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# ARTICLES

## WHAT CONGRESS KNOWS AND SOMETIMES DOESN'T KNOW

*Muriel Morisey Spence\**

### I. INTRODUCTION

It is a striking feature of the legislative process that Congress is neither required to articulate reasons for its actions nor subject to constitutional challenge merely on the ground that its choices are uninformed.<sup>1</sup> The Constitution contains a variety of

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1. These points are implicit in the Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21 (1819), holding that the Constitution permits Congress to determine the means of carrying out its enumerated powers. Though in *McCulloch* the Court was addressing the substance of what Congress considered "necessary and proper" legislation, it is fully consistent with *McCulloch* to conclude that Congress has even more latitude with respect to procedural choices. *Field v. Clark*, 143 U.S. 649 (1892) provides additional implicit support for the proposition that Congress is bound only by the Constitution's *express* procedural requirements. More recent support appears in *Bowsher v. Synar*, 478 U.S. 714 (1986), *United States v. Munoz-Flores*, 495 U.S. 385 (1990) and *FCC v. Beach Communications*, 113 S. Ct. 2096 (1993).

Articulated reasons for legislation are common, either in statutory findings, statements of policy or purpose, or in legislative history, but such reasons are not constitutionally necessary. Congress must maintain a record of its proceedings, but the Constitution states only that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." U.S. CONST. art. I, § 5, cl. 3. Useful general references on

procedural rules for enacting legislation.<sup>2</sup> It also requires that statutes conform to a number of substantive requirements.<sup>3</sup> But Congress has traditionally enjoyed wide latitude in deciding whether and to what extent it bases decisions on policy-relevant knowledge<sup>4</sup> or articulates the factual foundations for its ac-

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congressional practices include WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* (8th ed. 1993); CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH AND LEGISLATIVE GUIDE* (1989).

This article focuses exclusively on the federal legislature. State constitutions are far more likely to have detailed provisions with respect to legislative procedure. Professor Popkin observes that

[t]his reflects deep suspicion of the state legislative process. State legislatures have traditionally consisted of poorly paid part time legislators who lack resources of their own to research the issues and draft statutes. . . . Most of the procedural rules were embedded in the State constitutions during the 19th Century, when private economic interests often dominated state legislatures and obtained legislation for private gain.

WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION, POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 195 (1993). For summaries and analysis of state constitutional provisions on legislative procedure, see, e.g., THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (8th ed. 1927); OTTO J. HETZEL ET AL., *LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS* 431-562 (2d ed. 1993); 1 & 2 C. DALLAS SANDS & MICHAEL E. LIBONATI, *LOCAL GOVERNMENT LAW*, §§ 3.01-4.23, 11.01-11.33 (1982); *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (Robert F. Williams, ed. 1993).

2. Most notable are the bicameralism and presentment requirements, including the veto and override provisions, and the Fifth and Fourteenth Amendments' due process clauses. The requirement that federal legislation contain an enacting clause is statutory. 1 U.S.C. § 101 (1994). Most of Congress' other procedures are also statutory, not constitutional, in origin. There is a thorough discussion of "the federal and state constitutional provisions that structure and condition the framework within which the legislature performs its constitutional functions" in HETZEL ET AL., *supra* note 1. See also Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

3. These include, for example, the First, Fifth and Fourteenth Amendments.

4. There are many philosophical questions one could ask about the meaning of "knowledge." This article incorporates a practical understanding of the term. For the purposes of this article, "policy-relevant knowledge" includes the wide range of empirical data and research that can inform the policy choices Congress makes. Examples include the research that has established the link between cigarette smoking and certain health conditions. The link is not beyond scientific debate, but public and private policy-makers are on solid ground proceeding on the basis that the link actually exists. Another example is the research correlating seat belt use with mortality rates in automobile accidents. Social scientists may debate the reliability of this data, but legislatures and private citizens can make rational decisions on the basis that seat belt use promotes safety. Similarly, there are analyses supporting the proposition that changing from a graduated to a flat federal income tax rate would result in changed tax burdens for most taxpayers. It might be impossible for anyone to predict accu-

tions.<sup>5</sup> Until recently, even when evaluating statutes under close judicial scrutiny,<sup>6</sup> the Supreme Court has tended to defer to Congress' special competence as the fact-finding branch of the federal government.<sup>7</sup> Such deference recognizes the significant fact-finding value inherent in Congress' ability to conduct hearings and investigations, to subpoena witnesses and documents, and to assign to legislative committees and staff responsibility for detailed scrutiny of legislative proposals, their factual foundations and their suitability as responses to social policy concerns. It also recognizes that the variety of backgrounds and interests among legislators enables them to draw upon a wide knowledge of social and economic conditions. In addition, the tradition of judicial deference respects the democratically elected legislature as the primary source of statutory law.<sup>8</sup>

This article examines some contemporary aspects of the tradi-

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rately, before implementation, the extent of such changes and which income groups would be most affected, but Congress has substantial cause to believe that one way to redistribute the tax burden is to switch from a graduated to a flat rate. Sometimes policy-relevant knowledge bears on whether and to what extent a particular problem exists. For example, as Congress debates whether to adopt a constitutional amendment to protect the United States flag, the policy-relevant knowledge includes information on the nature and frequency of incidents of flag desecration.

This understanding of "knowledge" refers to something more substantial than anecdotal evidence, although such evidence has an important and appropriate place in public debate and the building of political support for legislation actions. It may be an insufficient basis on which to make some decisions, however, and is subject to over-use. The examples discussed in part III, *infra* are instances where, in addition to taking too little account of available empirical knowledge, Congress may have relied too heavily on anecdotes as support for their policy conclusions.

Among those who have reflected on the use of knowledge and its relationship to democratic decisionmaking are ISAAH BERLIN, FROM HOPE AND FEAR SET FREE, reprinted in CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS, at 173 (Henry Hardy, ed. 1979); AARON WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS (1979).

5. As the authors of a leading casebook on legislation observe, "[I]t is settled law that the trappings of procedural due process, e.g. notice and an opportunity to be heard, are in-applicable to 'legislative' decisions." HETZEL ET AL., *supra* note 1, at 729.

6. A significant example is the Supreme Court's decision about the constitutionality of a race-based statute in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), discussed *infra* part II.A.

7. See *infra* part II.A.

8. For a valuable review of judicial and scholarly views on statutes as sources of law, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 385-423 (2d ed. 1994).

tion of judicial deference to legislative fact-finding and offers three observations.<sup>9</sup>

First, the Supreme Court's decisions in *Adarand Constructors, Inc. v. Peña*<sup>10</sup> and *United States v. Lopez*<sup>11</sup> constitute an invitation to courts to review statutes with little or no deference to the legislature's fact-finding role.<sup>12</sup> In *Adarand*, the Court concluded that the proper standard of review for all statutory racial classifications should be strict scrutiny, overruling a decision<sup>13</sup> that had called for a lesser standard of review for federal statutes with benign purposes.<sup>14</sup> In *Lopez*, the Court struck down a federal statute prohibiting firearms in areas near public schools.<sup>15</sup> The Court held that the statute exceeded Congress' authority under the Commerce Clause.<sup>16</sup> The *Adarand* and *Lopez* decisions should be viewed in combination with the textualist approach to statutory interpretation as part of a disturbing judicial challenge to Congress' position as the authoritative source of statutory law.<sup>17</sup> They are also signs of a larger trend toward limiting the federal government and challenging the legitimacy of many of its actions. This trend appears grounded to a great extent in revitalized judicial interest in the Tenth Amendment.<sup>18</sup> For example, in *New York v. Unit-*

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9. For a useful volume providing historical and comparative perspectives, see KNOWLEDGE, POWER, AND THE CONGRESS (William H. Robinson & Clay H. Wellborn eds., 1991) [hereinafter KNOWLEDGE, POWER AND THE CONGRESS]. Some of the themes in this article appear in Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty,"* 46 HASTINGS L.J. 1723 (1995). Professor Rogovin's inquiry focuses on "the sources of and justifications for a judicial requirement that legislation be supported by empirical data." *Id.* at 1727.

10. 115 S. Ct. 2097 (1995).

11. 115 S. Ct. 1624 (1995).

12. See *infra* parts II.A & II.B. The assertion about *Adarand* is not a criticism of the Court's decision to apply strict scrutiny, but rather a comment on what the Court says strict scrutiny entails.

13. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

14. *Adarand*, 115 S. Ct. at 2112. The decision also undercut the holding in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which upheld a federal statute establishing racial set-asides for certain public works contracts.

15. *Lopez*, 115 S. Ct. at 1626.

16. *Id.* at 1626-34.

17. See *infra* part II.C.

18. The Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

*ed States*,<sup>19</sup> the Supreme Court held that the Low-Level Radioactive Waste Policy Act's provisions requiring states to either accept ownership of waste or regulate it according to congressional instructions went beyond Congress' enumerated powers and was inconsistent with the Tenth Amendment.<sup>20</sup> In 1995 four Justices made their convictions about the scope and force of the Tenth Amendment explicit through Justice Thomas' dissent, in a case striking down congressional term limits:

As far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them. The Federal government and the States thus face different default rules: where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it. These basic principles are enshrined in the Tenth Amendment. . . .<sup>21</sup>

Even Congress seeks to reduce the role of the federal government. A centerpiece of the welfare reform legislation, for example, is increasing use of "block grants" that give money for social programs to the states with far fewer federal constraints on how they may use the funds.<sup>22</sup>

Second, while the Supreme Court accords too little deference to congressional fact-finding in some situations, the electorate

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19. 505 U.S. 144 (1992).

20. *Id.* at 177.

21. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1876 (1995). (Thomas, J., dissenting) (joined by Justices O'Connor, Scalia, and the Chief Justice). As discussed *infra* notes 125-130 and accompanying text, this perspective is quite similar to the views the Court expressed in several pre-1937 cases.

22. The Personal Responsibility and Work Opportunity Act of 1995, H.R. 4, 104th Cong., 1st Sess. The bill was presented to the President on December 29, 1995 and vetoed on January 9, 1996. Congress also has limited its own role in the spending process. The 104th Congress enacted legislation giving the President the authority to veto specific items in appropriations bills. S.4, Legislative Line Item Veto Act of 1995, Pub. L. 104-130, 110 Stat. 1200 (1996). One of the vigorous opponents of the legislation, Senate Minority Leader Robert C. Byrd (D-W.Va.), said:

It is difficult to imagine why this body would want to deal such a painful blow, not only to itself, but to this basic structure of our constitutional form of government and to the interests of the people we represent. . . . [The legislation] simply gives away too much of the congressional control over the purse strings to the president.

142 CONG. REC. S2929-02, S2940 (daily ed. Mar. 27, 1996) (statement of Sen. Byrd).

should press Congress to make better use of factual information.<sup>23</sup> The assertion that the Court should return to a deferential stance towards congressional fact-finding may seem at first to be inconsistent with the proposition that the electorate should be tougher on Congress. But these ideas can co-exist because of the distinction between the Court's limited role in our constitutional structure and the electorate's right to question whether Congress is legislating wisely. In deciding whether certain congressional actions are consistent with the Constitution, the Supreme Court has a duty to respect Congress' status as a co-equal branch of government. The first observation comments critically on the Supreme Court's exercise of that duty. On the other hand, when evaluating Congress, the electorate it is not limited to the question whether legislation is constitutionally valid. The electorate is free to ask whether Congress is making wise and well-informed choices. Moreover, at a time when the Supreme Court is less deferential to Congress with respect to its fact-finding role, tougher scrutiny by the electorate may spur Congress to carry out that role with greater care. This second observation is, in part, a critical comment on the electorate's exercise of its influence on Congress.

The link between these two observations receives implicit support from Judge Pollak in his foreword to a recent symposium on *Lopez*.<sup>24</sup> Speculating whether *Lopez* will lead to the striking down of other statutes by the Court, he noted:

[T]o the extent that happens, it seems fair to surmise that a number of such casualties will be attributable not to a restless activism on the part of the Justices but to irresponsibility on the part of a Congress that has failed to make out even a minimally plausible case for utilizing the commerce power to undergird a new regulatory scheme, especially one that deals with problems historically regarded as chiefly of state and local concern.<sup>25</sup>

As the judge's comment points out, both the Court's perspective on congressional power and the strength of Congress' articulat-

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23. See discussion *infra* part III.

24. Judge Louis H. Pollak, *Foreword* to Symposium: *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995).

25. *Id.* at 551-52.

ed justifications for its actions influence the determination of whether statutes survive judicial scrutiny.

Finally, to counter the troubling effects of *Adarand* and *Lopez*, to enrich public policy debate and decision-making, and to strengthen the factual records that are subject to judicial review, Congress should take increasing care to develop and articulate the factual foundations of its actions.<sup>26</sup>

These observations are part of an ongoing debate among legal and political science scholars about the tension between political and empirical bases for legislative decisionmaking.<sup>27</sup> The policy science literature of the mid-twentieth century also reflects scholarly interest in whether legislative deliberation can be improved through the incorporation of concepts and practices associated primarily with the "hard" sciences.<sup>28</sup> Another body of literature on how decisionmakers use social science research examines the practices of contemporary policy-makers in all branches of government and in the private sector.<sup>29</sup> Recently, members of the scientific community have made vocal complaints that policy-makers ignore scientific knowledge.<sup>30</sup>

The debate about what sorts of decisions are best made by judges and which should be left to legislators is also pertinent to the themes in this article.<sup>31</sup> Three complementary views on this question inform the assertions made here. The first view is that judges are essential guardians of the enduring principles

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26. See *infra* part IV.

