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REMANDING TO CONGRESS: THE SUPREME COURT'S NEW "ON THE RECORD" CONSTITUTIONAL REVIEW OF FEDERAL STATUTES

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In recent years, the fate of federal statutes has increasingly turned on the contents of their formal legislative records. The Supreme Court has shown a new willingness to find statutes unconstitutional because their legislative records do not support the factual judgments that justify congressional action. In this Article, Professors Bryant and Simeone trace the development of the trend toward increased judicial scrutiny of legislative records in recent Supreme Court rulings on the constitutionality of federal statutes. They then critique the Court's new approach, arguing that it is not only inconsistent with precedent, but also fundamentally ill advised, most importantly because it constitutes a constitutionally suspect intrusion on congressional investigative and legislative procedures. Finally, the authors consider whether heightened judicial review of the legislative records of federal statutes is a defensible means of preventing Congress from overstepping the constitutional bounds of its authority. Concluding that this is an inappropriate way to restrain Congress, the authors briefly discuss alternative methods of ensuring that congressional action has a legitimate constitutional basis.

INTRODUCTION

In January 2000, the United States Supreme Court invalidated the provisions of the Age Discrimination in Employment Act (ADEA) authorizing private persons to sue their state employers in federal court.[1] The Court's opinion in *Kimel v. Florida Board of Regents* relied heavily on Congress's failure to find explicitly, or to compile a legislative record evidencing, a widespread pattern of age discrimination by the States.[2] *Kimel*'s result and rationale closely parallel the Court's June 1999 decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[3] which struck down the Patent Remedy Act's provision authorizing private suits against nonconsenting States in federal court.[4] The Court reasoned that the formal legislative re-

1 Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 650 (2000).

2 *Id.* at 648-50. *See infra* text accompanying notes 148-61 (discussing the Court's decision in *Kimel* at greater length).

3 527 U.S. 627 (1999).

4 *Id.* at 647-48.

cord provided inadequate support for Congress's prediction that states will, as they become more involved in researching marketable technologies, increasingly deprive patent owners of property rights guaranteed by the United States Constitution.[5]

Kimel and *Florida Prepaid* are only the latest in a series of decisions over the past decade in which the Court has carefully scrutinized the contents of the formal legislative record in evaluating the constitutionality of federal statutes. These cases reflect an important shift in Supreme Court jurisprudence that the Court itself has not acknowledged. Specifically, the Court has, in recent years, become increasingly aggressive in striking down federal statutes *because* the formal legislative record inadequately supports a factual judgment underlying congressional action.[6] This development encompasses several substantive areas of constitutional law, including cases decided under the First Amendment,[7] the Commerce Clause,[8] and Section 5 of the Fourteenth Amendment.[9] This trend has, however, largely gone unnoticed in the academic literature.[10]

Thus, an important goal of this Article is essentially descriptive. In Part I, we trace the evolution of the Supreme Court's treatment of the legislative record by examining many of this decade's landmark

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5 *Id.* at 645-46. *See infra* text accompanying notes 124-47 (discussing the *Florida Prepaid* decision at greater length).

6 *Infra* Part I (discussing recent Supreme Court decisions making new demands of the legislative record in evaluating federal statutes).

7 *E.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I"); *see also infra* Part I.A (discussing the Court's emerging requirement of an adequate formal record in "intermediate scrutiny" cases decided under the First Amendment).

8 *E.g.*, United States v. Lopez, 514 U.S. 549 (1995), *superceded by statute as stated in* United States v. Danks, 221 F.3d 1037 (8th Cir. 1999); *see also infra* Part I.B (discussing cases decided under the Commerce Clause).

9 *E.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); *see also infra* Part I.C (discussing cases decided under Section 5 of the Fourteenth Amendment).

10 Notably, to the extent that some legal commentators have perceived movement toward heightened scrutiny of the legislative record in one or more of the Court's cases, they have—in sharp contrast to the present Article—uniformly endorsed it. *E.g.*, Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 697 (1996) (concluding that "the approach taken in *Lopez* may be a plausible technique to encourage appropriate congressional procedures and consideration"); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 760 (1996) ("[T]he legislative record canon . . . is a useful suggestion calculated to facilitate the exercise of judicial review and improve interbranch communication."); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 734 (1996) (endorsing with caution the requirement of adequate legislative findings); Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty,"* 46 HASTINGS L.J. 1723, 1729 (1995) (concluding that the requirement of adequate legislative findings "represents a radical change in the law governing the process by which Congress legislates" and "is not all bad"); *cf., e.g.*, Muriel Morisey Spence, *What Congress Knows and Sometimes Doesn't Know*, 30 U. RICH. L. REV. 653, 659 (1996) (concluding that "Congress should take increasing care to develop and articulate the factual foundations of its actions").

cases addressing the boundaries of Congress's authority to legislate. These decisions impose an unexplained requirement on Congress to support the factual judgments underlying legislative action with evidence included in the legislative record.

Part II explains why we find the Court's imposition of this new procedural requirement on Congress to be highly questionable. To begin, this approach is simply inconsistent with the Court's own precedents. Until recently, the Court did not make the constitutionality of federal statutes depend on Congress supporting its formal findings with record evidence, at least outside of the narrow categories of laws subject to the strictest judicial scrutiny. The Court's nascent approach does not explain why this settled doctrine should not continue to hold sway, but instead simply ignores it. More importantly, the Court's new emphasis on the record is fundamentally ill advised for reasons apart from precedent. First, Congress is simply not an administrative agency, and the reasons that justify "on-the-record" review in the administrative context, where it arose, do not apply to the legislative branch. Second, the Court's imposition of new procedural conditions on Congress's exercise of its legislative authority raises substantial separation-of-powers questions. Third, the Court's new approach is inconsistent with the realities of congressional fact-finding. Consequently, the Court's recent rulings threaten to divert scarce congressional time and resources to creating a legislative record that satisfies judicial needs at the expense of legitimate legislative ones.

In Part III, we move from describing and criticizing the Court's increased attention to the legislative record to considering whether, notwithstanding our reservations, the need to restrain Congress justifies this important shift. Numerous scholars and, in recent years, a tentative majority of Supreme Court Justices have expressed concern that Congress frequently exceeds the constitutional bounds of its authority.[11] Accordingly, Part III considers the argument that the

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11 Indeed, in the years leading up to the Court's decisions in *Florida Prepaid* and *Kimel*, a number of legal scholars expressly advocated—much as the Court's decisions now require—that, to keep Congress within constitutional bounds, the Court should compel Congress to compile an evidentiary record or make formal findings before enacting laws potentially threatening federalism values. *See infra* Part III.A (discussing and critiquing this rationale). For instance, Professor Lessig urged the Court to require that, "when regulating in an area of primarily intrastate economic activity," Congress must clearly state "the economic effect that it estimates a statute will have on interstate commerce." Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 207; *see also id.* at 208-13 (advocating other, related legislative-process requirements as a judicious means to prevent congressional overreaching). Similarly, Professor Gardbaum suggested that the Court should subject federal statutes regulating intrastate conduct to "hard look" review like that applicable to federal administrative agency action challenged under the Administrative Procedure Act. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 826 (1996). More recently, Professor Jackson has called on the Court to impose upon Congress "process-based clear evidence/clear statement" requirements whenever it

Court's recent approach, even if doctrinally problematic, is, nonetheless, a jurisprudentially sound response to overreaching by Congress. We conclude, however, that such a cure would prove worse than the targeted disease. We then briefly summarize alternative approaches to policing the constitutional bounds of Congress's authority, recognizing that a thorough analysis of this issue lies beyond the scope of the present Article.

I
RECENT CASES

Over the past decade, the Court has, subtly and without explanation, become increasingly willing to strike down federal statutes as unconstitutional because of perceived deficiencies in the formal legislative record. The trend began to emerge in the first of two decisions addressing a First Amendment challenge to cable broadcasting regulation.[12] From there, it achieved a tenuous foothold first in the Commerce Clause[13] context and then in the Court's jurisprudence concerning Congress's power to enforce Section 5 of the Fourteenth Amendment.[14] Most recently, in *Florida Prepaid* and *Kimel*, the Court has attached apparently decisive significance to Congress's failure to compile a record demonstrating that the challenged statutes addressed real problems. Because the Court has not even acknowledged, let alone attempted to justify, this shift in its jurisprudence, this Part describes this progression in some detail.

A. A Tale of Two *Turners*: The Court's *Turner Broadcasting* Decisions

The 1994 and 1997 *Turner Broadcasting*[15] decisions constitute the modern Court's first foray—outside the context of so-called "strict scrutiny"—into heightened review of the legislative record underlying

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attempts "to regulate private conduct outside of established areas of federal regulation and not obviously within an enumerated power." *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2240 (1998) (internal quotation marks omitted). Professor Jackson argued that her approach "would result, in effect, in a referral back to Congress of legislation when the Court found the connection to an enumerated power . . . inadequately established" in the legislative record, *id.* at 2234 n.238, much as a court might remand a proposed rule to a federal agency if the administrative record were to be held deficient.

12 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I").

13 United States v. Lopez, 514 U.S. 549 (1995), *superceded by statute as stated in* United States v. Dank, 221 F.3d 1037 (8th Cir. 1999).

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

15 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I"); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) ("Turner II"). *See generally* Comment, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court's* Turner Broadcasting *Decisions*, 97 COLUM. L. REV. 1162 (1997) (attempting to clarify the Court's approach in the *Turner* decisions); Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Tur-

a federal statute. At issue in the *Turner* cases was the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable television providers to dedicate a portion of their channels to carrying local broadcast television stations.[16] To support the must-carry provisions, Congress wrote into the Act's preamble numerous factual conclusions and predictive judgments about the broadcast and cable television industries.[17] These judgments followed three years of congressional hearings on the subject.[18]

Congress specifically found that "[t]here ha[d] been a substantial increase in the penetration of cable television systems over the past decade" and that, because "most cable television subscribers have no opportunity to select between competing cable systems," cable operators enjoyed "undue market power . . . as compared to that of consumers and video programmers."[19] Congress concluded further that "[m]ost subscribers to cable television systems do not or cannot . . . receive broadcast television services" unless broadcast channels are carried via cable.[20] Because "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues," Congress reasoned, cable systems had a powerful economic incentive to refuse to carry broadcast signals.[21] Congress concluded that the combination of broadcasters' needs for access to the viewer audience serviced by cable systems, the undue market power enjoyed by cable operators, and cable operators' economic incentives not to carry broadcast signals, seriously jeopardized the economic viability of free local broadcast television.[22] Congress enacted the must-carry provisions to protect broadcast television from this threat.

Shortly after the Act became law, numerous cable operators and programmers filed suit in federal court challenging the must-carry provisions as violative of the Free Speech and Press Clause of the First Amendment.[23] After a three-judge district court rejected the plaintiffs' constitutional challenge and upheld the Act,[24] the plaintiffs ap-

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ner Broadcasting, 111 HARV. L. REV. 2312 (1998) (describing judicial review of legislative fact-finding after *Turner*).

16 *Turner I*, 512 U.S. at 626.

17 *Id.* at 632-34.

18 *Id.* at 632.

19 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), (3), 106 Stat. 1460, 1460 (codified as amended in scattered sections of 47 U.S.C.).

20 *Id.* § 2(a)(17), 106 Stat. at 1462.

21 *Id.* § 2(a)(14), (15), 106 Stat. at 1462.

22 *Id.* § 2(a)(16), 106 Stat. at 1462.

23 *Turner I*, 512 U.S. at 634.

24 Turner Broad. Sys., Inc. v. FCC, 819 F. Supp. 32, 51 (D.D.C. 1993), *vacated*, 512 U.S. 622 (1994). The Cable Act required that a three-judge district court first hear constitu-

pealed directly to the Supreme Court. Most of Justice Kennedy's opinion for the Court in *Turner I* is devoted to rejecting the threshold claim that the must-carry provisions were "content based" and thus subject to the "most exacting" First Amendment scrutiny.[25] The Court ratified the district court's decision to apply the more deferential "intermediate level of scrutiny applicable to content-neutral restrictions."[26] Nevertheless, the Court vacated the district court's decision granting summary judgment in favor of the government and remanded for further development.[27]

In a portion of his opinion representing a four-justice plurality, Justice Kennedy explained that a remand was necessary because it was unable to determine whether Congress supported its pertinent factual findings with sufficient record evidence to satisfy even intermediate scrutiny.[28] The plurality "ha[d] no difficulty concluding" that Congress's asserted interests in preserving "free, over-the-air local broadcast television" and "promoting fair competition" in the television industry constituted "important governmental interest[s]" for the purposes of intermediate scrutiny when "viewed in the abstract."[29] The plurality was skeptical, however, of Congress's determination that the must-carry rules would "in fact advance those interests."[30] Justice Kennedy reasoned that Congress could not defend governmental restrictions on speech with "mere[ ] conjectur[e]" that the supposed harms to be addressed are real and will be substantially alleviated by the challenged restrictions.[31] Accordingly, the government bore a duty to convince the Court, exercising its independent judgment, that local broadcasting was "in need of the protections afforded by the must-carry regulations" and that, in any event, the regulations did not

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tional challenges to the must-carry provisions. § 23, 106 Stat. at 1500 (codified as amended at 47 U.S.C. § 555(c) (1994)).

25 *Turner I*, 512 U.S. at 641-61. Both the four-Justice dissent and Judge Williams's dissent from the decision of the three-judge district court championed that position. *See id.* at 677-78 (O'Connor, J., concurring in part and dissenting in part); *Turner*, 819 F. Supp. at 59 (Williams, J., dissenting).

26 *Turner I*, 512 U.S. at 661-62.

27 *Id.* at 666-68 (plurality opinion).

28 *Id.* at 664-68 (plurality opinion) (opinion for Chief Justice Rehnquist, and Justices Kennedy, Blackmun, and Souter). A court applying intermediate scrutiny under the First Amendment must uphold a content-neutral speech restriction so long as the regulation is narrowly tailored to further "'an important or substantial governmental interest . . . unrelated to the suppression of free expression.'" *Id.* at 662 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

29 *Id.* at 662-63. The Court also concluded that "promoting the widespread dissemination of information from a multiplicity of sources" was a similar "important governmental interest" in the abstract. *Id.*

30 *Id.* at 664 (plurality opinion).

31 *Id.* (plurality opinion).

"'burden substantially more speech than . . . necessary.'"[32] The plurality concluded that remand was necessary because "[o]n the state of the record developed thus far," it could neither confirm nor reject Congress's prediction that the economic viability of local broadcast television would be threatened absent the Act's must-carry requirements.[33]

The plurality opinion was, however, strangely ambiguous about whether the inquiry on remand should focus solely on the formal legislative history of the Act or should extend to consideration of any relevant, admissible evidence that the parties subsequently gathered.[34] At one point, Justice Kennedy implied that the inquiry turned on the adequacy of the evidence on which Congress had actually relied, stating that the Court had a duty "to assure that, in formulating its judgments, Congress has drawn reasonable inferences *based on substantial evidence*."[35] This characterization of the Court's role suggested that it should evaluate Congress's judgment by independently assessing only the evidence that Congress had actually considered, as reflected in the formal legislative history of the Act. The sole authority Justice Kennedy cited for this proposition was a D.C. Circuit decision reviewing not an Act of Congress, but rather an agency rule.[36]

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32 *Id.* at 664-65 (plurality opinion) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

33 *Id.* at 665 (plurality opinion). The Court cited two prior decisions to support the proposition that, at least in the First Amendment context, "the deference afforded to legislative findings does not foreclose [the Court's] independent judgment of the facts bearing on an issue of constitutional law." *Id.* at 666 (plurality opinion) (internal quotation marks and citations omitted). In both of the prior cases, however, the Court reserved for itself the final decision on "mixed" questions of (constitutional) law and fact, as opposed to "pure" questions of fact or predictions as to the likely future course of a complex and evolving industry. First, in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Court quite sensibly rejected the claim that it must acquiesce in an implicit "factual" finding by the Virginia legislature that the proscribed speech posed the kind of "clear-and-present-danger" justifying regulation of protected speech consistent with the First Amendment. *Id.* at 842-44. In effect, counsel for the Commonwealth boldly argued that the Court should defer to the legislature's implicit conclusion that the statute was constitutional. For a discussion of the second decision, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), see *infra* text accompanying notes 263-74.

34 *See Turner I*, 512 U.S. at 664-68 (plurality opinion).

35 *Id.* at 666 (plurality opinion) (emphasis added).

36 *Id.* at 666 (plurality opinion). Justice Kennedy relied on *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). In *Century Communications*, the court struck down FCC must-carry *regulations* that the Commission promulgated prior to the enactment of the Cable Television Act of 1992 as an exercise of its general statutory authority to ensure that the broadcast spectrum advances the "public interest." *Id.* at 293-94 (citing Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1439 (D.C. Cir. 1985)). In both *Century Communications* and *Quincy Cable TV*, the D.C. Circuit acknowledged that its power to insist upon a formal record supporting the factual findings and predictive judgments underlying the FCC's content-neutral speech restrictions arose from "the administrative context." *Century Communications*, 835 F.2d at 300 (citing authority for the proposition that "agencies" are "requir[ed]" to compile a formal record demonstrating the existence of a problem in

Elsewhere in this portion of his opinion, however, Justice Kennedy acknowledged that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."[37] Nevertheless, Justice Kennedy indicated that the Court would require "a more substantial elaboration in the District Court of the predictive or historical evidence *upon which Congress relied,* or the introduction of *some additional evidence*" supporting Congress's conclusions in order to uphold the statute.[38] With this ambiguous directive, the Court remanded to the three-judge district court for the development of "a more thorough factual record."[39]

On remand, the three-judge district court broadly interpreted *Turner I*'s mandate to authorize the introduction of evidence not part of "the record before Congress at the time that it enacted the 1992 Cable Act."[40] This included evidence relating to postenactment devel-

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order to satisfy intermediate scrutiny under the First Amendment); *Quincy Cable TV,* 768 F.2d at 1454; *see id.* at 1455 n.44 (recognizing that the court's role would be different "in the context of reviewing legislative acts").

37 *Turner I,* 512 U.S. at 666 (plurality opinion). The Court also acknowledged its duty to "accord substantial deference to the predictive judgments of Congress" and insisted that the Court's "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo,* or to replace Congress'[s] factual predictions with our own." *Id.* at 665-66 (plurality opinion).

38 *Id.* at 667 (plurality opinion) (emphasis added). The tension in Justice Kennedy's plurality opinion was echoed in the concurring opinion of Justice Blackmun, who wrote separately "to emphasize the paramount importance of according substantial deference to the predictive judgments of Congress, particularly where, as here, that legislative body has compiled an extensive record in the course of reaching its judgment." *Id.* at 669 (Blackmun, J., concurring) (citation omitted). Justice Blackmun explained that "[t]he Government had occasion to submit to the District Court only portions of the record developed by Congress," and opined that "[t]he record before the District Court no doubt will benefit from any additional evidence the Government and the other parties now see fit to present." *Id.* (Blackmun, J., concurring). Justice Blackmun did not say, however, whether the inquiry on remand should focus on the sufficiency of the record compiled by Congress before it acted or the broader question of the economic need for and proper scope of a must-carry requirement.

39 *Id.* at 668 (plurality opinion). Only three Justices—the Chief Justice and Justices Blackmun and Souter—joined section III.B of Justice Kennedy's opinion. Justice O'Connor, joined by Justices Scalia, Thomas, and Ginsburg, would have held the statute unconstitutional, *id.* at 685 (O'Connor, J., concurring in part and dissenting in part), and Justice Stevens would have affirmed the district court's decision without a remand. *Id.* at 669-70 (Stevens, J., concurring in part). Although Justice Stevens agreed that "the question for the reviewing court . . . is merely whether 'Congress has drawn reasonable inferences based on substantial evidence,' given [Justice Kennedy's] caveat that Congress need not compile or restrict itself to a formal record in the manner required of a judicial or administrative factfinder," Justice Stevens believed that "application of that standard . . . require[d] affirmance" of the district court's decision. *Id.* at 670-71 n.1 (Stevens, J., concurring in part). Because a vote by Justice Stevens to affirm would have left no majority support to dispose of the appeal, he decided to concur in the judgment vacating and remanding for further proceedings. *Id.* at 674 (Stevens, J., concurring in part).

