voting Rights Act, which prohibited local electoral changes that were discriminatory in either purpose or effect, as appropriate legislation under Section 2 of the Fifteenth Amendment.<sup>48</sup> Again deciding against the backdrop of "pervasive evil" that Congress and the Court both had recognized in the voting rights area,<sup>49</sup> the Court held that Congress was permitted to prohibit electoral changes that merely had discriminatory impact, even if the Court itself would find only purposeful discrimination to be constitutionally

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43. *Katzenbach v. Morgan*, 384 U.S. 641, 655 (1966).

44. *Id.* at 649.

45. *Id.* at 651.

46. *Id.* at 656.

47. 446 U.S. 156 (1980).

48. *City of Rome v. United States*, 446 U.S. 156, 177-78 (1980).

49. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

proscribed.<sup>50</sup> The Court was satisfied that "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact."<sup>51</sup> Congress's "considered judgment,"<sup>52</sup> which it had consistently applied,<sup>53</sup> would not be disturbed by any judicial notion of stare decisis.

How much the enforcement decisions (*South Carolina, Morgan, City of Rome*), read together, had to do with empirical predicates is not clear. To be sure, Congress had compiled a considerable record of pervasive discrimination in connection with the Voting Rights Act of 1965, and the Court made liberal use of the record in upholding various provisions of the Act. But the extent to which the Court was prepared to defer to Congress's judgments was remarkably broad – as broad as the scope of the Necessary and Proper Clause. And the Court appeared to be content to let the matter rest with Congress so long as there was a perceptible basis for its ultimate judgment as to what the Constitution required. What was not certain was how the Court would react to enforcement enactments that did not bear witness to the Civil Rights era. The Court would not have occasion to consider the matter for many years.

## 2. *The Benefit of the Empirical Doubt*

The post-*Lochner* presumption of constitutionality did not settle the matter of legislative records in constitutional adjudication. Even when the government's interest was supported by fact, the presumption of constitutionality was rebuttable, at least in theory. The question was when, if ever, the presumption could be overcome in practice, in particular by a strong factual showing that Congress's judgment was in error. In *Lochner* itself, the defendants had urged the Court to consider statistical evidence proportionally demonstrating that there was no material danger to workers in the baking industry. The Court was quite willing to do so, and the evidence convinced the Court that the baker's trade was not a particularly unhealthy one.<sup>54</sup> The Court thus concluded that the challenged legislation was not a permissible exercise of police powers in promotion of health, safety, or morals, but rather an impermissible regulation of employment relations.<sup>55</sup>

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50. *City of Rome*, 446 U.S. at 173, 175, 177.

51. *Id.* at 177.

52. *Id.* at 178.

53. *See id.* at 173 ("Congress recognized that the Act prohibited both discriminatory purpose and effect when, in 1975, it extended the Act for another seven years.").

54. *Lochner v. New York*, 198 U.S. 45, 59 (1905).

55. *Id.*

This entertainment of statistical evidence struck some as an invitation to challenge legislative predicates. The so-called "Brandeis Brief" became a popular weapon used to challenge the reasonableness of legislative determinations. These lengthy briefs contained reams of statistical and other empirical data bearing specifically on the purported factual predicate for the legislation at issue. Sometimes the information presented was treated as establishing the "common understanding" as to a certain factual issue, and the Court would invalidate the statute.<sup>56</sup> In other cases, the Court reflexively applied the presumptive rule in favor of constitutionality, notwithstanding the presentation of substantial evidence that Congress had erred.<sup>57</sup>

Although the view that factual predicates must be presumed valid ultimately prevailed, the matter of the legislative record refused to go away entirely. Indeed, the struggle to define a workable model for judicial review of legislative predicates arguably began in earnest only in *United States v. Carolene Products Co.*,<sup>58</sup> decided in 1938 and now famous for other reasons.<sup>59</sup> *Carolene Products* is a watershed example of the Court's post-*Lochner* empirical ambivalence. The Court ultimately upheld the federal Filled Milk Act against claims that it was beyond Congress's commerce power and that it violated the Due Process Clause of the Fifth Amendment. The *Carolene Products* Court readily concluded that the commerce power permitted a prohibition on the shipment of filled milk in interstate commerce. As for the Due Process Clause, the Court found that the statute, although infringing upon liberty and property, had a rational basis.<sup>60</sup> Characterizing the necessity of filled-milk regulation as "at least debatable," the Court held that "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it."<sup>61</sup>

Although the Court appeared willing to base its decision entirely on the "presumption of constitutionality" that attached to the statute, it did not do so.

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56. See *Bunting v. Oregon*, 243 U.S. 426, 438-39 (1917) (upholding Oregon labor law); *Muller v. Oregon*, 208 U.S. 412, 420-21 (1908) (same).

57. See, e.g., *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 208-09 (1934) (upholding New York milk control law); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931) (upholding New Jersey statute regulating insurance commissions). Ironically, once he joined the Court, Justice Brandeis himself took the position that the courts must presume the existence of facts underlying legislative judgments. See *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 184-85 (1935) (upholding, in opinion written by Justice Brandeis, Oregon law regulating size and shape of fruit containers).

58. 304 U.S. 144 (1938).

59. *United States v. Carolene Products*, 304 U.S. 144 (1938). The chief reason for *Carolene Products*'s future notoriety, of course, was Justice Jackson's famous "footnote four."

60. *Id.* at 148.

61. *Id.* at 154.



The Court noted that there was also "affirmative evidence" to sustain the statute.<sup>62</sup> It referred to two decades of cumulative evidence that filled milk was injurious to the public health, evidence that Congress had accumulated from committee hearings, the testimony of "eminent scientists and health experts," and an "extensive investigation" of the commerce in milk compounds.<sup>63</sup> Of course, the Constitution could not be interpreted to require that Congress disregard such evidence in enacting its prohibition.<sup>64</sup> Nor, however, was the Court's function merely to rubber stamp Congress's factual predicates. Thus, although the Court deemed that reliance on the presumption was appropriate under the specific circumstances of *Carolene Products*, the Court reaffirmed its own power to review legislative factual predicates.<sup>65</sup>

In theory, this meant that when the facts the legislature relied upon had ceased to exist, judicial review included the power to invalidate the enactment as unsupported by a sufficient empirical record. In later practice, however, the rational basis standard would nearly always save even a factually suspect enactment from being invalidated. Under rational basis review, a court must uphold ordinary legislation if *any* state of facts, "either known or which could reasonably be assumed," supports it.<sup>66</sup> In such cases, factual findings and other evidence considered by legislators are not necessary, but might be useful to courts as "aiding informed judicial review," in the same way that committee reports "reveal[ ] the rationale of the legislation."<sup>67</sup>

Nevertheless, *Carolene Products* left open the possibility, however remote, that some empirical showing might satisfy the Court that the legislature had acted irrationally. Again, as after *Lochner*, that small opening was all the invitation litigators would need to contest factual allegations and seek to overcome the deference rule. They pointed to the absence of a legislative record or to evidence tending to show that the legislature's facts were contradicted by other facts, or had simply ceased to exist. All of these efforts to

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62. *Id.* at 148.

63. *Id.*

64. *Id.* at 149.

65. The Supreme Court treated factual matters in much the same way in other cases during this period. In *Helvering v. Davis*, 301 U.S. 619, 640 (1937), the Court found that the Social Security Act was within Congress's broad power under the Spending Clause. The opinion does not rest, however, exclusively on the breadth of Congress's power. The Court was careful to note that, in passing the Act, "Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare." *Id.* at 641. The Court pointed to "[e]xtensive hearings" and a "great mass of evidence" supporting the legislative policy. *Id.* at 642. In any event, the Court found that Congress "had a basis" for its belief and its choice was not "arbitrary." *Id.* at 644, 645.

66. *Carolene Products*, 304 U.S. at 154.

67. *Id.* at 152.

undermine legislative factual predicates backfired rather famously when the Court clarified its prior statements by making plain that legislatures need not create *any* empirical record at all.<sup>68</sup> Challengers of ordinary legislation would not prevail simply by contesting the factual predicate for the legislative judgment.<sup>69</sup> When Congress determined, for example, that mandatory retirement for certain federal officials at a specified age was a wise restriction related to the reliability and fitness of those employees for the foreign service, those affected vigorously contested the purported connection between age, fitness, and reliability. In *Vance v. Bradley*,<sup>70</sup> the Supreme Court accepted the connection between age and fitness, plainly one open to some debate, as a "common sense proposition."<sup>71</sup> The Court emphasized that even when the legislature *voluntarily* undertakes fact-finding and the evidence on a factual issue is conflicting, courts are not to weigh the evidence against the legislative judgment with that presented in its favor.<sup>72</sup>

The Court's rule in favor of legislative judgments with regard to ordinary social and economic legislation was rooted in the separation of powers. The Court found that, in the face of conflicting evidence, the judicial function was severely circumscribed.<sup>73</sup> The Court would not countenance an unelected

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68. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976) ("The state is not compelled to verify logical assumptions with statistical evidence."); see also *Heller v. Doe*, 509 U.S. 312, 320 (1993) ("A state, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification.").

69. See *Bhd. of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R.*, 393 U.S. 129, 139 (1968) (stating that factual questions concerning railroad safety were "essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives").

70. 440 U.S. 93 (1979).

71. *Vance v. Bradley*, 440 U.S. 93, 112 (1979).

72. See *id.* (stating that it is "the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment"). The concept was not exactly novel. See *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) ("It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.").

73. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding legislative prerogative to establish standards of "mental illness" in civil commitment proceedings). The Court recognized the disagreement among psychiatric professionals in making such determinations, but upheld the state's choice:

These disagreements [among psychiatric professionals], however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. As we have explained regarding congressional enactments, when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation."

judiciary judging the merits of the legislature's factual predicate for exercising its express power under the Constitution to regulate commercial activity, provide for the safety of its citizenry, or administer foreign relations.

All of these considerations applied when the Court reviewed ordinary economic legislation. For other enactments, the Court reserved the judiciary's right to require a heightened empirical showing. In particular, a "narrower scope" for the applicability of the presumption of validity might apply, the Court indicated, where the enactment under review (1) "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," (2) is "directed at" particular minorities, or (3) indicates the operation of prejudice against "discrete and insular minorities."<sup>74</sup>

### 3. *The Rule Favoring Legislative Classifications*

The Supreme Court has assiduously deferred to legislative judgments underlying ordinary social or economic legislation. Although it is surely the case that Congress and the states err in making factual determinations, and sometimes fail to make them at all, the Court has invalidated no legislative enactment of this type under rational basis review based upon a supposed lack of empirical support in the record.<sup>75</sup>

Today, of course, the paradigmatic cases arise not under the Due Process Clause, as they did during the *Lochner* era, but instead under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause does not authorize courts to "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."<sup>76</sup> Thus, legislative classifications that do not involve a suspect or quasi-suspect class, or impinge on fundamental rights, are presumed to be constitutional.<sup>77</sup> As the Court has noted on many occasions, the guarantee of equal protection "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."<sup>78</sup> So long as there is a theoretical basis for the legislature's choice, the Court will uphold it.<sup>79</sup> Indeed, those attacking the rationality of a classification must "negative

*Id.* at 360 n.3 (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)) (citation omitted).

74. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

75. In fact, the Court has rarely invalidated statutes under the rationality standard for any reason. See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357 (1999) (noting that during past twenty-five years, Supreme Court has invalidated laws under rationality test on only ten occasions, while rejecting such claims in one hundred cases).

76. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

77. *Lyng v. United Auto. Workers*, 485 U.S. 360, 370 (1988).

78. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

79. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (upholding

every conceivable basis which might support it."<sup>80</sup> So long as the issue "is at least debatable,"<sup>81</sup> the courts will defer to the legislature.

The Court has concluded that classifications are matters of degree and policy, best resolved by a duly elected legislature. Thus, a legislature need not demonstrate the perfection<sup>82</sup> or "mathematical nicety"<sup>83</sup> of its choice. In such matters, the normally counter-majoritarian judiciary places its faith in the democratic process. The presumption of constitutionality encompasses a corollary presumption that "absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process."<sup>84</sup> In other words, the rule of deference to legislative classifications leaves substantial room for Congress, and the states, to err in the process of governing. Again, the presumption against judicial correction is rooted in the separation of powers principle; policy is to be "fixed only by the people acting through their elected representatives."<sup>85</sup>

Litigants get nowhere in cases measured against a rationality standard by marshaling impressive empirical evidence to demonstrate that the legislature either erred in predicting the effect of a chosen classification or could not have actually relied upon the stated reason for the enactment. Under the rule of rationality, the Court has never required that, in order to withstand an Equal Protection challenge, a legislature articulate any reasons for enacting a statute. Nor is there any requirement that the legislature set forth "legislative facts" or explain its chosen classification "on the record."<sup>86</sup> As the Supreme Court recently explained, "In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."<sup>87</sup>

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Minnesota milk laws); *see also* *Sullivan v. Stoop*, 496 U.S. 478, 485 (1990) (finding congressional rationale for child support law sufficient); *Bowen v. Gilliard*, 483 U.S. 587, 600-03 (1987) (same).

80. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotation marks omitted).

81. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

82. *See Phillips Chem. Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960) (stating that "perfection is by no means required").

83. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)); *see also* *Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 350 (1949) ("[T]he demand for perfection must inevitably compromise with the hard facts of political life.").

84. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

85. *Bhd. of Locomotive Firemen & Enginemen v. Chicago, Rock Island, & Pacific R.R.*, 393 U.S. 129, 138 (1968).

86. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

87. *Id.*

*B. Heightened Record Review for "Novel" and "Implausible" Enactments*

Where legislation affects one of the special interests mentioned in footnote four of *Carolene Products* or otherwise involves circumstances that may merit "a more searching judicial inquiry," ordinary record review does not apply. Where legislative power clashes with the Bill of Rights, for instance, the gravity of the constitutional rights at issue sometimes trumps concerns about judicial competence or accountability. It is here that judicial skepticism concerning legislative predicates is sometimes quite high. To put the matter crudely, the Supreme Court simply does not trust legislatures to do the right thing in certain contexts. One of the consequences of judicial distrust has been an occasional resort to more stringent record requirements.

It is difficult to determine under which circumstances the Court will apply heightened record review. One area that may provide some guidance is the Court's First Amendment jurisprudence.<sup>88</sup> Appellate courts, including the Supreme Court, have traditionally exercised independent judgment with respect to certain regulations on speech. Such courts have interpreted that independent judgment to include the power to review *de novo* not only legal issues, but factual predicates as well.<sup>89</sup> The path of record review in First Amendment jurisprudence is highly indeterminate, and a comprehensive examination of the subject is beyond the scope of this Article. We can, however, learn something about the phenomenon of heightened record review from First Amendment cases. The general trend that emerges is that novel exercises of legislative power, by which is meant expansive interpretations of express powers or application of those powers in new contexts, often will lead to heightened record review.<sup>90</sup>

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88. Although I have chosen to focus on the treatment of empirical matters in First Amendment cases, other areas are characterized by similar trends. The Fourth Amendment "special needs" cases are just one example. *See, e.g., Bd. of Educ. v. Earls*, 122 S.Ct. 2559, 2567-68 (2002) (upholding random drug testing in public school based on evidence of societal problem of drug abuse); *Chandler v. Miller*, 520 U.S. 305, 319 (1997) (invalidating statute requiring candidates to submit to and pass drug test to qualify for state office because there was no evidence of drug abuse by candidates).

89. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 504-10 (1984) (discussing cases in which Court engaged in *de novo* review of facts found in lower courts).

90. One commentator who has reviewed the Court's First Amendment cases has concluded that "a host of highly contextual factors" must be consulted to determine whether the Court will require a substantial empirical showing in defense of any restriction. *See William E. Lee, Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1261 (1998). No doubt much depends on the factors Professor Lee has identified. But there is an overarching, if unstated and indeterminate, philosophy in the cases that is based upon what might broadly be referred to as judicial trust. This notion fits nicely with the

The Court has recently articulated a sliding scale of record review in First Amendment cases. In *Nixon v. Shrink Missouri Government PAC*,<sup>91</sup> Justice Souter stated the Court's general philosophy: "The quantum of evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the *novelty* and *plausibility* of the justification raised."<sup>92</sup> In practice, the approach boils down to judicial distrust or skepticism concerning the legislature's competence to regulate, its motive in undertaking legislative action, or both.<sup>93</sup> Judicial skepticism is often articulated in terms of a finding that the legislature or other governing body did not identify a "real," as opposed to a conjectural, harm or evil.

### 1. Generally Accepted Legislative Predicates

Although articulation of the "novelty" and "implausibility" standard is recent, the practice is well established. The Court has been calibrating review

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Court's continued focus on the nature of the medium in First Amendment cases. The Court has developed a spectrum of First Amendment protection, depending on the specific characteristics of the medium of expression being regulated. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . may present its own problems."). Regulation of new industries is, by definition, a "novel" exercise of legislative power. Not surprisingly, the record burden rises when new technologies are regulated. Radio, for example, enjoys limited First Amendment protection, while the Internet, which has no regulatory history as of yet, enjoys heightened protection.

91. 528 U.S. 377 (2000).

92. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (emphasis added).

93. Classifications that merit heightened scrutiny have generally been invalidated because the Court perceives an improper legislative motive, without regard to any legislative record. *Romer v. Evans*, 517 U.S. 620 (1996) is a good recent example. In *Romer*, the Court invalidated a Colorado constitutional amendment which would have prohibited the State of Colorado or any of its political subdivisions to "adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." *Id.* at 625. In his majority opinion striking down the Colorado constitutional amendment, Justice Kennedy stated: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is a denial of equal protection of the laws in the most literal sense." *Id.* at 634. In addition to the text of the Fourteenth Amendment, Justice Kennedy invoked the spirit of the Equal Protection Clause as well. The Court determined that the Colorado amendment violated the Equal Protection guarantee because it "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* The Court routinely invalidates or sustains legislative stereotypes without regard to empirical evidence. See generally *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (upholding statute making it more difficult for child born out of wedlock to only one American parent to establish citizenship if parent was father); *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating males-only policy at military institute).

in this manner for some time. Not every law that restricts free speech is subjected to heightened record review. In some circumstances, such as those in which speech is unprotected or the government purports to regulate speech based on its "secondary effects" rather than its content, the Court does not ask whether the legislature sought to remedy a "real" harm, but is content to accept the barest of factual predicates.<sup>94</sup> Here, as where the legislature exercises plenary power, the Court simply presumes that there is a factual basis for legislation. In most such cases, the legislature need not compile a record at all. Furthermore, when the factual predicate offered to sustain the regulation is at least debatable, the presumption of validity requires that the Court rule in the legislature's favor.