27. For a discussion of these themes, see generally ESKRIDGE & FRICKEY, *supra* note 8, at 383-511.

28. See, e.g., HAROLD D. LASWELL, A PRE-VIEW OF POLICY SCIENCES (1971).

29. See, e.g., DANIEL A. DREYFUS, THE LIMITATIONS OF POLICY RESEARCH IN CONGRESSIONAL DECISION MAKING *in* USING SOCIAL RESEARCH IN PUBLIC POLICY MAKING 100 (Carol Weiss, ed. 1977); KNOWLEDGE, POWER, AND THE CONGRESS, *supra* note 9; Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279 (1995); Charles E. Lindblom & David K. Cohen, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* (1979); Charles E. Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79-88 (1959) (discussing the use of knowledge in the private sector).

30. See *infra* text accompanying notes 152-54.

31. For informative discussions of that debate, see Henry W. Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); ESKRIDGE & FRICKEY, *supra* note 8.



articulated in the Constitution but are ill-equipped to make most of the factual and policy determinations that are the province of the legislature.<sup>32</sup> The second view is that the deliberations of a democratically elected legislature yield more legitimate answers to complex policy judgments than the reflections of appointed judges, even though the legislature may sometimes choose to make only limited use of available fact-based knowledge. The third view is that because legislators make so many significant factual and policy determinations, they have an obligation to be thorough and thoughtful in their deliberations; this necessarily includes a duty to consider as much policy-relevant knowledge as they can realistically absorb.

Part II of this article discusses the judicial challenge to Congress. Part III argues for a higher level of voter scrutiny of how Congress uses fact-based knowledge. Using contemporary examples, it comments critically on how Congress uses available knowledge. Finally, it discusses why court challenges and the electoral process are insufficient ways to monitor whether Congress uses information effectively. Part IV offers recommendations on what Congress and the public might do differently.

## II. IMPLICATIONS OF NON-DEFERENTIAL JUDGING BY THE COURT

The ways in which Congress uses or fails to use policy-relevant knowledge have implications for the legitimacy of statutory law, partly because of the movement away from judicial deference to Congress' factual deliberations and conclusions. This change in judicial deference is revealed in the June 1995 decision in *Adarand Constructors, Inc. v. Peña*.<sup>33</sup> The Court framed its analysis in *Adarand* as an inquiry into the appropriate constitutional standard for evaluating race-specific federal statutes and concluded that:

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32. There are limits to legislative competence, of course. Legislatures are not competent to determine the appropriate medical treatment for illnesses, for example. The matters on which judges have traditionally deferred to legislatures involve subjects within the realm of legislative competence. The issues Justice O'Connor says the City of Richmond should have considered before enacting a race-specific ordinance (quoted *infra* note 76 and accompanying text) are good examples.

33. 115 S. Ct. 2097 (1995).

[A]ll racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.<sup>34</sup>

A careful reading of the case and those leading up to it supports the conclusion that five Justices<sup>35</sup> are willing to have the Court's analysis of what constitutes a compelling governmental interest and a narrowly tailored response to that interest virtually ignore the factual conclusions drawn by Congress. The decision thus undermines the legitimacy of statutory law because Congress' factual conclusions, an area that has traditionally been its domain, receive little deference from the Court. This is not an inevitable result of strict scrutiny analysis but flows instead from this Court's evident willingness to discount the value of Congress' factual support for its statutes.

#### A. *Historical Background*

Before discussing *Adarand* and the cases leading up to it more fully, some historical context may be useful. While there have been instances in which the Court refused to defer to congressional findings of fact in striking down statutes (notably the striking down of elements of the welfare state),<sup>36</sup> there has been a tradition of judicial deference to legislative findings, and the presumption that facts exist that will support the constitutionality of legislation.<sup>37</sup>

This tradition is grounded in the earliest judicial statements on the contours of judicial and legislative authority. In *McCulloch v. Maryland*,<sup>38</sup> Chief Justice Marshall articulated

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34. *Id.* at 2117.

35. Justice O'Connor wrote the majority opinion in which Justices Kennedy, Thomas, Scalia and Chief Justice Rehnquist joined. *Id.* at 2101.

36. *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

37. *Cox, supra* note 31, reviews this pattern of judicial behavior.

38. 17 U.S. (4 Wheat.) 316 (1819) (raising the specific questions whether Congress had the authority to incorporate a bank and whether the State of Maryland had the authority to tax it).

Congress' authority to enact legislation that would create legal obligations binding on the states:

[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.<sup>39</sup>

Marshall went on to make clear that while the Supreme Court had a duty to strike down statutes that were either "prohibited by the constitution"<sup>40</sup> or "for the accomplishment of objects not [e]ntrusted to the government,"<sup>41</sup> there is a limit to the judicial authority to substitute its judgment for that of Congress:

[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.<sup>42</sup>

A number of the judicial statements urging that the Court should defer to Congress' judgment about what laws were necessary and appropriate came in the context of statutes enacted under the Commerce Clause. The Court's decisions reflected the perspective that a legislature is typically more competent at fact-finding than an appellate court. A related theme was that judicial review is inherently counter-majoritarian. When it is employed to second guess the legislature on essentially factual determinations it also undermines the legislature's ability to respond to the democratic forces that are supposed to shape public policy.<sup>43</sup> For example, in *United States v. Carolene Prod-*

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39. *Id.* at 421.

40. *Id.* at 422.

41. *Id.* at 423.

42. *Id.*

43. Cox, *supra* note 31, at 209-10.

*ucts Co.*,<sup>44</sup> the Court upheld the Filled Milk Act of 1923, which prohibited the shipment of "filled milk" in interstate commerce. The Court stated:

[W]here the legislative judgment is drawn into question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here [Carolene Products Co.] challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it<sup>45</sup>

Similarly, in *United States v. Darby*,<sup>46</sup> the Court upheld provisions of the Fair Labor Standards Act setting maximum hours and minimum wages for covered employees. In *Wickard v. Filburn*,<sup>47</sup> the Court upheld a quota for wheat production established by the Secretary of Agriculture under the Agricultural Adjustment Act. The Court's opinion stated, in part:

The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.<sup>48</sup>

These decisions were part of a modern disavowal of the earlier view that the Court should actively discourage enactment of statutes regulating businesses. In *Lochner v. New York*,<sup>49</sup> the Court struck down a New York statute limiting to sixty hours

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44. 304 U.S. 144 (1938).

45. *Id.* at 154 (citations omitted).

46. 312 U.S. 100 (1941).

47. 317 U.S. 111 (1942).

48. *Id.* at 129.

49. 198 U.S. 45 (1905).

per week or ten hours per day the time bakery employees could be required to work. The Court observed that "[s]tatutes of the nature of that under review . . . are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power. . . ."<sup>50</sup>

A similar judicial attitude appeared in Commerce Clause cases. In *Hammer v. Dagenhart*,<sup>51</sup> for example, the Court struck down the Child Labor Act that prohibited goods produced with child labor from interstate commerce.

As the Court began to review more cases involving civil liberties and civil rights, it intervened more willingly in the interest of protecting basic rights, such as those embodied in the First, Thirteenth, Fourteenth and Fifteenth Amendments. However, this primarily took the form of heightened levels of scrutiny that still preserved the concept of judicial deference. For example, in *South Carolina v. Katzenbach*,<sup>52</sup> the Court upheld the Voting Rights Act of 1965 provision outlawing state literacy tests for voter registration,<sup>53</sup> taking a broad view of Congress' authority to enforce the Fifteenth Amendment. It is noteworthy that Congress acted on the basis of its belief that literacy tests might be used in discriminatory ways, even though there was no proof of actual Fifteenth Amendment violations.<sup>54</sup> In *Katzenbach v. Morgan*,<sup>55</sup> the Court upheld that section of the Voting Rights Act that prohibited States from denying the right to vote because of a lack of proficiency in English,<sup>56</sup> even though it meant invalidating a state statute. The federal and state legislatures appeared not to agree on the pertinent findings and conclusions, but the Court deferred to Congress.<sup>57</sup>

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50. *Id.* at 61.

51. 247 U.S. 251 (1918).

52. 383 U.S. 301 (1966).

53. 42 U.S.C. §§ 1973, 1973a-p (1965), amended by 42 U.S.C. §§ 1973b,c,aa to bb-4 (1994).

54. Cox, *supra* note 31, at 227.

55. 384 U.S. 641 (1966).

56. 42 U.S.C. § 1973(b)(e)(2) (1994).

57. Cox, *supra* note 31, at 212-29. See *infra* part II.B for a discussion of how the *Lopez* decision cuts back on this deference in the context of rational basis review.

The cases addressing Supreme Court deference to congressional statutes in the area of individual rights and liberties had almost exclusively involved congressional actions that superseded state statutes. In 1980, the Court addressed the constitutionality of a congressional race-specific set-aside for federal public works contracts.<sup>58</sup> While the majority generated three separate opinions, all those voting to uphold the statute agreed that Congress was empowered to enact remedial legislation aimed at racial discrimination and could conclude that there was an ample historical basis on which to determine that the action was necessary.<sup>59</sup> It is noteworthy that a majority of the Court was willing to uphold the racial set-aside even though it was introduced during House floor debate of the public works legislation without prior hearings and without any congressional factual findings that were specific to this legislation. Chief Justice Burger stated that "although the Act recites no preambulatory 'findings' on the subject, we are satisfied that Congress had abundant historical basis" for its conclusion that the set-aside was an appropriate means of ensuring equal opportunity for minority businesses to participate in the federal programs funded by the Act.<sup>60</sup> In his concurring opinion, Justice Powell also noted that Congress is not to be treated like a lower court, bound to make specific findings of fact to accompany each statute.<sup>61</sup>

In *City of Richmond v. Croson Co.*<sup>62</sup> the Supreme Court held that a Richmond, Virginia ordinance violated the Fourteenth Amendment's Equal Protection Clause. The ordinance required non-minority-owned prime contractors on city construction projects to grant at least thirty percent of the subcontracts to minority-owned firms.<sup>63</sup>

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58. Public Works Employment Act § 103(f)(2), 42 U.S.C. § 6705(f)(2) (1977).

59. *Fullilove v. Klutznick*, 448 U.S. 448, 473-78 (1980).

60. *Id.* at 478.

61. *Id.* at 502-03 (Powell, J., concurring) Justice Stevens dissented in *Fullilove*, largely on the basis that Congress had failed to engage in sufficient deliberation prior to enactment, but even he concluded that prior to enactment of the program at issue in *Adarand*, Congress had deliberated enough. *Id.* at 549-54. (Stevens, J., dissenting).

62. 488 U.S. 469 (1989). There was no majority opinion. The plurality opinion by Justice O'Connor is the most often cited and quoted.

63. RICHMOND, VA., CODE § 12-156(a) (1985).

The plurality in *Croson* made several points directly relating to the question of Congress' special authority to make factual determinations. The opinion noted that:

Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.<sup>64</sup>

Quoting *Katzenbach v. Morgan*,<sup>65</sup> the plurality observed, that "[c]orrectly viewed, § 5 [of the Voting Rights Act] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>66</sup> The plurality emphasized that Congress has distinct authority to determine how to enforce key constitutional provisions. The plurality said of the Thirteenth and Fourteenth Amendments that, "[t]hey were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress."<sup>67</sup> It also quoted from a lower federal court opinion and two law review articles highlighting the differences between Congress and nonfederal entities in that regard.<sup>68</sup>

The plurality also said that "[t]he fact-finding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary . . ."<sup>69</sup> but cautioned

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64. *Croson*, 488 U.S. at 490 (emphasis in original).

65. 384 U.S. 641 (1966).

66. *Croson*, 488 U.S. at 490.

67. *Id.* (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1800)).

68. *Id.* at 491. "The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action." *Associated Gen. Contractors of Cal. v. City and County of San Francisco*, 813 F.2d, 922, 929 (1987); "Fullilove clearly focused on the constitutionality of a congressionally mandated set-aside program." *Drew S. Days III, Fullilove*, 96 YALE L.J. 453, 474 (1987). "Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone." Robert A. Bohrer, Bakke, Weber and Fullilove: *Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 512-13 (1981). As Justice Stevens pointed out in his dissent in *Adarand*, the *Adarand* majority disavowed these statements in *Croson* as reason to review federal statutes under a less strict standard of review. *Adarand*, 115 S. Ct. at 2124-25 (Stevens, J., dissenting).

69. *Croson*, 488 U.S. at 500.

against "blind judicial deference to legislative or executive pronouncements of necessity. . . ."<sup>70</sup> The plurality concluded that the legislative fact-finding preceding enactment of the Richmond ordinance was inadequate to support the adoption of the race-specific statute under review.<sup>71</sup> At no point, however, did the Court address the question of what would constitute adequate fact-finding by Congress. The issue of congressional authority to enact provisions similar to the one in *Croson* had already been addressed in *Fullilove* and was not before the Court in *Croson*.

The *Croson* plurality opinion also supports the proposition that factual findings by the legislature play an important role in the specific tasks of determining whether a statute addresses a compelling governmental interest and sets out a narrowly tailored remedy. Relying in part on Justice Powell's opinion in *University of California Regents v. Bakke*,<sup>72</sup> the plurality observed that the governmental interest in remedying past discrimination must be grounded in "judicial, legislative, or administrative findings of constitutional or statutory violations. . . ."<sup>73</sup> An earlier reference to *Wygant v. Jackson Board of Education*<sup>74</sup> also reinforces the proposition that findings are an important element in these determinations.<sup>75</sup> Justice O'Connor stated specifically what kinds of facts the City of Richmond should have evaluated:

In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated a "strong basis in evidence for its conclusion that remedial action was necessary."<sup>76</sup>

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70. *Id.* at 501.

71. *Id.* at 505-10.

72. 438 U.S. 265 (1978).

73. *Croson*, 488 U.S. at 497 (quoting *Bakke*, 438 U.S. at 307).

74. 476 U.S. 267 (1986).

75. *Croson*, 488 U.S. at 485.

76. *Id.* at 510 (quoting *Wygant*, 476 U.S. at 277).



The plurality concluded that the city "failed to demonstrate a compelling interest in apportioning the public contracting opportunities on the basis of race."<sup>77</sup>

The plurality's recognition of the saliency of legislative findings is an important part of the context for discussing *Metro Broadcasting, Inc. v. Federal Communications Commission*<sup>78</sup> and *Adarand*.