40 Turner Broad. v. FCC, 910 F. Supp. 734, 738 (D.D.C. 1995), *aff'd,* 520 U.S. 180 (1997).

opments in the broadcast and cable television industries.[41] The three opinions produced on remand, however, reflected a more subtle, and fundamental, disagreement over what role the Supreme Court decision had intended the district court to play. After the parties put "reams of paper" before the court,[42] the more developed record pulled the three district court judges in three different directions. Judge Sporkin concluded, as he had initially, that the government was entitled to summary judgment;[43] Judge Williams remained convinced that the statute was unconstitutional;[44] and Judge Jackson would have sent the matter on to trial for even further development of the factual record.[45] In the end, Judge Jackson reluctantly agreed to join Judge Sporkin in granting summary judgment in favor of the government and holding the Act constitutional.[46]

All three judges concluded that the Supreme Court's *Turner I* decision permitted them to consider new evidence on remand.[47] But they all struggled to understand how evidence outside the record Congress had compiled could be relevant to the question the Supreme Court had directed them to resolve: whether Congress had drawn reasonable inferences on the basis of the record before it.[48] Judge Sporkin's understanding of the standard of review reflected his awareness of the oddity of considering additional evidence to evaluate the reasonableness of a judgment made on a narrower record; he cast the question as whether there was before the court "substantial evidence from which Congress *could have drawn* a reasonable inference" in support of the Act.[49] Judge Jackson, who believed that the parties' submissions on remand left the record "intractably ambiguous," ultimately decided to uphold the Act by "tak[ing] at face value" the record before Congress in 1992 and, apparently, by ignoring the ambiguities created by the evidence subsequently presented only to the court.[50] Finally, Judge Williams refused to confine his analysis to the record compiled by Congress on the theory that it was a one-sided account "put together under the aegis of the statute's proponents."[51] Like Judge Sporkin, Judge Williams had some difficulty articulating the standard of review to be applied to Congress's resolution of disputed facts; he wrote that "we must accord substantial deference to

41 *Id.* at 745-47.
42 *Id.* at 739.
43 *Id.* at 751-52.
44 *Id.* at 789 (Williams, J., dissenting).
45 *Id.* at 752 (Jackson, J., concurring).
46 *Id.* (Jackson, J., concurring).
47 *Id.* at 738-39; *id.* at 752 (Jackson, J., concurring); *id.* at 758 (Williams, J., dissenting).
48 *Id.* at 738-39.
49 *Id.* at 739 (emphasis added).
50 *Id.* at 752 (Jackson, J., concurring).
51 *Id.* at 758 (Williams., J., dissenting).

the predictive judgments of Congress, making an independent judgment of the facts but not reweighing the evidence *de novo*."[52] Of course, given the ambiguity of the Supreme Court's *Turner I* directive, confusion at the district-court level was to be expected.

On further appeal, the Supreme Court affirmed, with a dissent from the same four Justices who dissented in *Turner I*.[53] Writing for the five-Justice majority, Justice Kennedy found that the "expanded record"[54] assuaged the Court's earlier doubts about Congress's judgments that broadcast television faced a serious threat and that the must-carry rules constituted a measured response.[55] With a hint of retreat, if not apology, Justice Kennedy emphasized the narrowness of the reviewing court's role: In determining whether Congress's judgments are supported by substantial evidence, "substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency."[56] Although "the deference [due] to Congress is in one respect akin to deference owed to administrative agencies because of their expertise," courts "owe Congress'[s] findings an additional measure of deference out of respect for its authority to exercise the legislative power," for courts ought not "infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy."[57] Perhaps most importantly, Justice Kennedy's reliance on materials introduced on remand, including evidence of postenactment developments in the television industry, indicated that a reviewing court should not limit its inquiry to evidence included in the formal legislative record.[58] Thus, *Turner II* appeared to undercut the *Turner I* plurality's suggestion that the Court may oblige Congress, like an administrative agency, to substantiate its findings that support its decision to regulate with evidence on the formal record of its proceedings.

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52 *Id.* at 757 (Williams, J., dissenting).

53 Justice Breyer, who had replaced Justice Blackmun in the interim, voted to affirm. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 225 (1997) (Breyer, J., concurring in part) ("Turner II").

54 *Id.* at 195.

55 *Id.* at 196.

56 *Id.* at 195.

57 *Id.* at 196.

58 *E.g.*, *id.* at 203-06 (plurality opinion); *id.* at 221. More recently, in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), a divided Court rejected a First Amendment challenge to a city ordinance prohibiting nude dancing. In a separate opinion concurring in part and dissenting in part, Justice Souter questioned the factual validity of the city's association of nude dancing with a variety of social ills and chastised the plurality for not remanding to provide for what he deemed to be necessary development of the evidentiary record in the lower court. *Id.* at 1403-06 (Souter, J., concurring in part and dissenting in part). By advocating a remand for development of the *judicial* record, rather than affirming the lower court decision invalidating the ordinance, Justice Souter implicitly reaffirmed the teaching of *Turner II* that a reviewing court should not confine its inquiry to the formal legislative record.

Unfortunately, however, the *Turner II* dissent more accurately foreshadowed the future of the Court's review of the legislative record in constitutional cases. After a brief nonacquiescence in *Turner I*'s conclusion that the must-carry rules required only intermediate scrutiny under the First Amendment,[59] the dissent undertook to demonstrate in detail that the congressional judgments underlying the must-carry rules were not supported by substantial evidence.[60] In this regard, the dissent reflects the critical lesson of the two *Turner* decisions: the ambiguity in Justice Kennedy's opinions regarding the significance of the formal legislative record represents, as has become clear in retrospect, the slipping of the camel's nose into Congress's tent.[61]

B. From Free Speech to the Commerce Clause: *Lopez* and *Morrison*

Between the Supreme Court's two *Turner* decisions, the Court held in *United States v. Lopez*[62] that the Gun-Free School Zones Act of 1990 exceeded Congress's power under the Commerce Clause.[63] Although *Lopez* may be the single most-discussed decision of the last decade,[64] its significance for our purposes is confined to the limited, but nonetheless fundamental, observation that the *Lopez* decision began to extend the high demands of the formal legislative record suggested by *Turner I* to the Court's revived Commerce Clause jurisprudence.

Lopez's central issue was whether Congress had power under the Commerce Clause to impose a criminal prohibition on the possession of a firearm within 1000 feet of a school.[65] The *Lopez* Court did not question that Congress had that power *if* possession of a firearm

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59 *Turner II*, 520 U.S. at 230-35 (O'Connor, J., dissenting).

60 *Id.* at 235-44 (O'Connor, J., dissenting).

61 *Cf.* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1326-27 (1999) (noting that, with respect to recent federalism decisions, "broad, process-oriented proposals could have disastrous separation of powers consequences, as they invite the camel's nose of judicial review into the tent of legislative deliberation").

62 514 U.S. 549 (1995), *superceded by statute as stated in* United States v. Danks, 221 F.3d 1037 (8th Cir. 1999).

63 *Id.* at 551. The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

64 *See, e.g.*, Cross, *supra* note 61, at 1322 (arguing that "*Lopez* garnered much attention but seems unlikely to have much impact on the exercise of federal power" (citation omitted)); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995) (exploring the new Commerce Clause jurisprudence); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 896 (1999) (describing *Lopez* as merely a "minor obstacle" to Congress); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 176 (1998) (noting that "[w]hether *Lopez* marks a dramatic shift in Commerce Clause jurisprudence or is instead destined to be a 'but see' citation remains to be seen"); Joan Biskupic, *Court Signals Sharp Shift on Congressional Powers*, WASH. POST, Apr. 28, 1995, at A3 (discussing *Lopez*'s implications).

65 514 U.S. at 551.

within a school zone had a sufficiently substantial effect on interstate commerce. Instead, the Court's discussion of this issue focused substantially on Congress's failure to make explicit factual findings or compile record evidence demonstrating such a connection.[66]

Before examining the Supreme Court's decision, however, a brief examination of the Fifth Circuit's *Lopez*[67] opinion provides helpful background for understanding the Supreme Court's treatment of the Gun-Free School Zone Act's legislative history. Most significantly, the Fifth Circuit held that the Act was unconstitutional *solely because* Congress had not expressly found, in either the text of the statute or the formal legislative history of the Act, that possession of guns in and around schools has a substantial effect on interstate commerce.[68] The Fifth Circuit expressly stated that this lack of findings, or legislative history in lieu thereof, was fatal and that the result might have been different had Congress compiled a sufficient legislative record.[69] The court explained that the requirement of findings, in either the text or legislative history of a statute, served to compel Members of Congress "to fairly and consciously fix, rather than to simply disregard, the Constitution's boundary line between the 'completely internal commerce of a state . . . reserved for the state itself' and the power to regulate 'Commerce with foreign Nations, and among the several States.'"[70] In other words, the Fifth Circuit concluded that the courts could, by requiring explicit findings, compel Congress to deliberate before enacting statutes that stretch the outer boundaries of the Commerce Clause power. Moreover, unlike the Supreme Court in *Turner I*, the Fifth Circuit in *Lopez* concluded that a remand was unnecessary.[71] The court reasoned that supplying "evidence in court of the same general kind that might have been presented to a Congressional committee or the like concerning any relationship between the legislation and interstate commerce" would still require the court to "guess at what *Congress*'s determination would have been" had it considered the same evidence.[72] Thus, the Fifth Circuit concluded that the Gun-Free

66 *Id.* at 562-63.

67 United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

68 *Id.* at 1367-68.

69 *Id.* at 1363, 1367-68 ("Where Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer 'if there is any rational basis for' the finding. . . . Practically speaking, such findings almost always end the matter." (citations omitted)). Although the Fifth Circuit was clearly troubled by the Supreme Court's pronouncement in *Perez v. United States* that "'Congress need [not] make particularized findings in order to legislate,'" the court dismissed that well-established rule on the ground that "[n]o citation of authority is given." *Id.* at 1362 n.41 (quoting Perez v. United States, 402 U.S. 146, 156 (1971)).

70 *Id.* at 1363 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824), and U.S. CONST. art. I, § 8, cl. 3).

71 *Id.* at 1368.

72 *Id.* at 1364 n.44 (emphasis added).

School Zones Act was unconstitutional *because* Congress had not compiled the kind of legislative record "necessary to locate [the Act] within the Commerce Clause."[73]

Chief Justice Rehnquist's majority opinion affirming the Fifth Circuit placed somewhat less emphasis on the lack of legislative findings, but only hinted that Congress might have avoided the Act's invalidation had it made appropriate findings supported by evidence in the legislative record. The Court reaffirmed that "Congress *normally* is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[74] It added, however, 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."[75]

In his dissent, Justice Souter aptly summarized the Court's ambiguous position on the relevance of factual findings: He observed that the Fifth Circuit believed that appropriate findings could have saved the Act, and that the majority "does not repudiate that position."[76] Moreover, Justice Souter recognized the significance of the Fifth Circuit's, and perhaps the majority's, understanding of the role that legislative findings play in constitutional adjudication. He reminded the Court that its precedents did not require Congress to make explicit findings as a predicate to legislating because a law's enactment generally implies that Congress believes conditions exist to support its exercise of an enumerated power.[77] Justice Souter emphasized that the proper question for the Court was "whether the legislative judgment is

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73 *Id.* at 1368.

74 United States v. Lopez, 514 U.S. 549, 562 (1995) (emphasis added), *superceded by statute as stated in* United States v. Danks, 221 F.3d 1037 (8th Cir. 1999).

75 *Id.* at 563. After the Fifth Circuit held the Act unconstitutional, but before the matter was resolved by the Supreme Court, Congress enacted a law stating that:

> the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
>
> . . . this decline . . . has an adverse impact on interstate commerce and the foreign commerce of the United States;
>
> . . . Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125 (codified as amended at 18 U.S.C. § 922(g)(1)-(4) (1994)). The *Lopez* majority dismissed these subsequent findings in a footnote, observing that the "Government does not rely upon these . . . findings as a substitute for the absence of findings in the first instance." 514 U.S. at 563 n.4. *But see id.* at 612 n.2 (Souter, J., dissenting) (observing that there is "no reason not to consider Congress's findings, insofar as they might be helpful in reviewing the challenge to this statute, even though adopted in later legislation").

76 *Lopez*, 514 U.S. at 612 (Souter, J., dissenting).

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

within the realm of reason," and not whether Congress's judgment was correct.[78]

From these established premises, Justice Souter concluded that if the Court "were to make the existence of explicit congressional findings dispositive in . . . difficult cases something other than rationality review would be afoot."[79] Obligating Congress to explain "its policy choices on the merits would imply either a judicial authority to review the justification . . . of those choices, or authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence."[80] Justice Souter believed, however, that the Court could claim authority for neither role, as "review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court."[81] Because "[s]uch a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied," Justice Souter feared that "[u]nder such a regime . . . the rationality standard of review would be a thing of the past."[82]

In sum, as Justice Souter's dissent acknowledges, the Court's *Lopez* decision, unlike the Fifth Circuit's, did not go so far as to expressly require congressional findings sufficient to "locate" federal legislation within the Commerce Clause. Rather, like the *Turner* cases, the *Lopez* majority was simply ambiguous on this point.[83]

The Court's recent decision in *United States v. Morrison*,[84] decided in May 2000, passed over an important opportunity to clarify this ambiguity. In *Morrison*, the Court invalidated the civil suit provision of the Violence Against Women Act of 1994 (VAWA).[85] The civil suit provision authorized any person injured by "a crime of violence moti-

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

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

80 *Id.* at 613-14 (Souter, J., dissenting).

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

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

83 Other commentators have noted the ambiguity of the majority opinion in *Lopez* on this point. *See, e.g.*, Frickey, *supra* note 10, at 707; Friedman, *supra* note 10, at 762; Krent, *supra* note 10, at 732; Sara E. Kropf, *The Failure of* United States v. Lopez*: Analyzing the Violence Against Women Act*, 8 S. CAL. REV. L. & WOMEN'S STUD. 373, 398 (1999). *See generally* Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 MARQ. L. REV. 435 (1999) (evaluating the new Commerce Clause jurisprudence). For constitutional defenses of VAWA, see Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1 (2000), and Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000).

84 120 S. Ct. 1740 (2000).

85 42 U.S.C. § 13981(c) (1994).

vated by gender"[86] to bring a suit for compensatory and punitive damages as well as injunctive or declaratory relief[87] in federal district court.[88] The Court invalidated the provision on the grounds that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment provided Congress with the power to authorize the civil remedy for gender-motivated violence.[89]

Unlike the Gun-Free School Zones Act struck down in *Lopez*, VAWA was supported by "a mountain of data assembled by Congress," which was all part of the formal legislative record, "showing the effects of violence against women on interstate commerce."[90] Moreover, the Conference Committee Report on VAWA contained express, detailed findings, including the determination that

> crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.[91]

These specific congressional findings, and the extensive use of supportive evidence in the legislative record, clearly distinguished *Morrison* from *Lopez*, thus providing the Court the opportunity to clarify the role that the absence of such findings had played in *Lopez*. The Court did not find it necessary to address that issue, however, despite the fact that the legislative record's adequacy was hotly disputed by the parties.[92] Instead, the Court ruled that even if Congress's findings proved beyond question that intrastate domestic violence has, in the aggregate, a substantial impact on interstate commerce, the civil remedy provision of VAWA could not be upheld as a valid exercise of Congress's power under the Commerce Clause.[93] Specifically, the majority held that the aggregate effect of individual instances of intra-

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86 *Id.* § 13981(b).

87 *Id.* § 13981(c).

88 *Id.* § 13981(e)(3).

89 *Morrison*, 120 S. Ct. at 1759.

90 *Id.* at 1760 (Souter, J., dissenting).

91 H.R. CONF. REP. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

92 Indeed, these issues dominated the briefing and the argument in *Morrison*. *E.g.*, Brief of Petitioner Christy Brzonkala at 26-31, *Morrison* (Nos. 99-5, 99-29); Brief for the United States at 21-27, *Morrison* (Nos. 99-5, 99-29); Brief for Respondent Antonio J. Morrison at 23-28, *Morrison* (Nos. 99-5, 99-29); Brief of Respondent James LaDale Crawford at 25-26, *Morrison* (Nos. 99-5, 99-29); Oral Argument, *Morrison* (Nos. 99-5, 99-29), *available at* 2000 WL 41232.

93 *Morrison*, 120 S. Ct. at 1754 (rejecting "the argument that Congress may regulate noneconomic . . . conduct based solely on that conduct's aggregate effect on interstate commerce").

state, noneconomic activity could not overcome the Court's newly articulated requirement that an "activity [must be] economic in nature" in order to be subject to regulation under the Commerce Clause.[94] This conclusion rendered Congress's findings linking gender-based violence to interstate commerce, and the extensive supportive evidence it had compiled, legally irrelevant.

The *Morrison* Court thus furthered *Lopez*'s ambiguity regarding the need for findings and record evidence in close Commerce Clause cases. In fact, in describing the importance of *Lopez*, the *Morrison* majority emphasized that the result in that case had turned in part on the absence of legislative findings and record evidence.[95] Accordingly, the implication of *Lopez* and *Morrison*, taken together, is that findings and record evidence, while *necessary* vis-à-vis the constitutionality of a congressional statute in a close case, are not alone sufficient.[96]

Significantly, the Court's decisions in a third area of constitutional law, Congress's enforcement power under Section 5 of the Fourteenth Amendment, confirm this reading of the Commerce Clause decisions. Indeed, as discussed directly below, the Court's decisions striking down the Religious Freedom Restoration Act,[97] the Patent Remedy Act,[98] and the state-suit provision of the ADEA,[99] not only extend this approach to the Fourteenth Amendment context, but also substantiate Justice Souter's fears that "something other than rationality review [is] afoot."[100]

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94 *Id.* at 1751 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). Justice Souter noted that

> [F]or the majority . . . some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation.

Id. at 1765 (Souter, J., dissenting).

95 *Id.* at 1751.

96 *Id.* at 1752 ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."). In rejecting the Solicitor General's alternative claim that the Court could uphold the civil remedy provision of VAWA as a valid exercise of Congress's power to enforce the Fourteenth Amendment, the majority opinion in *Morrison* even more clearly reaffirmed the requirement that contestable assertions of congressional authority be backed by unimpeachable findings and record evidence. *See infra* note 161.

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

98 Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

99 Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631 (2000).

100 United States v. Lopez, 514 U.S. 549, 613 (1995) (Souter, J., dissenting), *superceded by statute as stated in* United States v. Danks, 221 F.3d 1037 (8th Cir. 1999).

C. Flores: From the Commerce Clause to Section 5 of the Fourteenth Amendment

In *City of Boerne v. Flores*,[101] the Supreme Court invalidated the Religious Freedom Restoration Act (RFRA) as beyond Congress's enforcement power under Section 5 of the Fourteenth Amendment.[102] As RFRA's title suggests, Congress intended the Act to restore the practice of applying the strictest judicial scrutiny to laws of general applicability with the incidental effect of imposing a substantial burden on the free exercise of religion.[103] The Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*[104] had found this practice to be unnecessary under the Free Exercise Clause of the First Amendment.[105]

Insofar as RFRA applied to state and local law, Congress expressly invoked its power under Section 5 of the Fourteenth Amendment,[106] and RFRA defenders in the Supreme Court articulated two quite distinct (indeed, potentially incompatible) theories to justify upholding the statute.[107] First, RFRA could be upheld as Congress's construction of the Free Exercise Clause of the First Amendment, which the Supreme Court had long since held to be incorporated in the Fourteenth Amendment.[108] Although this reading conflicted with that of

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101 521 U.S. 507 (1997).

102 *Id.* at 536. Section 1 of the Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or 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 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5. RFRA's defenders argued that the Act "enforce[d]" Section 1's guarantees of "'the equal protection of the laws'" and "'due process of law,'" to the extent that the latter phrase had been interpreted to incorporate the First Amendment's Free Exercise Clause. *See Flores*, 521 U.S. at 517, 519 (quoting U.S. CONST. amend. XIV, §§ 1, 5).

Other commentators have addressed this topic in depth. *E.g.*, Kent Greenawalt, *Why Now Is Not the Time for Constitutional Amendment: The Limited Reach of* City of Boerne v. Flores, 39 WM. & MARY L. REV. 689 (1998) (arguing against an amendment to protect religious liberties); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After* City of Boerne v. Flores, 32 IND. L. REV. 163 (1998) (arguing for limitations on Congress's legislative authority under Section 5); Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999) (arguing for more deference to congressional legislation passed pursuant to the Fourteenth Amendment).