When the legislature has been regulating a category of speech for many years and has established a relationship of trust with the courts, the Court is generally disinclined to demand a record in support of legislative predicates. Nowhere is this more evident than in the Court's review of enactments regulating electoral speech. State regulation of the electoral process dates back at least to the beginning of the nineteenth century. Both state legislatures and Congress have long regulated the process of elections, principally to ensure that contests are fair.<sup>95</sup> Numerous state rules relating to ballot access and the right to vote in primaries have been before the Supreme Court, and many of these have survived scrutiny.<sup>96</sup> Recall that in the early Section 5 cases, the

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94. See *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (upholding New York "harmful to minors" statute); *Roth v. United States*, 354 U.S. 476, 486 (1957) (upholding obscenity statutes without inquiring as to legislature's empirical basis); see also *City of Erie v. PAP's A.M.*, 529 U.S. 277, 290-91 (2000) (plurality) (upholding ordinance prohibiting nude dancing under "secondary effects" doctrine). The "secondary effects" doctrine permits regulations under a less demanding scrutiny if they are aimed at the incidents associated with adult speech. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). In *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002), the Supreme Court continued its pattern of lenient empiricism in secondary effects cases. In *Alameda Books*, the City of Los Angeles adopted a zoning ordinance in 1977 requiring dispersion of adult establishments. *Id.* at 1732. In 1983, the City amended the ordinance to forbid clusters of adult businesses at a single address. *Id.* The City's empirical record for the 1983 amendment was thin, consisting of a single judicial precedent upholding a dispersion ordinance and a 1977 survey. *Id.* at 1744 (Souter, J., dissenting). The Court nevertheless upheld the cluster ordinance, stating:

While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.

*Id.* at 1735.

95. Cf. *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

96. See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) (upholding

Court noted Congress's "specially informed legislative competence" in such matters as voting and elections.<sup>97</sup>

One category of electoral restriction that has received a substantial measure of empirical leeway is limitations on campaign contributions. Here both Congress and the states have enjoyed wide latitude to restrict contributions to political candidates. In *Buckley v. Valeo*,<sup>98</sup> the Court upheld limits on contributions by individuals to any single candidate for federal office.<sup>99</sup> The Court concluded that unlike *expenditure* limits on candidates, which were invalidated in *Buckley*, contribution limits are not direct limitations on speech and do not impair the right of association.<sup>100</sup> The Court was satisfied that Congress passed these restrictions in part to prevent corruption of the electoral process or at least to lessen the appearance that large contributions could buy access and influence after the election had been decided. This was, of course, solely a matter of congressional prediction, as the Court did not have before it a legislative record demonstrating the corrupting influence of large contributions.

The Court continues to be receptive to legislative predictions in this area. Recently, in *Nixon v. Shrink Missouri Government PAC*,<sup>101</sup> the Court upheld state limits on contributions to candidates for state political office. The Government defended the limits as necessary to avoid the corruption, or the perception of corruption, brought about when candidates for public office accept large campaign contributions.<sup>102</sup> The Eighth Circuit, applying strict scrutiny, had invalidated the contribution limits for lack of "demonstrable evidence" that there were, in fact, problems associated with contributions in excess of the enacted limits.<sup>103</sup> On appeal, the Supreme Court, relying on *Buckley*, accepted

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Washington statute requiring that minor party candidate receive at least one percent of votes cast in primary election to gain access to general election ballot); *Jenness v. Fortson*, 403 U.S. 431, 439-40 (1971) (upholding Georgia law restricting access to ballot to nominees of parties whose candidates received twenty percent or more of vote at most recent presidential or gubernatorial election or who collected nominating petition signed by five percent of eligible voters); see also *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality) (holding that Tennessee statute prohibiting solicitation of votes and display of campaign materials within 100 feet of polling place satisfied strict scrutiny, based on "[a] long history, a substantial consensus, and simple common sense"). The Constitution grants states wide authority to regulate congressional elections. See U.S. CONST. art. I, § 2 (choosing representatives); *id.* art. I, § 4 (regulation of time, place, and manner of elections).

97. *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966).

98. 424 U.S. 1 (1976).

99. *Buckley v. Valeo*, 424 U.S. 1, 58 (1976).

100. *Id.* at 20-22.

101. 528 U.S. 377 (2000).

102. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389-90 (2000).

103. *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 521 (8th Cir. 1998), *rev'd sub nom.*



the state's justifications with remarkably little in the way of empirical support. Holding that the limits were not void for "want of evidence,"<sup>104</sup> the Court explained that it did not find the connection between large contributions and corruption either "novel" or "implausible."<sup>105</sup> Although the Court had "never accepted mere conjecture as adequate to carry a First Amendment burden," Justice Souter wrote, neither was it necessary for the state *in all cases* to present a substantial empirical record to support its stated interests.<sup>106</sup>

Deference to factual predicates for contribution limits continues to be the norm. Last Term, the Court decided *Federal Election Commission v. Colorado Republican Federal Campaign Committee*,<sup>107</sup> which involved a constitutional challenge by a political party to certain federal campaign spending limits on "coordinated" party expenditures. The Court again found adequate evidentiary grounds to sustain the limits, stressing the "risk of corruption (and its appearance)."<sup>108</sup> This was so despite the fact that unlimited coordinated spending – the targeted practice – had never before been permitted. Thus, there was no available direct evidence that the practice actually led to electoral corruption. The Court itself was forced to speculate that without the limits on coordinated expenditures, donors would be able to circumvent contribution limits.<sup>109</sup>

There are other notable examples of the sliding scale of record review under the First Amendment. For example, the speech of government employees has traditionally been subjected to different First Amendment standards than speech of the public at large. Although the Supreme Court has struggled to articulate the parameters of that difference,<sup>110</sup> it has generally accepted that when the State acts as employer, rather than sovereign, it has broader discretion to regulate speech. There is a long history of government regulation of even the core speech interests of public employees, extending even to limitations on their participation in political campaigns.<sup>111</sup> The Court has upheld

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Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

104. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 378 (2000).

105. *Id.* at 379.

106. *Id.*

107. 533 U.S. 431 (2001).

108. FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 456 (2001).

109. *See id.* at 464 ("Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits.").

110. *See Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality) (discussing substantive and procedural requirements under First Amendment for regulation of government employee speech).

111. *See Broadrick v. Oklahoma*, 413 U.S. 601, 617-18 (1973) (upholding Oklahoma statute restricting government employees' political activities); *Public Workers v. Mitchell*, 330 U.S. 75, 94-97 (1947) (upholding federal law requiring political neutrality for public servants).

these and other restrictions based upon nothing more than the legislature's rank speculation concerning the harm that could occur without regulation. The Court has generally given "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential."<sup>112</sup> Thus, the Court views government employer restrictions as neither "novel" nor "implausible."

## 2. *Enactments That Are Per Se Novel and Implausible*

Two types of legislation impacting First Amendment rights engender heightened record review. First, blanket prohibitions on truthful speech are viewed as diminishing the Court's power to construe constitutional meaning insofar as they are not supported by evidence of a "real" harm. Second, legislation that affects speech rights exercised in the context of new media is per se novel and often deemed implausible as well.

In *Landmark Communications, Inc. v. Virginia*,<sup>113</sup> the Court invalidated a Virginia statute that made it a crime to divulge information regarding state judicial review commission proceedings, as applied to a newspaper that published such information.<sup>114</sup> The parties vigorously disputed before the Virginia Supreme Court whether the Commonwealth, in defending the law, bore an empirical burden to demonstrate that such publications would cause some harm to the process of judicial discipline, or harm the reputations of the Commonwealth's judges. The Virginia Supreme Court ruled that the Commonwealth did not need to come forward with "hard in-court evidence" to support these proffered state interests, holding that the mere legislative declaration of harm was sufficient.<sup>115</sup>

The Supreme Court disagreed. It held that the Virginia court had a duty to "go behind the legislative determination and examine for itself" whether the asserted interest was compelling.<sup>116</sup> The Court made this oft-cited pronouncement: "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."<sup>117</sup> The Commonwealth's asserted interests were deemed "implausible" for two reasons. First, as for protecting the integrity and reputation of the judiciary, the Court held that potential injury to

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112. *Waters*, 511 U.S. at 673.

113. 435 U.S. 829 (1978).

114. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 831-32 (1978).

115. *Landmark Communications, Inc. v. Commonwealth*, 233 S.E.2d 120, 129 (Va. 1977), *rev'd* by 435 U.S. 829 (1978).

116. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978).

117. *Id.* at 843.

judicial reputation was not a sufficient justification for the suppression of truthful speech.<sup>118</sup> Moreover, the Court rejected the Commonwealth's argument that suppressing speech would protect the integrity of the bench as counter-intuitive; punishing truthful reporting on judicial matters, the Court reasoned, could only harm, not enhance, the reputation of the bench.<sup>119</sup> Second, the Court was concerned that by effecting a blanket prohibition on press coverage of significant issues without evidence of a specific harm, the Commonwealth was relying upon a "legislative definition" of free speech that would substantially chill commentary critical of the government.<sup>120</sup>

Virginia's statutory scheme was also seen by the Court as "novel." The Court recognized the collective wisdom of forty-seven state legislatures, which had enacted prohibitions similar to the Commonwealth's, that protecting the confidentiality of judicial misconduct proceedings was a compelling interest. But only Hawaii and Virginia had chosen criminal sanctions as a means of furthering the compelling interest, making the Commonwealth's ban a particularly novel one.<sup>121</sup> The novelty of the scheme served only to reinforce the Court's view that the Commonwealth's reasoning was implausible. The Commonwealth had come forward with nothing more than "assertion and conjecture" to support its claim that criminal sanctions were necessary to serve the same interest that other states had furthered with only civil and administrative penalties.<sup>122</sup>

New technologies have given rise to a system of bifurcated review of legislative predicates. The Court generally presumes that factual predicates exist for long-regulated media like broadcast television and radio.<sup>123</sup> Only where Congress appears not to have deliberated at all, failing to express its "considered judgment" with respect to the purported harm and the efficacy of its enactment, will the Court openly second-guess Congress's judgment.<sup>124</sup> In those circumstances, at least, the Court is emphatic that it must exercise its "independent judgment of the facts bearing on an issue of constitutional law."<sup>125</sup>

In contrast to the Court's general comfort with regulation of unprotected speech, zoned speech, electoral speech, government employee speech, and

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118. *Id.* at 841.

119. *Id.* at 842.

120. *Id.* at 844.

121. *Id.* at 837.

122. *Id.* at 841.

123. *See, e.g.,* FCC v. Pacifica Foundation, 438 U.S. 726, 738 (1978) (upholding declaratory order of Federal Communications Commission that twelve-minute monologue entitled "Filthy Words," previously delivered to live audience, could be sanctioned if broadcast).

124. *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 130 (1989).

125. *Id.* at 129.

historically regulated technologies, attempts to regulate new media – cable television, wireless communications, and the Internet – have all encountered heightened record review. These regulations are, of course, "novel" by their very nature, and the Court has found many of them to be "implausible" as well. With respect to each, the Court has resorted to the legislative record to determine whether legislative predicates relating to means and ends are entitled to judicial deference.

Full-blown heightened record review first appeared in the First Amendment area in *Turner Broadcasting System, Inc. v. FCC (Turner I and II)*,<sup>126</sup> in which the Court examined whether Congress had sufficient evidence to support its predictive judgment that proposed "must-carry" rules, imposed on cable operators under the Cable Television Consumer Protection and Competition Act of 1992, were necessary to preserve local broadcasting. A careful reading of the *Turner* cases reveals a Court deeply divided as to the appropriate model to apply to legislative enactments that touch on First Amendment rights. The Court was concerned that it should give at least as much deference to Congress's judgments as it does to those of executive agencies. In the end, although certainly rhetorically deferential, the decisions cannot be deemed practically so.

The principal issue in the *Turner* cases was whether Congress had adequately demonstrated the plausibility of its prediction that broadcast companies would be in financial peril without the "must carry" regime, which required cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. In *Turner I*, the Court was not satisfied that there was "substantial evidence" in the legislative record, which included detailed findings, to support Congress's concerns. The Court stated, "When the Government defends a regulation of speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'"<sup>127</sup> In this context, the Court held, Congress must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."<sup>128</sup> To enable the Court to exercise its independent judgment regarding Congress's predictions, the Court remanded to the district court for additional factual findings.

Eighteen months of additional fact-finding followed the Court's remand, "yielding a record of tens of thousands of pages" of evidence.<sup>129</sup> No longer

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126. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) [hereinafter *Turner I*]; *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) [hereinafter *Turner II*].

127. *Turner I*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

128. *Id.*

129. *Turner II*, 520 U.S. at 187 (quoting *Turner Broad. v. FCC*, 910 F. Supp. 734, 755

"constrained by the state of the record,"<sup>130</sup> which now included not only the materials gathered during Congress's three years of pre-enactment hearings, but also "additional expert submissions, sworn declarations and testimony, and industry documents obtained on remand,"<sup>131</sup> the Court in *Turner II* was finally able to accept that Congress sought through must-carry rules to further important government interests. The Court held that Congress had sought to regulate "a real harm"<sup>132</sup> and that its proposed solution alleviated that harm "in a material way."<sup>133</sup> In the Court's view, Congress's record, which the Court treated as having simply been "supplemented" in the proceedings below,<sup>134</sup> now supported its predictive judgment that the must-carry provisions furthered important government interests and were adequately tailored.<sup>135</sup>

Congress was not so fortunate in *United States v. Playboy Entertainment Group, Inc.*,<sup>136</sup> in which the Court invalidated an attempt to regulate the phenomenon of "signal bleed," by which households that did not pay to receive sexually-oriented programming "may happen across discernible images of a sexually explicit nature."<sup>137</sup> The Court invalidated a provision of the Telecom-

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(D.D.C. 1995)).

130. *Id.* at 195.

131. *Id.* at 187.

132. *Id.* at 195-96.

133. *Id.*

134. *Id.* at 200.

135. *See id.* at 204 (stating that additional evidence from remand supports "Congress's predictive judgment"). The Court was sharply divided. Indeed, Justices O'Connor, Scalia, Ginsburg, and Thomas opined that the evidence actually *compelled* invalidation of the must-carry rules. *Id.* at 236 (O'Connor, J., dissenting). The division was also apparent in *Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), which the Court decided between the two *Turner* decisions. A plurality invalidated a provision of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 532, that required cable system operators to segregate "patently offensive" programming, place it on a separate channel, and block that channel from viewer access unless the viewer requests access in advance and in writing. This provision, according to the plurality, "does not reveal the caution and care that the standards underlying [First Amendment doctrine] impose upon laws that seek to reconcile the critically important interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions." *Id.* at 756. The Court lamented the absence of an "empirical reason" for the restriction and reminded Congress that "this Court has not been willing to stretch the limits of the plausible, to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech." *Id.* at 757, 760. The Court upheld a provision of the Act that allowed cable system operators to prohibit the broadcasting of programming if the operators reasonably believe the material "describes or depicts sexual or excretory activities or organs in a patently offensive manner." *Id.* at 768.

136. 529 U.S. 803 (2000).

137. *United States v. Playboy Enter. Group, Inc.*, 529 U.S. 803, 808 (2000).

munications Act of 1996 that required cable operators who provide channels "primarily dedicated to sexually-oriented programming" to either "fully scramble or otherwise fully block" those channels or to limit their transmission to hours when children were unlikely to be viewing.<sup>138</sup> Congress added the provision to the statute by floor amendment, without significant debate, and the provisions came to the Court with a "near barren"<sup>139</sup> legislative record. The Court found particularly disturbing the absence of a legislative record showing that children were actually, as opposed to potentially, exposed to signal bleed and providing some quantification as to how many children were affected nationwide.<sup>140</sup> The Court hastened to add that it should not be understood "to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition."<sup>141</sup>

Efforts to regulate the Internet have come under similar scrutiny. While *Turner I* was on remand, Congress enacted the Communications Decency Act (CDA),<sup>142</sup> its first attempt to regulate speech on the burgeoning Internet. In *Reno v. ACLU*,<sup>143</sup> the Supreme Court invalidated certain provisions of the CDA that criminalized transmission of "indecent" messages over the Internet.<sup>144</sup> The Court was considerably underwhelmed by the amount of legislative attention and deliberation that presaged passage of the CDA. It noted that the CDA's provisions "were either added in executive committee after the hearings [on the Telecommunications Act of 1996] were concluded or as amendments offered during floor debate on the legislation."<sup>145</sup> Congress had spent remarkably little time considering the nature of this new medium<sup>146</sup> or the severity of the criminal penalties it had attached to "indecent" messages.<sup>147</sup> In that context, the Court refused simply to defer to the legislative judgment that only a total ban on the targeted speech would serve the government's interest in protecting children from "indecent" materials.<sup>148</sup> The Court said,

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138. *Id.* at 806 (quoting 47 U.S.C. § 561(a)).

139. *Id.* at 822.

140. *See id.* at 819 (noting that government offered no proof of duration or quality of signal bleed or of how many children were exposed to signal bleed).

141. *Id.* at 822.

142. 47 U.S.C. §§ 223(a)-(e) (1994 & Supp. V 1999).

143. 521 U.S. 844 (1997).

144. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

145. *Id.* at 858; *see also id.* n.24 (describing limited legislative pedigree of CDA).

146. *See id.* at 868-70 (discussing characteristics of Internet communications).

147. *See id.* at 878-79 (discussing severity of punishment in certain situations).

148. *Id.* at 875-76.

"Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all."<sup>149</sup>

Finally, regulation of wireless communications, such as cellular phones, has also spawned heightened empirical attention under the First Amendment. In *Bartnicki v. Vopper*,<sup>150</sup> the Court invalidated certain provisions of Title III, the federal wiretapping statute, that created a civil penalty for intentionally using or disclosing illegally intercepted wireless communications.<sup>151</sup> Once again, the Court invalidated the provisions for failing to meet an evidentiary threshold. The Government had argued that penalties for further disclosure of intercepted communications would deter *initial* interceptions by effectively "drying up the market" for them.<sup>152</sup> It contended that the identity of the interceptor was often unknown and that only by deterrence of this nature would the government be able to serve its important interest in maintaining the privacy of wireless communicators.<sup>153</sup> The Court rejected the "dry up the market" theory for lack of evidence. The majority noted that there was little hard evidence that the identity of the interceptors was unknown.<sup>154</sup> Moreover, the Court found "no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions."<sup>155</sup>

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149. *Id.* at 879. In *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), the Court again rejected the Government's empirical showing as insufficient to support limits on the transmission of pornography. The Court held that the Child Pornography Prevention Act (CPPA), which prohibited the dissemination or possession of any visual depiction of sexually explicit conduct that "is, or appears to be, of a minor engaging in sexually explicit conduct," or is "advertised, promoted, presented, described or distributed in such a manner that conveys the impression" that the material depicts "a minor engaging in sexually explicit conduct," violated the First Amendment. *Id.* at 1397 (quoting 18 U.S.C. § 2256) (emphasis added) (internal quotation marks omitted). The CPPA's prohibition was based on congressional findings and evidence that, like depictions of sexual activity using actual children, simulated depictions of sexual activity by children can be used to persuade actual children to participate in such activity; or to stimulate susceptible adults to sexually exploit real children; or to increase the trade in pictures of real children engaged in such conduct; or to make it more difficult for law enforcement to identify and prosecute the use of such materials produced using real children. The Court concluded that "the causal link is contingent and indirect" because it "depends upon some unquantified potential for subsequent criminal acts." *Id.* at 1402.

150. 532 U.S. 514 (2001).

151. *Bartnicki v. Vopper*, 532 U.S. 514, 523-24 (2001).

152. *Id.* at 529.

153. *Id.* at 529-30.

154. *Id.* at 530.

155. *Id.* at 530-31. Once again, the Court was sharply divided. Justices Rehnquist, Scalia, and Thomas, who had felt strongly that the record in *Turner* was deficient, were more than satisfied with the legislative record in *Bartnicki*. The dissenters were vocally critical of the

### III. Judicial Review of Congress's Power to Administer the Civil War Amendments

In a sense, Section 5 and the other enforcement provisions stand at the crossroads of the Court's heightened record review. On one hand, because Section 5 is an express power, we would expect ordinary record review to apply. Indeed, many commentators appear to assume this is the case. We cannot be certain whether the Court applied ordinary or heightened record review in cases like *South Carolina v. Katzenbach*. There was no need to examine the scope of review because the record that accompanied the Voting Rights Act of 1965 was by any measure sufficient, particularly in light of the historical experience that gave rise to it.<sup>156</sup> Even if the empirical record had not been as strong, we might expect that the combined institutional common sense of Congress and the Court would have sufficed to support the legislative predicate. After all, at that time the Court was prepared to defer to Congress up to the limits of the Necessary and Proper Clause.<sup>157</sup>

On the other hand, until recently the Court had not been called upon in any substantial way to consider Section 5's scope outside the narrow confines of voting rights in the 1960s.<sup>158</sup> Thus, in certain respects, the Court might view a spate of modern enactments pursuant to Section 5 as "novel" exertions of Congress's enforcement power calling for heightened record review. As we shall see, the Court has come to view a great many of these enactments as involving "implausible" interpretations of the Constitution. Section 5 is a special breed of non-plenary express power, one that *presupposes* the existence of a harm to be remedied. More importantly, the heightened record review that has been at play in more recent Section 5 cases is intricately tied to Congress's – and the Court's – power to "say what the law is."

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majority's empirical approach. They argued that the *Turner* substantiality standard, which the majority apparently applied, actually *compelled* judicial deference to the government's "dry up the market" theory. They argued that Congress was institutionally better positioned to make judgments concerning the effects of a statute, and that the Court was not entitled to replace legislative predictions with its own. *Id.* at 550-52 (Rehnquist, C.J., dissenting). The dissenters characterized the majority's new empirical requirements as "nothing more than the bald substitution of its own prognostications in place of the reasoned judgment of 41 legislative bodies and the United States Congress." *Id.* at 552.

156. *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966) (discussing history and legislative background of Act).

157. *See id.* at 334-35 (noting that "exceptional circumstances" surrounding voting rights justify otherwise inappropriate remedies).

158. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L. J. 441, 447-49 (2000) (detailing Court's 1960s civil rights cases under Section 5 and Commerce Clause).



*A. Curtailing Congress's Power Under Article I*

Congress traditionally has not had to rely upon Section 5 to protect constitutional rights. For most of the Nation's history, the Commerce Clause has authorized a remarkably broad range of enactments, including those which the Court has come more recently to review under Section 5. Two recent trends have substantially curtailed Congress's Article I power, causing a renewed focus on Section 5. The first event was the Court's holding in *Seminole Tribe v. Florida*<sup>159</sup> that legislation enacted pursuant to Article I could not waive the States' sovereign immunity from suits by private parties in federal courts.<sup>160</sup> This effectively meant that Congress would have to rely on Section 5 to subject states to such suits. The second phenomenon is the Court's recent signaling that it intends to take up once again the difficult task of establishing the parameters of the Commerce Clause. As the commerce power contracts, Section 5's significance as a source of congressional power expands.

The commerce power is perhaps the quintessential plenary power in the legislative arsenal.<sup>161</sup> With the exception of the aforementioned *Lochner* Era, the Court historically had deferred to Congress's judgment that an activity had a sufficient nexus to interstate commerce to come within the commerce power. Applying ordinary record review, the Court has repeatedly affirmed that Congress is not required to make any findings in order to legislate under the Commerce Clause.<sup>162</sup> The presumptive rule was that the factual predicate of interstate activity existed, whether Congress expressly said so or not. Indeed, the Court's view was that the presence of a factual predicate could be inferred from the fact that legislation had been enacted in the first place.

This arrangement works fine so long as Congress does a reasonably good job of respecting the boundaries of its admittedly broad authority. But now and then, an institution granted such sweeping powers will test the boundaries of its authority. In *United States v. Lopez*,<sup>163</sup> the Court negatively reacted to what it perceived as one such probe of the limits of the commerce power. The Court's reaction signaled an unwillingness to continue the historical pattern of wholesale judicial deference to Congress's determination of the scope of the commerce power.

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159. 517 U.S. 44 (1996).

160. See *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996) (holding that Eleventh Amendment "prevents congressional authorization" of private suits against states); see also Post & Siegel, *supra* note 158, at 450-51 (discussing recent sovereign immunity cases).

161. The story of the Commerce Clause is well rehearsed, and this Article will not review it in any detail. For a brief summary, see Frickey, *supra* note 4, at 698-701, 709-20.

162. See *Perez v. United States*, 402 U.S. 146, 156 (1971) (stating that Congress need not "make particularized findings" of effect on interstate commerce to legislate).

163. 514 U.S. 549 (1995).

In *Lopez*, the Court refused to defer to Congress's implicit judgment in the Gun Free School Zones Act that possession of a handgun within a school zone "substantially affected" interstate commerce. The Court asserted its supremacy as interpreter of the Constitution. Whether an activity "substantially affects" interstate commerce so as to come within the commerce power, the Court said, "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."<sup>164</sup> Fair enough, it would seem, but by what standard would the question be settled and on what evidentiary showing?

The *Lopez* Court agreed with the Government that "Congress *normally* is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."<sup>165</sup> But the Court was quick to remind Congress that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."<sup>166</sup> Recall that the empirical model advanced in *Carolene Products* included an "aid to judicial function" component. In that sense, at least, *Lopez* broke no new ground. It simply affirmed the unremarkable proposition that where the effect of a particular activity is not apparent from the statutory text, to the "naked eye," findings may aid judicial review.

Although the majority hesitated to frame the debate as one concerning the division between national and state power, federalism concerns plainly had a great deal to do with the Court's admonition about congressional findings. Absent findings on the substantial effect on interstate commerce, the Court said, it was troubled by the breadth of the Government's position.<sup>167</sup> If Congress's purpose was not, as the Court plainly suspected, to intrude on local affairs, but truly to regulate an activity that affected in some meaningful way commerce among the states, then surely it would mark no judicial intrusion to ask that Congress set forth some rudimentary findings. The *Lopez* Court did not require that Congress come forward with an empirical record demonstrating the truth of its findings. Nor did the Court ultimately strike the enactment on the ground that findings had not been made. The Court merely implied that such findings may be useful when Congress legislates at the margin of its

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164. *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring) (internal quotation marks omitted)).

165. *Id.* at 562 (emphasis added).

166. *Id.* at 563.

167. *See id.* at 564 (stating that "it is difficult to perceive any limitation on federal power" under Government's arguments).

commerce power.<sup>168</sup> Although the breadth of *Lopez*'s holding and its effect on future exercises of the commerce power are still unclear, the case at least signals the Court's view that there are limits to congressional authority under the Commerce Clause.

Justices Kennedy and O'Connor, who concurred in *Lopez*, were perhaps more honest in their assessment. Although they were somewhat troubled by the doctrinal path the Court seemed to be embracing,<sup>169</sup> these justices saved most of their criticism for Congress. They challenged legislators to embrace the responsibility of preserving and respecting the balance of federal and state power when regulating commerce. Justice Kennedy reasoned that the "absence of structural mechanisms" to require legislators to do so, and the "momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."<sup>170</sup> Justice Kennedy acknowledged the many difficulties in identifying any consistent and workable standard from the line of Commerce Clause decisions, but rested on the notion that the Court had a "distinctive duty" to "declare what the law is."<sup>171</sup> He concluded, "The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required."<sup>172</sup>

Justice Souter's dissent is a sharp rebuke to the Court. He notes that the Court traditionally defers to "what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce."<sup>173</sup> The restraint the Court has exercised, according to Justice Souter, "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."<sup>174</sup> He noted

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168. *Id.* at 563. It should be noted that the Court focused on a number of factors, including the lack of findings. Also singled out were the lack of nexus between interstate commerce and an in-state activity, and Congress's apparent attempt to regulate a traditional state activity or a non-profit, noncommercial activity. *Id.* at 559-61.

169. *See id.* at 568 (Kennedy, J., concurring) (stating that history of Commerce Clause "counsels great restraint" before finding legislation to be invalid exercise of commerce power); *see also id.* at 574 (Kennedy, J., concurring) (stating that "[s]tare decisis operates with great force in counseling" against questioning "essential principles" of Congress's power to regulate commercial transactions).

170. *Id.* at 578 (Kennedy, J., concurring).

171. *Id.* at 579 (Kennedy, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

172. *Id.* at 580 (Kennedy, J., concurring).

173. *Id.* at 603 (Souter, J., dissenting).

174. *Id.* at 604 (Souter, J., dissenting).

that the deference principle in Commerce Clause cases "developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power."<sup>175</sup>

With respect to the majority's reference to the absence of factual findings, Justice Souter saw the Court poised to "ignor[e] the painful lesson learned in 1937,"<sup>176</sup> and foresaw further derogation of rationality review under the Commerce Clause.<sup>177</sup> He recognized that "[i]t is only natural to look for help with a hard job, and reviewing a claim that Congress has exceeded the commerce power is much harder in some cases than in others."<sup>178</sup> But Justice Souter insisted that the appropriate approach was to apply the traditional deference rule, which requires only that the legislative choice appear on the face of the statute to be a reasonable one. No matter that the statute was silent or ambiguous; courts were simply to infer the presence of a factual predicate from the fact that the legislation was passed.<sup>179</sup> Congress's findings, Justice Souter noted, address only what the legislature did in fact find, not all that Congress rationally could have found.<sup>180</sup> If findings were to be required, he said, "something other than rationality review would be afoot."<sup>181</sup> Of course, Justice Souter noted, Congress would earn the Court's thanks for making detailed findings, "[b]ut thanks do not carry the day as long as rational possibility is the touchstone."<sup>182</sup>

Justice Breyer, who authored the principal dissent in *Lopez*, saw the majority opinion as a major departure from the Court's Commerce Clause jurisprudence, and he darkly warned of a return to the mistakes of the past.<sup>183</sup> Justice Breyer took issue with the "substantial effects" formulation, noting that the Court had never consistently applied this standard in its Commerce Clause cases.<sup>184</sup> Invoking the rationality rule, Justice Breyer opined that courts must give Congress wide discretion in determining whether the requisite effect is

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175. *Id.* (Souter, J., dissenting).

176. *Id.* at 609 (Souter, J., dissenting).

177. *See id.* at 611 (Souter, J., dissenting) (stating that review may "degenerate into the sort of substantive policy review" overruled by New Deal Court).

178. *Id.* at 612 (Souter, J., dissenting).

179. *Id.* at 613 (Souter, J., dissenting).

180. *Id.* (Souter, J., dissenting).

181. *Id.* (Souter, J., dissenting).

182. *Id.* at 614 (Souter, J., dissenting).

183. *See id.* at 631 (Breyer, J., dissenting) (stating that upholding Act would accord with traditional view of Commerce Clause with exception of "one wrong turn subsequently corrected").

184. *See id.* at 615-16 (Breyer, J., dissenting) (detailing articulation of "substantial effects" test).

present, "both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy."<sup>185</sup> The absence of findings, Justice Breyer wrote, "at most, deprives a statute of the benefit of some *extra* leeway."<sup>186</sup> To invalidate the statute on the ground that Congress did not produce detailed findings concerning the source of its authority, he said, "would appear to elevate form over substance."<sup>187</sup>

*B. Heightened Scrutiny Under Section 5: Measuring "Congruence and Proportionality"*

As a result of Congress's diminished ability to waive the states' immunity and the possible scaling back of the commerce power, Section 5 has played an increasingly prominent role in the Court's separation-of-powers jurisprudence.<sup>188</sup> Although the Rehnquist Court declined to require even findings of fact in *Lopez*, it has consistently demanded far more under Section 5. A heightened record review has been incorporated into the Court's review of Section 5 enactments. The Court treats Section 5 enactments much the same as those enactments which, under the First Amendment, are considered per se "novel" and "implausible." The Court has invalidated a number of Section 5 enactments on the ground that Congress failed to provide a sufficient legislative record. There is, however, a significant distinction concerning the relevant predicate. The predicate that is being reviewed under Section 5 does not belong to Congress. Rather, the Court proceeds in two discrete steps to dismantle Section 5 enactments: first, the Court redefines the relevant evil or harm, and then it inevitably finds that there is insufficient support for the *judicially* defined predicate.

Modern Section 5 jurisprudence begins with *City of Boerne v. Flores*.<sup>189</sup> In *City of Boerne*, the Court invalidated the Religious Freedom Restoration Act (RFRA).<sup>190</sup> The RFRA was Congress's response to *Employment Division, Department of Human Resources v. Smith*,<sup>191</sup> a decision in which the Court held that it would not subject neutral, generally applicable laws to strict scrutiny, even when the laws, as applied, severely burdened the exercise of reli-

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185. *Id.* at 617 (Breyer, J., dissenting).

186. *Id.* (Breyer, J., dissenting).

187. *Id.* at 618 (Breyer, J., dissenting).

188. See Post & Siegel, *supra* note 158, at 448-50 (discussing need for using Section 5 to uphold civil rights legislation in light of *Lopez* and *Morrison*).

189. 521 U.S. 507 (1997).

190. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

191. 494 U.S. 872 (1990).

gion.<sup>192</sup> Congress reasoned that only by subjecting these laws to rigorous scrutiny could the courts uncover otherwise hidden improper motives. Its intent in enacting the RFRA could not have been more transparent; the statute itself stated that one of its primary purposes was to "restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."<sup>193</sup>

Paying homage to its early precedents in the area, the Court began in *City of Boerne* with the recognition that Section 5 was a broad, "positive grant of legislative power."<sup>194</sup> The Court also acknowledged that Congress was to be chiefly responsible for enforcing the guarantees of the Fourteenth Amendment: "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."<sup>195</sup> Indeed, the Court was willing to go so far as to reaffirm that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."<sup>196</sup>

But, the Court said, there are limits to even the broadest express powers. In particular, the Court found in the word "enforce" a textual limitation on Congress's broad powers under Section 5. According to the Court's reading, "[t]he design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."<sup>197</sup> The Court stated that although 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."<sup>198</sup> The Court then instituted the following standard for determining on which side of that line an enactment should be placed: "There must be a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end."<sup>199</sup> Without this tailoring, the Court said, "legislation may become substantive in operation and effect."<sup>200</sup>

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192. *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 885 (1990).

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

194. *Id.* at 517 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

195. *Id.* at 536 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

196. *Id.* at 518.

197. *Id.* at 519.

198. *Id.* at 519-20.

199. *Id.* at 520 (emphasis added).

200. *Id.*

Under this newly announced framework, the Court unanimously rejected, with some measure of righteous indignation, the notion that Congress could simply disagree with the Court's interpretation of the scope or definition of the constitutional guarantees in question and codify its own interpretation. That would have been quite enough to invalidate the statute. But the Court went on to indicate that "[t]he appropriateness of remedial measures must be considered in light of the evil presented."<sup>201</sup> In other words, there must be a record of "congruence and proportionality" in support of any Section 5 enactment. Not surprisingly, the Court could not find in the record any evidence to support Congress's prediction that application of strict scrutiny to generally applicable laws would unearth invidious religious bias.<sup>202</sup> If evidence of a pattern of discriminatory state laws existed, Congress had apparently rejected a strategy that would have resulted in its compilation. Having chosen instead a frontal attack on the supremacy of the Court's power to declare finally the meaning of the Constitution, Congress had compiled no record for the Court to review.<sup>203</sup>

It was not long before the Court had occasion to apply its newly minted "congruence and proportionality" standard. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>204</sup> the Court invalidated an attempt by Congress to abrogate states' Eleventh Amendment immunity under the Patent and Plant Variety Protection Remedy Clarification Act of 1992.<sup>205</sup> Congress had enacted the Patent Remedy Act under the Patent Clause, the Commerce Clause, and Section 5.<sup>206</sup> The Court had foreclosed any reliance on Article I powers for a congressional waiver of state sovereign immunity in *Seminole Tribe of Florida*.<sup>207</sup> Thus, if the Patent Remedy Act provisions were to be upheld, it would have to be under Section 5.

Applying its new "congruence and proportionality" standard, the Court held that to abrogate state immunity to enforce patent property rights under the Due Process Clause, Congress would have to demonstrate not only that the states had actually infringed many patents, but also that there were no adequate

201. *Id.* at 530.