In *Metro Broadcasting*, the Court upheld the constitutionality of two Federal Communications Commission (FCC) policies that gave minority owned enterprises preferences in seeking to obtain or retain radio and television broadcast licenses.<sup>79</sup> The policies were not designed to remedy identified discrimination but instead reflected federal efforts to promote minority participation in the broadcasting industry.<sup>80</sup> The Court held that because the FCC policies bore the "imprimatur of longstanding congressional support," were done in response to a congressional statutory command, and were "substantially related to the achievement of the important governmental objective of broadcast diversity," they did not violate equal protection principles.<sup>81</sup>

On the issue of the justification for the race-specific policies, the majority opinion discussed the congressional and Commission consideration of the policies at length,<sup>82</sup> including specific reference to the Commission's consideration of alternatives to the adopted policies.<sup>83</sup> The dissenters, in an opinion authored by Justice O'Connor,<sup>84</sup> discounted the legislative and agency deliberations, objecting that they failed to establish a factual predicate for the proposition that there is a nexus between a station owner's race and the station's programming.<sup>85</sup> The dissenters made their disdain for congressional findings quite plain:

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77. *Id.* at 505.

78. 497 U.S. 547 (1990).

79. *Id.*

80. *Id.* at 552-53.

81. *Id.* at 563, 567, 569.

82. *Id.* at 572-92.

83. *Id.* at 584.

84. The dissent was joined by Justices Scalia and Kennedy and Chief Justice Rehnquist.

85. *Metro Broadcasting*, 497 U.S. at 627-29 (O'Connor, J., dissenting).

[N]o degree of congressional endorsement may transform the equation of race with behavior and thoughts into a permissible basis of governmental action. Even the most express and lavishly documented congressional declaration that members of certain races will as owners produce distinct and *superior programming* would not allow the Government to employ such reasoning to allocate benefits and burdens among citizens on that basis.<sup>86</sup>

This statement demeans the congressional goal of increased diversity in station ownership by suggesting Congress was making a comment about programming quality.

### B. *Adarand Constructors, Inc. v. Pena*

With *Adarand*, the perspective on congressional fact-finding expressed in O'Connor's *Metro Broadcasting* dissent became the majority view. *Adarand* expressly overruled *Metro Broadcasting* and undercut *Fullilove*.<sup>87</sup> *Adarand* involved a federal program that gave the prime contractor under a federal highway construction contract a financial incentive to hire subcontractors controlled by socially and economically disadvantaged individuals.<sup>88</sup> The program also required the contractor to employ the rebuttable presumption that such individuals include minorities or others found to be disadvantaged by the Small Business Administration.<sup>89</sup> The Supreme Court held that the proper standard of review for race specific federal statutes was strict scrutiny.<sup>90</sup> Because the court of appeals had decided the case using a lesser standard, the Court remanded the case to the lower court for further consideration.<sup>91</sup>

The *Adarand* decision turns strict scrutiny analysis into a circle that always leads back to a court and virtually excludes

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86. *Id.* at 629 (O'Connor, J., dissenting) (emphasis added).

87. The dissenters' approach in *Metro Broadcasting* became the majority view in *Adarand*, after Justice Thomas joined the Court. The majority in *Adarand* consists of the dissenters in *Metro Broadcasting* plus Justice Thomas.

88. *Adarand*, 115 S. Ct. at 2102 (citing the Small Business Act of 1953, Pub. L. No. 85-536, 72 Stat. 384 (codified as amended in scattered sections of 15 U.S.C.)).

89. *Id.*

90. *Id.* at 2113.

91. *Id.* at 2118.

Congress' determinations. The Court says that strict scrutiny requires a court to determine whether the interest is compelling and the remedy narrowly tailored<sup>92</sup> but urges that this will not be fatal to all race-specific statutes.<sup>93</sup> Yet the majority opinion discounts Congress' evidentiary support for its conclusions on both points. Both prongs of the inquiry require the assessment of facts about race discrimination, its impact on business opportunities for minorities, and the success or failure of various strategies to free minority entrepreneurs from those effects. The prongs are much like the factors Justice O'Connor noted that the Richmond City Council should have considered before passing its race-specific ordinance.<sup>94</sup> These factual matters are far more suited to legislative investigation and deliberation than judicial inquiry. A legislature is not confined to the factual presentations of specific litigants but can draw upon a wide range of relevant information gathered through hearings and the review of social science research and government data. Yet the *Adarand* decision makes no reference to the congressional deliberations that bear on these issues. For example, the majority opinion does not mention the legislative hearings Congress conducted over a period of several years.<sup>95</sup> This is in striking contrast to the decision in *Fullilove* in which the Court accepted as a valid factual predicate for the race-specific statute, legislative findings that were not specific to the particular provision under review.<sup>96</sup> The silence about the congressional predicate for the statute could be explained by the fact that the Court had decided to remand the case to the lower courts. But by discussing the issue of judicial review and how it should be conducted at such length, with no reference to congressional fact-finding, the *Adarand* decision implicitly invites courts to determine whether the interest is compelling, and whether the

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92. *Id.* at 2113.

93. *Id.* at 2117.

94. *City of Richmond v. Croson*, 488 U.S. 469, 510 (1989); see *supra* note 76 and quote in accompanying text.

95. *Adarand*, 115 S. Ct. at 2130 n.18 (Stevens, J., dissenting) (citing the record of the hearings).

96. *Fullilove*, 448 U.S. at 478. Justice Stevens' dissent provides a detailed comparison of the Court's *Adarand* holding with relevant precedents and questions whether it is "a faithful application of the doctrine of *stare decisis*." *Adarand*, 115 S. Ct. at 2127 (Stevens, J., dissenting).

remedy is narrowly tailored, with little regard for Congress' findings and conclusions.<sup>97</sup>

The Court could have addressed the matter of congressional fact-finding while still concluding that the matter should be remanded to the lower courts. For example, the majority might have encouraged the lower courts to consider whether the congressional hearings or debate addressed the three specific issues the Court says the court of appeals did not decide: (1) "whether the interests served by the use of subcontractor compensation clauses are properly described as 'compelling;'" (2) whether Congress considered any race-neutral means of achieving its goals, or (3) whether the program was appropriately limited so that it would not outlast the discrimination it was designed to eliminate.<sup>98</sup> The Court could have gone even further and instructed the lower courts to consider Congress' factual findings. Instead, the majority opinion makes no reference to them.

This is a particular use of the strict scrutiny standard, not an approach that strict scrutiny makes inevitable.<sup>99</sup> It is quite compatible, however, with Justice O'Connor's dissent in *Metro Broadcasting*, which dismissed the value of the relevant congressional deliberations. The *Metro Broadcasting* dissent, for example, expressly questioned Congress' authority to conclude that the interest in broadcast diversity was compelling and the provision narrowly tailored.<sup>100</sup> It also expressly disputed the

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97. With respect to the question whether the statute was narrowly tailored, Justice O'Connor wrote that the Tenth Circuit had failed to consider this issue "in terms of our strict scrutiny cases." *Adarand*, 115 S. Ct. at 2118. The Tenth Circuit gave specific reasons for why it considered the program narrowly tailored, *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1546-47 (1994), casting the discussion in terms of a level of review consistent with *Fullilove*. Although nothing in *Croson* suggested its analysis should be applied to federal statutes, Justice O'Connor's comment suggests that the Tenth Circuit should have used the *Croson* approach.

98. *Adarand*, 115 S. Ct. at 2118 (citations omitted).

99. As Justice Stevens points out in his *Adarand* dissent, the *Adarand* majority endorses a vision of strict scrutiny that would support the set-aside provision approved in *Fullilove*. *Id.* at 2130 (Stevens, J., dissenting).

100. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 629 (1990); see *supra* note 86 and quote in accompanying text. In his *Adarand* concurrence, Justice Scalia goes even further and asserts that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." *Adarand*, 115 S. Ct. at 2101 (Scalia, J., concurring).

notion that Congress gave careful thought to the FCC policy in question.<sup>101</sup>

The dissents written by Justices Stevens and Souter offer further evidence that *Adarand* is a judicial retreat from deference to Congress. Justice Stevens urged that even if the Court in *Fullilove* had adopted his view that Congress had failed to justify the racial preference, the statute in *Adarand* would be constitutional if principles of stare decisis were appropriately applied.<sup>102</sup> Justice Souter pointed out that the issue of the standard of review was raised only in the petition for certiorari, and said he would not have entertained the question of the standard of review.<sup>103</sup> He added:

The statutory scheme must be treated as constitutional if *Fullilove v. Klutznick* is applied, and petitioners did not identify any of the factual premises on which *Fullilove* rested as having disappeared since that case was decided.<sup>104</sup>

The dissenting Justices properly did not claim that the majority's central motive was to reverse the Court's view of congressional fact-finding set forth in *Fullilove* and strengthened in *Metro Broadcasting*. The *Adarand* majority opinion also reflects the Justices' vision of color-blindness as the goal of equal protection analysis. The perspective is made most explicit in Justice Scalia's concurrence where he said, "In the eyes of the government, we are just one race here."<sup>105</sup> The majority opinion made much the same point, but did so by quoting Justice Stevens' dissent in *Fullilove*.<sup>106</sup> The fact that the color-blindness theme influenced the Court's decision in *Adarand* is not inconsistent with the assertion in this article that the majority's perspective on the value and weight due congressional deliberations also was an influential factor. The dissenting opinions support the conclusion that *Adarand* was in part a deliberate judicial retreat from those decisions deferring to

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101. *Metro Broadcasting*, 497 U.S. at 629.

102. *Adarand*, 115 S. Ct. 2128 (Stevens, J., dissenting).

103. *Id.* at 2131 (Souter, J., dissenting).

104. *Id.* at 2130 (Souter, J., dissenting) (footnote omitted).

105. *Id.* at 2119 (Scalia, J., concurring).

106. *Id.* at 2113 (quoting *Hirabayashi v. United States*, 320 U.S. 81 (1943)).

congressional fact-based determinations of what constitute governmental interests and appropriate statutory responses to identified problems.

Finally, it is ironic that a pivotal step in the Court's movement away from deference to congressional fact-finding comes during review of legislation that is more likely to have benefited from extended deliberation. Strict scrutiny is employed in only a narrow category of situations—usually race-specific statutes, or statutes directly interfering with fundamental rights.<sup>107</sup> Such measures typically raise powerful issues of public values and engender vigorous debate, including questions about their constitutionality. Thus, Congress is more likely to have done the kind of thoughtful deliberation argued for in Part III at just those times when the Court is likely to engage in strict scrutiny.<sup>108</sup> On the other hand, the Court traditionally has been highly deferential to many congressional enactments with far-reaching social effects because they contain none of the provisions that trigger strict scrutiny. As discussed in Part III, this is an important reason why the electorate should evaluate the wisdom of what Congress does in many situations where judicial scrutiny will be minimal.

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107. For example, as noted below, race-specific statutes get strict scrutiny by the Court while gender-specific statutes do not.

108. It is important to acknowledge that neither the specter of strict scrutiny nor its use by the Court are sure protections against ill-advised decisionmaking, as the Court's upholding of measures directed against Americans of Japanese ancestry during World War II shows. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944). It is also important to acknowledge that legislation is sometimes driven by intense feeling rather than dispassionate deliberation. Statutory restrictions on abortion are an example. Nevertheless, Congress is more likely to engage in vigorous debate about matters subject to strict scrutiny.

It is conceivable that greater deference to Congress would make it easier for Congress to enact legislation intended to discriminate, assuming political support for such legislation. Justice Stevens responds effectively to this concern by pointing out that decisions by the majority to discriminate against the minority have regularly been considered unacceptable. *Adarand*, 115 S. Ct. at 2126 (Stevens, J., dissenting). We can reasonably expect normative considerations (such as a commitment to protect minority rights) to moderate the risk that the Court may uphold discriminatory legislation.

C. United States v. Lopez<sup>109</sup>

The *Lopez* decision shows that Congress can take little comfort in the fact that the majority of its statutes contain no provisions that will trigger heightened scrutiny. *Lopez* demonstrates that the Court is willing to challenge Congress as the authoritative source of statutory law even through its use of rational basis review.

In *Lopez*, the Court affirmed a Fifth Circuit decision<sup>110</sup> striking down the Gun-Free School Zones Act of 1990,<sup>111</sup> which forbids "any individual knowingly to possess a firearm" within a school zone.<sup>112</sup> In an opinion by Chief Justice Rehnquist,<sup>113</sup> the Court held that the Act exceeds Congress' authority under the Commerce Clause.<sup>114</sup> The majority opinion reviewed the history of judicial application of the Commerce Clause and concluded that Congress may regulate intrastate activity that "substantially affects" interstate commerce.<sup>115</sup> However, the Court held that because the statute regulated noncommercial activity and its implications for interstate commerce could be identified only by multiple inferences, the statute was an inappropriate imposition of federal authority.<sup>116</sup>

The dissenting Justices responded in terms that highlighted the majority's retreat from deferential review under the rational basis standard. Justice Souter said:

The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's

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109. 115 S. Ct. 1624 (1995).

110. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1994).

111. 18 U.S.C. § 922(q) (1994).

112. *Id.* § 922(q)(2)(A).

113. He was joined by Justices O'Connor, Scalia, Kennedy and Thomas. The *Lopez* and *Adarand* majorities are identical.

114. *Lopez*, 115 S. Ct. at 1624.

115. *Id.* at 1629.