103 *See Flores*, 521 U.S. at 513-15.

104 494 U.S. 872 (1990), *superceded by statute as stated in* Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994).

105 *See Flores*, 521 U.S. at 512-16 (discussing Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990), and the preamble to RFRA, 42 U.S.C. § 2000bb(a) to (b)).

106 *See id.* at 516.

107 *See id.* at 517, 529.

108 *See id.* at 517.

the *Smith* majority,[109] RFRA's supporters argued that it was certainly plausible as an initial matter.[110] Alternatively, RFRA's proponents argued that even if Congress's Section 5 enforcement power does not extend so far as to allow such a constitutional difference of opinion between Congress and the Court, RFRA nevertheless could be upheld as a prophylactic rule designed to enforce the Free Exercise Clause as the Court construed it in *Smith*.[111] On this theory, by requiring heightened judicial review of *all* laws that have the *effect* of substantially burdening religious practice, RFRA would increase the likelihood of courts identifying and striking down those facially neutral laws enacted for the purpose of discouraging or prohibiting disfavored religious exercise.[112] The rationale for such a prophylactic rule would be that at least some facially neutral laws may mask a hidden, unconstitutional intent to discriminate against religious practices.[113]

In rejecting this second rationale, the Court relied in part on perceived gaps in the legislative record. The Court found "instructive" the contrast between "RFRA's legislative record" and "the record which confronted Congress and the Judiciary in the voting rights cases."[114] The comparison was inevitable. In claiming that the Court could uphold RFRA as a prophylactic rule consistent with the *Smith* decision, RFRA's defenders appealed to the wide latitude that the Court had previously given Congress's exercise of its Fourteenth and

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109 *Smith*, 494 U.S. at 876-90.

110 *See Flores*, 521 U.S. at 517; *see also* Brief of Respondent Flores at 43-45, *Flores* (No. 95-2074); Brief for the United States at 39, *Flores* (No. 95-2074). Commentators have made thoughtful rejoinders to the Court's dismissal of the first, substantive theory presented by the RFRA defenders--that Section 5 gave to Congress a role in determining the meaning of the substantive provisions of the Fourteenth Amendment. *E.g.*, Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); *see also, e.g.*, David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 34 (arguing that "[a] proper recognition of the relationship between constitutional interpretation and institutional roles would afford Congress far more deference than the Court gave it in *Flores* when Congress extends statutory protection to liberty under Section 5 of the Fourteenth Amendment"). *But see* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1633 (1995) (stating that "[i]n RFRA Congress has simply willed itself power it cannot possess").

111 *See Flores*, 521 U.S. at 529.

112 *See id.*

113 *See id.* at 517; *see also* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause protects against governmental hostility which is masked as well as overt."), *superceded by statute as stated in* Diaz v. Collins, 872 F. Supp. 353 (E.D. Tex. 1994); Brief of Respondent Flores at 9, *Flores* (No. 95-2074) (noting that "a jurisdiction's laws may discriminate against religion in . . . forbidden ways without there having been conscious governmental hostility to religion"); Brief for the United States at 24-25, *Flores* (No. 95-2074) (stating that RFRA protects "against religious discrimination, whether veiled behind generally applicable laws or resulting from disparate legislative accommodations, that might otherwise go undetected").

114 *Flores*, 521 U.S. at 530.

Fifteenth Amendment enforcement powers in the voting rights context.[115] For example, RFRA's defenders noted that in 1966 the Court had found that Congress could exercise its enforcement power to prohibit state-imposed literacy tests,[116] notwithstanding the Court's decision a mere seven years before, holding that the Fourteenth and Fifteenth Amendments did *not* bar such tests.[117] The *Flores* Court distinguished this and other voting rights cases based in part on a perceived paucity of evidence of intentional discrimination in RFRA's formal legislative record: "In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."[118] The Court discounted the testimony that congressional committees heard in support of RFRA as being "anecdotal evidence" inadequate to support Congress's implicit finding of a "widespread pattern of religious discrimination in this country."[119]

As in the *Turner* and *Lopez* decisions, however, the *Flores* Court assiduously preserved ambiguity as to the ultimate significance or necessity of legislative findings of fact and supportive legislative record evidence. Although the Court found the contrast between the legislative records in the voting rights cases and those in the RFRA "instructive," it hastened to add that "[t]his lack of support in the legislative record, however, [was] not RFRA's most serious shortcoming."[120] The

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115 Brief of Respondent Flores at 11-13, *Flores* (No. 95-2074); Brief for the United States at 9-11, *Flores* (No. 95-2074).

116 *See* Katzenbach v. Morgan, 384 U.S. 641, 646 (1966), *abrogation recognized by* Varner v. Ill. Stat. Univ., 150 F.3d 706 (7th Cir. 1998); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); *see also* Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that Congress has power under the Fourteenth and Fifteenth Amendments to enforce a prohibition against state literacy tests), *superceded by constitutional amendment as stated in* Nat'l Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974).

117 Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); *see* Brief of Respondent Flores at 11-12, *Flores* (No. 95-2074).

118 *Flores*, 521 U.S. at 530. Commentators have questioned the force of Justice Kennedy's effort to distinguish the voting rights cases. *E.g.*, MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 35-37 & n.37 (1999) (concluding that, because the "pre-*Flores* case law teaches that judges should refrain from second-guessing congressional responses to perceived problems of discrimination," Justice Kennedy's reliance on any gaps in RFRA's legislative record, relative to the record that undergirded the Voting Rights Act, "may be the *Flores* majority's most questionable argument"). For a discussion of the Voting Rights Act cases, see *infra* Part II.A.2.

119 *Flores*, 521 U.S. at 531. Although three Justices dissented from the Court's disposition in *Flores*, all three did so because of their nonacquiescence to the majority's reliance upon *Smith*. *Id.* at 544-45 (O'Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting). Professor McConnell has observed the similarity between the Court's treatment of the formal legislative record in *Flores* and *Lopez* and has questioned, but offered no solution, why none of the *Lopez* dissenters also dissented from the *Flores* majority's Section 5 analysis. McConnell, *supra* note 110, at 166.

120 *Flores*, 521 U.S. at 530-31.

Court reaffirmed that "[a]s a general matter, it is for Congress to determine the method by which it will reach a decision."[121] The Court concluded that "[r]egardless of the state of the legislative record," RFRA would have failed constitutional muster because the Act was neither "remedial" nor "preventive" but rather was an impermissible "attempt [to enact] a substantive change in [the] constitutional protections" of the Free Exercise Clause as construed by *Smith*.[122] In essence, then, the *Flores* Court rejected as a ruse the claim that RFRA was merely a prophylactic rule designed to enforce *Smith*'s interpretation of the Free Exercise Clause,[123] and, as a result, the Court's disparagement of the legislative record was not dispositive. Thus, while *Flores* provided the Court a further opportunity to question the adequacy of Congress's evidentiary record compiled in support of its federal statute, the case did not resolve whether heightened scrutiny of the legislative record constituted an exception to the well-established rule of deference, or whether it was part of a grander assertion of judicial power to require record evidence in support of Congress's constitutional judgments. Two cases decided within the last eighteen months reveal that the latter characterization is more accurate.

D. *Florida Prepaid* and *Kimel*: Treating Congress Like an Administrative Agency

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[124] the Court addressed the constitutional validity of a congressional effort to abrogate the states' Eleventh Amendment immunity. Specifically, the Court considered whether Congress's at-

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121 *Id.* at 531-32.

122 *Id.* at 532. In his concurring opinion, Justice Scalia wrote that by striking down RFRA and preserving the *Smith* rule as a matter of practice as well as constitutional theory, the Court allowed "the people, through their elected representatives," rather than the federal judiciary, to balance the individual's religious liberty against conflicting community policy. *Id.* at 544 (Scalia, J., concurring). Arguably, however, in striking down RFRA, the Supreme Court placed its own perceptions about the relative pervasiveness and seriousness of religious discrimination in this country over those of "the elected representatives of the people" serving in the United States Congress. *See* McConnell, *supra* note 110, at 168.

123 Likewise, members of the Court could have argued in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), that the congressional prohibition on literacy tests, defended as an exercise of Congress's Section 2 enforcement power under the Fifteenth Amendment, was instead an attempt by Congress to reverse the Court's prior decision that literacy tests were permissible under the Constitution. There, however, the Court deferred to the claim that it could uphold the Voting Rights Act of 1965 as a remedial measure. *Id.* at 333; *see* GREVE, *supra* note 118, at 35 (observing that under the pre-*Flores*, Section 5 case law, RFRA "appear[ed] plainly constitutional"). For a discussion of the Voting Rights Act cases see *infra* Part II.A.2.

124 527 U.S. 627 (1999). The Court's decision in *Florida Prepaid*, although recent, has already generated some scholarly commentary. *E.g.*, John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1, 85 (1999) (discussing and criticizing *Florida Prepaid*).

tempt to empower federal courts to entertain patent-enforcement actions against States could be justified as an exercise of Congress's Section 5 power to enforce the substantive provisions of the Fourteenth Amendment.[125]

Employing the framework it had announced in *Flores*, the Court inquired whether Congress had "identif[ied] conduct transgressing the Fourteenth Amendment's substantive provisions" and had "tailor[ed] its legislative scheme to remedying or preventing such conduct."[126] Significantly, however, *Florida Prepaid* continued where *Flores* had stopped, indicating clearly that the answer to these questions would turn on whether the Court was satisfied with the evidence that Congress had compiled in the statute's legislative history.[127]

The Court began its analysis by conceding that a state's intentional infringement of a patent without providing an adequate state process for redress would constitute a deprivation of "property without due process of law" within the meaning of the Fourteenth Amendment.[128] Nevertheless, the Court struck down the state-suit provision because the underlying legislative record failed to document a sufficient "history of 'widespread and persisting deprivation of constitutional rights.'"[129] The Court stressed that to violate the Due Process Clause of the Fourteenth Amendment, a state had to *both* infringe a patent *and* deny the owner an adequate state-law remedy.[130] As to the

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125 Given the Constitution's express grant to Congress of authority to regulate patents, *see* U.S. CONST. art. I, § 8, cl. 8, the question raised in *Florida Prepaid* would have been entirely academic four years ago. The Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996), however, "makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers." *Florida Prepaid*, 527 U.S. at 636. Congress may do so, however, when enforcing the Fourteenth Amendment. *Id.* at 637 (citing *Seminole Tribe*, 517 U.S. at 59). Thus, the *Seminole Tribe* decision renders dispositive the question presented in *Florida Prepaid*—whether the provision allowing a federal court remedy in cases of patent infringement by the States constituted remedial or preventive (i.e., "appropriate") legislation enforcing the Fourteenth Amendment's Due Process Clause. *Id.*

126 *Florida Prepaid*, 527 U.S. at 639.

127 *Id.*

128 *Id.* at 636-37.

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

130 *Id.* at 643. In a footnote, the Court dismissed the argument that the state-suit provision could be justified as enforcing the patent holder's rights under the Takings Clause of the Fifth Amendment. *Id.* at 642 n.7. The Court found dispositive that, while Congress had explicitly invoked its authority to enforce the Due Process Clause of the Fourteenth Amendment, the legislative record contained no express invocation of the Takings Clause. *Id.* The Takings Clause was, however, among the first provisions of the Bill of Rights "incorporated" into the Due Process Clause of the Fourteenth Amendment. *See* Chi. Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897). Thus, according to the *Florida Prepaid* majority, even though Congress had expressed its intent to enforce the Due Process Clause, the Patent Remedy Act failed constitutional muster in part because its legislative history did not document Congress's intent to enforce that Clause as the Court had interpreted it for over one hundred years. *But see* EEOC v. Wyoming, 460 U.S. 226, 243-44 n.18 (1983) (stating that the "constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." (*quoting* Woods v. Cloyd W.

first of these requirements, the Court observed that "Congress identified no pattern of patent infringement by the States" and that "Congress came up with little evidence of infringing conduct on the part of the States."[131] The instances of state patent infringement that Congress—and the lower courts—had identified were insufficient because they did not demonstrate a "massive or widespread violation of patent laws by the States" such as would constitute "evidence that unremedied patent infringement by States had become a problem of national import."[132] The Court dismissed as "speculative" congressional hearing testimony that the incidence of state patent infringement is likely to increase significantly because state-owned research universities are becoming increasingly involved in the development of marketable technologies.[133] The Court concluded that the Act's legislative record lacked sufficient evidence of present or anticipated state patent infringement to substantiate Congress's invocation of its Section 5 enforcement power.[134]

As to the second element of a Due Process Clause violation, that state-law remedies for state patent infringement must be inadequate, the Court likewise concluded that the legislative record was deficient. The Court found that "Congress [had] barely considered the availability of state remedies for patent infringement,"[135] and noted that "Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report."[136] The Court was unmoved by what it termed the "limited amount" of testimony taken at congressional hearings suggesting that efforts by patent holders to employ state-law causes of action, such as deceit or restitution, would probably fail or, at best, provide incomplete relief.[137] Similarly, the Court found insufficient the House Report's finding that the "'availability of a State remedy is tenuous and could vary significantly [from] State to State.'"[138] According to the Court, "[t]he primary point made by [the hearing] witnesses . . . was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent

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Miller Co., 333 U.S. 138, 144 (1948))), *superceded by statute as stated in* McCann v. City of Chicago, 968 F.2d 625 (7th Cir. 1992).

131 *Florida Prepaid*, 527 U.S. at 640.

132 *Id.* at 641 (internal quotation marks omitted).

133 *Id.*; *see also id.* at 656-57 (Stevens, J., dissenting) (citing numerous patent cases involving state universities).

134 *Id.* at 647.

135 *Id.* at 643.

136 *Id.* at 644.

137 *Id.* at 643-44 & n.8.

138 *Id.* at 644 (quoting H.R. REP. No. 101-960, pt. 1, at 37 n.158 (1990)).

law."[139] As the dissent pointed out, however, the majority's insistence that the record compiled by Congress did not convincingly show that state-court remedies were inadequate seems particularly misplaced in the patent context: "Congress had long ago pre-empted state jurisdiction over patent infringement cases, it was surely reasonable for Congress to assume that such remedies simply did not exist."[140]

Significantly, unlike the *Flores* decision, *Florida Prepaid* does not lend itself to a narrow, fact-specific interpretation. Although the *Flores* majority relied in part on perceived gaps in the legislative record, the Court's holding rested primarily on its view that the RFRA represented an attempt to *change* the content of, rather than *enforce*, the Fourteenth Amendment—essentially an act of nonacquiescence in a Supreme Court decision.[141] The Patent Remedy Act could not be so easily dismissed. Indeed, whereas "Congress enacted RFRA in direct response to the Court's decision in" *Smith*,[142] Congress had enacted the Patent Remedy Act *before* the Court held in *Seminole Tribe* that Congress may not abrogate state sovereign immunity pursuant to its Article I powers.[143] Accordingly, while *Flores* could have been limited to circumstances in which Congress attempts to exercise its Section 5 power to alter, rather than enforce, the Constitution, *Florida Prepaid* indicates that the Court will make the same searching demands of the legislative record whenever Congress invokes this power.

Thus, in *Florida Prepaid*, the Court struck down a federal statute solely because it found the legislative record supporting the Act incomplete.[144] The Court did so despite three factors distinguishing the Act from RFRA: (1) the statute at issue was predicated on plausible assumptions about the present extent of an evil manifested by the very complaint before the Court;[145] (2) record evidence existed to support Congress's conclusion that the extent of the targeted evil was likely to

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139 *Id.* By recharacterizing Congress's interest in ensuring that states fully compensate patent holders as merely an Article I interest in creating one nationwide system for resolving patent disputes, the Court avoided Congress's inconvenient finding—supported by hearing testimony—that state-law remedies do not reliably protect patent holders from state infringement.

140 *Id.* at 658 (Stevens, J., dissenting).

141 *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997) ("[RFRA] attempt[s] a substantive change in constitutional protections."); *see also Florida Prepaid*, 527 U.S. at 661 (Stevens, J., dissenting) ("In RFRA Congress sought to overrule this Court's interpretation of the First Amendment."); Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits After* Boerne, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 542 (1998) (noting ambiguity as to how extensively *Flores* limits Congress's Power under Section 5).

142 *Flores*, 521 U.S. at 512.

143 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).

144 *Florida Prepaid*, 527 U.S. at 640, 647.

145 *See id.* at 639-40; *id.* at 656-57 (Stevens, J., dissenting).

increase in the near future;[146] and (3) the Act could not be characterized as the product of congressional resistance to a Supreme Court decision.[147] In short, the *Florida Prepaid* Court boldly asserted the power to require Congress to articulate and support with evidence in the formal legislative record its factual conclusions and predictive judgments underlying a constitutionally controversial statute.

The Court's even more recent decision in *Kimel v. Florida Board of Regents*,[148] decided on January 11, 2000, went out of its way to reaffirm *Florida Prepaid*'s teaching that Congress is obligated to make formal findings of fact supported by substantial legislative-record evidence when it acts at (what the Court perceives to be) the margins of its constitutional authority.[149] Like *Florida Prepaid*, *Kimel* concerned the constitutional validity of an attempt by Congress to abrogate state sovereign immunity from suit in federal court. Following the example of *Florida Prepaid*, the Court in *Kimel* struck down the state-suit provision of the Age Discrimination in Employment Act (ADEA), holding that it violated the Eleventh Amendment.[150] Justice O'Connor's opinion for the Court acknowledged that *EEOC v. Wyoming*[151] had upheld the extension of the ADEA's provisions to state employers as a valid exercise of Congress's Commerce Clause power.[152] Applying the analytical framework set forth in *Florida Prepaid*, however, Justice O'Connor reasoned that Congress's correlative effort to abrogate state sovereign immunity would be upheld only if applying the ADEA to the states lies within Congress's power to enforce the substantive guarantees of the Fourteenth Amendment.[153]

Intervening in defense of the challenged provision, the federal government argued that the Act could be upheld on the ground that it remedied or prevented discrimination by states on the basis of age in violation of the Fourteenth Amendment's Equal Protection Clause.[154] The Court rejected this argument, noting first that under its prior holdings state discrimination on the basis of age was constitutionally permissible so long as it could be said to be "rationally related to a legitimate state interest."[155] On this basis, the Court concluded that very little of the state conduct prohibited by the ADEA would violate the Fourteenth Amendment and thus that "the ADEA '[was] so

146 *Id.* at 656-57 (Stevens, J., dissenting).
147 *Id.* at 661 (Stevens, J., dissenting).
148 120 S. Ct. 631 (2000).
149 *Id.* at 645.
150 *Id.* at 650.
151 460 U.S. 226, 243 (1983), *superceded by statute as stated in* McCann v. City of Chicago, 968 F.2d 635 (7th Cir. 1992).
152 *Kimel*, 120 S. Ct. at 643.
153 *Id.* at 644.
154 *Id.* at 647-48.
155 *Id.* at 646.

out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'"[156]

Although the Court might have ended its analysis there, it did not. Rather, the Court concluded that the disproportionate reach of the ADEA "while significant, does not alone provide the answer to our § 5 inquiry" because "[d]ifficult and intractable problems often require powerful remedies."[157] In other words, the constitutionality of the ADEA state-suit provision ultimately turned not on the overbreadth of the ADEA, which the Court conceded was tolerable on the theory that the Act operated as a prophylactic measure, but instead on the Court's assessment of the extent and insidiousness of unconstitutional, that is irrational, age discrimination by the states. Relying on *Flores* and *Florida Prepaid*, the Court reasoned that the latter issue could be resolved "by examining the legislative record containing the reasons for Congress'[s] action."[158] Thus, in the final analysis, the ADEA's state-suit provision failed constitutional muster *because* the formal legislative record "lack[ed] . . . evidence of widespread and unconstitutional age discrimination by the States."[159]

Perhaps the most significant, and disturbing, aspect of *Kimel* is the Court's justification of its decision to strike down the state-suit provision of the ADEA because, on the Court's reading of the legislative record, "Congress'[s] 1974 extension of the Act to the States was an unwarranted response to a *perhaps* inconsequential problem."[160] The Court thereby obliquely conceded its uncertainty as to whether unconstitutional age discrimination by the states is a problem of real consequence. Nevertheless, the Court held that Congress lacked power to address this problem, which Congress had clearly perceived to be significant, because the legislative record lacked sufficient evidence supporting that perception.[161]

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156 *Id.* at 647 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

157 *Id.* at 648.