202. *See id.* at 532 (concluding that RFRA is so disproportionate that it cannot be "understood" to remedy or prevent unconstitutional conduct).

203. *See Devins, supra* note 12, at 1196-97 (concluding that "Congress gave short shrift to factfinding in order to do precisely what RFRA's interest group sponsors asked for, that is, repudiate *Smith*").

204. 527 U.S. 627 (1999).

205. 35 U.S.C. §§ 271(h), 296(a) (1994).

206. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 635-36 (1999).

207. *See id.* at 636 (finding that under *Seminole Tribe*, Act cannot be sustained under Commerce Clause or Patent Clause).

remedies at state law.<sup>208</sup> The Court first examined the "evil" Congress purported to address in the Patent Remedy Act. It found little proof of "widespread and persisting" patent violations by the states.<sup>209</sup> The evil identified, according to the Court, was nothing more than "speculative harm," an insufficient predicate for Section 5 legislation.<sup>210</sup> Moreover, as a matter of constitutional definition, the Court stated that only state deprivations of patent rights *without due process* would amount to a constitutional violation.<sup>211</sup> Because Congress had "barely considered" whether state remedies for patent infringement were adequate and had failed to focus on instances of intentional, as opposed to merely negligent, patent infringement by the states, there was no evidence in the record that the states had engaged in conduct that implicated the Due Process Clause.<sup>212</sup> Thus, the Court found no "plausible argument" that the states had deprived patentees of property and left them without adequate remedies.<sup>213</sup> Justice Stevens, writing for the four dissenters, argued to the contrary that Congress had in fact compiled a substantial legislative record in support of the need for abrogation of state immunity to protect against state infringements of patent rights.<sup>214</sup>

In *Kimel v. Florida Board of Regents*,<sup>215</sup> the same five-Justice majority that had invalidated the RFRA and the state suit provisions of the Patent Remedy Act held that Congress did not have the power under Section 5 to enforce the Age Discrimination in Employment Act of 1967 (ADEA)<sup>216</sup> by authorizing federal damage suits by state employees against the states as sovereigns, which Congress attempted to do in 1974 revisions to the ADEA.<sup>217</sup> The Court had previously upheld the extension of the ADEA to state and local governments under the Commerce Clause.<sup>218</sup> However, because the Court had later held in *Seminole Tribe* that Congress lacks the power to waive sovereign immunity by exercising its Article I powers, Congress again had to turn to Section 5 as its source of power.<sup>219</sup>

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208. *Id.* at 642.

209. *Id.* at 645 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997)).

210. *Id.* at 641.

211. *Id.* at 642-43.

212. *Id.* at 643, 645.

213. *Id.* at 647.

214. *See id.* at 656-59 (Stevens, J., dissenting) (noting legislative findings that state patent infringement was likely to increase and that state universities were heavily involved in patent system and needed to be regulated).

215. 528 U.S. 62 (2000).

216. 29 U.S.C. §§ 621-634 (1994 & Supp. V 1999).

217. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

218. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983).

219. *See Kimel*, 528 U.S. at 80 (stating that plaintiffs may maintain ADEA suits only if



In what had become a familiar pattern, the Court first set the parameters of its inquiry. It reiterated that "Congress'[s] § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."<sup>220</sup> Congress could remedy or prohibit "a somewhat broader swath of conduct," the Court noted, "including that which is not itself forbidden by the Amendment's text."<sup>221</sup> But the Court again affirmed that "the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power."<sup>222</sup> As the Court had made plain in *City of Boerne*, because the "ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch," Congress's power under Section 5 did not extend to measures by which it intended to decree the substance of the constitutional guarantee.<sup>223</sup>

The Government argued that the Court could uphold the ADEA state-suit provision as a remedy for past and present discrimination by states on the basis of age in violation of the Fourteenth Amendment's Equal Protection Clause.<sup>224</sup> But the Court was highly skeptical of that claim, principally because its own precedents failed to grant "suspect class" status on the basis of age.<sup>225</sup> Rather, the Court noted, age classifications are "presumptively rational."<sup>226</sup> Against this "backdrop" of Fourteenth Amendment jurisprudence, the Court readily concluded that the ADEA failed the "congruence and proportionality" test. The Court specifically rejected the argument that the ADEA provisions, when read in the context of certain statutory exceptions, targeted only arbitrary age discrimination, which in most cases would violate the Fourteenth Amendment.<sup>227</sup>

To ascertain whether the ADEA provision was proportional to the "evil" Congress found to exist, the Court examined the legislative record. On the Court's reading of the record, the state-suit provision was "an unwarranted response to a perhaps inconsequential problem."<sup>228</sup> The Court dismissed the evidence presented – "assorted sentences . . . from a decade's worth of congressional reports and floor debates" and a dated California report on age dis-

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ADEA is valid exercise of Section 5 power).

220. *Id.* at 81.

221. *Id.*

222. *Id.*

223. *Id.* (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

224. *Id.* at 86-88.

225. *Id.* at 83.

226. *Id.* at 84.

227. *Id.* at 86-88.

228. *Id.* at 89.

crimination in public agencies – as failing to demonstrate a sufficient problem of unconstitutional discrimination based on age.<sup>229</sup> The Court took pains to emphasize that the lack of record evidence was not dispositive. Nevertheless, the absence of a substantial record of a "widespread pattern of age discrimination by the States" confirmed for the Court that Congress "had no reason to believe that broad prophylactic legislation was necessary in this field."<sup>230</sup>

Soon after *Kimel*, the Court invalidated a provision of the Violence Against Women Act (VAWA)<sup>231</sup> that provided a federal civil remedy to victims of gender-motivated violence. In *United States v. Morrison*,<sup>232</sup> the Court first held, based on *Lopez*, that Congress did not have the authority to enact the VAWA provisions under its Article I commerce power.<sup>233</sup> It then turned to what it termed the "well settled" Section 5 standard of congruence and proportionality.<sup>234</sup> After again reaffirming that Section 5 permits Congress to prohibit conduct the Court itself has not deemed unconstitutional, the Court addressed the state of the legislative record before Congress.<sup>235</sup> The Court noted that the government pointed to a "voluminous congressional record" of "pervasive bias" against women in various state justice systems.<sup>236</sup> If all that was required was evidence of gender discrimination, Congress had come forward with an abundant record.

Again, however, the problem in *Morrison* was not the weight of the evidence of discrimination, but its specific substance. In particular, the Court narrowly interpreted the Fourteenth Amendment to apply only to violations by state actors.<sup>237</sup> For that proposition, the Court reached all the way back to *United States v. Harris*<sup>238</sup> and the *Civil Rights Cases*.<sup>239</sup> According to the Court, *stare decisis* demanded that the Court enforce the state action limitation announced in these early cases,<sup>240</sup> an assertion that ignores both history and

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229. *Id.* at 90-91.

230. *Id.*

231. 42 U.S.C. § 13981(b) (1994).

232. 529 U.S. 598 (2000).

233. *United States v. Morrison*, 529 U.S. 598, 617 (2000). Although the Court conceded that Congress supported VAWA's remedial provisions with detailed findings, it held that this alone was not sufficient to sustain the Act under the Commerce Clause. *See id.* at 614 ("But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

234. *Id.* at 619.

235. *Id.* at 619-20.

236. *Id.*

237. *Id.* at 621.

238. 106 U.S. 629 (1883).

239. 109 U.S. 3 (1883).

240. *See United States v. Morrison*, 529 U.S. 598, 622 (2000) (stating that *stare decisis* is

precedent.<sup>241</sup> Thus, even assuming that the legislative record relating to VAWA contained substantial evidence of state discrimination based on gender, the fact that its prohibitions affected private actors robbed it of "congruence and proportionality," in the Court's view.

In *Board of Trustees v. Garrett*,<sup>242</sup> the same familiar five-Justice majority invalidated the state-suit provision of the Americans with Disabilities Act (ADA).<sup>243</sup> The majority again acknowledged that "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence."<sup>244</sup> The power to "enforce" Section 1 of the Fourteenth Amendment, the Court wrote, "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."<sup>245</sup> The Court reaffirmed, however, that "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."<sup>246</sup>

The Court for the first time expressly separated into two steps the "congruence and proportionality" standard for analyzing Section 5 enactments that reach beyond the "actual guarantees" of the Fourteenth Amendment. First, the Court sought to "identify with some precision the scope of the constitutional right at issue."<sup>247</sup> The Court did that by looking at its prior decisions under the Equal Protection Clause dealing with the rights of the disabled. That review demonstrated that the disabled enjoyed only minimal constitutional protection as a group.<sup>248</sup> Thus, "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational."<sup>249</sup>

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especially strong due to Justices deciding *Harris* and *Civil Rights Cases*).

241. See Post & Siegel, *supra* note 158, at 474-77 (criticizing Court's reasoning on this point); see also *District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973) (adopting view that Congress acting under Section 5 may regulate private conduct that Fourteenth Amendment standing alone does not reach).

242. 531 U.S. 356 (2001).

243. 42 U.S.C. §§ 12111-12117 (1994).

244. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001).

245. *Id.* (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)).

246. *Id.*

247. *Id.*

248. *Id.* at 366-68.

249. *Id.* at 367. *Garrett* thus might answer some of the questions that commentators felt the Court had left open in *Kimel* and *Morrison*. See Post & Siegel, *supra* note 158, at 443 ("After *Kimel*, for example, it is uncertain whether and to what extent Congress can exercise its power under Section 5 to redress forms of discrimination that differ from those that courts prohibit in cases arising under Section 1 of the Fourteenth Amendment.").

Second, having determined the "metes and bounds of the constitutional right in question," the Court proceeded to ask "whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."<sup>250</sup> Although Congress did make a general finding in the ADA of historical discrimination against the disabled, the Court noted that most of this discrimination was carried out by private actors, not states.<sup>251</sup> In any event, the Court could not find in the record any evidence of a pattern of unconstitutional state action against the disabled. In that regard, the Court compared the ADA's record with the record that accompanied the Voting Rights Act of 1965.<sup>252</sup> In contrast to the care and consideration that went into the compilation of the Voting Rights Act record, the Court saw little evidence to support Congress's judgment that a national remedial measure against the states was necessary to cure the evil of state discrimination against the nation's disabled persons.<sup>253</sup> The ADA, according to the Court, would permit Congress to "rewrite the Fourteenth Amendment law" that had been established in the Court's own precedents.<sup>254</sup>

Justice Breyer, writing on behalf of the now equally familiar group of dissenters,<sup>255</sup> accused the majority of blurring the constitutional separation of powers with its empirical standards. He criticized the majority for reviewing the legislative record "as if it were an administrative agency record."<sup>256</sup> The dissent also criticized the majority's approach for requiring Congress to assemble a record that would support a *judicial* finding of state discrimination. The dissenters pointedly observed that "a legislature is not a court of law."<sup>257</sup>

In addition to their disagreement regarding the proper separation of powers, the dissent's view of the record could not have been more different than that of Chief Justice Rehnquist and the majority. According to the dissent, Congress had compiled a "vast legislative record" documenting instances of unlawful discrimination against the disabled.<sup>258</sup> The dissent noted that Congress had held thirteen hearings and had relied on "its own prior

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250. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 360 (2001).

251. *Id.* at 369.

252. *Id.* at 373-74.

253. *Id.*

254. *Id.* at 374.

255. Justices Stevens, Souter, and Ginsburg joined the dissent. *Id.* at 376 (Breyer, J., dissenting).

256. *Id.* (Breyer, J., dissenting).

257. *Id.* at 379-80 (Breyer, J., dissenting).

258. *Id.* at 377 (Breyer, J., dissenting).

experience gathered over forty years during which it contemplated and enacted considerable similar legislation."<sup>259</sup> The dissent also pointed to "roughly 300 examples of discrimination by state governments" in the record, which they collected and presented in an appendix to their opinion.<sup>260</sup> Of course, they acknowledged that many of these examples were anecdotal in nature. But the dissent stated: "Congress, unlike courts, must, and does, routinely draw general conclusions – for example, of likely motive or of likely relationship to legitimate need – from anecdotal and opinion-based evidence of this kind, particularly when the evidence lacks strong refutation."<sup>261</sup> Nor, the dissent noted, has the Court "traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category."<sup>262</sup>

In addition to the many instances of unlawful discrimination they found in the record, the dissenters also noted Congress's express, detailed findings of discrimination against persons with disabilities.<sup>263</sup> In their view, these findings, and the evidence of record, bore out Congress's conclusion that the states had engaged in a pattern of discrimination that violated the Equal Protection Clause.<sup>264</sup> After reviewing the record materials, the dissent remarked that "[t]he Court's failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard."<sup>265</sup> Justice Breyer argued that this strict standard was at odds with the Court's institutional role and with the resulting traditional deference to Congress<sup>266</sup> and that it seemed reminiscent of the Court's "now-discredited" *Lochner* Era jurisprudence.<sup>267</sup> The dissenters stated that the "problem with the Court's approach is that neither the 'burden of proof' that favors States nor any other rule of restraint applicable to *judges* applies to *Congress* when it exercises its § 5 power."<sup>268</sup> The four dissenting justices concluded that "[t]he Court, through its evidentiary demands, its non-deferential review, and its

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259. *Id.* (Breyer, J., dissenting).

260. *Id.* at 379 (Breyer, J., dissenting); *see also id.* app. C at 391-424.

261. *Id.* at 380 (Breyer, J., dissenting).

262. *Id.* (Breyer, J., dissenting).

263. *Id.* at 380-81 (Breyer, J., dissenting).

264. *Id.* at 381-82 (Breyer, J., dissenting).

265. *Id.* at 382 (Breyer, J., dissenting).

266. *See id.* at 387 (Breyer, J., dissenting) ("And even today, the Court purports to apply, not to depart from, these [deferential] standards. But the Court's analysis and ultimate conclusion deprive its declarations of practical significance. The Court 'sounds the word of promise to the ear but breaks it to the hope.'" (citations omitted)).

267. *Id.* (Breyer, J., dissenting).

268. *Id.* at 383 (Breyer, J., dissenting).

failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress."<sup>269</sup>

#### IV. *Judicial Review of Agency Statutory Constructions*

Under Section 5, the Court reviews Congress's enforcement enactments for "appropriateness." The Court uses the benchmarks of "congruence and proportionality" to separate valid remedial legislation from enactments that would effect a substantive change in the law. Thus far, the Rehnquist Court has rejected as inappropriate *all* legislative enactments that purport to enforce the Fourteenth Amendment beyond the letter of the Court's own precedents. Congress has essentially been prohibited from addressing "enforcement gaps" under the Fourteenth Amendment.

Establishing rules for reviewing enforcement gaps is not an entirely new enterprise for the Court. Executive agencies have long filled enforcement gaps in federal statutes that, like constitutional text, are often silent or ambiguous. Agencies enforce statutes in a variety of ways. For example, they may bring specific enforcement actions under a statutory scheme or may adjudicate rights pursuant to a statute. Agencies also enforce ambiguous statutes by filling gaps in statutory text through interpretation of the statutory language. For many years now, the presumptive rule of review has been that all reasonable or permissible constructions are valid. Only recently has the Rehnquist Court begun to reclaim much of the independent judgment it had ceded to agencies to "say what the law is."

##### A. *Chevron and the "Province of the Judiciary"*

As it has done recently under Section 5 with regard to Congress, the Court has struggled to define proper boundaries of review of legal interpretations offered by executive agencies. Many articles have charted the path of judicial deference in this area,<sup>270</sup> and this Article will not repeat the history in any detail. Prior to 1984, the Court had a difficult time deciding whether to check agency interpretations by exercising its own, independent judgment with regard to their validity or rather to leave the matter of construction of ambiguous federal statutes almost entirely to agencies considered expert in the particular field.<sup>271</sup>

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269. *Id.* at 388-89 (Breyer, J., dissenting).

270. See, e.g., Leslie E. Gerwin, *The Deference Dilemma: Judicial Responses to the Great Legislative Power Giveaway*, 14 HASTINGS CONST. L.Q. 289, 301-05 (1987).

271. See I KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.1 (3d ed. 1994) (explaining Court's use of both deference and substituted judgment in pre-Chevron review of agency decisions); Cynthia R. Farina, *Statutory Interpreta-*

Since the Court decided it in 1984, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>272</sup> has been the paradigm for judicial review of agency interpretations of the federal statutes that agencies are charged with enforcing.<sup>273</sup> Following *Chevron*, lower courts analyze agency legal interpretations in two discrete steps. At Step One, the court is to ask "whether Congress has directly spoken to the precise question at issue."<sup>274</sup> This is a narrow rule. It requires not only that Congress consider and speak to a broad subject area, but that the issue under consideration be the "precise" question to which the parties' arguments are addressed. If Congress has so spoken, and has done so clearly, the court "must give effect to the unambiguously expressed intent of the Congress."<sup>275</sup>

Step Two comes into play only if the statute at issue is silent or ambiguous as to the specific question being considered. At Step Two, the presumptive rule is that the agency has the power to interpret ambiguous laws it has been "entrusted to administer."<sup>276</sup> This of course begs the question of when an agency has been entrusted with such power. Under *Chevron*, the agency has been "entrusted to administer" a statute so long as Congress has left gaps in the text. The apparent rationale for this principle is that by leaving the matter unresolved, Congress intended that the agency fill in any gaps through future interpretations. The judicial inquiry is severely bounded at *Chevron*'s Step Two: the court determines only whether the agency's interpretation of law "is based on a permissible construction of the statute."<sup>277</sup> If the agency's construction is permissible or "reasonable," the court must defer, giving the agency's interpretation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."<sup>278</sup> *Chevron* deference applies even if the agency's interpretation is not the one "the court would have reached if the question initially had arisen in a judicial proceeding."<sup>279</sup>

The "normative core" of *Chevron*'s Step Two is similar to the core of the presumptive rule in favor of legislative predicates in most constitutional

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*tion and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 454 (1989) (detailing "independent judgment model" and "deferential model" of court review).

272. 467 U.S. 837 (1984).

273. See Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1113-14 (2001) (detailing *Chevron* deference).

274. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

275. *Id.* at 843.

276. *Id.* at 844.

277. *Id.* at 843.

278. *Id.* at 844.