116. *Id.* at 1629, 1634.

political accountability in dealing with matters open to a wide range of possible choices.<sup>117</sup>

Because the court of appeals had speculated that explicit findings about the impact of guns in schools on interstate commerce might have led to a different result, Justice Souter wrote specifically on the question of legislative findings.<sup>118</sup> He observed that under a rational basis review, while findings might provide helpful insight into the legislature's reasoning, they are not essential.<sup>119</sup> The question for courts "is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. . . . Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason."<sup>120</sup>

Justice Souter expressed concern that obliging Congress to justify its policy choices by making the existence of explicit congressional findings dispositive "would function merely as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied. Under such regime, in any case, the rationality standard of review would be a thing of the past."<sup>121</sup>

In his dissent, Justice Breyer pursued the point about the Court's obligation to further defer to Congress' fact-finding competence.<sup>122</sup> He wrote, "[u]pholding this legislation would do no more than simply recognize that Congress had a 'rational basis' for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten."<sup>123</sup> In an appendix

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117. *Id.* at 1651-52 (Souter, J., dissenting) (citations omitted).

118. *Id.* at 1655-57 (Souter, J., dissenting).

119. *Id.* at 1655-56. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, amended 18 U.S.C. § 922(q) to include congressional findings on the effects of firearm possession in and around schools on interstate commerce. The majority in *Lopez* chose not to view them as adequate findings to support the legislation. *Lopez*, 115 S. Ct. at 1632 n.4; see *infra* notes 234-39 and accompanying text for a further discussion of *Lopez*.

120. *Lopez*, 115 S. Ct. at 1656 (Souter, J., dissenting).

121. *Id.* at 1656-57 (Souter, J., dissenting).

122. *Id.* at 1657-65 (Breyer, J., dissenting) (joined by Justices Stevens, Souter, and Ginsburg).

123. *Id.* at 1665 (Breyer, J., dissenting).



to his opinion he listed twenty-five items of congressional materials supporting such a finding, seventeen items of other federal government materials, and 123 other "readily available" materials.<sup>124</sup>

The Court's perspective in *Lopez* is reminiscent of its attitude towards legislative powers in the early years of this century. For example, in *Lopez* the Court objects to the statute partly on the ground that it is

a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. . . .

[U]nder the Government's . . . reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law . . . for example. Under the theories that the Government presents in support of [the statute] it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate. . . .

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.<sup>125</sup>

In *Lochner v. New York*,<sup>126</sup> the Court used similar language to invalidate a New York statute limiting the hours of bakery workers on the ground that it was not a valid exercise of the state's police power to advance public health and welfare. The Court said:

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124. *Id.* at 1665-71 (Breyer, J., dissenting).

125. *Id.* at 1630-31, 1632, 1634 (citations omitted).

126. 198 U.S. 45 (1905).

The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate. . . .

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid . . . there would seem to be no length to which legislation of this nature might not go.<sup>127</sup>

*Lochner* involved a state statute while the Court had an even more limited view of the proper subjects for federal government action. In 1918, when the Court reviewed the Child Labor Act, prohibiting factory work by children under fourteen and limiting working hours for older children, it said:

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. . . .

The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority . . . all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.<sup>128</sup>

Later, in *Carter v. Carter Coal Co.*,<sup>129</sup> the Court said:

The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that

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127. *Id.* at 57-58.

128. *Hammer v. Dagenhart*, 247 U.S. 251, 273, 276 (1918).

129. 298 U.S. 238 (1936).

instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment.<sup>130</sup>

Justice Souter expressed concern that *Lopez* might signal a return to pre-1937 jurisprudence. He wrote:

[U]nder commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments, and for the past half-century the Court has no more turned back in the direction of formalistic Commerce Clause review (as in deciding whether regulation of commerce was sufficiently direct) than it has inclined toward reasserting the substantive authority of *Lochner* due process (as in the inflated protection of contractual autonomy).

There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. . . . Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.<sup>131</sup>

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130. *Id.* at 294.

131. *United States v. Lopez*, 115 S. Ct. 1624, 1653-54 (1995) (Souter, J., dissenting) (citation omitted). A more recent decision has led four of the justices to reiterate concern that the Court is intruding on congressional authority. In *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the Court held that the Eleventh Amendment prevents Congress from authorizing lawsuits by Indian tribes against States under the Indian Commerce Clause. Justice Stevens' dissent called the decision a "shocking" affront to Congress. *Id.* at 1134. Justice Souter wrote a dissent joined by Justices Ginsburg and Breyer. He observed:

It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutional suspect. . . . The majority today, indeed, seems to be going *Lochner* one better.

D. *The Threat from Textualism*<sup>132</sup>

Just as diminished judicial deference to congressional fact-finding undermines Congress' status as the primary source of statutory law, textualism poses a similar threat because of its disdain for legislative history. Textualism posits that when interpreting ambiguous statutory text judges should not use extraneous sources, such as legislative history. It urges judges to "rely on the texts themselves—assisted by the structure of the statutes, the canons of statutory construction, administrative practices under the statutes, comparisons with judicial interpretations of similar statutory provisions, and the meanings most compatible with ordinary usage and relevant law."<sup>133</sup>

Textualism's threat to Congress is similar to the threat discussed in this Part for several reasons. First, it interferes with Congress' role as the primary fact-finding and policymaking arm of government. Much of the content and context of legislative deliberation is reported in legislative history. When interpreting ambiguous statutory language, judges who refuse to read legislative history can too easily miss important public policy themes and misconstrue legislative intent. Ultimately, judicial review that ignores legislative history increases the risk that judicial preferences will supplant those of Congress.

In addition, textualism challenges Congress' choices about its own procedures. Since the Constitution's procedural requirements for the passage of legislation are relatively few,<sup>134</sup> most of the processes by which Congress conducts its business reflect choices Congress has made. Congress' use of legislative history

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*Id.* at 1176.

132. The points made in this section are presented at length in Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994).

133. *Id.* at 588.

134. All statutes must be passed by both the House of Representatives and the Senate and then either signed by the President or, in the event of presidential veto, passed again by a supermajority of both the House and the Senate. A third possibility is that the time within which a veto must occur expires without veto action by the President. U.S. CONST. art. I, § 7, cl. 2.

reflects a deliberate decision to complement and supplement statutory provisions. Textualists have failed to demonstrate that either Congress or courts confuse the interpretive value of legislative history with the legal effect of statutory language. Though there are critics of how legislative history comes about<sup>135</sup> and of how courts use it,<sup>136</sup> these are insufficient reasons for ignoring it, given Congress' constitutional right to decide to make legislative history a part of its work product.

Textualists object to legislative history partly because of the role played in its development by congressional staff and lobbyists. Though it facilitates Congress' deliberations on a wide range of complex topics, the work that staff and lobbyists do is no more inherently authoritative than the work of judicial clerks. A staff member or lobbyist may draft a segment of legislative history, for example, but it gains official status only when adopted by a legislator. Yet it is no less valid because the legislator chooses to seek assistance in its development. Similarly, a judicial decision is no less valid or authoritative because it reflects substantial drafting work by a clerk. Congress' evident desire to rely on staff and lobbyists for assistance is entitled to judicial respect as the choice of an equal and independent branch of government.

Ultimately, textualism and judicial denigration of congressional fact-finding enhance judicial power at the expense of Congress. Describing the phenomenon in his 1932 critique of judicial exercises of power,<sup>137</sup> Louis Boudin wrote:

[In theory] the primary duty of judges is to enforce the law as made by the Legislature, unless they have a clear mandate from the Constitution itself to the contrary. . . .

Unfortunately, the official theory does not at all tally with the facts. The actual practice of the courts is to declare any law *unconstitutional* of which they strongly disapprove, whatever the reason of such disapproval, and quite irrespective of the actual provisions of the Constitution, which very

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135. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring) (criticizing the creation of legislative history).

136. See, e.g., Stephen L. Wasby, *Legislative Materials as an Aid to Statutory Interpretation: A Caveat*, 12 J. Pub. L. 262 (1963).

137. LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* (1st ed. 1932).

frequently says nothing at all on the subject. . . . *The Constitution has ceased to be the measure of the Judicial Power or any check or limit to the judges' exercise of the power to declare legislation unconstitutional.* The Judges have become superior not only to the Legislature but to the Constitution itself, since the Constitution *is* what the judges *say* it is.<sup>138</sup>

Antidemocratic attacks on legislative decisionmaking are as old as the republic.<sup>139</sup> The contemporary versions of such attacks highlight the need to monitor and preserve the balance between the branches of government. This process would benefit from an inquiry into how effectively Congress is carrying out its fact-finding and deliberative roles.

### III. CONTEMPORARY CONGRESS AS A USER OF FACTUAL KNOWLEDGE

Even under the current Court's reduced deference to congressional fact-finding, in most situations, courts only question whether Congress has articulated a constitutionally sufficient justification for its action. They do not ask whether Congress used available knowledge effectively.<sup>140</sup> But this question merits close attention for several reasons. The potential for far-reaching impact on people's lives, the rhetorical claims of efficacy that often accompany congressional action, and the high fiscal cost of much legislation justify searching nonjudicial inquiries into how Congress uses available knowledge to develop the factual foundations of its actions. Moreover, since the Supreme Court's review of congressional decisionmaking is increasingly skeptical, Congress should be making its decisions with increasing care. Congress cannot force the Supreme Court to change its approach, so some adjustments in congressional behavior may be in order. This Part urges that the electorate

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138. *Id.* at v-vi.

139. *See, e.g.*, DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME 6 (1993) (observing that "There is a deep distrust of democracy in the conservative tradition and among the framers of the Constitution. The record of the constitutional convention reflects considerable contempt for ordinary people and popularly elected legislatures.")

140. A useful volume providing historical and comparative perspectives on legislator use of knowledge is KNOWLEDGE, POWER, AND THE CONGRESS, *supra* note 9.

become a greater force pushing Congress to improve its use of factual knowledge.

It is important to note how this contrasts with traditional rational basis judicial review. A court can conclude that a statute survives this level of scrutiny if the court finds during post-enactment review that there is some minimal rationality to Congress' decision.<sup>141</sup> *Nonjudicial* review of congressional action should go further and ask what Congress knew or readily could have known at the time it was making legislative decisions. The approach urged here is analogous to the concept in administrative law that an agency's decision may be struck down by a court if it was arbitrary and capricious. The Supreme Court has said that an agency must articulate "a rational connection between the facts found and the choice made."<sup>142</sup> The electorate should question whether Congress' choices have a rational connection to the available facts as a means of increasing the likelihood that Congress will make wise and effective choices.

There are troubling contemporary examples of congressional failure to make effective use of policy-relevant knowledge.<sup>143</sup> However, the ability of affected parties to challenge statutes through court actions and the ability of voters to defeat legislators with whom they are displeased are insufficient mechanisms for evaluating and responding to congressional failure in the use of policy-relevant knowledge. Therefore, the electorate should take other steps to assess and influence Congress in this regard.<sup>144</sup>

As the examples offered in this Part reveal, congressional failure to make decisions based on effective use of knowledge typically occurs when political forces drive the adoption of legis-

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141. As the discussion of *Lopez* in Part II.B points out, the Court appears now to employ the rational basis standard with less deference to Congress. The shift in the Court's approach increases the need for Congress to demonstrate some factual foundation for its actions. Note, however, that the Supreme Court's April 1995 decision in *United States v. Lopez* suggests that rational basis review has become less deferential.

142. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

143. See *infra* part III.B. This is not, however, to assert that such actions should be struck down on constitutional grounds.

144. See *infra* part IV.

lation, and when there are no provisions that would lead to strict judicial scrutiny. These two factors influence congressional willingness to enact legislation that lacks solid support in available knowledge.

#### A. *Implications for Public Debate and Decisionmaking*

When Congress acts, it is usually to advance specific social policy goals.<sup>145</sup> Even appropriations bills implicate policy judgments for they reflect congressional choices about how to distribute limited fiscal resources among the wide variety of authorizing statutes.<sup>146</sup> These legislative actions create in the electorate the appropriate expectation that perceptible results will flow from Congress' actions.<sup>147</sup> Proponents and opponents, both within and outside of Congress, expect the legislation to make a difference, for neither support nor opposition would make sense otherwise.<sup>148</sup> The expectation that congressional action will make a difference justifies a searching inquiry into how Congress uses available knowledge.<sup>149</sup>

Moreover, virtually every congressional decision carries significant fiscal implications. Congress makes many decisions impli-

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145. I use the phrase "social policy" expansively to include, for example, legislation in the areas of civil rights, welfare, the environment, the economy, health programs, housing, transportation and research. It also includes virtually all income tax legislation, for such legislation promotes certain distributions and redistributions of wealth for reasons grounded in policy objectives. Common exceptions to social policy legislation are measures dealing with intra-congressional procedure and technical matters.

146. Congressional process requires that no appropriation measure be adopted until the funding has been authorized through a separate piece of legislation. See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

147. This discussion deliberately sidesteps the vibrant debate about legislative intent as an element of judicial statutory interpretation. See Spence, *supra* note 132, at 589-93. It presumes instead that for the purposes of this article, congressional statements, whether oral or written, and whether in the legislative history, the statutory language or informal public discussion, provide a reliable picture of what Congress intends for the legislation to do.

148. Support or opposition to legislation may be grounded in political motives as much as in actual expectations about what the legislation will accomplish. A legislator may speak forcefully for or against a particular piece of legislation while doubting as a practical matter that it will ever be enacted or implemented. Nonetheless, the legislation must have some potential for making a difference in order for the forces in either support or opposition to have anything to talk about.

149. The congressional action discussed here includes legislation that passed either the House, the Senate, or both.



cating billions of dollars. Decisions that take little account of the available knowledge about the need for or potential effectiveness of the statutory provisions risk the waste of significant amounts of money.

The impetus for congressional action often comes from political imperatives that are quite distinct from and may even overwhelm available knowledge. Such political motivations for legislative decision-making are often both inevitable and appropriate.<sup>150</sup> For example, it may have been the urgent need for a program to speed recovery from the Depression rather than thoughtful economic analysis that led Congress to enact the main features of the New Deal. Yet such political motivations may also be incompatible at times with reasoned decisionmaking. The actions taken against Americans of Japanese ancestry during World War II are good examples. It is appropriate, therefore, to evaluate the quality of the deliberation that precedes significant congressional decisions.