158 *Id.*

159 *Id.* at 650. As in *Florida Prepaid*, the Court in *Kimel* continued formally to honor the proposition that "lack of support [in the legislative record] is not determinative of the § 5 inquiry." *Id.* at 649 (citing *Florida Prepaid*, 527 U.S. 627, 646 (1999) and *Flores*, 521 U.S. at 531-32). At the same time, as in *Florida Prepaid*, the Court's justification for holding the challenged provision unconstitutional ultimately rested on the Court's determination that the legislative record was inadequate. *See* Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 667-69 (2000) (noting that the Court's recent Section 5 cases require Congress to create an ample record to justify the need for legislation enacted under that provision).

160 *Kimel*, 120 S. Ct. at 648-49 (emphasis added).

161 The Court's May 2000 decision in *United States v. Morrison*, 120 S. Ct. 1740 (2000), provides further evidence that perceived gaps in the legislative record may tip the scales against the constitutionality of a challenged statute. *Morrison* held that Congress lacked power, under both the Commerce Clause and Section 5 of the Fourteenth Amendment, to enact the civil remedy provision of the Violence Against Women Act (VAWA). *Id.* at 1759.

The Court has come a long way in the past six years. *Turner I*'s ambiguous suggestion of judicial power to require that Congress compile record evidence and make formal findings in support of its constitutional judgments has now been offered as the controlling rationale for invalidating two major federal statutes. Therefore, the Court has, without express justification or explanation, imposed upon Congress procedural requirements akin to those imposed on federal administrative agencies.

II

WHAT'S WRONG WITH THE COURT'S NEW APPROACH?

Part I of this Article describes a subtle, but nonetheless fundamentally important, shift in the way the Supreme Court reviews federal statutes. Specifically, we catalogued the Court's evolution from the tentative suggestion in *Turner I* that Congress must provide "substantial evidence" to justify the exercise of its legislative powers, to the *Florida Prepaid* and *Kimel* rule that Congress must, at least in cases approaching the limits of its constitutional authority, predicate the exercise of its constitutional authority on express findings supported by convincing record evidence. In so doing, the Court appears to have applied procedural requirements to Congress similar to the requirements imposed on federal administrative agencies by the Administrative Procedure Act (APA).[162]

This section of the Article considers whether this heightened scrutiny of the legislative record in constitutional cases is appropriate. For several reasons, we conclude that it is not.[163] Part II first argues that the Court's new approach is inconsistent with the Court's own

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For a discussion of the *Morrison* Court's Commerce Clause analysis, see *supra* text accompanying notes 84-96. In dispensing with the Fourteenth Amendment argument, the Court concluded that VAWA lacked the "congruence and proportionality" required of remedial legislation enacted under Section 5 because VAWA "applie[d] uniformly throughout the Nation" even though "Congress'[s] findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all states, or even most States." *Morrison*, 120 S.Ct. at 1758-59. As Justice Breyer observed in his dissenting opinion, however, the relevant congressional findings nowhere concluded that the problem of pervasive unconstitutional gender bias was limited to certain states. *Id.* at 1779 (Breyer, J., dissenting). Rather, the majority was disturbed that Congress had enacted nationwide legislation on the basis of reports documenting constitutional violations from "only" twenty-one—not all fifty—states. *Id.* (Breyer, J., dissenting). Justice Breyer asked rhetorically, "Why can Congress not take the evidence before it as evidence of a national problem?" *Id.* (Breyer, J., dissenting) (noting that the Supreme "Court ha[d] not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution" and that "the deference this Court gives to Congress'[s] chosen remedy under § 5 . . . suggests that any such requirement would be inappropriate" (citation omitted)).

162 5 U.S.C. §§ 551-559, 701-706 (1994).

163 Notably, although this trend appears to have gone largely unnoticed in the academic literature to date, the limited attention focused on the issue in the wake of *Lopez*

precedents.[164] Part II then explains that even putting precedent aside, the Court's new approach raises substantial separation-of-powers concerns and ignores important realities of congressional fact-finding.[165]

A. The Court's New Procedural Requirement is Inconsistent with Precedent

Less than a decade ago, it was settled law that, outside of the narrow categories subject to the strictest judicial scrutiny,[166] Congress was under no obligation to make findings or compile an evidentiary record in support of the factual assumptions and predictive judgments underlying federal statutes. This was, of course, not always the case. Prior to the 1937 "switch in time,"[167] the Court sometimes attached great significance to the presence or absence of congressional findings or supporting evidence in the formal legislative record. But from

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was, if anything, approving of the Court's increased emphasis on the legislative record in constitutional adjudication. *See supra* note 10.

164 *Infra* Part II.A.

165 *Infra* Part II.B.

166 Although both the precise meaning and bounds of "strict scrutiny" are fluid, the categories to which we allude here include, at a minimum, laws imposing racial classifications—*see, e.g.*, Adarand Constructors, Inc. v. Pena, 512 U.S. 200 (1995) (plurality opinion) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (noting that, in the context of affirmative action, racial classifications must be "supported by a compelling state purpose[,] and . . . the means chosen to accomplish that purpose [must be] . . . narrowly tailored."); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (noting that classification of persons according to race "are subject to the most exacting scrutiny")—religious classification—*see, e.g.*, Larson v. Valente, 456 U.S. 228, 246 (1982) (noting that the Court must apply strict scrutiny to charity registration law selectively exempting some, but not all, religious organizations)—content-based regulations of speech—*see, e.g.*, Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (holding that regulation of speech on government property that has traditionally been available for public expression is subject to highest scrutiny); Sable Communications of Cal. v. FCC, 492 U.S. 115, 126 (1989) (holding that the government many only regulate speech that is indecent but not obscene "to promote a compelling interest," and must "choose[ ] the least restrictive means to further the articulated interest")—and limitations on fundamental rights—*see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that strict scrutiny applies to limitations on the right of interstate travel); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (holding that strict scrutiny applies to limitations on equal access to voting); Douglas v. California, 372 U.S. 353 (1963) (holding that strict scrutiny applies to limitations on equal access to the judiciary). An analysis of how the Court has treated the legislative record in these or other "heightened scrutiny" cases lies well beyond the scope of this Article; we allude to them only to acknowledge that the question of what demands the judiciary may legitimately place on congressional procedures in such cases may be different than in the Section 5 and Commerce Clause cases that are our focus here.

167 *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 363-65 & n.38 (1998) (discussing Justice Roberts's changed vote shortly after President Roosevelt promulgated his court-packing plan).

the late 1930s to the early 1990s, the Court repeatedly repudiated this approach.

This section briefly reviews the development of the rule that Congress need not compile a formal record in support of its decision to legislate. This section focuses first on the Court's twentieth-century treatment of the formal legislative record in cases challenging a particular statute as beyond Congress's power under the Commerce Clause of Article I.[168] It then reviews the history of the Court's treatment of the formal legislative record in cases addressing Congress's power to enforce the substantive provisions of the Reconstruction Amendments.[169] Finally, it discusses the Supreme Court's traditional reluctance to require Congress to make formal factual findings or document the basis for its predictive judgments even in the context of heightened judicial scrutiny under the First Amendment.[170] This history demonstrates that the Court's new approach conflicts with these unchallenged precedents.

1. *Congress's Power Under the Commerce Clause*

a. *Before the "Switch" of 1937*

Prior to its post-1937 acquiescence in the constitutional innovations of the New Deal, the Supreme Court viewed with suspicion federal statutes premised on an expansive understanding of Congress's Commerce Clause power.[171] One manifestation of this suspicion was the Court's rigorous review of the legislative record supporting challenged statutes. Two cases from the early 1920s addressing congressional efforts to regulate grain-futures trading illustrate this approach.

In *Hill v. Wallace*,[172] the Court struck down the Grain Future Trading Act of 1921 as beyond Congress's power under the Commerce Clause.[173] In an opinion by Chief Justice Taft, the Court reasoned that transactions for future delivery of grain between members of the Board of Trade of the City of Chicago, to be settled by offsetting purchases or by delivery of warehouse receipts of grain stored in Chicago, did not constitute interstate commerce.[174] The Court also rejected the alternate argument that Congress could regulate these transactions because of their impact on interstate commerce, emphasizing that no such impact was evident from the formal legislative re-

168 *Infra* Part II.A.1.
169 *Infra* Part II.A.2.
170 *Infra* Part II.A.3.
171 *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, at 222-26 (1990).
172 259 U.S. 44 (1922).
173 *Id.* at 68-69.
174 *Id.* at 68-69.

cord compiled by Congress.[175] The Court declared that, "without any limitation . . . to interstate commerce, *or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce,* we do not find it possible to sustain the validity of the regulations as they are set forth in this act."[176] In order to make the reservation even clearer, the Court reiterated that "sales for future delivery on the Board of Trade are not in and of themselves interstate commerce" and "can not come within the regulatory power of Congress as such, *unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon.*"[177]

The Court's hints in *Hill* were not lost on Congress. Congress essentially reenacted the invalidated law the following year as the Grain Futures Act with additional detailed findings based on evidence gathered in public hearings.[178] Congress wrote its findings into section 3 of the Act, which declared that the prices of grain futures were generally used "for determining the prices to the producer and the consumer of grain . . . and to facilitate the movements thereof in interstate commerce."[179] Congress also found that trading in grain futures was "susceptible to speculation, manipulation, and control" that resulted in "sudden or unreasonable fluctuations in . . . prices . . . detrimental to the producer or the consumer and the persons handling grain . . . in interstate commerce."[180] Because, in Congress's considered judgment, these "fluctuations in prices [were] an obstruction to and a burden upon interstate commerce in grain," Congress rendered uniform, federal "regulation imperative for the protection of such commerce and the national public interest therein."[181]

Congress's extensive post-*Hill* findings led the Court to uphold the new Act in *Board of Trade of Chicago v. Olsen.*[182] The Court, again in an opinion by Chief Justice Taft, recited in full the congressional findings in section 3.[183] The Court also acknowledged that the Act's opponents had "submitted a large number of affidavits" at trial reflecting the "opinions of many professors of political economy in the colleges of the country to the effect that," contrary to Congress's findings, "trading in futures in the long run did not depress prices,

175 *Id.* at 68.

176 *Id.* (emphasis added).

177 *Id.* at 69 (emphasis added) (citation omitted).

178 *Compare* The Future Trading Act, Pub. L. No. 67-66, 42 Stat. 187 (1921) (superseded by The Grain Futures Act, Pub. L. No. 67-331, 42 Stat. 998 (1922)), *with* The Grain Futures Act § 3, 42 Stat. at 999 (current version at Commodity Exchange Act, 7 U.S.C. § 1 (1999)) (discussing congressional findings).

179 The Grain Futures Act § 3, 42 Stat. at 999.

180 *Id.*

181 *Id.*

182 262 U.S. 1 (1923).

183 *Id.* at 4-5.

but stabilized them."[184] The Court was impressed, however, that Congress's findings had drawn upon "many years of investigation and examination of witnesses, including the advocates of regulation and those opposed, and men intimately advised in respect to the grain markets of the country."[185] The Court recounted in some detail the expert testimony at public hearings and the conclusions of the Senate and House Agriculture committees, which supported the findings written into the 1922 Act.[186]

In light of this evidentiary support, the Court held that "we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain."[187] The Court distinguished *Hill v. Wallace* on the basis that the 1921 Act lacked such well-supported findings[188] and upheld the 1922 Act as within Congress's power under the Commerce Clause, thus effectively reversing its prior position on the underlying constitutional question.[189] Taken together, the *Hill* and *Olsen* cases clearly indicate that in the pre-"switch" era, congressional findings, supported by evidence in the legislative record, made a decisive difference in cases concerning Congress's Commerce Clause power.[190]

The Court's now-infamous 1936 decision in *Carter v. Carter Coal Co.*,[191] which struck down the labor-relations provisions of the Bitumi-

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184 *Id.* at 10.

185 *Id.*

186 *Id.* at 10-15.

187 *Id.* at 37-38.

188 *Id.* at 32-33. The Court stated:

> The Grain Futures Act [of 1922] which is now before us differs from the Future Trading Act [of 1921] in having the very features the absence of which we held in the somewhat carefully framed language of [*Hill v. Wallace*] prevented our sustaining the Future Trading Act. As we have seen in the statement of the case, the [1922] act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation they have become a constantly recurring burden and obstruction to that commerce. Instead, therefore, of being an authority against the validity of the Grain Futures Act [of 1922], [*Hill v. Wallace*] is an authority in its favor.

Id.

189 *Id.* at 40.

190 Frickey, *supra* note 10, at 708-09 (discussing *Hill* and *Olsen*); *see also* Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240, 311-16 (1935) (stating that "Congress is entitled to its own judgment" regarding decisive "determinations of questions of facts" (cited in Frickey, *supra* note 10, at 709 n.82)); Stafford v. Wallace, 258 U.S. 495, 521 (1922) ("[I]t is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a manner unless the relationship . . . to interstate commerce . . . [is] clearly non-existent." (cited in Frickey, *supra* note 10, at 709 n.82)).

191 298 U.S. 238 (1936).

nous Coal Conservation Act of 1935,[192] reinforced this lesson in dramatic fashion. In an opinion by Justice Sutherland, the Court dismissed as "pure assumption" the congressional conclusion written into the first section of the Act that "the production and distribution of [bituminous] coal 'directly affect[s] interstate commerce.'"[193] Similarly, the court rejected as too speculative Congress's view that the nation's "industrial activities [and] transportation facilities"[194] had become so dependent on the steady production and distribution of bituminous coal as to render congressional regulation of the latter "imperative for the protection of [interstate] commerce."[195] Thus, the *Carter Coal* decision, like *Olsen*, implicitly directed Congress to document in the formal legislative record the "direct" effect on interstate commerce of conduct targeted by a federal statute, or else to expect invalidation on grounds of exceeding congressional power under the Commerce Clause.[196]

b. *After the "Switch"*

Justice Roberts's decisive vote in *West Coast Hotel Co. v. Parrish*,[197] which on March 29, 1937, upheld state wage and hours legislation governing employment of women and children,[198] has been accorded the dubious distinction of being the "switch in time that saved nine" by dissipating support for President Roosevelt's then-pending proposal to "pack" the Court.[199] But of far greater contemporary significance was the Court's decision later that same term in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[200] which upheld the Na-

192 *Id.* at 310.

193 *Id.* at 290 (quoting The Bituminous Coal Conservation Act of 1935, ch. 824, § 1, 49 Stat. 991, 992).

194 *Id.* at 279 (summarizing section 1 of the Act, § 1, 49 Stat. at 991-92).

195 *Id.* at 280 (summarizing section 1 of the Act, § 1, 49 Stat. at 991-92); *see also id.* at 309 ("Such effect as [labor disputes in the coal mining industry] may have upon commerce, however extensive it may be, is secondary and indirect.").

196 Indeed, in the wake of cases such as *Olsen* and *Carter Coal*, attorneys in the Roosevelt Administration—including Charles Fahy, then General Counsel of the NLRB—thought careful drafting and substantiation of appropriate congressional findings to be essential to a successful constitutional defense of the National Labor Relations Act. Frickey, *supra* note 10, at 698-99 & n.25.

197 300 U.S. 379 (1937).

198 *Id.* at 400.

199 *See* 2 ACKERMAN, *supra* note 167, at 363-64. In the prior term, Justice Roberts had joined with the four conservative Justices, then widely known as the "four horsemen," to strike down a law quite similar to those at issue in *Parrish*. *See id.* at 363. Justice Roberts's failure to write an opinion explaining his decision to abandon his earlier position made his motivations the subject of "endless controversy—with [legal] realists making his switch into a symbol of the potency of the President's unconventional threat, and legalists defending Roberts against the taint of political jurisprudence." *Id.* at 364.

200 301 U.S. 1 (1937), *abrogation recognized by* United States v. Taylor, 226 F.3d 593 (7th Cir. 2000).

tional Labor Relations Act (NLRA) as within Congress's Commerce Clause power.[201] In an opinion by Chief Justice Hughes, the Court—without expressly overruling *Carter Coal*—held that at least with respect to nationwide industries, the danger of divisive labor disputes had a "direct" enough impact on interstate commerce to justify congressional regulation.[202] Four years later, in *United States v. Darby*,[203] a unanimous Court upheld the Fair Labor Standards Act of 1938 (FLSA), which set minimum wages and maximum hours for employees producing "goods, which, at the time of production, the employer . . . intends or expects to move in interstate commerce."[204] In so doing, the *Darby* Court acknowledged that neither its holding nor that of *Jones & Laughlin* could be reconciled with *Carter Coal*.[205]

A rarely noticed aspect of the *Jones & Laughlin* and *Darby* decisions, which are widely and correctly regarded as "watershed" cases,[206] is that, unlike *Hill*, *Olsen*, and *Carter Coal*, the post-1936 decisions attached little significance to the existence of congressional findings of fact or legislative-record evidence. Rather, *Jones & Laughlin* and *Darby* turned on the Court's assessment, apart from any congressional findings or record evidence, of the relationship between labor peace and interstate commerce.

In *Jones & Laughlin*, the Court relegated to a footnote in the background portion of the opinion the extensive findings that Congress had written into section 1 of the NLRA.[207] The Court's sole, oblique reference in the text of its opinion to these findings and the supporting legislative record was its observation that questions concerning the impact of labor disputes on interstate commerce "have frequently engaged the attention of Congress and have been the sub-

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201 *Id.* at 43; *see* 2 ACKERMAN, *supra* note 167, at 4884 n.34. Ackerman asserts that

> If any single case is crucial, it was *Jones & Laughlin*, not *Parrish*. If Justice Roberts had joined the four conservatives in striking down the [NLRA], the Justices would have deprived the New Deal of its only creative solution to the proliferating sit-down strikes that were precipitating all-out class war in America's industrial heartland.

Id.

202 *Jones & Laughlin*, 301 U.S. at 41-43.

203 312 U.S. 100 (1941), *abrogation recognized by* United States v. Taylor, 226 F.3d 593 (7th Cir. 2000).

204 *Id.* at 118.

205 *Id.* at 123 ("So far as *Carter v. Carter Coal Co.* . . . is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act [including *Jones & Laughlin*], which we have cited and which we follow." (citation omitted)).

206 *E.g.*, Frickey, *supra* note 10, at 708; *see also, e.g.*, CURRIE, *supra* note 171, at 236-38 (stating that *Jones & Laughlin* was a "real breakthrough," which *Darby* confirmed).

207 *Jones & Laughlin*, 301 U.S. at 23 n.2. Notably, prior to the Court's decision in *Jones & Laughlin*, Solicitor of Labor Charles Fahy, along with other prominent lawyers in the Roosevelt Administration, had pinned their hopes for sustaining the NLRA on the inclusion of carefully crafted, detailed findings in the text of the Act. *Supra* note 196.

ject of many inquiries."[208] Similarly, in *Darby*, the Court's sole reliance on the express congressional findings of fact and legislative record in support of the Act was to note that Congress "recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great."[209] The Court's relative lack of interest in the legislative record in *Jones & Laughlin* and *Darby*, when contrasted with its scrutiny of the formal legislative record in *Hill*, *Olsen*, and *Carter Coal*, signaled a shift in the Court's approach to congressional findings and supporting evidence in Commerce Clause cases.

The Court's decisions in subsequent decades confirmed that Congress was under no obligation to make factual findings or compile an evidentiary record in support of even highly attenuated assertions of its Commerce Clause power. The Court first disposed of the claim that formal findings written into the text of the statute should be required. In *Heart of Atlanta Motel, Inc. v. United States*[210] and *Katzenbach v. McClung*,[211] two companion cases decided the same day, the Court upheld the public-accommodations provisions of the Civil Rights Act of 1964 as an appropriate exercise of Congress's power under the Commerce Clause.[212] In so doing, the Court rejected the argument that the Act was constitutionally deficient because it lacked formal findings of fact stating Congress's belief that racial discrimination in hotels and restaurants substantially burdened interstate commerce.[213] The Court noted that "both Houses of Congress conducted prolonged hearings on the Act,"[214] and concluded that, although Congress had made explicit findings in support of the NLRA and the FLSA, the absence of such findings in the Civil Rights Act was "not fatal to the validity of the statute . . . for the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate."[215]

The Court also indicated that, so long as the members of Congress, "in light of the facts and testimony before them, have a *rational basis* for finding a chosen regulatory scheme necessary to the protection of commerce," the resulting statute would fall within Congress's

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208 *Jones & Laughlin*, 301 U.S. at 43. In support of the quoted observation, the Court cited, along with other nonlegislative studies, one twenty-one-year-old report and another thirty-five-year-old report of two congressional commissions tasked to study labor relations. *Id.* at 43 n.8.