279. *Id.* at 843 n.11.

cases – "an appreciation of agency expertise, the limits of the specialized knowledge of judges, and political accountability."<sup>280</sup> As Justice Stevens noted in *Chevron*: "Judges are not expert in the field, and are not part of either political branch of the Government."<sup>281</sup> And although agencies lack the same measure of accountability as Congress, the President, who is accountable, controls agency choices to a degree. Thus, it is "entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."<sup>282</sup>

Because it cedes so much of the interpretive function to agencies, *Chevron* has been described as the "counter-*Marbury*" for the administrative state.<sup>283</sup> The judiciary's duty to "say what the law is" gives way to all reasonable agency interpretations of ambiguous or silent statutes. Although the Administrative Procedure Act expressly entrusts legal issues to the judiciary,<sup>284</sup> the *Chevron* Court determined that agencies, given their institutional expertise, have the ability to "reconcil[e] conflicting policies" and to comprehend regulatory schemes that are often "technical and complex."<sup>285</sup> Thus, if a challenge, "fairly conceptualized," arises questioning the wisdom of the agency's choice of policy, *Chevron* dictates that the challenge must fail.<sup>286</sup> Put another way, courts are not permitted to second-guess the policy choices made by more accountable or more expert political branches. As the Court emphasized in *Chevron*, "[f]ederal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do."<sup>287</sup>

A spirited debate followed the *Chevron* decision concerning the merit of its core presumption that Congress intended to leave enforcement gaps for agencies to flesh out in their own interpretations and the degree to which the decision cedes judicial power to "say what the law is." Some commentators doubt that congressional silence or ambiguity can be stretched so far,<sup>288</sup>

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280. Rossi, *supra* note 273, at 1114.

281. *Chevron*, 467 U.S. at 865.

282. *Id.* at 865-66.

283. Sunstein, *supra* note 11, at 2074-75.

284. See 5 U.S.C. § 706(2)(A) (2000) (providing that purely legal questions be reviewed de novo).

285. *Chevron*, 467 U.S. at 865.

286. *Id.* at 866.

287. *Id.*

288. See, e.g., Farina, *supra* note 271, at 469-76 (criticizing application of presumption under *Chevron* Step Two).



whereas others argue that acceptance of *Chevron's* presumption will promote uniformity and certainty.<sup>289</sup> Other commentators have questioned prescribing *Chevron's* strong medicine in light of what might be considered an "incompletely theorized"<sup>290</sup> opinion, which sheds less light on the reasons for judicial deference than many perhaps would wish. Interest in the "scope" or "domain" of *Chevron* deference has been on the rise for some time and has recently reached a crescendo in the commentary.<sup>291</sup>

Much of the doubt stems, of course, from the uncertain provenance of executive agencies in a democratic constitutional system. The common argument is that agencies are less accountable than Congress and are subject to "capture" by special interests. Thus, insofar as *Chevron's* Step Two rests on the notion that agencies are more accountable than courts, its normative core seems dubious, or even illegitimate. In addition, some believe that a deference rule that cedes so much power to agencies where Congress has not clearly expressed its intention derogates, rather than supports, the constitutional separation of powers. How can we be certain that the agency, or the court, is respecting the wishes of Congress if the statutory text is silent or ambiguous? Moreover, some critics of the *Chevron* model contend that there is little merit to the argument that independent judicial interpretation of federal statutes constitutes "usurpation" of an agency function. It is, after all, the province of the judiciary to "say what the law is," and that is in fact what judges do when they interpret all manner of *non-regulatory* federal statutes.

Despite these sometimes strident criticisms, *Chevron* has been a "pillar" of administrative law since the Court decided it nearly twenty years ago. Agencies, as well as Congress, have come to rely upon *Chevron's* interpretive model, which, despite all of its faults, provides some certainty that judicial second-guessing will not constantly upset agency choices. Only where Congress plainly indicates a result contrary to that reached by the agency are courts expressly authorized to intervene. Even its critics can agree that the *Chevron* model "has the significant virtue of combining a fair degree of accuracy with a reasonably clear rule."<sup>292</sup>

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289. See, e.g., Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117-29 (1987) (noting that *Chevron's* presumption in favor of agency's interpretation reduces friction between federal circuits and "enhances the probability of uniform national administration of the laws").

290. SUNSTEIN, *supra* note 17, at 42.

291. See, e.g., Merrill & Hickman, *supra* note 11, at 835 (exploring *Chevron's* scope); see also Rossi, *supra* note 272, at 1116 ("For years . . . the scope of *Chevron's* application has puzzled courts.").

292. Sunstein, *supra* note 11, at 2091.

### B. The Ascendance of the Independent Judgment Model

At the same time as it has been retreating from the deference afforded to "appropriate" Section 5 enactments, the Court has been stepping back from *Chevron's* strong deference to "reasonable" agency interpretations of law. *Chevron* deference has recently been bifurcated. "Formal" agency interpretations that are expressly sanctioned in statutory text retain presumptive force under *Chevron*, whereas more "informal" pronouncements are to be reviewed under a highly contextual standard that focuses, ultimately, on the "persuasiveness" of the agency's interpretation. In contrast to the entrenched battles that characterize recent Section 5 cases, here there is little disagreement in the Court. Eight Justices – with Justice Scalia being the lone holdout – now appear to be firmly convinced that *Chevron* cannot be applied as an all-or-nothing approach to judicial review of agency legal interpretations.<sup>293</sup>

#### 1. Christensen: A Matter of Opinion

Although there had certainly been signs of judicial ambivalence in years past,<sup>294</sup> the retreat from the *Chevron* rule formally began in *Christensen v. Harris County*.<sup>295</sup> In *Christensen*, the Court refused to give "full" *Chevron* deference to an interpretation of the Fair Labor Standards Act issued to an employer by the Acting Administrator of the Department of Labor's Wage and Hour Division. The interpretation at issue was set forth in an agency "opinion letter." Rejecting the Government's claim for deference to its construction of the statute, the Supreme Court explained that opinion letters, like policy statements, agency manuals, and enforcement guidelines, lack the "force of law" and are not entitled to full *Chevron* deference.<sup>296</sup>

Rather, the Court said, informal interpretations are entitled to a degree of deference only if they satisfy the factors set forth in *Skidmore*.<sup>297</sup> *Skidmore* deference, which was in vogue well before *Chevron* came to be a "pillar" of law, recognizes that even the least formal interpretation results from special

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293. See *infra* text accompanying notes 304-26 (discussing eight-justice majority opinion in *Mead*).

294. One commentator noted that "there are signs that *Chevron* is being transformed by the Court into a new judicial mandate to 'say what the law is.'" Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 970 (1992).

295. 529 U.S. 576 (2000).

296. See *Christensen v. Harris County*, 529 U.S. 576, 586 (2000) (explaining that lack of deference toward informal interpretations stems from lack of notice and comment that exists in formal rulemaking).

297. See *id.* at 587 (citing *Skidmore* as requiring deference to informal interpretations provided that they have "power to persuade").

expertise and is entitled to some degree of weight.<sup>298</sup> As Justice Jackson explained in *Skidmore*, some agency rulings, interpretations, and opinions

while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control.<sup>299</sup>

Thus, under *Skidmore*, the weight or deference afforded to informal agency decisions or statements will ultimately depend upon how persuasive they are to a court exercising independent judgment.

In *Christensen*, a nearly unanimous Court held that the agency's opinion letter was not entitled to "full" *Chevron* deference. *Christensen*'s full impact on traditional *Chevron* deference was not entirely clear, however.<sup>300</sup> The decision did not explain the rationale for refusing deference to less "formal" agency interpretations. The Court appeared to have made a blanket determination that Congress did not intend "informal" interpretations to be binding on courts or those regulated.<sup>301</sup> Moreover, the Court appeared to alter the focus in *Chevron*'s Step Two from whether the statute was silent and ambiguous, in which case a reasonable agency interpretation would bind courts and litigants, to whether there was some evidence in the statutory scheme that Congress actually intended to delegate lawmaking authority to the agency.<sup>302</sup> Finally, although there was general agreement that *Chevron* deference should not be afforded the opinion letter in *Christensen*, the Justices differed on the proper application of *Skidmore* deference, with various Justices emphasizing one factor or another.<sup>303</sup>

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298. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that informal findings of Labor Department Administrator were entitled to deference because they represented "a body of experience and informed judgment" on which courts could depend).

299. *Id.*

300. See Rossi, *supra* note 273, at 1110-12 (arguing that "the *Christensen* decision has introduced even more confusion into the maze of cases regarding judicial review of agency interpretations" and noting that "*Christensen* does not resolve every question regarding the scope of *Chevron* deference").

301. *Id.* at 1122.

302. *Id.* at 1146 (explaining that under *Skidmore*, congressional intent to give agency lawmaking authority must be found before *Chevron* deference can apply).

303. *Christensen*, 529 U.S. at 599 (Scalia, J., dissenting); *id.* at 592 (Stevens, J., dissenting); *id.* at 596 (Breyer, J., dissenting). For a list of questions that appeared to have been left open after *Christensen*, see Merrill & Hickman, *supra* note 11, at 849-52.

2. Mead: *The Counter-Chevron*

Some, but not all, of the questions that the Supreme Court left open in *Christensen* it answered in *United States v. Mead Corp.*<sup>304</sup> In *Mead*, the Court continued its nearly-unanimous tilt away from *Chevron*'s uniform deference principle.<sup>305</sup> The narrow holding in *Mead* was that classification rulings issued by the United States Customs Service pursuant to a federal statute were not entitled to *Chevron* deference in determining the proper tariff classification of imported goods.<sup>306</sup> Building on *Christensen*, eight Justices agreed that *Chevron* deference was not appropriate, "there being no indication that Congress intended such a ruling to carry the force of law."<sup>307</sup> With regard to congressional intent, the Court stated:

[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.<sup>308</sup>

In sum, in place of *Chevron*'s presumption, the Court placed upon the agency the burden of demonstrating: first, that Congress delegated broad rulemaking authority to the agency and, second, that the specific agency interpretation at issue was an exercise of the delegated rulemaking authority.<sup>309</sup>

In *Mead*, the Court described its precedents as producing "a spectrum of judicial responses, from great respect at one end, to near indifference at the other."<sup>310</sup> The Court explained why *Chevron* deference was properly limited to instances involving "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for

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304. 533 U.S. 218 (2001).

305. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (finding that administrative implementation of statute involving U.S. Customs Service did not qualify for *Chevron* deference because it did not appear that Congress intended to delegate such lawmaking authority).

306. See *id.* at 224 (holding that classification rulings are beyond "pale" of *Chevron*). The specific question was whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" in Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States to include the spiral-bound and ring-bound day planners imported by respondent. *Id.*

307. *Id.* at 221.

308. *Id.* at 226-27.

309. See *id.* (requiring clear congressional delegation of authority and requiring agency interpretation to be pursuant to that authority).

310. *Id.* at 228 (citations omitted).

which deference is claimed."<sup>311</sup> "It is fair to assume generally," the Court explained, "that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."<sup>312</sup> Although the Court emphasized formality, it quickly added that the mere absence of a formal process does not *necessarily* preclude application of *Chevron* deference.<sup>313</sup> If indicia of congressional intent to delegate interpretive power to the agency can be found elsewhere, the Court indicated, perhaps *Chevron* deference would still apply.

The Court found "ample reasons" for denying *Chevron* deference to the tariff ruling at issue in *Mead*.<sup>314</sup> The authorization of classification rulings, the Court stated, "present[s] a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."<sup>315</sup> Examining the statute and past agency practice, the Court found no persuasive evidence of congressional intent to give classification rulings the force of law.<sup>316</sup>

Under the Court's new approach, however, finding *Chevron* deference inapplicable did not end the matter. The *Mead* Court made explicit the bifurcated deference principle to which it had alluded in *Christensen*. The Court announced that "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires."<sup>317</sup> Whether that deference was appropriate for the ruling at issue depended on the "merit of [the] writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight."<sup>318</sup> The Court declined to undertake the *Skidmore* inquiry in the first instance and remanded the matter to the court of appeals.<sup>319</sup>

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311. *Id.* at 229. The Court noted that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *Id.* at 230.

312. *Id.*

313. *Id.* at 230-31 (emphasis added).

314. *Id.* at 231.

315. *Id.*

316. *Id.* at 231-32.

317. *Id.* at 234 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)) (citations omitted).

318. *Id.* at 235.

319. *Id.* at 238-39.

For the majority, there was nothing inherently suspect about applying a scaled version of the deference principle to the great variety of agency processes, forms, and enforcement schemes.<sup>320</sup> Its holding was premised upon a choice, as the Court put it, between respect for the "breadth of the spectrum of possible agency action" and a rule (*Chevron*) designed solely "to limit and simplify."<sup>321</sup> Eight Justices chose scaled deference over simplification and uniformity, placing their trust in lower court judges to make "reasoned choices [between *Chevron* and *Skidmore*], . . . the way courts have always done."<sup>322</sup>

Justice Scalia continued his lonely battle to retain a strong *Chevron* rule. In a strongly worded dissent, he argued that *Mead* "marks an avulsive change in judicial review of federal administrative action" and predicted that courts and regulatees "will be sorting out the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come."<sup>323</sup> He further predicted that as a result of the formalism inherent in the majority's opinion, we will see "an artificially induced increase in informal rulemaking."<sup>324</sup> "Buy stock in the GPO," he wrote, "[s]ince informal rulemaking and formal adjudication are the only more-or-less safe harbors from the storm that the Court has unleashed."<sup>325</sup> And, finally, Justice Scalia dismissed the "sliding scale" of *Skidmore* deference, which is dependent upon a host of factors, as "an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers."<sup>326</sup>

#### V. Conceptualizing Enforcement Legislation as Constitutional Construction

It overstates the matter to view the Rehnquist Court's recent Section 5 jurisprudence principally as an interference with legislative factfinding. Conceptualizing the Section 5 cases in this manner ignores the unique constitutional dynamic of the congressional enforcement power. Section 5 reposes in Congress the chief responsibility for administering the Fourteenth Amendment.<sup>327</sup> Congress carries out this administrative function by exercising a

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320. See *id.* at 236 (noting that Court has traditionally tailored its deference to fit type of administrative action involved).

321. *Id.*

322. *Id.* at 237 n.18.

323. *Id.* at 239 (Scalia, J., dissenting).

324. *Id.* at 246 (Scalia, J., dissenting).

325. *Id.* (Scalia, J., dissenting).

326. *Id.* at 250 (Scalia, J., dissenting).

327. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); see also *Ex parte Virginia*, 100 U.S. 339, 346 (1879) ("[W]hatever tends . . . to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if

broad power to "enforce" constitutional rights by any "appropriate" legislative means.<sup>328</sup> Just as an agency administers governing law by interpreting it, so must Congress render an interpretation of the Fourteenth Amendment when exercising its enforcement power.<sup>329</sup> This is a rather unusual interpretive function for Congress. In the normal course, Congress impliedly renders an interpretation of its own powers under, say, the Commerce Clause, simply by enacting statutes. Those statutes necessarily *affect* rights, but they do not *interpret* them in the same sense as enactments under Section 5. Put another way, Commerce Clause enactments say something about Congress's view of its own power (with which courts may or may not disagree), but unlike Section 5 enactments, which the Court has acknowledged may expand rights beyond judicial precedent, they do not purport to construe the substance of rights contained elsewhere in the Constitution.

*A. Toward Judicial Supremacy: The Voting Rights Act of 1965 and the Americans with Disabilities Act of 1990*

The Rehnquist Court has fundamentally altered the manner in which Section 5 enactments are reviewed. The Court has moved from strong, *Chevron*-like deference toward Congress's constitutional interpretations to a model of judicial supremacy. In this subpart, the Article examines two examples of the application of the deference principle to congressional enforcement statutes under the Civil War Amendments. The Voting Rights Act of 1965 and the Americans with Disabilities Act of 1990 stand historically at polar ends of the Court's Section 5 jurisprudence. The analysis will demonstrate that the Rehnquist Court, while feigning some degree of deference to Congress's Section 5 constructions, has firmly established the judicial supremacy model under Section 5. Although it appears to leave itself open to persuasion, the Court refuses to share the interpretive function with Congress under Section 5. Record review is part of the limiting equation the Court has adopted, but the core of the matter is the Court's refusal to share interpretive power under Section 5 with Congress.

*1. The Voting Rights Act of 1965*

The Voting Rights Act of 1965 "was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."<sup>330</sup> In *South Carolina v. Katzenbach*, the Supreme Court upheld various remedial provisions of the Act as "appropriate" measures against claims that they were beyond Congress's

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not prohibited, is brought within the domain of congressional power.").

328. *Ex parte Virginia*, 100 U.S. at 345.

329. See Cole, *supra* note 15, at 59-60 (stating that Supreme Court and Congress have concurrent responsibility to interpret constitutional provisions).

330. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

power under Section 2 of the Fifteenth Amendment. The "historical experience"<sup>331</sup> of the country, and the Court's own specific encounters, with rampant voting rights discrimination undoubtedly influenced the decision.

The Court noted that Congress, before it enacted the voting rights measures, had explored the problem with "great care."<sup>332</sup> Congress had also rationally concluded that its past remedial measures had failed to put an end to the "pervasive evil" of discrimination.<sup>333</sup> The Court itself was aware of the lengths to which some states had gone to avoid these measures.<sup>334</sup> Among the avoidance practices the Court had encountered in past litigation were "grandfather" clauses, procedural hurdles, improper challenges, racial gerrymandering, and discriminatory application of voting rights tests.<sup>335</sup> In addition to Congress's own findings, several courts had found a "pattern and practice" of unconstitutional discrimination.<sup>336</sup>

In response to this apparent evil, Congress enacted a complex, but geographically limited, scheme of remedial and prophylactic measures. Among other things, literacy tests and new voting regulations were to be suspended, and federal examiners were to be enlisted by the Attorney General to determine who would be qualified to vote. For the Court, the "ground rules" for determining whether these measures were valid under Section 2 of the Fifteenth Amendment were straightforward.<sup>337</sup> Congress needed only to demonstrate that it had used a "rational means" to prevent the evil of racial discrimination in voting.<sup>338</sup> The Court acknowledged that Congress was to be "chiefly responsible" for implementing the rights guaranteed by Section 1 of the Fifteenth Amendment and that the judiciary did not have the power to second-guess legislative enforcement choices.<sup>339</sup> The "basic test" was whether the means chosen were "appropriate."<sup>340</sup>

Under this reasonableness model of review, the Court had little difficulty upholding the provisions of the Voting Rights Act.<sup>341</sup> The Court noted that the provisions of the Voting Rights Act were consistent with similar exercises of

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331. *Id.*

332. *Id.*

333. *Id.* at 309.