Information about the potential effects of legislative proposals is a critical component of informed public debate, congressional deliberation and public policy-making. Congress' failure to use knowledge effectively can reinforce misinformation that reaches the electorate and can compound the risk that the public will endorse measures that offer scant promise of efficacy. This reduces the likelihood that Congress' fact-finding resources will offset the force of uninformed ideas that might otherwise drive public policy.<sup>151</sup>

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150. A powerful criticism of common law is that it makes claims of objectivity and rationality that are unwarranted because of the impact of judicial perceptions, biases and policy preferences. *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1990) is a useful collection of essays on this theme. Proponents of this view have given relatively little attention to statutory law, but an interesting inquiry (outside the scope of this discussion) is whether statutory law is vulnerable to a similar critique, or whether instead statutes carry no equivalent implications of objectivity and rationality because of the inevitable impact of political forces.

151. A recent study of public attitudes about federal spending on foreign policy revealed that most people guessed the level of expenditure to be 15 times greater than it actually is. See STEVEN KRULL, *PROGRAM ON INTERNATIONAL POLICY ATTITUDES* (1995). Legislation which comes about through the voter initiative process is particularly vulnerable to the impact of misinformation or lack of information among the electorate. A significant advantage of formal legislation is that it is subject to such screening devices as referral to committee where there is greater potential for close inspection. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE*

Concerns about the level of knowledge that guides public policy-making appear in a number of different settings. The scientific community has become increasingly vocal on this same point. For example, at a three day June 1995 meeting at the New York Academy of Sciences, many of the approximately 200 participants expressed alarm at what they called "The Flight from Science and Reason."<sup>152</sup> They raised the possibility that democratic processes could be undermined if citizens distrust and avoid using the insights of science, medicine and technology.<sup>153</sup> Another observer has complained that, "[S]olid scientific studies are easily ignored when they give politically out-of-step answers. . . ."<sup>154</sup>

The American Bar Association adopted a resolution at its August 1995 annual meeting calling for governments at all levels to "take account of all appropriate scientific knowledge when regulating environmental matters."<sup>155</sup> The ABA further urged that the Executive Branch and Congress should

through administrative and legislative means, as appropriate, provide for a suitable scientific body to undertake the on-going assessment of the state of scientific environmental knowledge, the on-going identification of environmental issues for which research is necessary, the oversight of such research and the dissemination of environmental scientific findings and information to [governments, scientists and the public].<sup>156</sup>

The sponsors report accompanying the resolution noted that:

Reliable scientific information necessary to respond to environmental issues often is not available. This compromises government's ability to develop effective policies and make knowledgeable decisions on environmental matters. . . .

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L.J. 1503 (1990).

152. Malcolm W. Brown, *Scientists Deplore Flights from Reason*, N.Y. TIMES, June 6, 1995, at C1.

153. *Id.*

154. Stephen M. Meyer, *The Role of Scientists in the "New Politics,"* CHRON. OF HIGHER EDUC., May 26, 1995, at B1. Mr. Meyer is a professor of political science.

155. ABA Res. 119 (1995) (submitted to the House of Delegates by the Standing Committee on Environmental Law and the Section of Natural Resources, Energy and Environmental Law).

156. *Id.*

Some governmental action must be taken to remove the burden on the legal system resulting from inefficiency and uncertainty arising from the absence of reliable scientific information on environmental matters. The present recommendation highlights the need for reliable scientific data as the basis for increasingly complex environmental decisionmaking and encourages appropriate steps to be taken at all levels of government in support of this goal.<sup>157</sup>

There are a number of perspectives on how legislators should make decisions.<sup>158</sup> According to one view, legislators carry out their appropriate democratic functions when they do what their constituents want, rather than relying on the views of other interested parties. Thus, statutory law takes its legitimacy from the fact that it represents the will of majority, not from the extent or quality of any articulated reasons. Proponents of the public choice theory of legislative deliberation view legislation as the product of negotiated compromises growing out of the interplay of lobbying by private interest groups and judgments by legislators about how votes will affect the goal of reelection.<sup>159</sup> Each of these perspectives allows for the likelihood that legislators will sometimes respond to forces other than the persuasive value of rational arguments and empirical knowledge.

The assertion made here that Congress should engage in more reason-based decision making is not intended to take issue with either perspective. The purpose here is to highlight the importance of thoughtful and well-informed decisions. An ill-advised statute may be entirely legitimate in the sense that the public is bound by its dictates. In other words, legislation may conform to the due process clauses of the Fifth and Fourteenth Amendments requiring Congress to act rationally and in the interest of legitimate purposes, yet still be of dubious wisdom.<sup>160</sup> It may have the legitimacy that comes with

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157. *Id.* (Executive Summary).

158. Professors Hetzel, Libonati and Williams provide an overview of these perspectives. See HETZEL ET AL., *supra* note 1, at 189-192.

159. See, e.g., Daniel A. Farber & Philip P. Frickey, *Symposium on the Theory of Public Choice: Legislation Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (giving a summary of public choice theory as it applies to legislative decisionmaking).

160. The extent to which legislation derives its legitimacy from adherence to formal processes is the subject of enduring scholarly interest. See, e.g., Linde, *supra*,

majoritarian support or reflect deliberate consensus building among interested constituencies. But, the electorate is better served by statutes that, in addition, reflect Congress' well-informed deliberations. Congress is more likely to spend the electorate's collective resources more wisely, and achieve more of its hoped-for policy goals.

Perhaps Congress should not be expected to be more careful in its use of information and facts than the electorate by which it was chosen. One observer of how the public uses information notes, for example, that most people have little understanding of how to distinguish useful facts from mere anecdotes.<sup>161</sup> But any suggestion that Congress, as the democratically elected legislature, is as free as the electorate to use information unwisely is misguided. It overlooks the fact that significant public resources go to making the best knowledge available to Congress, and that Congress' decisions determine the content and cost of programs that spend taxpayer dollars. It is appropriate to expect that Congress will make decisions that reflect careful deliberation even if people sometimes fail to do so in their private lives.

Substantial polling research provides evidence that the public is already deeply disaffected with Congress.<sup>162</sup> Legislative judgments that lack sound and well-articulated bases in pertinent knowledge may add to that disaffection.<sup>163</sup> They may even foster disrespect for the entire legal system if unwise legislative choices rob the electorate of any residual belief that the laws under which they live, and the programs of which they are the purported beneficiaries, reflect thoughtful decisions by well-informed decisionmakers.

Moreover, one can envision political costs associated with congressional adherence to the wishes of a relatively unin-

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note 2.

161. See JOHN A. PAULOS, *A MATHEMATICIAN READS THE NEWSPAPER* (1995); JOHN A. PAULOS, *INNUMERACY* (1988).

162. A May 1996 Wall Street Journal/NBC News Poll found that 68% disapproved of how Congress was doing its job. James Pinkerton, *A New Outsider Is Born: Bob Dole*, *NEWSDAY* at A39 (May 19, 1996).

163. It is not clear that the polls ask questions that pinpoint whether disaffection with Congress is related to disappointment with the results of legislation. This would be an interesting area for further inquiry.

formed electorate or the demands of particular interest groups if the resulting legislation falls short of achieving public expectations. For example, if claims that certain legislation will reduce crime go unrealized, the electorate might not be mollified by the fact the Congress enacted popular, though ineffective, legislation. Similarly, the defense that the legislation enjoyed strong support from powerful interest groups might not protect Congress from hostile public reactions. And even if the legislation successfully achieved some purposes, the electorate would still be justified in objecting to its failure to achieve major goals promised at the outset.<sup>164</sup>

The electorate has expectations of what will happen in the wake of congressional action and reacts when those expectations are frustrated. For example, critics of the current welfare system often complain that it is a failure.<sup>165</sup> Since they cannot mean that benefits are not being distributed under the programs, they must be objecting to something about *how* it is working. In other words, there is an expectation about the welfare system that these critics believe is not being fulfilled. They may feel, for example, that they were promised that the welfare system would reduce the number of people living in poverty, which has not happened.<sup>166</sup> The problem and the political costs are likely to be most acute when legislators are making express claims about what the legislation will accomplish. Thus, making decisions with the full benefit of relevant knowledge about the likely effects of its legislation is in Congress' own best interests.<sup>167</sup>

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164. For example, when supporters of anti-crime legislation talk about its value in reducing crime, they may choose not to articulate openly any punitive or revenge motives they hold. Enactment of the legislation could satisfy those motives while having no demonstrable effect on the occurrence of crime. See *infra* Part III.B (discussing crime legislation).

165. For example, during Senate Finance Committee hearings on welfare revision proposals, one witness began his testimony by referring to "the need to reform our failed social-welfare system." He went on, "In discussing welfare reform it is important to understand the magnitude of the failure that has been our welfare policy." Hearing on Welfare Revision Before the Senate Finance Comm., 104th Cong., 1st Sess. (1995) (statement of Michael Tanner, Director of Health and Welfare Studies, The Cato Institute) [hereinafter Tanner Testimony]; see also 141 CONG. REC. S11,746 (daily ed. Aug. 7, 1995) (remarks of Sen. Gramm).

166. Tanner also said that "the United States has spent more than \$3.5 trillion trying to ease the plight of the poor. Yet, today, the poverty rate is actually slightly higher than when we started." Tanner Testimony, *supra* note 165.

167. Congress may also suffer from the comparison of our expectations of the par-

It may, at times, be in Congress' best interests for its statutes to leave important issues either unresolved or delegate them to the States or localities for decision. This can be motivated in part by the wish to dissipate political accountability and in part by the wish to have programs that are tailored to local or regional needs. For example, current welfare reform debates include discussion of whether and to what extent key decisions should be left to the States.

On the other hand, Congress may sometimes delegate matters to administrative agencies with broad grants of authority. For example, Congress may choose to delegate to agencies matters that call for special expertise. Setting acceptable standards for workplace exposure to toxic substances is a key example.<sup>168</sup> In each of these situations, the application of available factual knowledge by statute could subject Congress to risks of political accountability that it would prefer to deflect to agencies or nonfederal entities. But Congress should make such strategic choices with an awareness of the available knowledge, not despite it.

An objection to the assertions in this Part is that if the Supreme Court is truly disdainful of congressional fact-finding, then the quality of that fact-finding and the extent to which it is articulated become irrelevant. This view should be rejected for at least three reasons. First, we should take the Court at its word when it asserts that strict scrutiny need not lead to the striking down of all statutes subject to that level of review. Second, to the extent that the Court's approaches in *Adarand* and *Lopez* are part of a pattern of judicial disdain for Congress,<sup>169</sup> they merit a response by Congress and the electorate that includes thoughtful assessment of congressional practices. Finally, taking the view that the Supreme Court has made the

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ties in other legal contexts. For example, we require civil litigants to shoulder certain burdens of providing support for their core contentions (the requirement that a prima facie case be made in order for a claim to go forward, for example) and to prove their contentions by specified standards (such as the preponderance of the evidence). At a time when public regard for Congress is quite low, the legal reasons why Congress is not subject to the same evidentiary and proof requirements as private litigants may not be enough to preserve public support for legislative decisions that are uninformed or ineffective.

168. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1994).

169. See *supra* part II.

quality of congressional fact-finding irrelevant would lead to a troubling indifference among the electorate to the quality of public debate and decision making.

### B. *Contemporary Examples*

Congress has recently made choices that suggest indifference to or disdain for policy-relevant knowledge. Even when the knowledge comes from research carried out by federal agencies or is federally funded, Congress too often appears willing to ignore its results. The examples offered here are striking examples of legislative actions supported by little or no evidence that they will be effective responses to the problems they purport to solve.<sup>170</sup> They support the conclusion that Congress sometimes adopts legislation for reasons that outweigh any inclination to draw upon available policy-relevant knowledge.<sup>171</sup>

#### 1. Crime Legislation—Evidence on Deterrence

The most recent federal crime legislation, The Violent Crime Control and Law Enforcement Act of 1994,<sup>172</sup> was supported by the President<sup>173</sup> and by significant majorities of both parties in the House and Senate.<sup>174</sup> Key features of that legislation included harsher sentences and the expansion of the death penalty to more crimes.<sup>175</sup> There is little evidence that either

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170. While these examples are drawn from the social policy agenda of the new Republican majority in Congress, the described legislative behaviors can occur across the political spectrum.

171. Sometimes Congress acts in the face of contradictory policy-relevant research and conclusions. This is not necessarily unwise or inappropriate. Making tough choices is Congress' policy-making job. Congress and the electorate might benefit, however, if Congress acknowledged more readily those situations in which it must make policy judgments in the face of factual or scientific uncertainty.

172. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in part at 42 U.S.C. §§ 13,701-14,223 (1995)).

173. For example, the President praised the legislation in a news conference, 30 WEEKLY COMP. PRES. DOC. 1697 (Aug. 21, 1994), and in a letter urging the Senate to enact it, 30 WEEKLY COMP. PRES. DOC. 1701 (Aug. 22, 1994).

174. Final congressional action on the legislation came on votes to adopt the House-Senate Conference Report. It passed the House of Representatives on August 21, 1994 by a vote of 235 to 195 140 CONG. REC. H9005 (daily ed. Aug. 21, 1994). It passed the Senate on August 25, 1994 by a vote of 61 to 38. 140 CONG. REC. S12,600 (daily ed. Aug. 25, 1995).