209 *Darby*, 312 U.S. at 123.

210 379 U.S. 241 (1964), *abrogation recognized by* United States v. Taylor, 226 F.3d 593 (7th Cir. 2000).

211 379 U.S. 294 (1964).

212 *Id.* at 305; *Heart of Atlanta*, 379 U.S. at 261.

213 *McClung*, 379 U.S. at 304; *Heart of Atlanta*, 379 U.S. at 252.

214 *McClung*, 379 U.S. at 299; *see Heart of Atlanta*, 379 U.S. at 246.

215 *McClung*, 379 U.S. at 304 (citation omitted).

Commerce Clause power.[216] Thus, in considering the constitutionality of the Act as applied to restaurants that sold food shipped in interstate commerce, the Court found "the absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food" immaterial.[217] The court found sufficient the inference that racial discrimination in restaurants would adversely impact the interstate flow of food.[218]

Having established in these cases that Congress need not make formal findings of fact, the Court in *Maryland v. Wirtz*[219] further clarified that, notwithstanding its reliance on congressional committee hearings in upholding the Civil Rights Act, Congress need not compile a supporting legislative record evidencing the relationship between the regulated activity and interstate commerce.[220] In *Wirtz*, the Court upheld the 1961 amendments to the FLSA that expanded the Act's coverage from just those workers producing goods for interstate commerce to all workers "'employed in an enterprise engaged in [interstate] commerce or in the production of goods for [interstate] commerce.'"[221] The effect of these amendments "was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of *employers* subject to the Act."[222] The parties challenging these amendments as beyond Congress's power under the Commerce Clause attempted to distinguish *Heart of Atlanta Motel* and *McClung* by arguing that in those cases "Congress had undertaken extensive investigation of the commercial need for the" Civil Rights Act of 1964, whereas "the legislative history of the amendments" to the FLSA "la[id] no factual predicate for extensions of the original Act."[223]

The Court relegated this argument, which it described as a "major contention" of the amendments' challengers, to a footnote, dis-

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216 *Id.* at 303-04 (emphasis added).

217 *Id.* at 304-05.

218 *Id.* at 299, 304-05. The Court noted that testimony at congressional hearings demonstrated that

> [a] comparison of per capita spending by Negroes in restaurants, theaters, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. . . . This diminutive spending springing from a refusal to serve Negroes and their total loss as customers has, *regardless of the absence of direct evidence*, a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys.

Id. at 299 (emphasis added) (citation omitted).

219 392 U.S. 183 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

220 *Id.* at 190 n.13.

221 *Id.* at 188 (quoting 29 U.S.C. §§ 206(a), 207(a) (1964)).

222 *Id.*

223 *Id.* at 190 n.13.

missing the point as "irrelevant."[224] The Court explained that it was "not concerned with the manner in which Congress reached its factual conclusions."[225] Rather, the Court upheld the amendments because it was able on its own to identify a "rational basis" for the conclusion that the wages and hours of workers employed by firms conducting business across state lines had a sufficient effect on interstate commerce to justify congressional regulation.[226] *Wirtz* thus firmly entrenched the principle that Congress was under no obligation to make factual findings or compile a factual record to support novel assertions of its Commerce Clause authority.

2. *Congress's Power to Enforce the Reconstruction Amendments*

When Congress enacted the sweeping and revolutionary reforms of the Voting Rights Act of 1965,[227] it expressly invoked its power under Section 2 of the Fifteenth Amendment to enforce that Amendment's guarantee that "[t]he right . . . to vote shall not be denied or abridged . . . on account of race [or] color."[228] In *South Carolina v. Katzenbach*,[229] the first of numerous decisions concerning the Act and its subsequent amendments, the Court upheld its core provisions as an appropriate exercise of Congress's power to enforce the Fifteenth Amendment.[230] To justify the Act's novel and potentially intrusive remedial scheme, Chief Justice Warren's opinion for the Court relied heavily on congressional findings and the supporting evidence in the legislative record that demonstrated that resistance to black Americans' enfranchisement remained pervasive and therefore required extraordinary remedies.[231]

At the outset of its analysis, the Court declared that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."[232] The Court approvingly observed:

> Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. More than three

224 *Id.*
225 *Id.*
226 *Id.* at 190.
227 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in 42 U.S.C. §§ 1971-1973 (1994)).
228 U.S. CONST. amend. XV, § 1.
229 383 U.S. 301 (1966).
230 *Id.* at 337.
231 *Id.* at 308-09.
232 *Id.* at 308.

> full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.[233]

The Court read this "voluminous legislative history" to demonstrate "vividly" that Congress intended the Act to reverse the course of "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[234] The Court agreed with Congress's conclusion that, to achieve this goal, prior "unsuccessful remedies . . . ha[d] to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."[235]

Among the most controversial of the Act's provisions was section 4(a), which suspended literacy tests and similar voting qualifications in covered jurisdictions for a period of five years from the last occurrence of substantial voting discrimination.[236] This blanket prohibition on literacy tests diverged sharply from the Court's prior holding in *Lassiter v. Northampton County Board of Elections*[237] that literacy tests were not in themselves contrary to the Fifteenth Amendment.[238] In light of this holding, South Carolina argued that the Act's literacy test ban could not be held to enforce that same Amendment.[239] The Court disagreed. Because the legislative record demonstrated "that in most of the States covered by the Act, including South Carolina, various tests and devices ha[d] been instituted with the purpose of disenfranchising Negroes, ha[d] been framed in such a way as to facilitate this aim, and ha[d] been administered in a discriminatory fashion for many years,"[240] the Court deferred to Congress's conclusion that these tests must be proscribed to effectuate the promise of the Fifteenth Amendment.[241]

The Court's opinion in *South Carolina v. Katzenbach* did not expressly state that a novel exercise of Congress's power to enforce the Reconstruction Amendments required congressional findings or supporting record evidence to pass constitutional muster. But the

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233 *Id.* at 308-09 (footnote omitted).

234 *Id.* at 309.

235 *Id.* In support of these conclusions, the Court dedicated the next three pages of its opinion to a summary of "the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for" the Act. *Id.*

236 Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified as amended in 42 U.S.C. §§ 1971-1973 (1994)). Section 4(a)'s prohibition was itself defeasible "if the [State or political subdivision] obtain[ed] a declaratory judgment from the District Court for the District of Columbia, determining that tests and devices have not been used during the preceding five years to abridge the franchise on racial grounds." *Katzenbach*, 383 U.S. at 318.

237 360 U.S. 45 (1959).

238 *Id.* at 53.

239 *Katzenbach*, 383 U.S. at 333.

240 *Id.* at 333-34 (citing House and Senate Reports in support of the Act).

241 *See id.* at 337.

Court's reliance in that case on the record supporting the Voting Rights Act of 1965 could fairly have been read to advance such a requirement. This reading of *Katzenbach* would have constituted a substantial limit on Congress's enforcement authority because, as one commentator recently observed, the extent and quality of the legislative record compiled in support of the Voting Rights Act of 1965 "is unique among modern legislation under the Enforcement Clauses."[242] Just a few months after its *South Carolina v. Katzenbach* decision, however, the Court clarified that an exercise of congressional authority to enforce the Reconstruction Amendments required neither formal findings of fact nor evidentiary support in the legislative record.[243]

In *Katzenbach v. Morgan*,[244] decided later in the October 1965 term, the Court upheld section 4(e) of the Voting Rights Act—a provision not at issue in *South Carolina v. Katzenbach*—as a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment.[245] In order "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English," section 4(e) prohibited the use of a literacy test to disenfranchise any "person who . . . has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which" classes were conducted in a foreign langnage.[246] As a practical matter, the primary effect of this provision was to enfranchise those educated in Spanish-langnage schools, particularly "the several hundred thousand" Puerto Rican residents of New York City.[247] The Court reasoned that notwithstanding *Lassiter*'s holding that literacy tests were constitutionally permissible,[248] the limited prohibition in section 4(e) on the use of such tests furthered the Fourteenth Amendment's promise of "the equal protection of the laws"[249] in two distinct ways.[250]

Specifically, the Court found that section "4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New

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242 Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 748 (1998).

243 *See* Katzenbach v. Morgan, 384 U.S. 641, 653 (1966), *abrogation recognized by* Varner v. Ill. State Univ., 150 F.3d 706 (7th Cir. 1998).

244 384 U.S. 641 (1966), *abrogation recognized by* Varner v. Ill. State Univ., 150 F.3d 706 (7th Cir. 1998).

245 *Id.* at 652, 658.

246 Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e)(2), 79 Stat. 437, 439 (codified as amended at 42 U.S.C. §§ 1971-1973 (1994)).

247 *Morgan*, 384 U.S. at 644-45 & n.3.

248 Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959).

249 U.S. CONST. amend. XIV, § 1.

250 *Morgan*, 384 U.S. at 652.

York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement."[251] Regarding voting qualifications, section 4(e) was a proper means to shelter New York's Puerto Rican community from invidious discrimination hidden in either the purposes or the administration of New York's voter eligibility requirements.[252] Under the governmental-services rationale, the Court reasoned that by increasing the political clout of the Puerto Rican community, section 4(e) empowered that community to protect itself against discrimination in the allocation of public benefits and, thus, secured to it the equal protection of the laws.[253] The Court therefore concluded that because section 4(e) had the effect of extending the franchise, "the right that is 'preservative of all rights,'"[254] to a greater portion of New York's Puerto Rican community, the provision fell within Congress's power to enforce the Fourteenth Amendment.[255]

As Justice Harlan pointed out in his dissent, however, the Court's theories linking section 4(e) to the Fourteenth Amendment found no support in congressional findings of fact or evidence in the legislative record.[256] Specifically, neither source set forth evidence that New York's literacy requirement, either as originally proposed or as contemporarily administered, was infected with discriminatory bias.[257] Nor, in Justice Harlan's words,

> was there any showing whatever to support the Court's alternative argument that § 4(e) should be viewed as but a remedial measure designed to cure or assure against unconstitutional discrimination of other varieties, *e.g.*, in 'public schools, public housing and law enforcement,' . . . to which Puerto Rican minorities might be subject in such communities as New York. There is simply no legislative record supporting such hypothesized discrimination.[258]

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251 *Id.*

252 *Id.* at 653-56.

253 *Id.* at 652-53.

254 *Id.* at 652 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

255 *Id.*

256 *Id.* at 669 (Harlan, J., dissenting); *see also* Laycock, *supra* note 242, at 748 (noting, with respect to the Court's decision in *Morgan*, that "the congressional record said nothing about discrimination in public services in New York"); Saul M. 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, 348 (1984) ("[I]n *Morgan* there was no record evidence to support the federal statute.").

257 *Morgan*, 384 U.S. at 669 (Harlan, J., dissenting) (concluding that New York's nondiscriminatory justification for the literacy requirement had not been refuted because "no . . . factual data provide a legislative record supporting § 4(e) by way of showing that Spanish-speaking citizens are fully as capable of making informed decisions in a New York election as are English-speaking citizens" (footnote omitted)).

258 *Id.* (Harlan, J., dissenting) (footnote and citation omitted).

Thus, unlike the provisions at issue in *South Carolina v. Katzenbach*, section 4(e) was not defensible on the ground that it was justified by evidence in the legislative record.

For Justice Harlan and Justice Stewart, who joined Justice Harlan's dissenting opinion in *Morgan*, that difference should have dictated a different outcome in the two cases.[259] But that difference was immaterial to the seven-Justice majority in *Morgan*, which upheld section 4(e) even though the factual assumptions underlying the provision lacked support in express congressional findings or record evidence.[260] The Court's decision in *Morgan* thus made unmistakably clear that congressional findings of fact, or legislative record evidence in support thereof, were no more required under the enforcement sections of the Reconstruction Amendments than they were, after 1937, under the Commerce Clause. Subsequent judicial decisions, and unchallenged congressional action, confirmed this understanding.[261]

3. *Congressional Regulation of Speech*

Even a cursory effort to catalogue the Supreme Court's treatment of the legislative record in cases decided under the Free Speech Clause of the First Amendment would necessarily expand far beyond the scope of this Article.[262] Moreover, as this Article acknowledges, it may be that the considerations relevant to the proper treatment of the legislative record in cases requiring "strict" judicial scrutiny are quite different from those in cases attendant on "rational basis" review, like the Commerce Clause and Section 5 decisions that are the primary focus of this Article. Yet, even when core First Amendment interests were at stake, the Court had, prior to *Turner I*, frequently held that Congress was under no obligation to create a legislative record demonstrating the correctness of the underlying factual assumptions of a challenged restriction of speech.

Sable Communications of California, Inc. v. FCC[263] is one relatively recent case indicating that Congress need not create a record support-

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

260 *Id.* at 656.

261 Laycock, *supra* note 242, at 747-58 (collecting and discussing cases and statutes reflecting assumption that even novel assertions of Congress's power to enforce the Reconstruction Amendments would be upheld even though unsupported by relevant findings by Congress or evidence in the legislative record).

262 Notably, however, others have attempted this task and found the Court's approach to the legislative record in such cases rife with inconsistency and confusion. *E.g.*, William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1263-64 (1998) ("[T]he extent to which the Court believes that it should accept legislative facts in First Amendment cases varies dramatically. The Court has never attempted to reconcile its different approaches to legislative facts." (footnote omitted)).

263 492 U.S. 115 (1989).

ing its factual conclusions, even when enacting a statute subject to the most exacting judicial scrutiny under the First Amendment.[264] *Sable* addressed the constitutionality of a federal statute banning both obscene and indecent commercial telephone messages, a response to the then-incipient "dial-a-porn" industry.[265] The Court upheld the statute insofar as it applied to obscene and thus constitutionally unprotected communications, but struck down the ban on indecent messages, holding that it violated the First Amendment.[266] The Court reasoned that a total criminal prohibition on indecent telephone messages was a content-based regulation of speech subject to strict judicial scrutiny.[267] The Court held that such scrutiny would not permit legislators to limit adult speech to that suitable for children when alternative regulatory schemes already devised by the FCC constituted viable, less restrictive alternatives, even if those alternatives could result in some children being exposed to indecency.[268]

In support of this conclusion, the Court noted that the legislative record was devoid of any assertion that minors would have circumvented the FCC's restrictions with significant frequency.[269] Justice Scalia, who joined Justice White's majority opinion, wrote separately to dispel any inference that might otherwise have been drawn from the Court's discussion of the statute's legislative history.[270] He joined the Court's opinion "with the understanding that its examination of the legislative history is merely meant to establish that no more there than anywhere else can data be found demonstrating the infeasibility of alternative means to provide . . . adequate protection of minors."[271] He emphasized that the Court's opinion ought not be read "to sug-

264 *Id.* at 129-31.

265 *Id.* at 117-18.

266 *Id.* at 124, 131.

267 *Id.* at 126 (holding that the ban on indecent messages could be upheld only if it constituted the least restrictive means available to further a compelling governmental interest).

268 *Id.* at 128-31.

269 *Id.* at 130. The Court's reference to the legislative record is perhaps best understood as demonstrating that Congress's policy conclusion that the total ban was necessary to protect minors—a judgment to which the Court was invited to defer by the Solicitor General—was *not* predicated on a *factual* conclusion that a significant number of children were likely to be exposed to indecency. Rather, the statute reflected Congress's weighing of the relative importance of protecting free expression, on the one hand, and sheltering a few minors from occasional exposure to sexually explicit messages, on the other. Not surprisingly, the Court reserved to itself the balancing of those interests. *See id.* at 131 (Scalia, J., concurring) ("It should not be missed that we are making a value judgment with respect to the indecency portion of the statute."); *see also* Lee, *supra* note 262, at 1295 (concluding that "[t]he Court's criticism of the legislative history should not be read as a requirement that legislatures have factual data before them"); *supra* note 33 (discussing a similar decision by the Court in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978)).

270 *Sable*, 492 U.S. at 131 (Scalia, J., concurring).

271 *Id.* at 133 (Scalia, J., concurring) (citation omitted).

gest that such data must have been before Congress in order for the law to be valid."[272] To the contrary, he understood the Court's precedents to be clear that "[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote."[273] Thus, in *Sable*, the total ban would have been constitutional if less restrictive regulatory alternatives were in fact infeasible, even though "'[n]o Congressman or Senator purported to present a considered judgment'" on the issue.[274] Significantly, no other Justice disputed Justice Scalia's view that the constitutionality of a federal statute should not depend on whether Congress had created an adequate record, even in the context of strict judicial scrutiny under the First Amendment.

The cases discussed in this section established the general rule that Congress need not articulate findings or compile an evidentiary record in support of the factual assumptions or predictive judgments underlying federal statutes. In these and other cases, the Court repeatedly held that the absence of congressional findings or supporting evidence is not generally fatal to a challenged statute. Today, none of the cases has been overruled, but much has changed. The Court's new approach appears to reflect a fundamental shift toward the analysis of the pre-New Deal era.[275] This step back is not only inconsistent with precedent, but also fundamentally misguided as an analytical matter.

B. The Court's New Approach is Fundamentally Ill Advised

The Court's recent imposition of a requirement that Congress compile a formal legislative record in support of the exercise of its constitutional authority is not only inconsistent with the Court's own precedents, but is also ill advised. The Court's new approach is misguided for three reasons: (1) Congress is not an agency, and the reasons for "on-the-record" review in the administrative context do not apply to the legislative branch; (2) the Court's imposition of new, procedural conditions on Congress's exercise of its legislative authority raises substantial constitutional questions under the Rules and Journal Clauses, the Speech or Debate Clause, and the political question doctrine; and (3) the Court's new approach is simply inconsistent with

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272 *Id.* (Scalia, J., concurring).

273 *Id.* (Scalia, J., concurring).

274 *Id.* (Scalia, J., concurring) (quoting the majority opinion, *id.* at 130) (alteration in original); *see also* Lee, *supra* note 262, at 1296 (interpreting Justice Scalia's concurring opinion in *Sable* to mean "that the judiciary should not interfere with how the legislative branch chooses to enact laws" because "[t]he effect of [a] law and the question of whether it narrowly serves sufficiently important interests can be determined without a requirement that the legislature follow some specified method of gathering and evaluating data").

275 *See supra* Part II.A.1(a) (discussing the pre-New Deal era analysis).

the realities of congressional fact-finding as envisioned by the Constitution.

1. *The Purposes of "On-the-Record" Review Do Not Apply to Review of Congressional Enactments*

From Justice Kennedy's invocation of a "substantial evidence" requirement in *Turner I*[276] to the *Kimel* Court's declaration that the validity of the state-suit provision of the ADEA depended on "the legislative record containing the reasons for Congress's action,"[277] the Court's emerging approach to the legislative record resembles nothing so much as the careful, on-the-record review of agency action that has developed under the APA.[278] We pause only briefly here to observe what should essentially go without saying—that the purposes of such review in the administrative context do not apply to judicial review of federal statutes.

The reasons for close scrutiny of agency action under the APA have constitutional, political, and practical dimensions. On the constitutional front, the "uneasy" status of administrative agencies has been the subject of extensive scholarly and judicial inquiry.[279] The crux of the problem, of course, is that the Constitution expressly delegates "[a]ll legislative powers" of the federal government to the "Congress of the United States,"[280] the "executive Power"[281] to the President, and the "judicial Power"[282] to the courts. Nowhere does the Constitution authorize the creation of administrative agencies, and the Framers certainly could never have foreseen the rise of executive amalgams—like the Federal Communications Commission and

276 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994) (plurality opinion).

277 Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 648 (2000).

278 *E.g.*, Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 627 (1986) (recognizing that "Congress'[s] need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision"), *overruling recognized by* Garcia v. U.S. Dep't of Hous. & Urban Dev., No. 92C20327, 1993 WL 184213 (N.D. Ill. May 28, 1993); Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (requiring that the agency provide an "adequate" explanation for its decision, based on the administrative record); SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see also* Administrative Procedure Act § 2, 5 U.S.C. § 706 (1994) (requiring reviewing courts to set aside agency action that is arbitrary and capricious or "unsupported by substantial evidence").

279 *E.g.*, Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987); Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 331-32 (1989) (addressing the important role that the APA rules have played in preventing agencies from encroaching on the prerogatives of other branches of government).