334. *See id.* at 310 (noting state adoption of various literacy tests to prevent African-American citizens from voting).

335. *Id.* at 311-12.

336. *Id.* at 312.

337. *Id.* at 324.

338. *Id.*

339. *See id.* at 326 (outlining Congress's supremacy in implementing rights created in Section 1).

340. *Id.*

341. *See id.* at 325-26 (concluding that Congress has full power to remedy racial discrimination in voting).



congressional power in the past under the enforcement provisions.<sup>342</sup> Given the complexity of the problem and the apparent entrenchment of states opposed to securing voting rights for every citizen, the Court concluded that Congress had acted in "acceptable legislative fashion" using "relevant" evidence and "rational" means to effectuate the right to vote.<sup>343</sup>

Given the backdrop of historical evasion of Congress's efforts to secure equal voting rights, the Court was willing to give Congress extra leeway in construing the guarantees of the Fifteenth Amendment. This was so even though certain provisions of the Voting Rights Act arguably extended the bounds of the right to vote beyond the Court's prior precedents. South Carolina argued that the suspension of literacy tests in particular was beyond Congress's power, as the Court had previously held that literacy tests were not per se unconstitutional.<sup>344</sup> Under the circumstances, however, the Court concluded that the suspension of literacy tests, which had been used intentionally to deny the franchise to Blacks, was a "legitimate response" to the problem and that Congress had "permissibly" rejected the alternative of requiring a complete re-registration of voters.<sup>345</sup> Similarly, the Court upheld the provision suspending new voting regulations, reasoning that "the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."<sup>346</sup> Congress was indeed working in "unique circumstances" in 1965.<sup>347</sup>

## 2. *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990 (ADA) was intended to protect employees from workplace discrimination by employers, including the states, based upon disability.<sup>348</sup> The ADA requires that under certain circumstances, employers must make "reasonable accommodations" to physical or mental limitations of otherwise qualified individuals.<sup>349</sup> The ADA also prohibits employers from "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability."<sup>350</sup>

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342. *Id.* at 326 (citing enactments upheld by Court).

343. *Id.* at 328, 330.

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

345. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

346. *Id.*

347. *Id.* at 335.

348. 42 U.S.C. § 1201(a)-(b) (1994).

349. 42 U.S.C. § 12112(b)(5)(A) (1994).

350. *Id.* § 12112(b)(3)(A).

The basis for the ADA's waiver of state sovereign immunity was Section 5 of the Fourteenth Amendment.<sup>351</sup> By the time the Court addressed the ADA in *Garrett*, it had already made clear that its review philosophy had changed dramatically since the 1960s. The Court began its analysis of Congress's Section 5 power as it always has – by recognizing that "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence."<sup>352</sup> However, citing *City of Boerne*, the Court noted that "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."<sup>353</sup> Congressional interpretations like the ADA that seek, in the Court's view, to move beyond the Court's prior precedents must satisfy the "congruence and proportionality" standard.<sup>354</sup>

The Court then proceeded to the first step of its analysis – defining the constitutional right at issue. The Court had never specifically decided whether employment discrimination against the physically or mentally disabled violated the Equal Protection Clause. But in *Cleburne v. Cleburne Living Center, Inc.*,<sup>355</sup> the Court held more broadly that mental retardation was not a "quasi-suspect" classification under the Equal Protection Clause.<sup>356</sup> Thus, for purposes of judicial review, classifications based on mental disability need only satisfy the lenient "rational basis" test.<sup>357</sup> As the *Garrett* Court read *Cleburne*, so long as the states had a rational reason to treat the mentally disabled differently from other classes of people, the Court's precedents did not expressly condemn the states' choice.<sup>358</sup> Thus, states were not required to make accommodations for the disabled, "so long as their actions toward such individuals are rational."<sup>359</sup> As the Court put it, "They could quite hardheadedly – and perhaps hardheartedly – hold to job qualification requirements which do not make allowance for the disabled."<sup>360</sup>

Having already laid down the general contours of the constitutional right at issue, the Court proceeded to its second inquiry – "whether Congress identified a history and pattern of unconstitutional employment discrimination by the

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351. See *id.* § 12101(b)(4) (invoking Fourteenth Amendment as basis, in past, for ADA).

352. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001).

353. *Id.*

354. *Id.*

355. 473 U.S. 432 (1985).

356. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 435 (1985).

357. See *id.* at 446 (concluding that ordinance requiring permit for operation of home for mentally retarded should receive only rational basis review).

358. *Garrett*, 531 U.S. at 367 (noting that states can act on basis of people's distinguishing characteristics to treat people differently).

359. *Id.*

360. *Id.* at 367-68.

states against the disabled.<sup>361</sup> But the Court was not finished narrowing what it believed to be the appropriate remedial inquiry under Section 5. "Unconstitutional" in this context meant two things to the Court: first, that there had been judicially recognizable irrational discrimination against the disabled and, second, that the discrimination had been perpetrated by the state.<sup>362</sup> The first limitation came from *Cleburne*. The second limitation, the "state action" requirement, was in the Court's view implicit in Section 1 of the Fourteenth Amendment.<sup>363</sup>

Now the Court was finally prepared to examine Congress's legislative record. *Stare decisis* had limited the predicate under consideration to a pattern of discrimination by state actors that is constitutionally irrational.<sup>364</sup> This, of course, was not the predicate that Congress had proceeded upon in enacting the ADA. Thus, not surprisingly, the Court concluded that the legislative record of the ADA "fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."<sup>365</sup> Neither Congress's broad findings that disability discrimination was a pervasive social problem nor its specific examples of discriminatory conduct by state actors were deemed sufficient to satisfy the "congruence and proportionality" standard.<sup>366</sup> The former failed to adhere to the Court's narrow definition of Fourteenth Amendment protections, and the latter incidents of discrimination were rejected on the ground that the Court could not be certain that *Cleburne* would condemn them as a constitutional matter.<sup>367</sup>

Justice Breyer, in dissent, argued that Congress "reasonably could have concluded that the remedy before us constitutes an 'appropriate' way to enforce" the Equal Protection Clause.<sup>368</sup> He mistakenly, but understandably, concluded that the Court's "primary problem with [the ADA] is one of legislative evidence."<sup>369</sup> Justice Breyer even tried to meet the Court on what he

361. *Id.*

362. *See id.* at 368 (noting that Congress, in passing ADA, did not find irrational discrimination by states against disabled people).

363. *See id.* (noting that Fourteenth Amendment applies only to state action).

364. Defining the right at issue can often be dispositive. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court defined the question presented as whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. The formulation more or less predetermined the Court's answer.

365. *Bd. of Trs. v. Garrett*, 531 U.S. 365, 368 (2001).

366. *See id.* at 370-71 (dismissing Congress's record and accounts as inadequate to prove discrimination worthy of constitutional remedy).

367. *Id.* at 368-69.

368. *Id.* at 377 (Breyer, J., dissenting).

369. *Id.* (Breyer, J., dissenting).

thought to be its own terms by assembling an appendix which contained evidence of discriminatory treatment by state governments.<sup>370</sup> The majority criticized Appendix C to Justice Breyer's dissenting opinion, which it said consisted of "unexamined, anecdotal accounts" of adverse and disparate treatment of the disabled.<sup>371</sup> The Court then emphasized that Justice Breyer had misunderstood the "primary problem" with the ADA.<sup>372</sup> Disparate impact alone, the Court emphasized, was not enough under its precedents to render even state action "unconstitutional."<sup>373</sup>

To bring the matter full circle, the *Garrett* Court compared the ADA unfavorably with the Voting Rights Act of 1965, which the Court said had been enacted with "great care" and after thorough consideration of the problem of discriminatory voting practices.<sup>374</sup> Unlike the "detailed but limited remedial scheme" of the Voting Rights Act, the ADA struck the Court as little more than a legislative judgment that there should be a uniform, national mandate against disability discrimination.<sup>375</sup> Although the Court recognized that "Congress is the final authority as to desirable public policy," it concluded that the ADA's waiver of state immunity was not based upon proper considerations of judicially proscribed state discrimination.<sup>376</sup>

#### B. Putting Record Review in Its Place

With this historical perspective on judicial review of enforcement enactments, we may at last put record review in its proper place. As noted, commentators have been critical of the Rehnquist Court's Section 5 jurisprudence because it appears to invoke a heightened factual review in the context of Congress's exercise of an express constitutional power. Some liken this to the sort of "hard look" judicial review courts sometimes apply to formal agency actions.<sup>377</sup> When a court takes a "hard look" at agency action, it examines the agency's action on the basis of the whole record the agency has compiled in support of its decision. The ultimate question is whether, based on the extant record, the agency's action can be characterized as "arbitrary and capricious." This does not mean that courts can substitute their own judgments for the

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370. *Id.* at 389-424 (Breyer, J., dissenting).

371. *Id.* at 370.

372. *Id.* at 372.

373. *Id.* at 372-73.

374. *Id.* at 373.

375. *Id.* at 374.

376. *Id.*

377. *Cf. Buzbee & Shapiro, supra* note 4, at 119-35 (arguing that "legislative record" review in Section 5 cases is more rigorous than "hard look" review of administrative action).

agency's balancing of factors and policy choices. Rather, courts seek to ascertain whether agencies have considered all relevant factors and have engaged in sound, reasoned decisionmaking.<sup>378</sup> At the most basic level, the approach cannot be extrapolated to Section 5, commentators say, because Congress need not, and does not, compile the sort of legislative record that the Court requires of agencies under "hard look" review. Congress's findings of "fact," they say, must meet only ordinary empirical standards.<sup>379</sup>

In addition to agency analogies, the Section 5 cases might also be characterized as applications of the heightened record review the Court has applied to some "novel" and "implausible" regulations of free speech.<sup>380</sup> When the Court engages in heightened review of the predicate for speech restrictions, it examines the basis for Congress's determination that a "real" harm, like cable signal bleed, exists. When the Court reviews enforcement legislation, it examines whether a "real" harm exists such that remedial action is appropriate. Indeed, there are several parallels between heightened empiricism under Section 5 and the First Amendment. Both apply to arguably "novel" exercises of legislative power.<sup>381</sup> In both contexts, the Court declares a sphere of defer-

378. See, e.g., *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (underscoring that courts must consider whether agency action was based on consideration of relevant factors).

379. This position raises a long-standing debate as to whether one can usefully distinguish between matters of "fact" and issues of "law." See, e.g., Devins, *supra* note 12, at 1170 (arguing that "the law-fact divide is a shibboleth, something that the Court invokes to justify a conclusion about whether it or Congress should settle an issue, not something with independent analytical force"). For general discussions of the law/fact distinction, see Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985), who argues that federal appellate courts have a judicial duty to say what the law is but not to engage in constitutional fact review. See also Samuel L. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337 (1984) (suggesting that law/fact distinction should be scrapped to arrive at proper scope of congressional power under post-Civil War amendments). It may not go too far to suggest that simply "characterizing a matter as one of law or fact is no more than a conclusion, based upon an evaluation of pertinent policies, that one branch of government rather than another should make the decision in question." *Id.* at 396-97. This Article makes no effort to defend fact/law or any other labeling conventions. "Congruence and proportionality" cannot be described as an either/or standard. It is, like the *Skidmore* inquiry, a mixed bag of fact, law, policy-making, and legal interpretation.

380. See *supra* notes 88-94 and accompanying text (explaining Court's approach to regulation of speech cases).

381. As explained in Part III, although the enforcement powers under the Civil War Amendments have been available to Congress for more than 150 years, these powers have only recently been invoked on a somewhat regular basis. This is so principally because the Court has recently cast some doubt on the scope of the Commerce Clause and has limited Congress's ability to waive state sovereign immunity. More specifically, it is one thing to exercise the

ence to legislative power, only to scrutinize legislative predicates in an arguably unprecedented fashion.<sup>382</sup> Finally, in both areas, the Court purports to guard against legislative intrusions on the judicial power to define constitutional meaning by rigorously reviewing factual records.

Combining these analogies, we can characterize "congruence and proportionality" as a strain of "hard look" review by which the Court tests the "plausibility" of Section 5 enactments, judged, always, against the backdrop of judicial precedents. Whether the chosen analogy is "hard look" or heightened empiricism under the First Amendment, however, there is a fundamental difference between these empirical approaches and the Rehnquist Court's analysis of Section 5 legislation. The difference is rooted in the interpretive function Congress undertakes under Section 5 and the Court's judicial supremacy model for review of Section 5 enactments.

The primary Section 5 goalpost that the Court has shifted since the 1960s has been interpretive, not factual. What has changed since the 1960s and 70s is the Court's method of review of legislative interpretations of constitutional rights. What has caused Congress fits, and what threatens to scuttle a host of future Section 5 enactments, is not the legislature's inability to compile impressive records of its factual findings, but rather the Court's broad proscription of legislative constructions that do not comport with judicial stare decisis.<sup>383</sup> Because of this judicial philosophy, what a court ends up examining under Section 5 is not Congress's empirical predicate (for which there has often been voluminous support), but instead a narrow *judicial* predicate that in most, if not all, cases will fall beyond Congress's institutional capacity to demonstrate.<sup>384</sup> Congress has assumed, incorrectly, that Section 5 contains a measure of

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enforcement power to remedy or prevent racial discrimination, as in the Voting Rights Act of 1965, and quite another to invoke it to redress purported injuries to private property rights under the patent laws, as Congress purported to do in 1992. *See supra* Part III (discussing Congress's forced resourcefulness as result of its diminished commerce power).

382. There are good reasons for being wary of the Court's approach to "novel" enactments under the First Amendment. Heightened record review is a very indeterminate exercise of judicial power, as the discussion of the First Amendment area demonstrates. Still, one can conceive of a defense for greater scrutiny of legislative predicates when free speech is affected. *Carlene Products* itself indicates that more careful scrutiny is warranted when fundamental rights are involved, and the Court has always purported to exercise its independent review powers, even of factual matters, in First Amendment cases. These arguments cannot be extrapolated to Congress's express powers, however, which have long been upheld based upon a presumption that Congress had a factual predicate for the exercise of such powers.

383. *See infra* Part V.C.1 (explaining Rehnquist Court's strict analysis of Congress's Section 5 enactments).

384. Colker and Brudney refer to the Court's changing empirical requirements as "crystal ball" and "phantom legislation" approaches. Colker & Brudney, *supra* note 4, at 85.

interpretive flexibility and that a legislative construction of sufficient persuasiveness might satisfy the Court. The primary focus of commentators' criticism – that the Court is second-guessing Congress's factual predicates – is somewhat off target. This is not to say that the Court's recent empirical approach is not wanting, but simply that it is not the principal cause of legislative distress under Section 5.

It would overstate matters to contend that the Court need not concern itself with factual matters at all under Section 5. Even under the very deferential reasonableness standard the Court applied in the 1960s, Congress did not receive an empirical pass. It just so happened that the record associated with the Voting Rights Act of 1965 was substantial and, thus, able to support several early Section 5 enactments.<sup>385</sup> *South Carolina v. Katzenbach* demonstrates that a record may be quite convincing when coupled with the common sense of the era. Still, the early cases did not necessarily establish a high empirical threshold under the enforcement provisions. Although we cannot know for certain, it may have scarcely been necessary in 1965, given the history that preceded the Voting Rights Act and the general legislative and judicial awareness of the evil itself, to demonstrate empirically what everyone knew to be the case.<sup>386</sup>

The radical departure that has set Section 5 on its current path is doctrinal, not factual. If the question were whether Congress had a sufficient legislative record to demonstrate the existence of its chosen predicate – gender

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385. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966) (discussing "great care" and thoroughness Congress had demonstrated in exploring problem of racial discrimination in voting practices).

386. The Court has a checkered history with *de novo* review of factual predicates. Under the "constitutional facts doctrine," the Court engaged in rigorous review of agency action when the plaintiff alleged that the action violated some provision of the Constitution, as opposed to a federal statute or regulation, or when the fact at issue was determinative of Congress's power to enact the legislation at issue given the constitutional limitations on its power. See *Crowell v. Benson*, 285 U.S. 22, 60-61 (1932) (stating that courts must independently determine whether injury occurred on navigable waters of United States when agency's jurisdictional power to award compensation is dependent on that fact); *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) (stating that courts must independently determine citizenship of person ordered to be deported when constitutional power to deport depends on citizenship); see also John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055, 1061-63 (1932) (predicting that *de novo* review of "constitutional facts" in administrative proceedings would prove disruptive and unworkable). Professor Monaghan has noted that the constitutional facts doctrine had its origins in the "doctrine of jurisdictional fact" applied by the King's Bench. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 249 (1985). The approach was quickly abandoned by the Court, in large part based upon the recognition that judicial involvement on such a large scale would inhibit administrative flexibility. DAVIS & PIERCE, *supra* note 271, § 178.

or disability discrimination in the case of VAWA and the ADA, respectively, for example – then there is every reason to believe that many of the recently invalidated Section 5 enactments would have survived scrutiny. A close reading of the Section 5 cases indicates that the Court is not principally concerned that Congress has been remiss in compiling records.

In *City of Boerne*, the Court said that it would not have upheld the RFRA even if Congress had bothered to compile a record in support of the statute, rather than directly challenging the Court's constitutional precedent.<sup>387</sup> The Court struck down the VAWA provisions in *Morrison* despite overwhelming evidence of gender bias in the state criminal justice systems.<sup>388</sup> The substantial evidence in *Garrett*, compiled over the course of several years, that disability discrimination was a serious and prevalent societal problem, likewise failed to sustain the ADA.<sup>389</sup> The Court could ignore all of this evidence only by refusing to give any deference at all to Congress's construction of the Equal Protection Clause. Record review, properly characterized, is not a means of examining legislative predicates at all, but rather a tool the Court utilizes only after the outcome has been preordained by the application of judicial stare decisis to legislative interpretations of the Constitution.