175. Violent Crime Control and Law Enforcement Act of 1994 §§ 320,101 (in-

approach is an effective crime deterrent, but the political rhetoric calling for the legislation was replete with claims that it would prevent crime.

a. Evidence on Deterrence<sup>176</sup>

In 1967, the President's Commission on Law Enforcement and Administration of Justice concluded that measures directed expressly at crime and criminals could have little effect without much larger simultaneous efforts being directed at crime's underlying social and economic causes. Its report concluded, in part:

The Commission . . . has no doubt whatever that the most significant action that can be taken against crime is action designed to eliminate slums and ghettos, to improve education, to provide jobs. . . . We will not have dealt effectively with crime until we have alleviated the conditions that stimulate it.<sup>177</sup>

In 1978, the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects said "we cannot assert that the evidence warrants an affirmative conclusion regarding deterrence."<sup>178</sup> A 1991 U.S. Sentencing Commission report to

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creased penalties), 60,005-024 (additional crimes subject to the death penalty).

176. Each of the examples cited is either a public document, a document reporting on publicly funded research or research readily available in public or university libraries. Therefore, there is no doubt that each cited source was available to Congress.

177. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 15 (1967).

178. MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 19 (1995) (quoting National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects). The principal consultant, Daniel Nagin of Carnegie-Mellon University, also wrote, "The evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist. . . . Policy-makers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence . . . strongly supports the deterrence hypothesis." *Id.* at 19; see *DETERRENCE AND INCAPACITATION* (Blumstein et al., eds. 1975). At the 1991 Attorney General's Crime Summit, Steven D. Dillingham, then director of the Department of Justice Bureau of Justice Statistics asserted: "statisticians and criminal justice researchers have consistently found that falling crime rates are associated with rising imprisonment rates," citing the 1978 National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects. *Id.* at 20. However this claim may have been a distortion of the Panel's findings. *Id.*



Congress on mandatory minimum sentences recommended their repeal.<sup>179</sup> A 1993 National Academy of Sciences report commissioned by the Department of Justice noted that average prison time per violent crime had tripled between 1975 and 1989, and concluded that increasing the prison population had very little effect on levels of violent crime.<sup>180</sup>

The evidence before Congress relating specifically to the deterrent effect of the death penalty was also, at best, inconclusive.<sup>181</sup> Proponents of the death penalty provisions relied on anecdotal evidence to support their assertions that it would deter crime.<sup>182</sup> Senator Arlen Specter's statements were typical. Saying that "the experience has been that the death penalty is an effective deterrent against crimes of violence,"<sup>183</sup> he described one incident that occurred when he was the district attorney of Philadelphia.<sup>184</sup>

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The study was referred to during the congressional debate on the 1994 crime legislation on at least one occasion. See 140 CONG. REC. S200-02 (1994) (remarks of Sen. Simon).

179. The report was transmitted to Congress on September 11, 1991. See 137 CONG. REC. H6450 (1991).

180. NATIONAL RESEARCH COUNCIL, 1 UNDERSTANDING AND PREVENTING VIOLENCE 292-94 (Albert J. Reiss, Jr. & Jeffrey A. Roth, eds. 1993).

181. Senator Specter, an ardent and vocal supporter of the death penalty provisions conceded when he introduced legislation to expand the death penalty that "the studies go both ways" with respect to its deterrent effect. 139 CONG. REC. S853 (1993) (statement of Sen. Specter).

182. Although there were three earlier studies that appeared to support the deterrence hypothesis (Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. (1975); David P. Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, AM. J. OF SOC. 139 (1980); Stephen K. Layson, *Homicide and Deterrence: A Reexamination of the United States Time Series Evidence*, 51 S. ECON. J. 68 (1985)); each had been rebutted by other research: Ruth D. Peterson & William C. Bailey, *Murder and Capital Punishment in the United States: The Question of Deterrence* IN WILLIAM J. CHAMBLISS, CRIMINAL LAW IN ACTION 435-48 (2d ed. 1984). Kenneth C. Haas & James A. Inciardi, *Lingering Doubts About a Popular Punishment in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 11-28 (Kenneth C. Haas & James A. Inciardi, eds. 1988); James A. Fox & Michael L. Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. L.A. L. REV. 29 (1989). During consideration of the 1994 legislation, none of the supporters of the death penalty provisions cited any studies supporting the deterrence theory.

183. 139 Cong. Rec. S15,731 (1993).

184. *Id.* He also referred to the similar experiences of other prosecutors. *Id.* Some days earlier Senator Specter had introduced into the record information about other specific instances in which people arrested for violent crimes had asserted their be-

The evidence before Congress that the death penalty has little or no deterrent effect was substantial. For example, opponents of the crime legislation's death penalty provisions provided statistics showing that crime rates in States which have the death penalty are no lower than those which do not.<sup>185</sup>

Despite the evidence, the rhetoric accompanying the crime legislation contained numerous claims that the legislation's tougher penalty provisions would help stop crime.<sup>186</sup> For example, Representative Hoyer stated during the debate on passage of the Conference Report:

That is what this bill is about. Protecting our families. Putting more police ensuring our streets. Ensuring that our children are safe from the violence that plagues too many of our communities.

This bill will punish criminals.

This bill will prevent crime from happening in the first place. That is what the American people want from this legislation. This is what they demand that we do.<sup>187</sup>

One of the Senators supporting the legislation stated that the bill, will "toughen penalties, it will prevent crimes, and it will support law enforcement."<sup>188</sup>

Congressional deliberation focused for a time on a provision called the Racial Justice Act,<sup>189</sup> a proposal to establish procedures to guard against racially discriminatory imposition of the death penalty. Because its supporters wanted it included in the larger crime bill, the Racial Justice Act became a centerpiece of the crime bill debate about the death penalty. Many argued that the death penalty deters crime. For example, Representa-

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havior was affected by fear of the death penalty. 139 CONG. REC. S15,048-50 (1993).

185. *See, e.g.*, 139 CONG. REC. S15,996 (1993); 140 CONG. REC. H9002 (1994); 140 CONG. REC. S12,543 (1994).

186. During congressional consideration of the legislation, much debate centered on whether crime prevention was best accomplished by programs aimed at underlying social factors, such as youth unemployment. *See, e.g.* 140 CONG. REC. S12,267 (1994) (statement of Sen. Hatch); 140 CONG. REC. S12,271 (1994) (statement of Sen. Mikulski).

187. CONG. REC. H8,674-75 (1994) (statement of Rep. Hoyer).

188. 140 CONG. REC. S12,531 (daily ed. Aug. 25, 1994) (statement of Sen. Baucus).

189. H.R. 4017, 103rd Cong., 2nd Sess. (1994).

tive Newt Gingrich<sup>190</sup> stated “[A]ll of us are trying to protect the innocent. We want to stop the next 100,000 murders. We want to stop the murderer. . . . Those of use who believe in the death penalty and believe in an effective and believable death penalty are, in fact, committed to trying to protect innocent” Americans.<sup>191</sup> During Senate deliberations on the measure, Senator Arlen Specter said, “There is a consensus in America, not only reflected in the votes in the Congress, with more than 70 percent of this body in favor of the death penalty, but in the percentage of the American people who believe that the death penalty is an effective deterrent.”<sup>192</sup>

As Senator Specter’s remark demonstrates, the death penalty (and other enhanced penalty provisions) have substantial political support that offsets, for many legislators, the weight of the evidence.<sup>193</sup>

## 2. Welfare Reform

The welfare reform proposals adopted by both the House and Senate<sup>194</sup> reflected the belief in Congress that one way to limit the number of welfare recipients is to deny additional benefits to children born to mothers already in the welfare program. For example, one congressional supporter for such changes said

[t]he Republican reform bill takes aim at the heart of the welfare problem—the underage mother who enters the welfare rolls after conceiving an out-of-wedlock child. Our re-

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190. He had not yet assumed the post of Speaker.

191. 140 CONG. REC. H2580 (1994) (referring twice to an “effective” death penalty).

192. 140 CONG. REC. S5342 (1994).

193. There are other features of the crime legislation that may not be supported by the available evidence. These include the “three strikes and you’re out” provision that mandates prison without parole upon the third felony conviction. See WENDY KAMINER, *IT’S ALL THE RAGE* 176-239 (1995). Kaminer points out that Senators Biden and Hatch both acknowledged during congressional debate that the enhanced penalties provisions would have doubtful impact. *Id.* at 196 (quoting 140 CONG. REC. S15,384 (Nov. 9, 1993) (statement of Sen. Biden & Sen. Hatch)).

194. The Personal Responsibility and Work Opportunity Act of 1995, (“An Act to restore the American family, reduce illegitimacy, control welfare spending and reduce welfare dependency.”) bill would require states to deny welfare checks to children born to mothers already receiving welfare. H.R. 4, 104th Cong., 1st Sess. § 103 (1995). The bill was adopted after a House-Senate Conference (H. Rept. 430, 104th Cong., 1st Sess.) The President vetoed the legislation on January 6, 1996.

form denies benefits to those who continue to have children without having any means to independently support those children.<sup>195</sup>

There is virtually no evidence, however, to support the claim that welfare benefits affect significantly the decision to have a child. For example, the American Psychological Association submitted testimony that reviewed and summarized the relevant research on the hypothesis that welfare benefits provide economic incentives for adolescents to give birth out-of-wedlock. The testimony stated:

While there is not complete unanimity of opinion among researchers on this question, two relatively recent reviews of the welfare incentive literature conclude that welfare benefits do not serve as a reasonable explanation for variations in pregnancy and childbearing rates among unmarried adolescents.

In response to the public debate over the policy implications of presumed "incentive effect" for teen pregnancy, a group of 77 poverty researchers signed a statement ["Welfare and Out-of-Wedlock Births: A Research Summary," 1994] asserting that the accumulated research indicates that "welfare has not played a major role in the rise of out-of-wedlock childbearing."

The group includes several researchers whose work is often cited in support of restrictive welfare proposals (Plotnick and Ozawa).<sup>196</sup>

This testimony went unrefuted in the congressional debates and was not mentioned in the Committee Reports, except by legislators writing dissenting views on the legislation containing

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195. 141 CONG. REC. H3793 (daily ed. Mar. 24, 1995) (statement of Rep. Funderburk).

196. *Strategies for Reducing Adolescent Nonmarital Pregnancy: Appropriate Policy Responses Before the House of Representatives Ways and Means Subcommittee on Human Resources*, 104th Cong., 1st Sess. (1995) (testimony of the American Psychological Association). Other witnesses supporting the same conclusion based on their own research included Rebecca Maynard, Senior Fellow, Mathematica Policy Research, Inc. (*Teenage Childbearing and Welfare Reform Before the Senate Finance Committee*, 104th Cong., 1st Sess. (1995)) and Robert C. Granger, Senior Vice President, Manpower Demonstration Research Corporation (*Welfare Revision Before the Senate Finance Committee*, 104th Cong., 1st Sess. (1995)).

provisions to limit benefits to women who have other children while on welfare.<sup>197</sup>

Like the crime provisions, the welfare proposals have popular appeal that outweighs their lack of support in the available research.<sup>198</sup>

### 3. Other Issues

The two examples cited above illustrate how legislation can gain widespread legislative support despite substantial research-based reasons to doubt that it is well-designed to achieve its stated aims. There are other examples that show the potential for such ill-advised decisionmaking.

#### a. Tort Reform

Some of the tort reform proposals pending in Congress are promoted as needed responses to excessive use of the tort liability system, with its attendant costs in legal fees and huge financial settlements for tort victims.<sup>199</sup> Legislation passed by the House and Senate would limit punitive awards in all civil cases.<sup>200</sup>

Research from the Department of Justice Bureau of Justice Statistics underscores the need for careful questioning about the underlying premises of the tort liability reform legislation. A study released in July 1995 concluded that of 762,000 civil cases, punitive damages were awarded in only 364 of the 12,000 cases that went to trial.<sup>201</sup>

In addition, two recent scholarly examinations of tort liability laws and policies, while not taking positions on the merits of

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197. H.R. REP. NO. 104-75, 104TH CONG., 1st Sess. (1995).

198. The President vetoed the legislation. See *supra* note 194.

199. See, e.g., 141 CONG. REC. H2661 (daily ed. Mar. 6, 1995) (statement by Rep. Goss); 141 CONG. REC. S6321 (daily ed. May 9, 1995) (statement by Sen. Coats); 141 CONG. REC. S6045 (daily ed. May 3, 1995) (statement by Sen. Abraham).

200. The Common Sense Product Liability Reform Act of 1996, 104th Cong., 2d Sess. was vetoed by the President on May 2, 1996. The House of Representatives sustained the veto on May 9, 1996.

201. BUREAU OF JUSTICE STATISTICS (1995).

any particular proposals, raise serious questions about the extent to which current congressional deliberations take adequate account of available knowledge and significant unknown factors.

For example, one observer, writing about medical malpractice, comments:

The extensive studies of medical records of hospitalized patients in the 1970s and 1980s provided surprising answers to the question of whether there were too many medical malpractice claims filed in a tort system that allows compensation based only on proof of negligence. The answer was that many more negligent acts occur in medical practice than ever give rise to lawsuits. Rather than joining a debate marked by much heat and little light, we need answers to the following factual questions: . . . To what extent do juries or judges award damages that are excessive or inadequate? . . . Does the contingent fee system promote or retard effective evaluation and representation of injured consumers? . . . What effect would an award of attorneys' fees to the prevailing party have on meaningful access to the judiciary system by patients or health care providers? What effect do caps on noneconomic losses or total awards have on the goal of fair and adequate compensation to victims of medical negligence? Is the tort system a major contributor to inadequate access to medical care on the part of any segment of the community? . . .

Answers to these questions are so critical to rational policy making that lawmakers should insist that proponents and opponents of tort reform come forward with relevant data.<sup>202</sup>

Another commentator has asserted:

[T]he current call for major pro-defendant changes to tort doctrine . . . rests on a host of unstated and often questionable assumptions, value preferences that are often at odds with contemporary norms regarding injury compensations, and a considerable measure of profit-motivated self-interest. The claims of tort reformers also depend on undocumented factual assertions, many of which, when closely examined,

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202. FRANK M. MCCLELLAN, *MEDICAL MALPRACTICE: LAW, TACTICS, AND ETHICS* 92 (1994). These passages refer to themes that arise often in the current legislative debate about tort reform.

are contrary to common sense. Tort reform is thus very much a house of cards, lots of ingenuity, little substance. It is, however, dangerously seductive, because it offers a convenient scapegoat for the rising costs of accident compensation, because it feeds into legislative desires for quick fixes, and because it is so effectively reinforced by political lobbying and campaign contributions of large corporations and insurers. The trial-lawyer apologists for the status quo are of course no less self-interested, no less averse to political lobbying. But between these groups there is no spirit of compromise, and the danger is that we will either do nothing or jump headlong into measures that will repeal too much of the progress of the common law.