280 U.S. CONST. art. I, § 1.

281 *Id.* art. II, § 1, cl. 1.

282 *Id.* art. III, § 1.

the Federal Trade Commission—endowed with powers of all three theoretically "separate" branches. Thus, if taken literally, the Constitution's "separation of powers" among the three coordinate branches might lead to the conclusion that "the administrative state is unconstitutional"—that "[t]here is no room for a fourth branch within this tripartite scheme of governance."[283] Although the Supreme Court has understandably been loathe to embrace that extreme position,[284] close judicial scrutiny of agency action may be understood partially as a response to the uncomfortable constitutional status of the administrative state.

In addition to this somewhat abstract constitutional reason for careful judicial scrutiny of agency action, there are clearly more concrete political and practical needs for such oversight. Most significantly, the modern administrative state's claim to legitimacy has been, from the outset, one of expertise rather than political accountability.[285] Accordingly, judicial review, and particularly review based on

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283 Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2-3 (1994) (proposing that the Supreme Court should nonetheless continue to "tolerate structures or practices that are conceded to be unconstitutional when such structures or practices have become institutionalized"); *see also* Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357, 363 (1990) (observing that although "it seems unlikely that the Supreme Court will at any time in the near future strike down as unconstitutional any of the major aspects of the administrative state[,] . . . [s]trong arguments are still available that independent agencies have the status of constitutional outlaws, something contrary to the evident constitutional plan").

284 In particular, after a brief flirtation with the so-called "nondelegation doctrine," *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (holding that delegation of legislative power without limitation was unconstitutional), *implied overruling recognized by* United States v. Frank, 864 F.2d 992 (3d Cir. 1988); Panama Ref. Co. v. Ryan, 293 U.S. 388, 433 (1935) (applying nondelegation doctrine to invalidate congressional enactment), *implied overruling recognized* by United States v. Frank, 864 F.2d 992 (3d Cir. 1988), the Supreme Court essentially abandoned efforts to prevent executive agencies from exercising a significant measure of both "legislative" and "judicial" authority. *See, e.g.*, Commodity Future Trading Comm'n v. Schor, 478 U.S. 833, 858 (1986) (upholding the Commodity Futures Trading Commission's power to resolve common law disputes); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) (rejecting the argument that the Occupational Safety and Health Act was unconstitutional because it delegated to the agency the power to make fundamental policy decisions). *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 13 (1993) (discussing how "large corporations . . . labor unions, cause-based groups, and other cohesive minority interests sometimes can use delegation to triumph over the interests of the larger part of the general public"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575 (1984) ("At the root of these problems lies a difficulty in understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power.").

285 *See, e.g.*, 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.7, at 27 (3d ed. 1994) (observing that judicial review of agency action has been heavily influenced by "the New Deal era assumption that agency decisions are made by apolitical technocrats"); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE

the formal administrative record, is necessary to ensure that agency decision making is genuinely a product of that expertise. Indeed, absent such review, experience has shown that agencies are subject to "agency capture," or the tendency "to pursue the interests of the industries they regulate[ ] and not the general public interest, since the regulated industries ha[ve] far better access and opportunity to influence agency decisions in their favor."[286] "[E]nhanced [judicial] scrutiny of agency decisions,"[287] such as the on-the-record review required by *Citizens to Preserve Overton Park v. Volpe*,[288] is therefore necessary to address these concerns of political accountability and agency capture.[289] Clearly, however, while these constitutional and practical concerns justify enhanced review in the agency context, they are inapplicable to judicial review of congressional enactments or, rather, they counsel *against* heightened scrutiny of the congressional record. First, notions of separation of powers suggest that the judiciary has little authority to impose requirements regarding the kind of legisla-

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L.J. 1487, 1496 (1983) (discussing the influx of administrative agencies during the New Deal period and how "[t]he watchword of administration became expertise, and the key doctrine of judicial review of administrative action became deference to that expertise").

286 Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 226 (1996) (noting additionally that "[r]epeated instances in which agencies acted to protect regulated . . . carriers against new entrants to the motor freight industry, [has] made courts wary of agency motivations and unwilling any longer to accept their rationales on faith"); *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997) (arguing that judicial activism during that era was based on the federal judiciary's ideology that agencies were vulnerable to "capture"); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1681-88, 1713-15 (1975) (asserting that "[i]t has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decisions results in a persistent policy bias in favor of these interests"); Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, LAW & CONTEMP. PROBS., Autumn 1991, at 249, 264-68 (discussing capture theorists' argument "that transferring governmental authority into the hands of regulatory agencies, would sooner or later, put the foxes in charge of the chicken coop"). *Cf. generally* ROBERT C. FELLMETH, THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC 1 (1970) ("The ICC was set up by Congress . . . to protect the public interest . . . . In fact, the agency is predominately a forum at which transportation interests divide up the national transportation market."); LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION 4 (1994) ("The ICC is the agency associated with the development of the concept of *regulatory capture*, which stipulates that producer groups dominate the agency that is assigned to regulate them.").

287 Wald, *supra* note 286, at 226.

288 *See supra* note 278 and accompanying text.

289 Wald, *supra* note 286, at 226; *see also* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1314 (1999) (stating that "[a] now-prominent justification of judicial review of agency rulemaking is the avoidance of special interest manipulation of the regulatory process"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 469-71 (1987) (discussing a justification for the APA "hard look" doctrine as a deterrent to "agency subversion of statutory purposes," including "impermissible influences in the regulatory process").

tive record that Congress must compile when enacting a statute. Second, concepts of access and accountability suggest that Congress is much better situated than the courts to make judgments about the need for legislation.

2. *Constitutional Problems Posed by Judicial Review of Congressional Procedures*

Justice Souter's *Lopez* dissent[290] chastised the majority for hinting that its result might have been different had Congress made explicit findings linking the regulated conduct to interstate commerce.[291] In his words, to mandate congressional findings would presuppose "a judicial authority . . . to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But review . . . for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court."[292]

Given the Court's recent shift, however, it is appropriate to revisit some of the constitutional and policy reasons underlying the more traditional view expressed by Justice Souter and others that the Court lacks the power to mandate congressional findings or procedures. Thus, this analysis identifies some of the separation-of-powers problems raised by aggressive judicial demands on the legislative record Congress creates when it enacts a statute. At least two distinct sources of constitutional concern counsel against extending judicial scrutiny of statutes beyond Congress's final product to an examination of the steps taken to achieve that end. First, it is far from clear that the Court's now well-established authority to review statutes supplies any affirmative grant of power for the Court to influence Congress's deliberation prior to enacting a law.[293] Second, the Constitution itself both expressly and implicitly imposes limits on judicial intrusion into the workings of Congress.

a. *The Classical Model of Judicial Review*

Although at times in the Supreme Court's history the point appears to have been forgotten, the classical, theoretical justification for

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290 United States v. Lopez, 514 U.S. 549, 603-14 (1995) (Souter, J., dissenting), *superceded by statute as stated in* United States v. Danks, 221 F.3d 1037 (8th Cir. 1999); *see supra* text accompanying notes 76-82.

291 Lopez, 514 U.S. at 613-14 (Souter, J., dissenting).

292 *Id.* at 614 (Souter, J., dissenting). Of course, as discussed in Part I, the view expressed by Justice Souter was well established prior to 1995, when *Lopez* was decided. Indeed, even the *Lopez* majority cited precedent for the proposition that "Congress need [not] make particularized findings in order to legislate." *Id.* at 563 (quoting Perez v. United States, 402 U.S. 146, 156 (1971) (alteration in original)).

293 For example, both Philip Frickey and Harold Krent merely assume that the Court has the power to influence Congress's deliberation prior to enacting a law. Frickey, *supra* note 10, at 697; Krent, *supra* note 10, at 733.

judicial review of acts of Congress does not support the Court's assertion of a general power to supervise the national legislature. Rather, that argument, first articulated by Alexander Hamilton in *The Federalist Papers*[294] and later adopted by Chief Justice Marshall in *Marbury v. Madison*,[295] implies significant limits on the federal judiciary's power to review acts of Congress. This argument casts substantial doubt on the Supreme Court's recent assumption of the power to dictate legislative procedures.

In *Federalist No. 78*, Hamilton argued that the judiciary had both the power and the "duty . . . to declare all acts contrary to the manifest tenor of the Constitution void."[296] The first proposition in Hamilton's syllogism was that because "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void," "[n]o legislative act . . . contrary to the Constitution, can be valid."[297] Chief Justice Marshall started here as well, noting that "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."[298]

Of course, as scholars of Chief Justice Marshall's jurisprudence have observed, the supremacy of the U.S. Constitution over the laws of Congress was never seriously questioned; rather, doubts about judicial review concerned which constitutional actors had the power to decide whether acts of Congress comported with the Constitution.[299] Both Hamilton and Marshall contended that the federal courts necessarily had that power to the extent that the cases properly before them required a choice between a congressional statute and a conflicting constitutional provision.[300] In such a case, they argned, the Court would

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294 THE FEDERALIST No. 78 (Alexander Hamilton).

295 5 U.S. (1 Cranch) 137 (1803).

296 THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

297 *Id.* at 467.

298 *Marbury*, 5 U.S. (1 Cranch) at 177.

299 *E.g.*, Dean Alfange, Jr., Marbury v. Madison *and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 426-27 (answering Justice Marshall's claim that, absent judicial review, a written constitution would be meaningless); *see also, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 71 n.49 (1985) (noting that Justice Marshall "overstated his case badly by asserting that judicial review was 'essentially attached to a written constitution'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

300 *Marbury*, 5 U.S. (1 Cranch) at 178; THE FEDERALIST No. 78, *supra* note 296, at 467-68. Chief Justice Marshall stated that:

> [I]f a law be in opposition to the constitution if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

be obliged "to be governed by the latter rather than the former."[301]

This power to "disregard" a congressional statute when it cannot, in the Court's independent judgment, be reconciled with the Constitution, neither assumes nor supplies a general authority to insist on certain congressional procedures, so long as the statute was enacted pursuant to the "single, finely wrought and exhaustively considered, procedure" set forth in Article I, Section 7 of the Constitution.[302] In other words, although "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[303] the rationale for judicial review does not extend so far as to support the Supreme Court's assertion of a power to say how Congress is to make the law. Thus, when a case before a court squarely presents a constitutional question, the court is obliged simply to decide it. The court may not properly avoid this responsibility by conditioning its adherence to the statute on congressional compliance with procedural requirements beyond those set forth in Article I, Section 7.

As a practical matter, then, what is a court to do when confronted with a statute that may or may not be constitutional depending upon whether a debatable factual proposition or prediction is correct? Simply put, we believe that the court must, to the best of its ability, determine whether the challenged proposition or judgment is correct. Of course, precisely how that should be done is a matter fairly open to debate. At least until the sequence of cases discussed in Part I, the rule has been that a fact or prediction generally should be considered "correct," for purposes of constitutional adjudication, so long as Congress would not be irrational or unreasonable to so conclude.[304] One might reasonably argue, however, that the responsibility for determining whether a factual predicate to Congress's exercise of its constitutional authority is "correct" should ultimately lie with the courts. Resolving the question of how facts are to be established in constitutional adjudication, although an important issue, is beyond the scope of this Article. The critical point here is simply that Article I, Section 7 provides no warrant for a court, including the Supreme Court, to refuse to enforce a duly enacted statute on the ground that Congress's formal record does not establish the truth of an underlying congressional conclusion or prediction.

Marbury, 5 U.S. (1 Cranch) at 178.

301 THE FEDERALIST No. 78, *supra* note 296, at 468; *see also Marbury*, 5 U.S. (1 Cranch) at 178 ("[T]he constitution, and not such [an] ordinary act [of Congress], must govern the case to which they both apply.").

302 INS v. Chadha, 462 U.S. 919, 951 (1983).

303 *Marbury*, 5 U.S. (1 Cranch) at 177.

304 United States v. Lopez, 514 U.S. 549, 613 (1995) (Souter, J., dissenting).

b. *Constitutional Limits on Judicial Intrusion into the Legislative Sphere*

In addition to raising questions under Article I, Section 7, the Supreme Court's recent treatment of the legislative record in constitutional cases appears inconsistent with the spirit, if not also the letter, of several constitutional provisions and established jurisprudential doctrines designed to shelter the federal legislative process from the threat of judicial intrusion. The point here is not to demonstrate that the Court itself has clearly contravened any one of these provisions or doctrines, but rather to illustrate that, taken together, they strongly counsel against the Court's recent enthusiasm for treating the congressional record like an agency record compiled in support of administrative action.

In addition to "vest[ing]" in Congress "[a]ll legislative Powers herein granted,"[305] Article I of the Constitution provides that "[e]ach House may determine the Rules of its Proceedings"[306] and "shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."[307] The Journal Clause directs that "the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."[308] Other than these minimal requirements, the Constitution leaves to Congress's determination the manner of record to compile in support of legislation.[309]

The Supreme Court has long read the Rules and Journal Clauses as providing Congress broad discretion to determine how to report and record its consideration of proposed legislation.[310] In *Field v. Clark*,[311] the Court considered the argnment that what purported to be a statute enacted by Congress and signed by the President was void because "the Congressional record of proceedings" allegedly demonstrated that "a section of the bill, as it finally passed, was not in the bill

305 U.S. CONST. art. 1, § 1.

306 *Id.* art. 1, § 5, cl. 2.

307 *Id.* art. I, § 5, cl.3.

308 *Id.*

309 In a remarkable demonstration of Congress's power under these provisions, during the First Federal Congress, the Senate veiled its proceedings in secrecy and did not make its journal public until after experience proved that the publication of the proceedings in the House of Representatives apparently heightened the relative stature of that "other body." No member of the founding generation appears to have challenged as constitutionally suspect the Senate's original decision to keep secret the record of its proceedings. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 10 (1997) ("[T]he Senate chose to operate behind closed doors for several years . . . . [N]either chamber interpreted the journal provision [Article I, § 5] to require a verbatim transcript of its proceedings." (footnote omitted)).

310 *See, e.g.*, United States v. Ballin, 144 U.S. 1 (1892); Field v. Clark, 143 U.S. 649 (1892).

311 143 U.S. 649 (1892).

authenticated by the signatures of the presiding officers of the respective houses of Congress, and approved by the President."[312] The Court conceded that the mere fact that a bill had been "signed by the Speaker of the House . . . and by the President of the Senate, presented to and approved by the President of the United States" did not make it a law if the bill "had not in fact been passed by Congress."[313] The Court, however, rejected the argument that the Journal Clause made the journals of each house of Congress "the best, if not conclusive, evidence" as to whether a bill had been passed.[314] The Court observed that "[i]n regard to certain matters, the Constitution expressly requires that they shall be entered on the journal,"[315] but as to all other matters it was

> clear that, in respect to the particular mode in which, or with what fulness [sic], shall be kept the proceedings of either house . . . ; whether bills, orders, resolutions, reports and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of Congress.[316]

This conclusion was compelled by "[t]he respect [the courts owed] to coequal and independent departments" of the federal government.[317]

Thus, even when a law's very existence was in question, the Court has declined to impose on Congress the relatively modest requirement that its journals demonstrate that the same text had garnered approval by both houses. The Court's reluctance to impose such a requirement on the basis of the minimal requirements of the Journal Clause and "the respect due to a coordinate branch of the government,"[318] raises serious doubts about the Court's recent willingness to disregard an act of Congress merely because the legislative record fails to evidence a fact that the Court deems an essential predicate to the constitutionality of the challenged law.

The same day the Court decided *Field*, the Court rejected a similar challenge to another federal statute. In *United States v. Ballin*,[319] the issue was whether an act of Congress was invalid because of doubt that a quorum of Members was present when the House of Representatives passed the bill.[320] When the House considered the bill, only 138 of the 327 Representatives voted in favor of it, while none voted

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312 *Id.* at 668-69.
313 *Id.* at 669.
314 *Id.* at 670.
315 *Id.* at 671.
316 *Id.*
317 *Id.* at 672.
318 *Id.* at 673.
319 144 U.S. 1 (1892).
320 *Id.* at 3-6.

against it.[321] The Speaker of the House had invoked House Rule XV, which provided that the House could establish a quorum by adding to the number of members voting the clerk's estimate of the number of members present in the "hall of the house" but not voting.[322] The Supreme Court, while acknowledging that the Rule XV process was perhaps somewhat untrustworthy, observed that because "[t]he Constitution has prescribed no method of making this determination, . . . it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact."[323] The Court explained:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. . . . The power to make rules is . . . [,] within the limitations suggested, absolute and *beyond the challenge of any other body or tribunal.*[324]

Like *Field, Ballin* raises significant questions about the Court's present inclination to refuse to honor a congressional statute because of perceived deficiencies in the formal legislative record. In *Ballin,* the Court was confronted with the constitutional mandate that " 'a majority of each [house] shall constitute a quorum to do business' "[325] and a legitimate challenge to the Speaker's determination that a quorum existed at the time the bill passed the House.[326] The Court, however, refused to second-guess the House's procedures.[327] It is, of course, far more intrusive for the Court to mandate, as in the recent decisions discussed above, that Congress must either make a formal evidentiary record supporting its resolution of factual questions ancillary to a constitutional issue, or face the risk that its statutes will be disregarded by the judiciary.

The commitment to congressional independence reflected in the Rules and Journal Clauses is even more clearly asserted in Article I, Section 6, Clause 1, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned

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321 *Id.* at 3.
322 *Id.* at 5.
323 *Id.* at 6.
324 *Id.* at 5 (emphasis added).
325 *Id.* (quoting U.S. CONST. art I, § 5, cl. 1).
326 *Id.* at 3.
327 *Id.* at 6.

in any other Place."[328] Though this "Clause . . . speaks only of 'Speech or Debate,' . . . the [Supreme] Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view."[329] Rather, the Court has, "[w]ithout exception, . . . read the Speech or Debate Clause broadly to effectuate its purposes."[330] According to the Court, those purposes are, among others, "to insure that the legislative function the Constitution allocates to Congress may be performed independently," and to "'reinforc[e] the separation of powers so deliberately established by the Founders.'"[331]

The decision in *Gravel v. United States*[332] illustrates the wide berth that the Court has given Congress in Speech or Debate Clause cases. The facts of *Gravel* were rather extreme: the Court confronted Senator Gravel's invocation of the privilege in response to a federal grand jury investigation of possible crimes relating to the dissemination of the so-called "Pentagon Papers."[333] On June 29, 1971, just four days after a divided Supreme Court had refused to enjoin publication of portions of the Pentagon Papers,[334] Senator Gravel, then the Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a subcommittee meeting at which he read from the Pentagon Papers and then placed all forty-seven volumes of the report in the public record.[335] The grand jury subpoenaed Dr. Leonard S. Rodberg, a member of Senator Gravel's staff, to testify about the meeting.[336] Senator Gravel intervened and moved to quash the subpoena, arguing that its enforcement would violate his rights under the Speech or Debate Clause.[337]

Resisting Senator Gravel's assertion of privilege, the government asked the district court "to inquire into the regularity of the subcommittee meeting" held on June 29, 1971.[338] The government characterized that meeting as "a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), [convened] for the purpose of" dumping the Pen-

328 U.S. CONST. art. I, § 6, cl. 1.

329 Gravel v. United States, 408 U.S. 606, 617 (1972).

330 Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975).

331 *Id.* at 502 (quoting United States v. Johnson, 383 U.S. 169, 178 (1966)).

332 408 U.S. 606 (1972).

333 *Id.* at 608-09. The Pentagon Papers consisted of the forty-seven volume, classified Defense Department study entitled "History of the United States Decision-Making Process on Viet Nam Policy," which was also at the center of the controversy resolved in the much celebrated *New York Times v. United States*, 403 U.S. 713 (1971).

334 *New York Times*, 403 U.S. at 713-14.

335 *Gravel*, 408 U.S. at 609.

336 *Id.* at 608.

337 *Id.* at 608-09.

338 *Id.* at 610.

tagon Papers into the public record.[339] In answer to the government's argument that this meeting furthered no legitimate legislative purpose, Senator Gravel asserted that the Pentagon Papers were within his subcommittee's jurisdiction because "the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war [wa]s properly within the concern of [the] subcommittee" on public works.[340] The district court rejected the government's argument "without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations."[341]

The Supreme Court agreed, finding it "incontrovertible" that the Speech or Debate Clause shielded Senator Gravel and his aides "from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing."[342] Indeed, the Court held that, consistent with the Clause, neither the Senator nor his aides could be questioned about their preparation for or conduct during that congressional proceeding.[343] The Court's refusal to second-guess Senator Gravel's highly strained effort to connect the Pentagon Papers to the work of the subcommittee reflects the extent to which the Court understood the Speech or Debate Clause to preclude judicial supervision of congressional proceedings.