### C. Enforcement, Construction, and Judicial Review

Section 5 contemplates that Congress will be the primary enforcer of the guarantees set forth in Section 1 of the Fourteenth Amendment.<sup>390</sup> The Court seems to acknowledge that in the course of enforcing the Constitution, Congress will sometimes construe or interpret the Constitution differently than the judiciary. Unfortunately, that bare recognition is as far as the Rehnquist Court has been willing to venture so far. At the moment, the Court lacks a principled method by which to review Congress's constitutional constructions under Section 5. In this Section, the Article analogizes the Court's analysis under Section 5 to its method of review of agency constructions under *Chevron*. In the next Section, the Article proposes that the Court follow the path it has charted in *Mead* when reviewing Section 5 legislation, opening itself to

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387. See *City of Boerne v. Flores* 521 U.S. 507, 531 (1997) (noting that Congress's lack of record in passing RFRA was not Act's most serious flaw).

388. See *United States v. Morrison*, 529 U.S. 598, 619-20 (2000) (noting that Government pointed to "voluminous congressional record" of "pervasive bias" against women in various state justice systems).

389. See *supra* text accompanying notes 250-53 (explaining Congress's finding of historical discrimination against disabled persons).

390. See *supra* notes 327-29 and accompanying text (explaining Congress's responsibility for administering Fourteenth Amendment).



deference where the legislature's construction of the Constitution is "persuasive."

### 1. The Section 5 Two-Step

This Article has already mentioned some of the historical similarities between the Court's review of agency constructions and its examination of Congress's early enforcement enactments. The path of the deference principle has been similar with respect to both types of constructions. Until its last few terms, the Court seemed to have accepted that "reasonable" constructions of governing law by the other branches are deserving of deference.<sup>391</sup> The winds of distrust – of Congress in both instances – have caused a substantial turn-about, with the Rehnquist Court now unwilling to afford strong deference to many agency constructions, while refusing deference to all legislative constructions under Section 5.<sup>392</sup> The dilemma with respect to each type of construction is the same: how to balance judicial deference to the interpretations of more expert and accountable institutions without abdicating the judicial duty under *Marbury* to "say what the law is." The Court has instructed lower courts to review agency interpretations under *Skidmore* for their persuasive effect, while examining Congress's interpretations under Section 5 for their "congruence and proportionality" in light of the Court's precedents.<sup>393</sup>

In structural terms, the Court's approaches to judicial review of agency and congressional interpretations are quite similar. The Court undertakes a two-step inquiry with respect to each form of interpretation. Under Section 5, at what might be called Step One, the Court seeks to identify the scope of the constitutional right at issue. This is roughly analogous to *Chevron*'s Step One inquiry, where courts are directed to determine whether Congress has spoken in the governing statute to the precise issue under consideration. Under Section 5, of course, the framers and ratifiers would be the logical first focus of inquiry; the courts would seek to determine whether the text, or perhaps history, speaks to the precise issue in question.

The Constitution rarely, if ever, speaks *precisely* to an issue under consideration, and its ambiguity is perhaps nowhere more evident than in the Fourteenth Amendment's guarantee of "equal protection." Those who drafted and ratified the Fourteenth Amendment did not address specific interpretive issues relating to the equality right, for example, but rather left these matters

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391. See *supra* Part IV.A (analyzing *Chevron* decision and its staying power).

392. See *supra* Part IV.B and Part V.A.

393. Although neither approach is without fault, only the *Skidmore* approach allows for shared constructive power.

to be fleshed out by Congress and the courts. Thus, it is appropriate that under Section 5, at Step One, the Court look to its own precedents to define the scope of the right to be protected. If the judiciary is to remain supreme in declaring the meaning of law, as *Marbury* suggests, then courts should not interpret Section 5 to countenance enactments whose sole purpose is to codify a reading of the Constitution that differs from the Court's own specific interpretation. This would be analogous to an agency interpretation that contradicts the plain language of a statute. As the Court stated in *City of Boerne*: When Congress legislates "against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis."<sup>394</sup> The problem, as we shall see, is that the Court takes a rather broad view of stare decisis under Section 5.

At Step Two, the Section 5 inquiry, like the *Chevron* inquiry, considers whether, in the absence of a definitive pronouncement on the meaning of the text with respect to a precise issue, there is reason to defer to the proposed construction. Under Section 5, of course, that construction emanates from Congress. The Court has applied the "congruence and proportionality" standard to all Section 5 enactments, whereas the deference principle under *Chevron* has been bifurcated, with formal interpretations rendered pursuant to express delegations afforded strong deference, and with informal interpretations – where delegation is less clear – provided a weaker form of deference under *Skidmore*. The "congruence and proportionality" standard applies even though the Constitution plainly delegates an interpretive power to Congress. The congruence standard, like the *Chevron*, *Mead*, and *Skidmore* standards, is intended to measure the degree of deference, if any, the Court will afford to a construction of governing law.

The only decision in which the Court treated the Step One inquiry as dispositive thus far was *City of Boerne*, the first precedent to announce the "congruence and proportionality" standard. It is the rare case in which Congress so blatantly disrespects clear judicial precedent.<sup>395</sup> If that occurs, however, then the Court may feel that it has no choice but to assert its power to "say what the law is." If the Court has rendered a decision on the precise issue that Congress has addressed in Section 5 legislation, then there can be only one supreme interpretation. So long as *Marbury* remains the law of the land, the

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394. *City of Boerne v. Flores*, 521 U.S. 501, 536 (1997).

395. *But see, e.g., Dickerson v. United States*, 530 U.S. 428, 443 (2000) (holding that *Miranda*'s warning-based approach to interrogation of accused was constitutionally based and could not be overruled by act of Congress).

power to render supreme interpretations must necessarily belong to the Court under Section 5.

As it has for agency interpretations, the difficulty arises when the text is ambiguous or silent, or when the Court has not spoken to the precise issue at hand. Inherent ambiguities in constitutional provisions pose some of the same fundamental separation of powers issues as ambiguities and gaps left in federal statutes. Who is to decide meaning where the Constitution leaves gaps? By what standard?

Congress, of course, does not labor under the same institutional limitations that restrict the judiciary's ability and willingness to interpret constitutional rights.<sup>396</sup> Just as agencies are to be the primary enforcers of ambiguous or silent statutes, Section 5 contemplates that Congress is to be the chief enforcer of the guarantees of the Fourteenth Amendment. The Constitution contemplates a measure of "gap filling" by Congress, and anticipates a degree of constructive deference from the judiciary.<sup>397</sup> As the Court seems to acknowledge, the power to enforce and administer the Fourteenth Amendment granted to Congress under Section 5 contemplates that Congress may extend rights beyond the confines of Supreme Court precedent. The Court has in fact afforded judicial deference to Congress's extra-judicial constructions on several occasions in the past – in *South Carolina v. Katzenbach* and *Katzenbach v. Morgan*, for example. These and other cases stand for, among other things, the proposition that even if the Court interprets the Constitution to prohibit only *purposeful* discrimination, Congress has the power under the enforcement provisions of the Civil War Amendments to expand the constitutional guarantee of equality to prohibit acts that have a disparate impact on certain disadvantaged classes.

During the heyday of judicial deference in the 1960s, Section 5 and the other enforcement powers conceptually stretched as far as the Necessary and Proper Clause would take them. Just as agency interpretations under *Chevron*'s Step Two inquiry needed only to be reasonable, so too did congressional action need only a rational explanation for its enactments under the Civil War Amendments to be deemed "appropriate."<sup>398</sup> But just as the Rehnquist Court

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396. See Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 155 (1997) (noting that courts are ill-suited to make economic judgments); Post & Siegel, *supra* note 158, at 467-73 (noting Court's self-acknowledged institutional limitations); see also Cole, *supra* note 15, at 65-66 (noting similarities in institutional considerations under *Chevron* and Section 5 and suggesting that Court reject only legislative interpretations that are "predicated on an unreasonable interpretation of the substantive constitutional liberty enforced").

397. See Post & Siegel, *supra* note 158, at 467 (noting that judicial restraint often prevents courts from intruding on legislative discretion).

398. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court stated, with respect to

has diminished the domain of *Chevron*, it has, by only the slightest majority, dramatically altered the Step Two inquiry under Section 5. It is no longer the case that the Section 5 power, even as a conceptual matter, parallels the Necessary and Proper Clause. No longer must legislative constructions under Section 5 only be reasonable to receive strong judicial deference. Indeed, after *Garrett*, it is difficult to discern any degree of deference to congressional efforts to fill enforcement gaps that exist under the Fourteenth Amendment.<sup>399</sup> By collapsing everything into the Step One inquiry, where *stare decisis* reigns supreme, the Rehnquist Court has treated legislative constructions as wholly subject to the grace of the judiciary's independent judgment.

## 2. Models for Sharing Constructive Power Under Section 5

As it began to reconsider the Section 5 power in 1997, the Court could have chosen any one of three models for judicial review of legislative constructions at Step Two of the Section 5 inquiry.<sup>400</sup> It could have, as it did in the 1960s and 1970s, deferred to any reasonable or rational legislative construction. Instead, it might have chosen to exercise a greater degree of independent judgment, and uphold only those constructions that meet some higher standard, say of persuasiveness. The third option, and the one the Court actually chose to apply, was the judicial supremacy model, under which the Court refuses deference to any legislative constructions that do not satisfy an aggressive version of judicial *stare decisis*.

Although it invokes Section 5's history, the Court has essentially abandoned all pretense of following the respectful approach of *South Carolina v. Katzenbach* and *Katzenbach v. Morgan* regarding the scope of the enforcement powers under the Civil War Amendments. It is one thing to acknowledge the spirit of those decisions, as the Court routinely has in recent Section 5 cases. It is quite another to translate the deference those precedents respected into current practice. For at least five members of the Rehnquist Court, that is a level of deference that chafes too strongly against *Marbury*'s core. Heightened record review under Section 5 is a manifestation of the Court's discomfort with a regime of shared constructive power.

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Congress's exercise of its power under Section 2 of the Fifteenth Amendment: "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.* at 653.

399. See Post & Siegel, *supra* note 158, at 467-68 (noting possibility of "enforcement gap" under Fourteenth Amendment).

400. For a discussion along similar lines, see McConnell, *supra* note 396, at 173. I do not even consider the possibility that Congress might exercise *plenary* power under Section 5. One thing the framers of the Fourteenth Amendment did make clear was that Congress's power was not intended to be plenary. See *id.* at 174-76 (discussing intentions of framers of Fourteenth Amendment).

There may be good reasons for refusing to apply the strong deference of the 1960s to Congress's more recent Section 5 enactments. Again, a useful parallel might be drawn between the Court's Section 5 model and the Court's recent decision to refuse strong deference to most agency interpretations, applying instead the *Skidmore* model. First, there is the question of textual authority to bind the courts to Congress's interpretations. Although Congress undoubtedly exercises an interpretive function under Section 5, there is little, if any, support for the notion that Congress's constructions were intended to carry the "force of law." The delegated power simply was not so broad, although judicial review of Section 5 and other enforcement enactments during the "exceptional circumstances" of the 1960s came very close indeed to accepting legislative constructions as the law of the land.

Given the historical and political context, it is not at all surprising that the Court gave Congress such wide latitude in the early years. As it has in *Mead*, the Rehnquist Court has now taken a second look at the scope of deference owed to other interpreters. With respect to agencies, the Court does not trust Congress to delegate carefully to agencies or to oversee their work, which has spilled into ever more novel areas.<sup>401</sup> With respect to Congress, the Court does not trust the legislature to refrain from burdening the states unnecessarily through its own interpretation of the substantive meaning of the Constitution.

Second, again as in *Mead*, "informal" constructions generally merit less weight than those that are promulgated through formal processes.<sup>402</sup> It may seem odd to characterize the legislative process as informal. We envision as part of that process formal statements for the record, witnesses, hearings, investigations, and even the provision of some constitutional protections. However, as commentators and scholars have noted, the legislative process shares many of the characteristics of informal agency processes.<sup>403</sup> Many commentators critical of the Court's approach under Section 5 have noted, in particular, that Congress is not required to compile a formal record of its proceedings and in a great many instances does not do so.<sup>404</sup> Moreover, Congress relies to a large extent on informal contacts, institutional experience, and

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401. Changes in telecommunications, health care, and the environment, to name only a few, have launched agencies into more and more complex policymaking.

402. See *supra* notes 298-313 and accompanying text (discussing formal and informal agency rulemaking).

403. See, e.g., Bryant & Simeone, *supra* note 4, at 383-89 (noting Congress's historical dependence on information not found in record to reach its legislative judgments); see also Devins, *supra* note 12, at 1182-87 (noting that information from informal sources can find its way into legislative records).

404. See Buzbee & Shapiro, *supra* note 4, at 94-95 (noting that Congress is not required by Constitution to preserve legislative process on record).

range of other informal processes in making its policy choices.<sup>405</sup> Similarly, when an agency engages in less formal proceedings, like notice-and-comment rulemaking, it is not required under the APA to produce a formal record of its proceedings or to provide a detailed explanation of its decision.<sup>406</sup> Nevertheless, an agency's decision or interpretation may stand a better chance of surviving judicial review if voluminous documents and detailed factual findings are presented to the court. In these informal settings, courts seek to ensure that careful, deliberative, and logical decisionmaking has taken place.

Finally, on a more general level, there may be merit to the Court's concern that granting so much leeway to Congress under Section 5 diminishes or undermines *Marbury*'s core principle. Recall that the same argument has been made against *Chevron* from the beginning.<sup>407</sup> Many years of experience, along with an increasingly complex regulatory environment, caused the Court to reconsider *Chevron*'s premises. Similarly, the Court has both precipitated and witnessed an expansive use of the Section 5 power. As we have seen, the Court is particularly protective of its interpretive function when it reviews exercises of legislative power it deems to be "novel."<sup>408</sup> The Voting Rights Act of 1965, which spawned the bulk of the Court's pronouncements concerning the scope of the enforcement powers under the Civil War Amendments, did not strike the Court as a novel exercise of power. Indeed, the Court was keenly aware of the significant problem of voting discrimination; it had itself presided over disputes demonstrating the strength of Southern resolve to thwart the will of Congress in enforcing the Fourteenth and Fifteenth Amendments.<sup>409</sup> The Patent Remedy Act of 1992 does not stand on the same historical footing. And while the VAWA and the ADA raise substantial concerns of discriminatory treatment based on gender and disability, those statutes suffered from bad timing – they reached the Court after Congress had poisoned the well with the RFRA.

There may be cause to reexamine the scope of the Section 5 power in light of these concerns. But upon reexamining the *Chevron* doctrine in *Mead*, the Court did not simply switch from strong deference to no deference at all. The *Mead* doctrine or model is a far more nuanced approach to judicial review of constructions than is the judicial supremacy model the Court has chosen under Section 5. In the next Part, this Article urges the Court to apply a similarly flexible approach to Congress's interpretations under Section 5.

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405. See Pilchen, *supra* note 379, at 362-69 (describing legislative process of fact-finding).

406. See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L. J. 38, 61 (1975) (noting that agencies must deal with unwieldy records).

407. See Sunstein, *supra* note 11, at 2074-75 (describing *Chevron* as counter-*Marbury*).

408. *Supra* Part II.B.

409. *Supra* notes 334-36 and accompanying text.

*VI. Respecting Deference, Reviving Dialogue: The Enforcement of Constitutional Text*

The path of judicial supremacy the Court has chosen under Section 5 is not inevitable. Nor is it necessarily permanent; "congruence and proportionality" as applied in recent cases commands a narrow five-to-four majority on the Court, and there may well be new appointments to the Court in the near term. In the meantime, as *Mead* teaches, the Court is not stuck with only two choices – judicial supremacy or the near-abdication of judicial review. This Article proposes that it is possible under Section 5 to respect simultaneously a sphere of legislative deference and *Marbury*'s essence. Indeed, the Court demonstrated as much in *Mead*.

*Chevron*'s shrinking domain suggests that rigid review of interpretations using uniform deference rules is often an unsatisfactory solution to separation of powers concerns that arise when the branches share interpretive power. Rather than holding Congress to a questionable version of judicial stare decisis under Section 5, the Court might choose instead to respect Congress's constructions under a different model of review, one that allows greater judicial probing of the facets of interpretation that seem to matter most – the interpreter's thoroughness, consistency, logic, and care.<sup>410</sup> Naturally, as part of that review, the Court might examine the record submitted in support of Congress's factual predicate.<sup>411</sup> The fundamental difference proposed here is that the predicate examined would belong to Congress, not the Court.

"Congruence and proportionality" should be applied in a manner that gives Congress an opportunity to convince the Court of the "persuasiveness" of its construction. In order for something like *Skidmore* deference to be applied to Congress's constructions under Section 5, however, the first thing that must occur is a change in judicial attitude toward the sharing of power under the Fourteenth Amendment. The Court refuses to share power because it is convinced that judicial supremacy is somehow required by the Constitution. Another large concern, which arises in cases like *Garrett*, is that Congress will interfere with traditional state functions by incongruously waiving

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410. Although it is early, courts that have applied the *Mead/Skidmore* model appear to appreciate its flexibility. See, e.g., *Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ.*, 272 F.3d 1155, 1164 (9th Cir. 2001) (recognizing that fair amount of deference was due under *Mead* to agency's interpretation); *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1131 (D.C. Cir. 2001) (noting that Secretary's interpretation is entitled to deference "given her official duty, specialized expertise, investigatory knowledge, and other experience relevant to carrying out the purposes of the Act"). But see *U.S. Freightways Corp. v. Comm'r*, 270 F.3d 1137, 1141 (7th Cir. 2001) (refusing deference to Commissioner's interpretation of deduction that court found unpersuasive).

411. See *supra* notes 385-89 and accompanying text (explaining importance of legislative record when passing Section 5 legislation).

state immunity. Whatever ambiguities persist in the framing and ratification of Section 5, two things are clear: first, that Congress, not the Court, was to be chiefly responsible for administering the Fourteenth Amendment and, second, that Section 5 was specifically intended to burden the states to a degree by expanding Congress's power to enforce the Constitution.<sup>412</sup> Accordingly, insofar as the Court refuses to share the constructive function and bases that refusal on its own notions of federalism, it is doubly wrong. *Marbury* does not entitle the Court to prohibit legislative constructions under Section 5 by stretching *stare decisis* any more than it entitles courts to invalidate agency constructions solely on the ground that the courts would have rendered a different construction had the matter been presented to the courts in the first instance.