Some reform is needed, but it must be selective and deliberate, resting on a careful assessment of the arguments for and against limits on liability or compensation.<sup>203</sup>

#### b. Health Care Workers Infected with HIV

In July 1991, the Senate passed legislation that would make it a federal crime for any health care worker infected with the HIV virus that causes Acquired Immune Deficiency Syndrome (AIDS) to treat patients without disclosing their HIV status. Violators would be subject to a \$10,000 fine and a ten-year jail sentence.<sup>204</sup> The provision had not been the subject of any congressional hearings. Moreover, the Centers for Disease Control was in the process of publishing guidelines for procedures by infected health care workers, but the CDC proposal deliberately stopped short of requiring patient notification.<sup>205</sup> The medical literature suggests that the risk of transmission of the virus from health care worker to patient is extremely remote.<sup>206</sup> The risk of transmittal by health care workers of the

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203. MARK C. RAHDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY AND TORT REFORM 4-5 (1995).

204. Amendment 734 to the Treasury, Postal Service, Executive Office of the President and Independent Agencies Appropriations for Fiscal year 1992, CONG. REC. S10,331-348 (1991) Representative Dannemeyer (R-Ca.) introduced similar legislation, H.R. 2788, the Kimberly Bergalis Patient and Health Provider Act of 1991, on June 26, 1991, but the legislation was never enacted by the House. 137 CONG. REC. E2376-77, H5203-08 (1991).

205. Centers for Disease Control, *Recommendations for Preventing Transmissions of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures* 40 MORBIDITY & MORTALITY WKLY. REP. (1991).

206. For a discussion of the available medical evidence and the political and legal

hepatitis-B virus is projected to be 100 times greater, for example, yet there has been no comparable legislative effort involving that virus.<sup>207</sup>

The impact of political forces on the legislation is revealed, in part, by the fact that during congressional debate on the measure, Senator Helms reported that a June 20, 1991 Gallup poll indicated more than ninety percent of those polled believed that HIV-infected health care workers should be required to disclose the condition to their patients.<sup>208</sup>

The House did not adopt similar legislation and the HIV-infected health care workers provision was deleted when the House and Senate Conference met on the legislation which included this provision.<sup>209</sup> However, Senate passage of the provision is troubling by itself because congressional procedure permitted the House and Senate Conferees, if they so chose, to retain the provision without the need for any additional deliberation.

These examples illustrate that the need for concern about congressional action without substantial research-based support occurs in a wide range of subject areas.<sup>210</sup>

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issues relating to HIV infection, *see, e.g.*, American Bar Association AIDS Coordinating Committee, *Calming the AIDS Phobia: Legal Implications of the Low Risk of Transmitting HIV in the Health Care Setting*, 28 MICH. J.L. REFORM 733 (1995); Burris, *HIV-Infected Health Care Workers: The Restoration of Professional Authority*, 5 ARCH. FAM. MED. 102 (1996); Leonard H. Glantz, et al., *Risky Business: Setting Public Health Policy for HIV-infected Health Care Professionals*, 70 MILBANK Q. 43 (1992); Laurie M. Roberts et al., 122 ANN. INT. MED. 654 (1995).

207. *See, e.g.*, 137 Cong. Rec. S10,357 (1991) (remarks of Sen. Cranston).

208. 137 CONG. REC. S10,334 (1991) (remarks of Sen. Helms).

209. H. Rept. 102-234, 102nd Cong. 2d Sess. (1992).

210. There are at least two other policy areas in which available data may not be getting appropriate attention. In a fall 1995 report, the Centers for Disease Control and Prevention provided data suggesting that the incidence of first-time pregnancy among teenagers may be declining. CENTERS FOR DISEASE CONTROL, REPRODUCTIVE HEALTH INFORMATION: STATE SPECIFIC PREGNANCY AND BIRTH RATES AMONG TEENAGERS—UNITED STATES, 1991-92. *See also* Rene Denfeld, *Teen Pregnancy 'Epidemic' is Hyperbole*, PHILADELPHIA INQUIRER, Jan. 25, 1996, at A17.

Recent studies undermine the factual basis for the exclusion of homosexuals from military service. *See*, NONCONFORMING SEXUAL ORIENTATION AND MILITARY SUITABILITY (1988); PRESERVICE ADJUSTMENT OF HOMOSEXUAL AND HETEROSEXUAL MILITARY ACCESSIONS: IMPLICATIONS FOR SECURITY CLEARANCE SUITABILITY (1989); *Between Logic and Politics: Incisive Rand Study on Homosexuals/Military*, L.A. TIMES, Aug. 28, 1993, at B7.



### C. *Litigation and Electoral Action Are Not Enough*

Neither litigation nor the electoral processes are sufficient means of evaluating whether Congress has made choices that reflect wise deliberation and incorporate available relevant knowledge. Litigation is almost always both expensive and time-consuming. Few individuals can undertake the arduous task of challenging federal laws and many of the organizations that do so operate on limited budgets. Moreover, there are numerous constraints on access to judicial review in the federal courts, including limitations on standing to bring certain actions. In addition, few lawsuits raise questions about the extent or quality of congressional deliberation. Most focus instead on the particular impact of the legislation on the complaining parties.<sup>211</sup>

Nor is it enough that voters can, at the next election, defeat incumbents with whom they are displeased. This right permits displeased voters to oust particular Representatives or Senators but has little utility as a mechanism for evaluating what the legislature is accomplishing collectively. In each congressional election, voters will choose only one representative, and at most one Senator.<sup>212</sup> Each constituency's power to vote legislators out of office does not operate as the collective power to evaluate or dislodge Congress. The electorate should exercise alternative ways of monitoring congressional decisionmaking.

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211. This is a requirement in most statutes authorizing judicial review of agency actions. The Administrative Procedure Act, for example, provides that "A person suffering legal wrong because of agency action, or adversely or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Administrative Procedure Act § 702, 5 U.S.C. § 551 (1994). Because the statute expressly states that it does not apply to Congress, it does not authorize judicial review of congressional decisionmaking. *Id.*

212. Although each state has two Senators, they are not elected at the same time.

#### IV. RECOMMENDATIONS

##### A. *Steps Congress Should Take*

##### 1. Statutory Findings

Since Congress can control neither the Supreme Court's determinations about which level of review to employ nor the way the Court will conduct its review, Congress' best hope of having its statutes survive judicial scrutiny is to make clear that they are solidly grounded in relevant knowledge. While statutory findings are not and should not be constitutionally necessary,<sup>213</sup> they may serve Congress as a way of putting before courts the documented support for proposed legislation.<sup>214</sup> At the same time, through greater use of statutory findings Congress may become more likely to develop thoughtful responses to the kinds of questions the electorate should be asking about proposed legislation.

Committee reports and floor colloquies are weaker means of achieving this focus on available knowledge for at least two reasons. The first is that these elements of legislative history do not make each legislator as fully accountable to the electorate. Only Committee Members voting in the majority and the actual participants in floor colloquies necessarily accept responsibility for reports and floor debate content.<sup>215</sup> Second, the statutory language is more likely to be read by lawyers and others trying to understand the legislation and by judges engaged in its interpretation. Putting the findings in the statutes themselves will mean that they will be more widely read. This

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213. "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." *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

214. See Christopher J. Sprigman, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis*, 59 U. CHI. L. REV. 1645 (1992) (arguing for deference to congressional findings of fact regarding causation and redressability).

215. This is consistent with one of the valid points made by textualists: that the statutory language itself is the most authoritative. Textualists claim it is the *only* authoritative legislative text, a point with which I disagree. This is discussed at length in Spence, *supra* note 132, at 591-612.

should carry with it an extra sense of responsibility for ensuring that the findings reflect thoughtful deliberation.

Congress certainly uses statutory findings now,<sup>216</sup> but there are striking instances of legislation with major policy implications which have no statutory findings. For example, of the 590 statutes enacted during the 102d Congress, 112 included sections expressly designated as "Findings," 148 had quasi-findings—factual statements for the enactment of the law (usually employed with proclamations) and 330 had no findings at all. Of the 210 statutes enacted during the first session of the 103d Congress, 37 included findings, 50 included 'quasi-findings' and 123 had no findings.<sup>217</sup> Those with no findings included a number that made significant changes to existing law or established significant new programs.<sup>218</sup>

It is important to acknowledge there is no way to guarantee that even statutory findings will be solidly grounded in knowledge. The original impetus for this article came during work on legislation to promote volunteerism that was enacted in 1990.<sup>219</sup> The legislation as passed by the Senate contained several express statutory findings, one of which had no support in either the hearing record or the congressional debate.<sup>220</sup>

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216. Both of the tort reform bills mentioned in *supra* Part III.B.3.a and the welfare reform legislation discussed *supra* Part III.B.2 contain statutory findings. The crime legislation discussed *supra* Part III.B.1 does not.

217. My research assistant, Lisa Barton, was entrusted with the task of reviewing every piece of legislation enacted by the 102d Congress and the first session of the 103d Congress. These data are the result of her efforts.

218. For example, in the 103rd Congress, First Session, the National Institutes of Health Revitalization Act of 1993, 42 U.S.C. §§ 201-300ff (1994), established the requirement that the NIH develop review and approval procedures for NIH-funded research, created an Office of Scientific Integrity and authorized significant medical research initiatives. The authorized funding for the National Cancer Institute alone was more than \$2.2 billion; The FBI Access to Telephone Records Act, Pub. L. No. 103-142, 107 Stat. 1491 (amending 18 U.S.C. § 270 (b),(e)) authorized the FBI to obtain certain telephone subscriber records without a court order or subpoena for its use in foreign counterintelligence and international terrorism investigations. In the 102d Congress, the Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264-66 (amending scattered sections of 17 U.S.C. and 2 U.S.C.) made significant changes in copyright law; the Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403, 18 U.S.C. 228 note, authorized new measures to permit the enforcement of court-approved child support agreements.

219. The National and Community Service Act of 1990, 42 U.S.C. §§ 12,501-12,682 (1994).

220. In 1989, while serving as Director of Policy Analysis in the Harvard

The Senate-passed bill said that, "the cost of higher education, loan indebtedness, and the high price of housing deter many young adults from volunteering for VISTA and other service programs that involve a substantial time commitment."<sup>221</sup> No witnesses spoke to this issue, either in favor of the proposition or against it.<sup>222</sup> The express findings do not appear in the final legislation, but their presence in the Senate-passed bill illustrates some congressional willingness to be careless even with statutory findings.

Similarly, Congress could, for example, incorporate into crime legislation the "finding" that the death penalty deters crime despite the dearth of empirical support for this proposition. Recent tort reform legislation illustrates the potential problem. H.R. 956, the Common Sense Product Liability Reform Act of 1995, includes in its congressional findings:

The unpredictability of damage awards is inequitable to both plaintiffs and defendants and has added considerably to the high cost of liability insurance, making it difficult for producers, consumers, volunteers and nonprofit organizations insurers to protect themselves from liability with any degree of confidence and at a reasonable cost.<sup>223</sup>

This assertion may not reflect the facts with respect to the need for legislation.<sup>224</sup> While some witnesses supported this claim, others presented research data from several studies directly challenging the factual premises of the finding. Some of these data came from research by Congress' General Accounting Office.<sup>225</sup>

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University's Office of Government, Community and Public Affairs, I engaged in a detailed review of the pending national service legislation. With the help of my research assistant, John Emerson, I reviewed the congressional testimony on the legislation, and the committee reports. Hearings were held by the Senate Committee on Labor and Human Resources on March 9th, 14th and 20th and April 21st of 1989.

221. The National and Community Service Act of 1990, 101st Cong., 2d Sess. § 2 (1990), was passed by the Senate March 1, 1990. 136 CONG. REC. 3167 (1990).

222. There was some research circulating among interested parties about how education loan indebtedness appeared to influence post-college employment options, but this did not address the question of volunteerism. SANDY BAUM & SAUL SCHWARTZ, *THE IMPACT OF STUDENT LOANS ON BORROWERS: CONSUMPTION PATTERNS AND ATTITUDES TOWARDS REPAYMENT* (1988).

223. H.R. 956, 104th Cong., 2d Sess. § 2(a)(7).

224. See RAHDERT, *supra* note 203.

225. See HOUSE JUDICIARY COMM., Hearing of Feb. 13, 1995 (testimony of Thomas

Similarly, S. 454, The Health Care Liability Reform and Quality Assurance Act of 1995, as reported by the Senate Committee on Labor and Human Resources contains the findings that "the civil justice system of the United States is a costly and inefficient mechanism for resolving claims of health care liability and compensating injured patients."<sup>226</sup>

Some testimony presented in hearings on this legislation supported this conclusion,<sup>227</sup> but the Committee also received testimony on studies contradicting this finding, including one by the Congressional Office of Technology Assessment and one by the Congressional Budget Office.<sup>228</sup>

Despite this evidence that statutory findings may not reflect a full picture of the available knowledge, they are a valuable mechanism. It would have been helpful, for example, for the minority contractor set-aside at issue in *Fullilove* to have included some express congressional findings about discrimination in the granting of construction contracts. Even though the Court concluded that the necessary factual predicate for the set-aside existed,<sup>229</sup> the fate of the statute was made more doubtful by the brevity of Congress' deliberations on the set-aside and its failure to speak more clearly to its reasons for enacting the specific provision. Justice Stevens' dissent in *Fullilove* emphasized this point.<sup>230</sup>

The City of Richmond's failure to develop more detailed findings before enacting its set-aside ordinance may be attributable in part to Congress' reliance on findings that were not expressly articulated and specific to the set-aside. The City of

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Eaton); SENATE COMMERCE COMM., Hearing of April 3, 1995 (testimony of Robert Hunter); SENATE COMMERCE COMM., Hearing of April 4, 1995 (testimony of Jonathan S. Massey). See *infra* part IV.A.2 (discussing congressional use of research from the General Accounting Office).