The Court's subsequent decision in *Eastland v. United States Servicemen's Fund*[344] underscores this point. *Eastland* grew out of investigations by the Subcommittee on Internal Security, chaired by Senator James Eastland, into the extent to which foreign governments had infiltrated domestic organizations in efforts to subvert the United States government.[345] In the course of its investigations, the subcommittee inquired into the source of funding for the United States Servicemen's Fund (USSF), a nonprofit corporation committed to serving as "'the focus of dissent and expressions of opposition within the military toward the'" Vietnam War.[346]

The subcommittee subpoenaed bank records relating to USSF, and in response, the USSF filed a complaint naming as defendants the

339 *Id.* at 610 n.6 (internal quotation marks and citation omitted).

340 *Id.* (internal quotation marks and citation omitted).

341 *Id.* (quoting district court opinion, United States v. Doe, 332 F. Supp. 930, 935 (Mass. 1971)).

342 *Id.* at 615.

343 *Id.* at 628-29.

344 421 U.S. 491 (1975).

345 *Id.* at 493.

346 *Id.* at 494 (quoting the complaint filed by USSF).

subcommittee, Chairman Eastland, the chief counsel to the subcommittee, and the bank.[347] The complaint sought an injunction forbidding compliance with or enforcement of the subpoena on grounds that disclosure of the sources of USSF's funding would chill the private contributions on which it depended and infringe upon the First Amendment rights of the USSF and its individual members to speak and associate freely.[348] The complaint alleged that the subcommittee had acted in bad faith, seeking merely to expose, harass, and punish the USSF and its members because of its controversial, antiwar views, rather than gathering information in support of legitimate legislative efforts.[349] The trial court denied the requested relief, but the D.C. Circuit reversed, directing the trial court to fashion a remedy that would guard the USSF's First Amendment rights against congressional intrusion.[350]

The Supreme Court reversed, holding that the Speech or Debate Clause barred judicial intervention into the Senate's information-gathering processes.[351] The Court reasoned that, given the absolute nature of the Clause's command that Members of Congress "shall not be questioned" about their legislative conduct "in any . . . Place" other than the House of Congress in which they serve, the sole question for the courts in USSF's action was whether the defendants' actions fell "within the sphere of legitimate legislative activity" protected by the Clause.[352] The Court emphasized that the Speech or Debate Clause imposed strict limits on judicial assessment of the propriety of legislative procedures because "[t]he purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently."[353] The Clause "protect[s] the integrity of the legislative process" and "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders."[354] Even in the context of civil litigation, the Court cautioned, the judiciary should exercise great restraint when asked to second-guess congressional procedures because judicial intervention risks "distract[ing]" members from their lawmaking responsibilities and "divert[ing]" their scarce "time, energy, and attention" away from legislative priorities.[355]

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347 *Id.* at 494-45.

348 *Id.* at 495-96.

349 *Id.* at 495.

350 *Id.* at 497.

351 *Id.* at 501.

352 *Id.* (internal quotation marks omitted).

353 *Id.* at 502.

354 *Id.* at 502 (internal quotation marks and citation omitted).

355 *Id.* at 503.

Accordingly, the Court concluded that the Speech or Debate Clause protected the actions of Senator Eastland's subcommittee.[356] The Court held that given the plausible connection between the subcommittee's mandate and the activities of the USSF, the Constitution barred further judicial inquiry.[357] The Court rejected as immaterial the USSF's claim that the true purpose of the subcommittee's investigation was not to inform potential legislation, but rather to punish the organization's unpopular views, because "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."[358] Simply put, "[t]he wisdom of congressional approach or methodology is not open to judicial veto."[359] Thus, even in the face of credible claims that members were abusing legislative processes so as to directly infringe core constitutional rights, the Court has held that judicial intrusion into congressional procedures is inconsistent with the constitutional commitment to legislative independence.

A recent political-question decision, *Nixon v. United States*,[360] further illustrates the constitutional concerns raised by judicial intrusion into congressional procedures. In *Nixon*, the Supreme Court addressed the argument of former Chief Judge Nixon of the United States District Court for the Southern District of Mississippi that his impeachment should be set aside because the procedures employed by the Senate in his case were constitutionally inadequate.[361] Specifically, the Senate had opted to take evidence in a hearing before a special Senate committee, which then reported to the full Senate, rather than receiving live testimony before the full body.[362] Nixon argued that in so doing the Senate had failed to honor its constitutional obligation to "'try' all impeachments."[363] In an opinion by Chief Justice Rehnquist, however, the Court held that the issue constituted a nonjusticiable political question.[364]

The Court concluded that the Constitution's declaration that "[t]he Senate shall have the sole Power to try all Impeachments"[365] granted the Senate the final word as to what procedures would satisfy

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356 *Id.* at 507.

357 *Id.* at 506-07.

358 *Id.* at 508; *see also* United States v. Johnson, 383 U.S. 169, 180 (1966) (holding that the Speech or Debate Clause barred a criminal prosecution that challenged as improper the defendant congressman's motives for making a speech on the floor of the House of Representatives).

359 *Eastland*, 421 U.S. at 509.

360 506 U.S. 224 (1993).

361 *Id.* at 228.

362 *Id.*

363 *Id.* at 228.

364 *Id.* at 236.

365 U.S. CONST. art. 1, § 3, cl. 6.

that obligation, thus excluding the judiciary from any role in this determination.[366] En route to this conclusion, the Court rejected Nixon's straightforward textual argument that by placing the "sole" power to "try" impeachments in the "Senate," the Constitution precluded the Senate from delegating to a committee the task of hearing evidence.[367] Indeed, the Court embraced the government's argument against justiciability notwithstanding the government's concession at oral argument that its position would equally bar judicial review if the Senate were to dispense with evidentiary proceedings altogether and move directly to a vote on guilt or innocence.[368]

According to the Court, evidence that the Founders quite deliberately divided the impeachment power between the House and the Senate, rejecting proposals to vest the power in the judiciary,[369] when combined with the "[r]espect [due] a coordinate branch of the Government,"[370] compelled the conclusion that the courts were constitutionally prohibited from second-guessing the Senate's choice of impeachment procedures.[371] Thus, the political question doctrine as articulated and applied in *Nixon*, like the Rules Clause, Journal Clause, and Speech or Debate Clause cases, reflects the Constitution's commitment to protecting congressional processes from judicial manipulation.

3. *The Political Realities of Congressional Procedures*

We have argued above that the Court's recent decisions attaching increasing significance to perceived gaps in the formal legislative record contravene both prior precedent and the fundamental constitutional value of legislative independence. We also believe that the Court premises its new approach on two false assumptions about congressional procedures.

First, in *Flores*, *Florida Prepaid*, and *Kimel*, the Court appears to have assumed that the formal legislative record reflects all the information properly cognizable by Congress. In fact, however, members of Congress have from the institution's inception properly relied on a variety of sources not reflected in the legislative record. Moreover, in the last thirty years the number and quality of these extra-record sources have increased significantly. The Court's failure to acknowledge these sources has, not surprisingly, resulted in decisions characterized by an impoverished appreciation of the legislative process.

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366 *Nixon*, 506 U.S. at 226, 238.
367 *Id.* at 229, 232.
368 *See id.* at 239 (White, J., concurring in the judgment).
369 *Id.* at 233-34.
370 *Id.* at 238 (Stevens, J., concurring).
371 *Id.* at 234.

Second, the Court's recent decisions also rest on the false premise that congressional committee hearings, like the proceedings of a trial court or an administrative agency, serve the sole purpose of educating a neutral but uninformed tribunal of the facts central to its decision-making responsibilities. That *one* function served by congressional committee hearings is to inform Congress's legislative judgments cannot be denied. But it must also be recognized that congressional committee hearings are self-consciously orchestrated to serve other legitimate purposes as well: gauging the political benefits and risks of a specific legislative proposal and informing, shaping, and directing public discourse on matters of national concern, among others. By imposing on Congress the duty to create a record designed to facilitate searching judicial review of Congress's factual conclusions, the Court threatens to limit the other legitimate purposes served by congressional proceedings. In particular, if Congress heeds the message sent by the Court's recent decisions, the Court's approach will likely have the undesirable consequence of diverting scarce congressional resources away from the political and public-informing functions that committee hearings currently serve in order to satisfy the judiciary's increasingly rigorous demands of the legislative record.

a. *Extra-Record Sources of Information*

In *Flores*, *Florida Prepaid*, and *Kimel*, the Court assumed that the formal legislative record of the three challenged statutes reflected all the facts supporting Congress's judgments.[372] This assumption ignores those sources of information available to Congress that a statute's legislative history does not reflect. First, and most significantly, representative government is premised on the belief that members of Congress, acting as representatives of their constituents, bring to the

372 In *Flores*, the Court inferred that unconstitutional religious discrimination was all but nonexistent in the United States from the fact that the congressional committee hearings on RFRA identified no recent instances of "generally applicable laws passed because of religious bigotry." City of Boerne v. Flores, 521 U.S. 507, 530 (1997). For a contrary view on the present extent of unconstitutional religious discrimination, see Laycock, *supra* note 242, at 771-80. The Court made a similar leap in *Florida Prepaid*, when it reasoned that a paucity of evidence on the formal legislative record demonstrated that unconstitutional state patent infringement was too rare to justify Congress's express invocation of its power to enforce the Fourteenth Amendment. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645-47 (1999). Finally, in *Kimel*, because the formal legislative history of the ADEA lacked extensive documentation of age discrimination by states, the Court concluded that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 649 (2000). In each of these cases, the Court ignored the possibility that Congress's judgments were likely informed in ways not reflected in the formal legislative record.

legislature those constituents' views on the seriousness of perceived national problems and the appropriateness of a federal solution.[373]

During the ratification debates for the Constitution in 1787, among the most divisive of issues was whether the proposed House of Representatives was sufficiently numerous to represent adequately the diverse interests of all United States citizens.[374] Both Federalists and Antifederalists were in accord, however, that "[i]t is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents."[375] Of course, our commitment to this principle of representative government is as firm today as it was at the time of the founding.[376] Accordingly, unlike a judicial trier of fact or an administrative law judge, Congress is not a *tabula rasa* until it conducts on-the-record proceedings. Rather, members of Congress are expected to act in large part according to the views of their constituents, which the members bring to the institution. Congress grounds its claim to legitimacy on knowledge of and accountability to the citizens it represents, not on an assertion of neutrality or technical expertise.

In addition to whatever knowledge members of Congress bring with them from their home states or districts, Congress properly relies on a wide range of information-gathering methods not reflected in the formal legislative record. Key legislators' *ex parte* communications

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373 *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954) (arguing that the "local sensitivity . . . cannot fail to find reflection in the Congress").

374 1 THE FOUNDERS' CONSTITUTION 386 (Philip B. Kurland & Ralph Lerner eds., 1987) (stating that "[e]clipsing all [other] controversies and concerns" about the nature of representation under the proposed Constitution "was the issue of an adequate representation as expressed in the size of the proposed House of Representatives"). *See generally* THE FEDERALIST No. 55 (James Madison) (responding to concern that the number of members to serve in the proposed House of Representatives was too small to permit adequate representation).

375 THE FEDERALIST No. 56, at 346 (James Madison) (Clinton Rossiter ed., 1961); *see also* 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 132-33 (Yale rev. ed. 1937) (statement of James Wilson) ("The Govt. ought to possess not only 1st. the *force* but 2ndly. the *mind* or *sense* of the people at large." (emphasis in original)); 1 THE FOUNDERS' CONSTITUTION, *supra* note 374, at 409 (statement of George Mason at Virginia Ratifying Convention) ("To make representation real and actual, the number of Representatives ought to be adequate; they ought to mix with the people, think as they think, feel as they feel, ought to be perfectly amendable to them, and thoroughly acquainted with their interest and condition.").

376 *See* WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS 67 (9th ed. 1997) ("No tenets of democratic theory are grounded more firmly in American political thought and practice than that legislators are expected to look steadily to the people who elect them, to seek out their opinions, to speak their convictions and uncertainties, to express their values, [and] to protect their interests."); *see also* Theodore J. Lowi, *Toward a Legislature of the First Kind*, *in* KNOWLEDGE, POWER, AND THE CONGRESS 9, 12, 16-17 (William H. Robinson & Clay H. Wellborn eds., 1991) (stressing the role that "amateur" or "constituency" knowledge properly plays in the legislative process).

with interest groups educate Congress as to the need for and wisdom of potential legislation.[377] Of course, absent circumstances indicating corruption or bribery, these kinds of off-the-record communications are not only legally permissible, but constitutionally protected.[378] Observers of Congress recognize that these informal discussions often have far greater influence on Congress's judgments than on-the-record proceedings, such as committee hearings.[379] Moreover, in the last thirty years Congress has greatly enhanced the information support services available to individual members by dramatically increasing the number of both committee and personal staff serving the institution, many of whom bring to their capitol-hill service specialized knowledge relevant to issues of public policy and develop even greater

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377 *See* KEEFE & OGUL, *supra* note 376, at 327-28 ("Nearly two-thirds of the lobbyists believe that the most effective tactic involves the personal presentation of their case. Testifying before hearings . . . is ranked somewhat lower than personal contact with a single person."); LEROY N. RIESELBACH, CONGRESSIONAL POLITICS: THE EVOLVING LEGISLATIVE SYSTEM 236-38 (2d ed. 1995) (discussing the significance of *ex parte* meetings between lobbyists and members of Congress); Louis Sandy Maisel, *Congressional Information Sources*, *in* THE HOUSE AT WORK 247, 255-56 (Joseph Cooper & G. Calvin Mackenzie eds., 1981) (discussing the role lobbyists play in supplying information in both formal, on-the-record settings and informal, private meetings with representatives or their staff); Allen Schick, *Informed Legislation: Policy Research Versus Ordinary Knowledge*, *in* KNOWLEDGE, POWER, AND THE CONGRESS, *supra* note 376, at 99, 99 (stating that information flows into Congress from "diverse sources [including] . . . constituent complaints or requests for assistance . . . [and] meetings with lobbyists or others who have privileged access"). For a colorful, and somewhat disparaging, account of one lobbyist's off-the-record influence, see THOMAS B. CURTIS & DONALD L. WESTERFIELD, CONGRESSIONAL INTENT 14-15 (1992).

378 *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 292 (2d. ed. 1995) (noting that the "Speech" and "Petition" Clauses of the First Amendment to the United States Constitution presumptively protect legitimate communications concerning matters of public policy between elected representatives and their constituents). In the few instances in which the Court has acknowledged the existence of communications from constituents on matters of public concern, the Court has trivialized these communications as a potential source for Congress's ultimate judgments. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 649 (2000) (dismissing as inconsequential the floor statements of Senator Bentsen made in reliance on letters from his constituents reporting age discrimination by state or local governments).

379 *E.g.*, WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 66 (1978) (stating that although "*[o]stensibly*, hearings are important primarily as fact-finding instruments," in reality "[m]uch . . . information . . . is available to committee members long before the hearings take place" and "members [of Congress] often have strong partisan positions on the legislation and thus may have little interest in whatever additional information emerges from the hearings"); CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 150 (1989) (observing that "[a] much-mooted point is how much the content of hearings matters" and that "[s]ometimes the record created has minimal importance, since committees can find out through informal means where the key players stand, and the hearing may merely observe the formalities and allow interested persons to 'blow off steam'"). Nevertheless, for other reasons, committee hearings indisputably play a vital role in the legislative process. *Infra* Part II.B.3(b).

expertise during their tenure.[380] Congress has simultaneously supplied itself two new support agencies, the Office of Technology Assessment and the Congressional Budget Office, and has significantly upgraded two preexisting ones, the General Accounting Office and the Congressional Research Service of the Library of Congress.[381] Each of these entities is charged with, among other things, providing accurate, nonpartisan information to congressional committees and individual members upon request.[382] The information supplied by these entities to Congress frequently does not appear in the formal legislative record.

In sum, the formal legislative history of a statute reflects at best a small portion of the information on which members of Congress may legitimately rely in voting on a bill. This reality of congressional procedures conflicts with the Supreme Court's recent willingness to infer from silence in the legislative record that a problem that Congress identifies as significant does not warrant a federal response.

b. *The Informing Function of Congress*

The availability of off-the-record informational resources does not, of course, alter the fact that committee hearings are among the most important aspects of the legislative process. Such hearings are significant partially because of what is ostensibly their primary purpose—to inform the members of the committee as to the need for or wisdom of proposed legislation.[383] More often, however, committee hearings are intended to inform the *public*, rather than Congress. Over one hundred years ago, Woodrow Wilson, then an aspiring academic, concluded in his now famous study of congressional government that "[t]he informing function of Congress should be preferred even to its legislative function."[384] The future President explained that "even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of dis-

380 *See* KEEFE & OGUL, *supra* note 376, at 35-36, 193-95 (discussing increase in the quantity and quality of personal and committee staff); RANDALL B. RIPLEY, CONGRESS: PROCESS AND POLICY 250 (4th ed. 1988) (discussing legislative impact of increase in the numbers of personal and committee staff).

381 *See* RIPLEY, *supra* note 380, at 250.

382 *See id.* at 250-52.

383 *See* TIEFER, *supra* note 379, at 150 (noting that in 1965, during congressional consideration of Medicare legislation, hearing testimony by representatives of the American Medical Association had a dramatic, albeit unintended, impact on the views of members of the House Ways and Means Committee).

384 WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 198 (Meridian 1973) (1885).

cussion."[385] In President Wilson's estimation, Congress exists not merely to execute public opinion, but also to shape it.[386]

Although Wilson urged Congress to focus even greater efforts on informing the public,[387] the institution has, throughout its history, substantially dedicated its public proceedings to this end. Indeed, even at the nadir of congressional investigations (during the now infamously overzealous McCarthy Era investigations), the Supreme Court recognized that Congress had always "performed an 'informing function.'"[388] More recently, diverse authorities have acknowledged the important, although perhaps under-appreciated, role that Congress's informing function plays in shaping public opinion and in animating desired reforms.[389] As then-Senator Al Gore explained in 1986, "[i]n many areas, the most important missing ingredient is attention," not legislation, "and an elevated awareness of the problem can be a very successful outcome of the hearings."[390]

The Supreme Court's recently reinvigorated scrutiny of the formal legislative record in constitutional cases threatens to undermine the informing function of congressional committee hearings. As when Wilson first published his study, *Congressional Government*, time and resource limits still prevent Congress from entirely fulfilling its public-informing potential.[391] To the extent that Congress responds

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385 *Id.* at 195.

386 *Id.* at 198; *see also* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549 (1988) (noting that republican political theory would support "attempt[s] to design political institutions that promote discussion and debate among the citizenry").

387 WILSON, *supra* note 384, at 195-98.

388 Watkins v. United States, 354 U.S. 178, 200 n.33 (1957); *see also* Gravel v. United States, 408 U.S. 606, 650 (1972) (Brennan, J., dissenting) ("Congressional hearings . . . are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern.").

389 *E.g.*, KEEFE & OGUL, *supra* note 376, at 29 (discussing "the extraordinary opportunities" congressional committee investigations "offer for influencing public opinion"); OLESZEK, *supra* note 379, at 68 (noting that investigative hearings inform public opinion); Samuel Dash, *Congress' Spotlight on the Oval Office: The Senate Watergate Hearings*, 18 NOVA L. REV. 1719, 1723 (1994) (discussing the "tremendous impact" the Senate Watergate hearings had on public opinion about the Nixon administration, in particular, and American government, more generally); Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 GA. L. REV. 17, 18 (1986) ("Congress . . . must inform the public, as well as itself."); Arthur M. Schlesinger, Jr., *Introduction* to CONGRESS INVESTIGATES: 1792-1974, at xi, xii (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975) ("The investigative power may indeed be the sharpest legislative weapon against Executive aggrandizement.").

390 Alan L. Otten, *Sen. Albert Gore Gains Political Clout With Unlikely Issues Such as Bioethics*, WALL ST. J., Apr. 11, 1986, at 54; *see also* KEEFE & OGUL, *supra* note 376, at 29 (noting that "publicity by itself may lead to the correcting of abuses, thereby allaying the need for legislation").