The Rehnquist Court's invocation of *stare decisis* as the defining principle for Section 5 enactments is fundamentally at odds with the Court's own recent judicial philosophy. Even when it does decide constitutional cases, the Court tends not to decide very much. The Court practices a brand of "judicial minimalism" by which it favors narrow decisions over broad doctrinal pronouncements.<sup>413</sup> There are many sound reasons for exercising this sort of judicial conservatism. As a matter of constitutional power, the Court may only decide the case before it. The Court also adjudicates issues under certain institutional limitations. Courts are not well equipped to discern or predict broad social trends or to find facts relating to them. Thus, constructs like "rational basis" represent a judicial admission of sorts that the third, and "least dangerous,"<sup>414</sup> branch is not equipped as an institution to replace or supersede complex democratic processes. These same basic structural and democratic considerations led the Court to defer, under *Chevron*, to the reasonable interpretations and "policy" choices of executive agencies.<sup>415</sup>

The effect of this minimalism, however, is that the Rehnquist Court leaves many questions unanswered. Thus, the Court generally reads its own precedents narrowly, not as dispositive of a broad swath of issues. The approach is attractive to the Court in part because it minimizes judicial errors.<sup>416</sup> Judicial minimalism is also democratically attractive because by not

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412. See Thomas W. Beimers, *Searching for the Structural Vision of City of Boerne v. Flores: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 26 HASTINGS CONST. L.Q. 789, 795 (1999) (explaining purpose of Civil War Amendments); see *Ex parte Virginia*, 100 U.S. 339, 345 (1879) ("It is the power of Congress which has been enlarged.").

413. See *supra* note 17 and accompanying text (stating that Court prefers to settle as little as possible in constitutional cases).

414. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986).

415. *Supra* notes 276-79 and accompanying text.

416. See SUNSTEIN, *supra* note 17, at 4 (noting reduction of risk Court takes when it refuses



foreclosing future arguments, it leaves open channels for future dialogue and debate.<sup>417</sup>

Unfortunately, the Court has followed precisely the opposite approach under Section 5, in which, with respect to Congress, it treats merely relevant judicial precedents as settling the matter of constitutional substance for all time. A decision that classifications based upon mental retardation do not require heightened judicial scrutiny does not settle whether classifications based on, for example, physical impairment should be. This is a gap in enforcement that Congress has the power to fill.

Gaps in existing constitutional doctrine, and the institutional limitations under which courts must labor, leave much room for executive and legislative interpretation of governing law. As agency constructions and other enforcement actions are interpretations of statutory text, so too are Congress's enactments under Section 5 constructions of constitutional text. These constructions are made in furtherance of official legislative duties and are based on more specialized experience and broader investigations and information than is likely to come to the attention of the courts. They no more change the substance of constitutional text than an agency's interpretation with which the Court happens to disagree changes the text of the federal statute being administered. Furthermore, if the states, or their people, do not agree with the legislative construction of rights under Section 5, the democratic process, imperfect as it is, exists to correct mistakes and congressional overreaching.

With a basic change in judicial perspective, application of a *Skidmore*-type deference to Congress's constitutional constructions under Section 5 would not represent a radical proposition. In some sense, reviewing the logic, care, and thoroughness of Congress's enactments under the Civil War Amendments is what the Court has been doing all along. This is not simply a matter of parsing legislative records. Although the Court noted the great care with which Congress had acted in compiling a record of voting discrimination,<sup>418</sup> validation of the Voting Rights Act was not simply about the volume of the record. It was the logic and consistency of Congress's position that the Court found inescapable. Congress's purpose – to rid the country of the evil of racial discrimination in voting – was clear. Its enactment was consistent with prior uses of the enforcement power under provisions of the Civil Rights Amendments.<sup>419</sup> Faced with Southern intransigence in the form of poll taxes

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to speak broadly on complex issues).

417. *Id.*

418. See *supra* note 334 and accompanying text (noting care with which Congress had explored racial discrimination in voting).

419. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966).

and numerous other voting restrictions, Congress acted decisively in what the Court deemed an "inventive" manner.<sup>420</sup> Eschewing case-by-case litigation, for example, as an ineffective weapon, Congress instead prescribed remedies that did not require prior adjudication. Congress also limited the scope of the remedial provisions to specific geographic areas and used relevant tests and devices to determine where the remedial focus should lie.<sup>421</sup> All of this, not simply the state of the legislative record, demonstrated that the Voting Rights Act was an appropriate response to a defined evil.

Application of a *Skidmore*-type deference principle under Section 5 carries the same primary risk that it does when applied to agency interpretations – the difficulty for the interpreter to know, in advance, whether an enactment will meet the Court's notion of persuasiveness. But under a *Skidmore* model, at least Congress's construction will be considered on the merits, rather than decided in all cases at Step One, based upon a rigid application of strict rules of *stare decisis*. Neither an executive agency nor Congress has the right to insist on a rule of decision that guarantees deference for any and every interpretation. Particularly when we are talking about interpreting the Constitution, there is good cause to examine carefully the reasons advanced for an expansion of substantive rights. So long as the model of review does not stack the deck against all interpretations rendered by Congress, *Marbury* permits the judiciary to call upon Congress to justify its constructions.

In some cases, it may well be that Congress will fail to persuade the Court, based on the thoroughness of its work, the logic of its construction, and the consistency of its enactment with other exercises of Section 5 power, that an interpretation is entitled to deference. The Patent Remedy Act of 1992 is a good example of an enactment that, at least based upon the record assembled and the reasons advanced, was a very close case.<sup>422</sup> *Florida Prepaid*, in which the Court invalidated the Act, demonstrates how the Court might apply a *Skidmore* model under Section 5.

The Patent Remedy Act was a rather unique exercise of Congress's Section 5 power. Congress had never before used the Section 5 authority to enact remedial legislation aimed solely at property rights. Thus, the Court may have viewed the Patent Remedy Act as a "novel" exercise of the Section 5 power. Congress identified the transgressing conduct as the possibility that states would or might interfere with private patent rights, specifically by interfering with those rights and then invoking sovereign immunity to insulate themselves

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420. *Id.* at 327.

421. *Id.* at 328-30.

422. See *supra* note 214 and accompanying text (discussing dissent's finding of substantial record in Patent Remedy Act).

from suit. To be sure, the *Florida Prepaid* Court found little evidence to support the claim that this evil actually existed – it was, after all, a legislative prediction of harm.<sup>423</sup> But the Court also took aim at the logic of Congress's construction of the Due Process Clause as well. Mere interference with property rights does not offend the Due Process Clause. Rather, the clause focuses on inadequate process or remedy. How could the states be violating the Due Process Clause if they were, in fact, providing remedies to injured patent owners for infringements? For all that appeared, states were not cloaking themselves in sovereign immunity or otherwise denying remedies for infringements. Or at least Congress had not presented a strong case that states were misbehaving in that manner. In the Court's view, Congress barely paused to consider the matter of state remedies at all.<sup>424</sup>

The Court went on in *Florida Prepaid* to criticize Congress for failing to limit its inquiry to intentional or reckless infringements.<sup>425</sup> The Court itself has interpreted the Due Process Clause to proscribe only intentional deprivation of rights, although it has never done so in the context of patent rights.<sup>426</sup> Congress, by contrast, has permitted recovery under federal law even when the infringement is inadvertent or negligent.<sup>427</sup> Because the Supreme Court did not have a precedent on the precise issue in question, there was room under Step Two of its analysis for some measure of deference. One interpretation of the decision is that the Court was not persuaded, based on the record before it and the history of the Due Process Clause, that there was a "plausible argument" that the Due Process Clause called for a uniform national remedy for state patent infringements.<sup>428</sup> That purpose, the Court said, was not persuasive under Section 5, although it was a valid consideration under Article I.<sup>429</sup>

In rejecting Congress's interpretation of the Due Process Clause, the *Florida Prepaid* Court emphasized that the "lack of support in the legislative record is not determinative."<sup>430</sup> The absence of factual support was, of course, determinative in the sense that Congress had not presented evidence to support

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423. See *supra* text accompanying notes 209-13 (discussing Court's conclusion that Congress had failed to identify more than "speculative harm").

424. See *supra* text accompanying note 212 (noting that Congress hardly explored availability of state remedies).

425. See *Fla. Prepaid Post Secondary Educ. Expenses Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 643 (1999) (criticizing Congress's failure to focus on intentional patent infringement).

426. See *Daniels v. Williams*, 474 U.S. 327, 334 (1986) (finding that negligent conduct does not violate due process).

427. See 35 U.S.C. § 271(a) (1994) (defining patent infringement very broadly).

428. *Fla. Prepaid*, 527 U.S. at 647.

429. *Id.* at 629.

430. *Id.* at 646.

the Court's own interpretation that the Constitution condemned only intentional violations with wholly inadequate remedies. The information upon which Congress based its interpretation was relevant, however, to the thoroughness with which Congress had considered the matter and to the logic of the proposed remedy. As the Court has repeatedly emphasized, under Section 5, "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one."<sup>431</sup> If the Court is to be taken at its word, Congress might have persuaded the Court to expand constitutional protection if the problem of state patent infringement appeared to be severe.

There is nothing inherently wrong with examining the legislative record as part of a larger examination of the totality of the circumstances surrounding Congress's interpretation of the Constitution. How else is Congress to persuade the Court to follow its interpretation of constitutional rights? Like an agency hoping for respect for an informal interpretation, Congress and its advocates must gather and present a basis – including an empirical basis – for persuasive power. From the beginning, the Court has reviewed each of Congress's enforcement enactments "with reference to the historical experience which it reflects."<sup>432</sup>

In cases like *Morrison* and *Garrett*, however, it seems clear that the Court flatly refused to be persuaded, despite voluminous evidence that discrimination of grave concern to Congress, and presumably the nation, had occurred and continued to occur. The VAWA and the ADA fell not from a quantitative, but from a qualitative, record deficiency. The Court locked Congress into an interpretation of the Equal Protection Clause at Step One, then chastised it at Step Two for failing to compile a record to support the Court's own view of the scope of the equality guarantee. Or, more accurately perhaps, the Court collapsed Step One and Step Two, thereby depriving Congress of its chance to persuade the Court.

The Court's approach surely must leave Congress scratching its head. For all the Court's criticism in *Garrett* of the congruence and proportionality of the ADA, the Court never explained why Congress's construction of the Equal Protection Clause was not persuasive. Congress was thorough in its work, finding widespread discrimination against the disabled across the nation, and specifically by the states. The logic of its position that negative stereotypes, fear, and prejudice were irrational bases upon which to make employment decisions was arguably supported by the Court's own precedent in *Cleburne*. Only a disingenuous reading of *Cleburne*, and a narrow view as to what evidence "counts" under the congruence and proportionality standard, could lead

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431. *City of Boerne v. Flores*, 527 U.S. 507, 530 (1997).

432. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

the Court to withhold all deference. The Court should at the very least explain its position that the only interpretation of the Equal Protection Clause that has merit is one that narrowly condemns only the most irrational discrimination by state officials. It surely must explain why only instances of discrimination that have been found, or likely would be found, to violate judicial notions of constitutional mandates can be condemned under the Equal Protection Clause.

The Court had no good answer in *Garrett* to why a prophylactic measure aimed at negative stereotypes and the like was due no judicial respect whatsoever. The most that can be said is that the Court simply would have decided the matter differently if the case had come before it. That is not a sufficient reason for withholding deference from an interpretation, even under the less deferential *Skidmore* standard. The same criticism applies to the Court's decision in *Morrison*, in which the Court, faced with a massive legislative record, went out of its way to narrow the contours of Congress's authority under Section 5 to remedying or preventing only the most obvious and judicially sanctionable state action. Both the VAWA and the ADA were thoroughly considered enactments with logically sound premises.

Returning to the agency analogy, it is hard to imagine that a court would invalidate something similar to either the ADA or the VAWA if an agency announced them as policy, even in an informal proceeding, and presented a comparable record. The thoroughness and care with which Congress attacked the problems of disability and gender bias are beyond dispute. Their logic, in addition, appears just as strong as that offered in support of the Voting Rights Act. In upholding the Voting Rights Act, the Court recognized that discrimination does not always take the most obvious forms and that Congress sometimes has to expand the net to capture the more subtle forms of bias.<sup>433</sup> Congress reasoned in the ADA and the VAWA that discrimination often takes the form of systemic disparate impact resulting from negative attitudes and stereotypes. Although it is difficult to imagine ever duplicating the historical experience by which the Voting Rights Act was measured, the ADA and the VAWA came very close and are consistent with Congress's prior uses of the constitutional enforcement power. These were prophylactic measures intended to avoid the very history that necessitated the Voting Rights Act.

One might argue that agency construction and congressional construction are fundamentally different, that *Marbury* more closely guards the Court's power to construe the Constitution than other forms of governing law. Agency constructions are always subject to legislative supremacy, while Congress's constructions must be subject to something else. The "something else" does not have to be judicial supremacy, however. The *Skidmore* approach leaves

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433. See *id.* at 355 (Black, J., concurring and dissenting) (noting Congress's power to protect right to vote against subtle discrimination).

*Marbury* intact, and the ultimate determination of the law's substance lies with the courts. The four members of the Court who were persuaded by Congress's interpretation of equality in the ADA, ADEA, and VAWA understand this. The five in the majority who consistently invalidate Section 5 enactments cannot be persuaded to share constructive power regardless of Congress's thoroughness, consistency, and logic.

Unfortunately, that means that Congress and the Court cannot be "partners" in the enforcement of the Equal Protection Clause, the Due Process Clause, or any other constitutional guarantees administered under the enforcement provisions.<sup>434</sup> It means, in effect, that there can be no dialogue between the judicial and legislative branches concerning how to define the substance of constitutional rights. No matter how hard Congress works to document and explain more subtle forms of discrimination, a majority of the Court will refuse to be informed, freezing the meaning of the Constitution where it now stands. No matter how ingrained gender bias becomes in the state criminal justice system, the Court will cling to its outdated precedents limiting remedial measures to the conduct of state actors. "Inventive" enactments like the Voting Rights Act of 1965 can have no modern counterparts because, under current Section 5 precedents, *stare decisis* forbids Congress from all expansion and experimentation.<sup>435</sup>

This Article does not suggest that the Court simply return to an interpretation of Congress's Section 5 power that is coextensive with the Necessary and Proper Clause. If Section 5 is to be used to protect patent rights and the like, perhaps a heightened judicial review is in order to check the growth of the power. A reversion to *Katzenbach v. Morgan* is unlikely to occur in any event, at least not without some significant additional doctrinal changes. In a sense, the scaling back of Section 5 is the inevitable result of the Court's corralling of Congress, first by eliminating its power to waive state sovereign immunity under Article I, then diminishing – or at least hinting at diminution of – the commerce power. Congress could react by more judiciously exercising the commerce power. Insofar as Congress chooses instead to rely on Section 5, it can expect a vigilant Court.

The administrative analogy proposed in this Article is simply that – an analogous model suggested for use in reviewing Congress's enforcement power under Section 5 and the other Civil War Amendments. As an analogy, it is obviously imperfect. It does not, for example, fully solve the dilemma of the Court's heightened legislative record requirement. If Congress is institu-

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434. See Post & Siegel, *supra* note 158, at 510-22 (discussing lack of partnership between Congress and Court following Congress's entry into forum of enforcing equality values).

435. See *supra* Part V.B (discussing Court's reliance on *stare decisis* in rejecting empirical record of Section 5 legislation).

tionally incapable of compiling sufficient records, either through lack of resources or lack of will, the Court's "congruence and proportionality" standard is an empty promise. There is every reason to believe that Congress is capable of compiling persuasive records, as the VAWA and ADA enactments demonstrate.<sup>436</sup> Whether it has the will to continue to do so is another matter.

Part of the appeal of using the *Skidmore* model under Section 5 is that it does not require a complete retreat from the Court's current practice. A limited deference principle permits the Court to continue to examine any record materials Congress or its advocates may submit and encourages the Court to do so without limiting the scope of its inquiry so as to preclude the possibility of deference to legislative constructions. Paying attention to *Skidmore* and *Mead* at least points out the inconsistent state of the deference principle as applied by the Rehnquist Court. As things now stand, agencies, which do not interpret under any express constitutional grant, are always afforded the opportunity to persuade a court of the validity of their constructions, while Congress, which legislates under Section 5's grant of power, is denied any similar opportunity across the board.

### VII. Conclusion

In the name of *Marbury*, the Rehnquist Court has reclaimed the power to "say what the law is." As executive agencies have seen their broad authority to render interpretations of federal statutes retracted in *Chevron*'s shrinking domain, Congress's enforcement powers under Section 5 have been drastically limited in a recent series of cases. The judicial supremacy model has taken firm hold under Section 5, as the Court has emphatically asserted that the power to "say what the law is" belongs exclusively to the judicial branch. However, whereas agencies are always granted the opportunity to persuade the courts of the merit of their interpretations, the Court is not currently open to persuasion by Congress.

This Article analogizes Congress's power to enforce the Constitution under Section 5 to agency enforcement of federal statutes. Unlike most commentary, this Article approaches the current Section 5 dilemma not as an empirical quagmire, but as a recurring difficulty in which courts share the interpretive function with other departments of government. The approach this Article has taken attempts to meet the Rehnquist Court on its own terms. The Court has been applying a two-step inquiry under Section 5 that roughly resembles the *Chevron* two-step inquiry applied to agency interpretations of federal statutes. The fundamental difference has been the Rehnquist Court's

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436. See text accompanying *supra* notes 236 and 258 (noting vast legislative records backing these statutes).

unwillingness to be persuaded under a *Skidmore*-type analysis that Congress's construction of the Constitution is entitled to respect and some measure of deference. Eight justices are willing to listen to agency explanations, while five members of the Court selfishly refuse to share interpretive power under Section 5 on the ground that Congress is bound by a broad notion of *stare decisis* to follow the Court's precedents under the Equal Protection Clause. By refusing to be persuaded, the Court cuts off any dialogue with Congress concerning widespread societal problems like gender and disability discrimination. The judicial-legislative partnership under Section 5 has served the nation well. It is difficult to imagine where we would be today if the Rehnquist Court's philosophy had driven prior Courts or prior Congresses. The Section 5 partnership is in imminent danger of being extinguished in *Marbury*'s name. This Article contends that there is room under the Constitution for both judicial supremacy and shared interpretive power. The Court need look no further than *Chevron*'s path to verify that this is so.