226. S. Rept. 104-83, 104th Cong., 1st Sess. § 101(a) (1995).

227. See, e.g., *Healthcare Liability Revisions Before the Senate Committee on Labor and Human Resources*, 104th Cong., 1st Sess. (1995) (testimony of Thomas Scully, President and CEO, Federation of American Health Systems).

228. See *Health Care Liability Reform and Quality Assurance Before the Senate Committee on Labor and Human Resources*, 104th Cong., 1st Sess. (1995) (testimony of Laura Wittkin); see also *infra* part IV.A.2 (discussing the Office of Technology Assessment).

229. See *supra* notes 58-61 and accompanying text (discussing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

230. *Fullilove*, 448 U.S. at 552-554; see also *Days*, *supra* note 68 at 457-63.

Richmond's set-aside was modeled so closely after the congressional statute that it even included Eskimos and Aleuts as benefitted groups even though there was no evidence they were present in the Richmond population.<sup>231</sup> The plurality opinion in *Croson* cited these inclusions as evidence of the city's failure to establish a sufficient factual predicate for the race specificity in its ordinance.<sup>232</sup> If Congress' own steps to enactment had included the adoption of express findings, the City of Richmond might have been more likely to examine the suitability of the congressional language for its local circumstances. This is admittedly a speculative point. Nevertheless, congressional statutes probably will always be a source of language for nonfederal entities and more deliberate use of findings would be useful for that additional reason.

The circumstances leading up to the decision in *Lopez*<sup>233</sup> provide another example of how congressional findings might be used. While the case was moving through the courts, but before the Supreme Court made its decision, Congress amended the statute under review to state explicitly the impact of guns at schools in interstate commerce.<sup>234</sup> The Court chose not to take those findings into account and such findings should not be a necessary predicate for legislation.<sup>235</sup> Still, they can be a useful resource for courts. As Justice Souter remarked, "They may, in fact, have great value in telling courts what to look for, in

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231. See RICHMOND, VA., CODE § 12-156(a) (1985).

232. *City of Richmond v. Croson*, 488 U.S. 469, 510 (1989).

233. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

234. Pub. L. No. 103-222 § 320904, 108 Stat. 1796, 2125 (1994).

235. See *supra* part III.B.

establishing at least one frame of reference for review,<sup>236</sup> and in citing to factual authority."<sup>237</sup>

Finally, the threat from textualism is yet another reason for Congress to use statutory findings more frequently and more thoughtfully. Even the most ardent textualist is likely to take into account Congress' factual context for legislation if it is the statutory language.<sup>238</sup>

## 2. Other Options for Congress

Congress can and often does include in legislation statutory program evaluation requirements,<sup>239</sup> but these generate only post-enactment information about legislation. They provide no incentive for Congress to engage in rigorous pre-enactment assessment of its legislative choices. Therefore, Congress should take maximum advantage of its ability to hold committee hearings, its significant investigative powers and its own adjunct offices: the Congressional Research Service (CRS), the General

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236. In *NOW v. Scheidler*, 114 S. Ct. 798 (1994), the Court considered whether the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968, was implicated if the alleged racketeering activity lacked any economic motive. In holding that economic motive was not necessary, the Court addressed the respondents' citation of statutory findings as support for the economic motive requirement. The findings stated that the statute is directed at the activities of groups that drain "billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption." Pub. L. No. 91-452, 84 Stat. 922 (statement of Findings and Purpose). The Court concluded that despite the findings, Congress chose to enact a more general statute. The opinion says that the findings are a "rather thin reed" to make the economic motive essential. 114 S. Ct. at 805. This suggests that findings will be consulted by the Court for indications of what Congress intended, but not to limit the reach of statutes to matters expressly mentioned in the findings. This interpretive approach makes the use of carefully crafted findings a relative risk-free step by Congress.

237. *Lopez*, 115 S. Ct. at 1657 (Souter, J., dissenting) Congress amended the statute under review in *Lopez* before the Supreme Court made its decision. Congress added express statutory findings about the impact of guns in schools on interstate commerce, Pub. L. No. 103-322 § 320904, 108 Stat. 1796, 2125 (1994), but the Court took little account of those findings.

238. See *infra* Part II.C (discussing textualism).

239. They come in various forms, including limited authorization terms so that programs will be subjected to full congressional review in order to continue past a specified period of time, mandated reports to Congress by the agencies charged with implementation, and provisions that explicitly state a date on which certain provisions will expire.

Accounting Office (GAO), and the Office of Technology Assessment (OTA).

None of these suggestions are intended to imply that Congress is not using the available resources. Rather, they flow from the belief that congressional decision making could be improved if those resources were tapped more fully.<sup>240</sup> To some degree, this is a call for a changed perspective on the role of research and available knowledge, a perspective that puts increased value on the contributions research can make to public decisionmaking.<sup>241</sup>

There is reason to fear that Congress will decrease rather than increase its use of the existing research entities. The legislative appropriations bill for fiscal year 1996 eliminated the Office of Technology Assessment.<sup>242</sup> One commentator on this development observed:

The OTA is bipartisan and bicameral by design, overseen by a board composed of equal numbers of Republicans and Democrats, senators and representatives. This attention to balance runs through the whole body—the OTA is enjoined not to recommend a single policy, but instead to set out the consequences of different policies. The OTA has often seen this neutrality as its strength. Yet now it is revealed as a weakness. In a highly charged political atmosphere, impartiality and independence, laudable in technical analysis, can be transmuted into friendliness and isolation.<sup>243</sup>

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240. A useful discussion of how congressional staff use policy analysis and research is Carol H. Weiss, *Congressional Committees as Users of Analysis*, 8 J. POL. ANALYSIS & MGMT., 411-31 (1989). She concluded that while structural arrangements work against the use of analysis, there is some evidence that staff are aware of available analytical research and use it, primarily for political advantage and also take it as a way to be warned of some problems and for guidance on particular issues. She found little evidence that use of policy analysis led to fundamental changes in policy direction. See also HETZEL ET AL., *supra* note 2, at 949-54.

241. A recent General Accounting Office report indicates congressional interest in having better knowledge of agency information, but does not address the need for information from non-agency sources. Program Evaluation: Improving the Flow of Information to the Congress, GAO/PEMD-95-1, January 30, 1995.

242. Pub. L. 104-53, 109 Stat. 514 § 113 (1996).

243. *Reassessment With Extreme Prejudice*, THE ECONOMIST (U.K.), Aug. 12, 1995, at 65.



An example of OTA's work is a 1984 report about the proposed "Star Wars" defense system. An OTA paper concluded:

The prospect that emerging "Star Wars" technologies, when further developed, will provide a perfect or near-perfect system, literally removing from the hands of the Soviet Union the ability to do socially mortal damage to the United States with nuclear weapons, is so remote that it should not serve as the basis of public expectation or national policy about ballistic missile defense.<sup>244</sup>

At least one commentator has suggested that "the circumstances of the congressional role make a more rigorous application of policy research nearly impossible and practically unwarranted."<sup>245</sup> He argues that the constraints of time and political imperatives under which Congress operates are barriers to the more effective use of research-based knowledge.<sup>246</sup> There is little debate about the proposition that Congress operates under significant time constraints and political pressures. But the kind of knowledge-based decisionmaking called for here does not necessarily require any additional demands on Congress' time or adjustment of the role played by political pressures. The research-based knowledge discussed in Part III with respect to crime and welfare reform, for example, was put before Congress through the testimony of witnesses and hearings and the insertion of such information into the Congressional Record during debate. No additional time is associated with taking such information into account when proposals are before the legislature. The impact of political pressures, on the other hand, is inherent in legislative deliberation no matter how much policy-relevant research is or is not available. As discussed in Part III, this is both appropriate and inevitable. The suggestion in this Part, that Congress use knowledge more effectively, accepts that political forces will sometimes drive decisions. There are appropriate concerns, however, about the degree to which this occurs in the face of powerful contrary factual knowledge.

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244. *Id.*

245. Daniel A. Dreyfus, *The Limitations of Policy Research in Congressional Decision Making*, in *USING SOCIAL RESEARCH IN PUBLIC POLICY MAKING* 100 (Carol H. Weiss, ed. 1977).

246. *Id.*

### B. *The Electorate Should Ask Tougher Questions*

If the only standard for judging congressional action is whether it can withstand constitutional challenge, the electorate effectively cedes to the litigation arena much of its ability to assess whether the legislature is achieving what the electorate wants. In formal and informal meetings, written correspondence, congressional hearings and other public forums, the electorate should be asking legislators at least three questions: Why do you think this legislation will do what you say it will? What is the evidence this problem merits devoting substantial federal resources to it? What other solutions to the problem have you considered? To the extent legislation under discussion contains statutory findings, legislators should have substantial testimonial or other support for such findings. To the extent there is widely available information on a particular proposal, the public should also expect legislators to directly confront research that challenges the premises of the proposal and its prospects for efficacy.

In addition to the topics discussed above, there is other legislation approved by the 104th Congress that would be appropriate targets of such questions. Legislation to strengthen company defenses against investor lawsuits was challenged as unnecessary.<sup>247</sup> Much of the social program legislation is being amended to turn over to the states in "block grants" the money that has in the past been distributed from the federal government directly to recipients.<sup>248</sup> There is reason to question whether there is evidence to support the apparent congressional belief that states and localities are more efficient and responsive to constituent concerns as they administer government-funded social programs.<sup>249</sup> The proposal to amend the Constitution to permit statutes that make flag desecration a crime<sup>250</sup>

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247. The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995). See Jeff Gerth, *Overhaul of Securities Laws: A Fast Track to Change or a Hasty Decision?*, N.Y. TIMES, May 26, 1995, at A19.

248. See *supra* part III.B.2 (discussing welfare reform proposals).

249. See *Pendulum Politics*, WASH. POST, Mar. 26, 1995, at C7.

250. H.J. Res. 79 104th Cong., 1st Sess. (1995), approved by the House on June 7, 1995. An equivalent resolution, S.J. Res. 31, failed in the Senate on December 13, 1995.

appears to have support despite the lack of evidence that flag desecration occurs with any frequency. While for many voters and legislators the flag's symbolic significance is reason enough to take steps to protect it, amending the Constitution is such a significant act that it merits thorough examination, including the question whether it is necessary.

Finally, comparable questions should be raised about legislative efforts to repeal or significantly reduce funding for existing programs. For example, the electorate should ask for evidence that a program targeted for repeal or major funding reductions is not working in its current form or evidence that it will continue to function effectively with fewer fiscal resources.

With all of these questions, the answers should consist of more than multiple anecdotes. Legislators should show that their responses reflect use of the resources of the CRS, GAO and the OTA, along with the results of other pertinent governmental and private research efforts.

There are admittedly few ways for the electorate to raise these questions. As discussed in Part III, lawsuits and voting people out of office are insufficient mechanisms. Moreover, lobbyists supply legislators with many of the questions and answers that relate to legislative proposals.<sup>251</sup> The actual and perceived role of paid lobbyists may even discourage some members of the electorate from engaging in sharp questions about the justifications for congressional actions. The idea that people want a government that works well as an incentive for more voter engagement is appealing, but unlikely to provide the motivation for voters to press the kinds of questions raised here. Nevertheless, there are some approaches that hold some potential for increasing legislator attention to the kinds of questions posed above.

The greatest promise for such tough questioning may be the charged atmosphere of partisan campaigning. In partisan politics, each side wants to challenge the value of the other side's ideas. The electoral process can thus provide an incentive for probing questions.

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251. This is one of the points made in Weiss, *supra* note 242.

For example, the political parties could incorporate the questions suggested above into their challenges to the other party's platform claims and political rhetoric. Public debates can provide the opportunity for incumbent legislators and their challengers to pose such questions to each other. To the extent that candidates hold open question and answer sessions for voters, such questions should be a regular feature of the dialogue.

An example of how candidates might develop their challenges to each other comes from the dissenting views in the Committee Report to accompany H.R. 999, the Welfare Reform and Consolidation Act of 1995.<sup>252</sup> The dissenting members of the Committee objected to several aspects of the deliberative process, including the failure of the Committee to take into account the conclusions of witnesses that had appeared before them. They said:

We are mystified as to why Republicans in the 104th Congress suggest that there is something to be gained from dismantling [the supplemental nutrition program for women, infants and children] (WIC). The committee has heard no testimony complaining of "burdensome bureaucracies" from the program directors. . . .

After only one hearing during the 104th Congress, in which all Republican witnesses testified against the [proposal to end targeted funding for the school nutrition program] and despite the lack of any legitimate hearing record supporting the H.R. 999 proposal, the Republicans insist on going forward.<sup>253</sup>

Such challenges to the process and content of congressional decisionmaking could be readily framed as questions for use in political debates.

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252. H.R. Rep. No. 104-75, 104th Cong., 1st Sess. (1995).

253. H.R. Rep. No. 104-75, 104th Cong., 1st Sess. (1995) at 402-04 (dissenting views). The dissenters were all Democrats, but part of their frustration evidently comes from the fact that even the Republicans' own chosen witnesses testified against the action taken by the Committee.

## V. CONCLUSION

Congress has traditionally had the authority and primary responsibility in our constitutional system for determining both legislative fact and public policy. Congress should make maximum use of its access to relevant knowledge, and articulate its findings clearly. Failure to do so puts its own institutional stature at risk and robs the public of the benefits of Congress' best work.