391 KEEFE & OGUL, *supra* note 376, at 28-30 (discussing the pressures on legislative bodies that diminish their capacity to serve an educative function).

to the Court's recent decisions, it may increasingly divert its limited resources to the creation of a record designed to satisfy the Court.[392]

III
JUDICIAL REVIEW AT THE LIMITS OF CONGRESSIONAL AUTHORITY

Thus far, we have argned that a number of the Court's recent constitutional decisions impose heightened requirements on Congress to make factual findings and compile a factual record to justify legislation near the margins of its constitutional authority. We have also suggested that this trend is both problematic under the Court's own precedents and constitutionally and practically suspect. In this final Part of the Article, we move from identifying *doctrinal* objections to this development, to briefly considering the broader *jurisprudential* questions it raises. In particular, we anticipate the rejoinder that the Court's recent approach can be justified as a necessary means to the legitimate end of keeping Congress within constitutional limits, notwithstanding the legal objections set forth above.[393] On this view, Congress will not, absent searching judicial review, conscientiously honor the constitutional restraints on its authority. Thus, the Court's emerging requirement that Congress compile an extensive record in support of statutes at the margins of its authority is to be lauded, the objections outlined above notwithstanding, because it is a means by which the Court can enforce the Constitution's commands. Part III.A explains why we reject this argument, although we certainly recognize its appeal. Part III.B then discusses alternate approaches to the per-

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392 These two goals, informing the public and satisfying the Court, will often pull congressional committees in opposite directions. To take an obvious example, Congress often orchestrates congressional committee hearings to "put a human face" on an otherwise abstract issue. By focusing on compelling individual instances of a more general problem, congressional committees properly seek to direct public attention to neglected matters. *See* OLESZEK, *supra* note 379, at 68. The Court, however, has discounted such evidence, dismissing it as merely "anecdotal." City of Boerne v. Flores, 521 U.S. 507, 530-31 (1997) (noting that "[m]uch of the discussion" at the congressional committee hearings on RFRA "centered upon anecdotal evidence" and thus failed to demonstrate a "widespread pattern of religious discrimination in this country"); *see also, e.g.*, Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 649 (2000) (dismissing as insignificant evidence of individual instances of state age discrimination); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) (criticizing the House Report prepared in support of the Patent Remedy Act on the ground that it identified only two examples of patent infringement suits against the States).

393 Significantly, this argument is not one that the Court itself has advanced. Indeed, as the discussion of the recent decisions in Part I makes clear, the Court has not only failed to offer *any* explanation for the fundamental shift in the nature of its review of the legislative record in close constitutional cases, but has also failed even to acknowledge that there is change afoot. Nonetheless, this possible apology for the Court's approach is a serious one and merits consideration.

ceived problem of congressional lawlessness that do not entail the same risk of judicial aggrandizement.

A. Is the Court's Recent Approach Necessary to Restrain Congress?

Many scholars have forcefully argued that, under the pre-*Lopez* Commerce Clause and the pre-*Flores* Section 5 case law, Congress's affirmative powers under these provisions were not subject to meaningful judicial restraint.[394] Moreover, Congress arguably has shown little self-restraint in the exercise of this unchecked authority. Given this history, some scholars have advocated heightened judicial scrutiny of Congress's conclusions that a perceived problem requires a federal legislative response.[395] Indeed, perhaps the most forceful justification

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394 There is abundant commentary to this effect insofar as the Commerce Clause is concerned. *E.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (describing the Court as "being 'asleep at the constitutional switch' for [the] more than fifty years" that elapsed between the decisions upholding New Deal legislation and *Lopez* (citation omitted)); Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 746 (1996) (concluding that since the New Deal, "the Court had engaged in only pretend review" under the Commerce Clause); James M. McGoldrick, Katzenbach v. McClung: *The Abandonment of Federalism in the Name of Rational Basis*, 14 BYU J. PUB. L. 1, 5 (1999) (arguing that after the Court extended the rational-basis test to Commerce Clause review in *McClung*, the Court was no longer significantly involved in policing the boundaries of congressional power under that Clause); Moulton, *supra* note 64, at 889 (observing that "[b]efore *Lopez*, most commentators had come to the conclusion that Congress had a free hand in deciding what counts as 'commerce among the states.'" (citation omitted)); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 6 (1999) (noting that the Court's post-1936 Commerce Clause case law failed to "establish any concrete limits on Congress"); *cf.* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 561 (1997) (arguing that following the ratification of the Seventeenth Amendment, "Congress, determined to lead, . . . wrested the whip handle from the states and found itself unrestrained").

Commentators have made the same point with respect to the Court's pre-*Flores* construction of Congress's power under Section 5 of the Fourteenth Amendment. *E.g.*, GREVE, *supra* note 118, at 35 ("[T]he pre-*Flores* caselaw teaches that judges should refrain from second-guessing congressional responses to perceived problems of discrimination . . . ."); Laycock, *supra* note 242, at 747 (stating that "from 1866 to 1991, Congress repeatedly enacted enforcement legislation that went beyond judicial interpretations of the constitutional right being enforced," and that "most of these Acts were upheld or accepted into the fabric of the law without serious challenge").

395 Calabresi, *supra* note 394, at 799-811 (arguing for heightened judicial review); Gardbaum, *supra* note 11, at 799 (arguing for "policing Congress's deliberative processes and its reasons for regulating"); Jackson, *supra* note 11, at 2240 (arguing that "requiring Congress . . . to justify the basis for federal regulation in areas not previously regulated at the federal level and not obviously within an enumerated power . . . may help it do its job better by forcing it to be more thoughtful about whether a national law is the appropriate solution"); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 947 (1999) (arguing for an abandonment of judicial deference to factual judgments made by legislators).

for heightened judicial scrutiny of Congress's factual conclusions bearing on the constitutional limits of its authority is that, absent searching judicial inquiry, Congress would be left the judge of its own limitations.[396] This argument is formidable, especially in light of the all too palpable sense that Congress has in recent decades failed to honor faithfully the constitutional limits on its authority.[397]

Nevertheless this argument cannot justify the Court's recent approach because intractable problems of competency, legitimacy, and manipulability inevitably accompany it. Regarding competency, there can be little doubt that federal judges, and particularly appellate court judges, are singularly ill suited to make the kinds of factual determinations and predictive judgments that must be made in assessing whether legislation answers a real, rather than merely perceived, national problem. Yet that is essentially what the Court's recent cases entail. When five or more Justices are skeptical about the factual basis for congressional action, the Court will strike the challenged statute down, citing deficiencies in the legislative record as the act's constitutional infirmity. When, however, a majority of the Court perceives a problem meriting a congressional response, the challenged statute will be upheld, regardless of whether Congress compiled a thorough record when enacting the law. Thus, although the Court's new approach ostensibly turns on a procedural judgment about the state of the record, rather than a substantive one about the need for the legislation, it is the Court's own skepticism about the underlying facts that triggers the "procedural" requirement of a developed record in the first place. In our view, however, the judiciary is ill equipped to rule

396 Indeed, much of the rhetorical appeal of the Supreme Court decisions in *Lopez*, *Flores*, *Florida Prepaid*, and *Kimel* can be traced to the fear that the government's arguments in support of the challenged statutes would release Congress from any meaningful constitutional restraint. *E.g.*, United States v. Lopez, 514 U.S. 549, 567 (1995), *superceded by statute as stated in* United States v. Danks, 221 F.3d 1037 (8th Cir. 1999). Yet, as noted, *supra* note 393, the Court itself has not even acknowledged its recent shift toward more intensive scrutiny of the legislative record, let alone affirmatively advanced the need to keep Congress within constitutional bounds as a justification for its new approach.

397 It might also be argued that if the need to keep Congress in check exists, the Court's essentially procedural focus on the state of the legislative record is an especially appropriate way to do so. In particular, this approach might, albeit in a somewhat counterintuitive fashion, help to *limit* judicial intrusion into legislative prerogatives, because it leaves open the possibility that the same statute found impermissible in one case might be upheld in the next if supported by evidence that a truly national problem exists. *See* Gardbaum, *supra* note 11, at 830-31; Jackson, *supra* note 11, at 2237; Lessig, *supra* note 11, at 207. This understanding of the Court's recent decisions may find support in its much earlier decisions in *Hill v. Wallace*, 259 U.S. 44 (1922), and *Board of Trade of Chicago v. Olsen*, 262 U.S. 1 (1923). *See supra* notes 172-90 and accompanying text. So understood, the recent decisions, like *Hill*, indicate the Court's willingness for Congress to educate it about the relationship between the problem the challenged statute targets and the power Congress had invoked when enacting it.

on whether factual determinations and predictive judgments should be considered "suspect."[398]

Moreover, even if competency could be established, questions concerning the constitutional legitimacy of judges making such determinations would need to be frankly addressed. Judgments relating to the need for legislation are often inherently value-laden, and thus inevitably political.[399] Consigning such political judgments to the unelected federal judiciary would appear inconsistent with the structural framework of our Constitution.[400] Finally, proponents of heightened scrutiny of the legislative record as a check on the bounds of Congress's legislative authority would need to consider whether this approach would supply judicially manageable standards to govern future controversies.[401] Such a fact-intensive approach creates a significant risk that federal judges will decide cases based on their own predilections, rather than any articulable, neutral principles.[402] Although a highly manipulable fact-based approach to review of congressional enactments would retain maximum flexibility for the Supreme Court, such unbridled discretion would clearly be subject to judicial abuse.[403] In the long run, a fact-based approach to judicial

398 *But cf.* Peggy C. Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1602-03 (1987) (footnote omitted from title) (arguing for codification of the courts' authority to notice disputed legislative facts); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 110. One might also question whether an appellate court's doubts about the factual predicate for a challenged statute should result in invalidation of the statute, as in *Lopez*, *Flores*, *Florida Prepaid*, and *Kimel*, as opposed to a remand for further development of the *judicial* record, as in *Turner I*. *See supra* note 39 and accompanying text. When reasonable persons could disagree as to the factual assumptions underlying Congress's decision to legislate, one would at least expect an appellate court to develop the judicial record on the point in dispute.

399 *See* Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 123-24 (1988).

400 *See* Moulton, *supra* note 64, at 916 (contending that "[t]o grant judges the responsibility for undoing congressional . . . decisions based on federalism values or an alternate view of the facts is to invite the bald substitution of judicial preferences for the judgments of elected officials"); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994) (plurality opinion) (holding that courts do not have the authority "to replace Congress' factual predictions").

401 Kropf, *supra* note 83, at 373-74 (arguing that the *Lopez* decision was highly ambiguous and provided insufficient guidance to the lower courts).

402 A highly discretionary federalism doctrine, for example, might well lead to the perception, if not also the reality, that federal judges manipulate the doctrine in order to legislate from the bench. To illustrate, some of Congress's most out spoken champions of federalism have recently advanced bills banning so-called partial-birth abortions and physician-assisted suicide. *See* Michael Grunwald, *In Legislative Tide, State Power Ebbs: Federalization Has Few Friends but Many Votes*, WASH. POST, Oct. 24, 1999, at A1. So too, federal judges called upon to review a statute on such a controversial subject might, like their colleagues in Congress, allow their views on the merits of the issue to color their federalism analysis.

403 Cross, *supra* note 61, at 1306 (arguing that "judicial review of the basis for legislation . . . would not consistently advance the objectives of federalism but would merely enable judges to strike down occasional laws in order to better effect their ideological policy objectives"); *cf.* Lessig, *supra* note 11, at 174-75 (noting that the Court's need to

review of the limits on Congress's power may, therefore, be more intrusive than simply ruling that Congress may not reach certain subjects under its Commerce Clause or Section 5 powers. In addition, the indeterminacy of such an approach may ultimately exhaust the Court's "institutional capital" and undermine the legitimacy of the federal judiciary.[404]

These objections strongly counsel against heightened judicial scrutiny of Congress's conclusions that problems merit federal legislative solutions. Of course, the question then becomes whether some alternative approach would be better suited to keeping Congress within constitutional limits and more compatible with judicial legitimacy and competence. Plenary consideration of this question is beyond the scope of this Article, which focuses on describing and questioning the Court's evolving treatment of the legislative record in constitutional cases. Nevertheless, we briefly discuss two possible approaches and identify promising scholarship that explores the relative advantages and disadvantages of each.

B. Alternatives

If, as we contend, heightened judicial scrutiny of the legislative record is the wrong answer to the admittedly serious danger of congressional overreaching, the question remains: What, if anything, may the Court legitimately do to confine Congress to meaningful limits? First, and perhaps most obviously, the ultimate answer may be "very little." The Court's position in our constitutional order, properly understood, may simply preclude aggressive judicial efforts to police the boundaries of the Constitution's affirmative grants of power to Congress. Certainly, many scholars have drawn precisely that conclusion from the Court's ultimate acquiescence to the New Deal Congress's expansive understanding of the Commerce Clause.[405] Moreover, op-

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retain the appearance of impartiality requires that it adopt rules that will not be perceived as being manipulable).

404 *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL CONSIDERATION OF THE ROLE OF THE SUPREME COURT 169 (1980); *see also* Woolhandler, *supra* note 399, at 121 (arguing that "[f]ormalizing the process for judicial reception of legislative facts" will increase "the influence of pragmatic balancing in judicial decisionmaking," which will in turn "make the judicial process look more like the legislative and administrative processes" and thus "undermine the legitimacy of the courts").

405 *E.g.*, Cross, *supra* note 61, at 1320 (stating that the Court "has a strong incentive not to hamstring the exercise of federal power generally and little incentive to establish a strong, principled, consistently enforceable doctrine of federalism"); William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1359 (1994) (arguing that "because the Court is politically vulnerable to Congress and the President, it has rarely attempted to construe the Commerce Clause to limit congressional authority"); Graglia, *supra* note 394, at 770 (arguing that "a direct confrontation with Congress over the scope of federal legislative authority is a battle the Court cannot win").

ponents of vigorous judicial review of statutes at the margins of Congress's power have insisted that the "political safeguards of federalism" built into our constitutional architecture sufficiently protect the division of authority between the national and the state governments,[406] even though we recognize that this view has, in turn, been criticized as both unrealistic[407] and contrary to the founders' intent.[408] More recently, scholars who are less sanguine about Congress's ability to exercise self-restraint have, nevertheless, concluded that the dangers of aggressive judicial efforts to enforce the constitutional limits on Congress's authority far outweigh those of a more passive approach.[409] Not surprisingly, however, a wide array of critics from the time of the New Deal to the present have attacked the argument for judicial restraint as leading instead to complete judicial abdication.[410]

To avoid the pitfalls of, on the one hand, second-guessing Congress's inherently value-laden factual judgments and, on the other hand, an approach that eliminates any meaningful judicial role in restraining Congress, the Court must do something that it has struggled, and failed, to do for most of the twentieth century: articulate workable substantive legal standards by which Congress's more aggressive assertions of power may be impartially assessed.[411] *Morrison*'s tentative sug-

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406 *E.g.*, CHOPER, *supra* note 404, at 175 ("The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the . . . issue . . . should be treated as nonjusticiable, final resolution being relegated to the political branches—i.e., Congress and the President."); Wechsler, *supra* note 373, at 546 ("[T]he existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism.").

407 Moulton, *supra* note 64, at 912 (arguing that the political safeguards model "affords [the states] little protection from intrusive national legislation"). *But see* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that party politics secure federalism values).

408 John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 39 (1998) ("The founding generation feared that Congress would seek to grab more power from the states in order to enhance its own institutional power, prestige, and glory.").

409 Cross, *supra* note 61, at 1335; Graglia, *supra* note 394, at 769-70; Moulton, *supra* note 64, at 852.

410 *E.g.*, Calabresi, *supra* note 394, at 752 (arguing that the Court has been "'asleep at the constitutional switch'" (quoting *Expansion Checked*, WALL ST. J., Apr. 27, 1995, at A14)); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 23 (1950).

411 As a practical matter, the Court's recent focus on perceived deficiencies in the formal legislative record may have followed from a lack of consensus among the Justices in the majority as to the *legal* rationale for an agreed upon result. All the cases discussed in Part I presented difficult legal questions in areas of constitutional law, characterized by both a bitter history, and deep, yet unstable, divisions on the current Court. In the *Turner* cases, the question was the substantiality of the government interest necessary to justify content-neutral economic regulation imposing a burden on speech. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662-63 (1994) ("Turner I"); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189-90 (1997) ("Turner II"). In *Lopez*, the question was the scope of Congress's power under the Commerce Clause to regulate noncommercial intrastate activity with some nonnegligible impact on interstate commerce. United States v. Lopez, 514 U.S. 549, 559-61 (1995), *superceded by statute as stated in* United States v. Danks, 221 F.3d 1037 (8th

gestion of a reformulated legal standard for the resolution of Commerce Clause cases may prove to be a step in the right direction, although we presently take no position on the wisdom of the majority's distinction between economic and noneconomic causes of substantial effects on interstate commerce.[412] The Court's decisions in the *Turner* cases, as well as in *Lopez* and *Flores*, have also inspired commentators to offer some promising proposals.[413] Advocates for active judicial constraint of congressional overreaching should focus their efforts on refining and advancing these proposals. This focus would allow them to acknowledge the judicial usurpation threatened by the Court's recent heightened scrutiny of the formal legislative record, without abandoning hope that the Court might play a constructive role in keeping Congress within constitutional limits.

CONCLUSION

In a series of recent cases, the Supreme Court has become increasingly aggressive in striking down federal statutes because Congress's formal legislative record inadequately supports factual findings or predictions underlying congressional action. In so doing, the Court has placed new procedural burdens on Congress to compile an extensive legislative record in support of statutes approaching the boundaries of the legislature's constitutional authority, much as federal agencies are required to compile a record in support of administrative action.

This emerging procedural requirement is highly questionable on precedential, constitutional, and practical grounds. Congress is *not* an

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Cir. 1999). In *Flores*, *Florida Prepaid*, and *Kimel*, the issue was the extent of Congress's power under Section 5 of the Fourteenth Amendment to enact prophylactic measures. Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 644 (2000); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 638-40 (1999); City of Boerne v. Flores, 521 U.S. 507, 517 (1997).

In each case, the Court's ostensible focus on perceived inadequacies in the formal legislative record may well have been a convenient means to reach a desired result, without definitively resolving a difficult legal question that risked fracturing the majority. Of course, even intractable disputes among the Justices do not justify resort to a legally and jurisprudentially unsound approach to judicial review.

412 United States v. Morrison, 120 S. Ct. 1740, 1750 (2000). Notably, in their *Morrison* dissents, Justices Souter and Breyer raise serious questions about the theoretical validity and workability of the majority's statement regarding the governing legal standard. *Id.* at 1764-65 (Souter, J., dissenting); *id.* at 1774 (Breyer, J., dissenting).

413 *E.g.*, Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 794 (1996) (arguing for a Commerce Clause analysis that takes into account "the positive value of state and local government, the best uses of federal power, and the ideal allocation of cases between the state and federal courts"); Nelson & Pushaw, *supra* note 394, at 9-13 (proposing that the Court adopt a new definition of the term "commerce"); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 555-59 (1995) (suggesting a revised Commerce Clause jurisprudence).

agency, and, until recently, it was well established that the constitutionality of federal statutes did not depend on formal findings supported by record evidence, at least outside of the narrow categories of laws subject to the strictest judicial scrutiny. Moreover, the Court's imposition of new, procedural conditions on Congress's exercise of its legislative authority raises substantial constitutional questions under the Rules and Journal Clauses, the Speech or Debate Clause, and the political question doctrine. Finally, the Court's new approach is simply inconsistent with the political realities of congressional fact-finding.

Some might, nevertheless, forcefully defend the Court's recent approach as justified by the need to keep Congress within constitutional boundaries. Upon reflection, however, doubts about the limits of the courts' competence and legitimacy lead us to conclude that heightened judicial scrutiny of the factual basis for congressional action is inconsistent with the proper role of the federal judiciary. Accordingly, advocates of more aggressive judicial review of federal statutes at the margins of Congress's constitutional authority cannot avoid the hard question that has perplexed the Court for much of the twentieth century: Can the Court articulate *legal* standards that will, on the one hand, allow for federal legislation necessary to govern an integrated national economy and protect individual liberties from state intrusion, and, on the other hand, preserve the Constitution's intended balance between federal and state governments? It is this question, not factual questions concerning the extent of the problems particular federal statutes address, that interested commentators should consider, and that the Court must ultimately resolve.