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# The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments

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# ARTICLE

## THE PURSUIT OF PERFECTION: CONGRESSIONAL POWER TO ENFORCE THE RECONSTRUCTION AMENDMENTS

*A. Christopher Bryant\**

### ABSTRACT

In June 2009 the Supreme Court avoided a decision on the constitutionality of the Voting Rights Act's preclearance requirement, while at the same time managing to foreshadow that provision's ultimate demise. In a separate opinion, Justice Thomas announced that he would have reached the issue and invalidated the preclearance requirement. Conceding that unconstitutional racial discrimination in the administration of elections continued to be an unfortunate reality, he asserted that Congress was not permitted to pursue "perfect compliance" with the Constitution's mandate via the use of "broad prophylactic legislation."

Justice Thomas's statement accurately, though to be sure rather starkly, expressed an assumption underlying the last decade of the Court's case law concerning Congress's power to enforce any of the three Reconstruction Era Amendments. Yet this previously unchallenged assumption is wrong. To the contrary, Congress should enjoy extensive remedial authority, including the power to enact prophylactic legislation, so long as perfect compliance with the promises of the Reconstruction

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Amendments remains unrealized. Constitutional text, history, and structure all support this broader view of congressional authority. When the question of the Voting Rights Act's preclearance requirement returns to the Court, it should not only sustain the statutory provision but also use the occasion to set its case law governing congressional power to enforce the Reconstruction Amendments on a firmer foundation.

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“Perfect compliance with the Fifteenth Amendment’s substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment.”<sup>1</sup>

#### I. INTRODUCTION

In *Northwest Austin Municipal Utility District v. Holder* (NAMUDNO), the Supreme Court forecast the demise of a central provision of the justly celebrated Voting Rights Act of 1965.<sup>2</sup> The Chief Justice’s opinion for the Court acknowledged

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1. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2526 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

2. *See id.* at 2511–13 (majority opinion) (discussing the “constitutional concerns” section five of the Voting Rights Act of 1965 raises).

that the Act's preclearance requirement<sup>3</sup> could perhaps no longer be justified given the perception that the States had now substantially, albeit belatedly, complied with the Fifteenth Amendment.<sup>4</sup> Though the majority ultimately deferred the issue, Justice Thomas announced in his separate opinion that he would have gone further and invalidated the challenged provision without delay.<sup>5</sup>

Both the Chief Justice and Justice Thomas conceded that at least some persons were still denied the right to vote because of their race.<sup>6</sup> But they reasoned that the extent of the constitutionally prohibited discrimination may now be too limited to sustain the preclearance remedy.<sup>7</sup> Both also explicitly placed the risk of error or uncertainty about the matter on Congress.<sup>8</sup>

*NAMUDNO* is only the most recent of nearly a score of Supreme Court cases decided over the last decade in which the Court has reasoned that congressional power to enforce the Reconstruction Amendments via prophylactic legislation ends with achievement of substantial constitutional compliance.<sup>9</sup> Indeed, no member of the Rehnquist or Roberts Courts has even questioned the notion. Disputes have been limited to such issues as how "substantiality" should be defined and determined.<sup>10</sup> But the Thirteenth, Fourteenth, and Fifteenth Amendments speak in uncompromising terms and, as the Court is fond of saying in other contexts, promise rights to the individual, not to groups.<sup>11</sup>

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3. See *infra* notes 16–17 and accompanying text.

4. See *Nw. Austin*, 129 S. Ct. at 2508–09, 2511 (suggesting that the "exceptional conditions" justifying the passage of the Voting Rights Act are no longer applicable).

5. *Id.* at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part).

6. *Id.* at 2511 (majority opinion); *Id.* at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part).

7. *Id.* at 2511–12 (majority opinion); *Id.* at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part).

8. *Id.* at 2513 (majority opinion); *Id.* at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part).

9. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 341–42 (2003) (applying the requirement that "all governmental use of race must have a logical end point" to admissions programs that consider race as a factor); *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (stating that the Voting Rights Act would terminate at the request of states in which substantial voting discrimination had not occurred in the preceding five years); *United States v. Fordice*, 505 U.S. 717, 727–28 (1992) (discussing prior decisions that establish "a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation").

10. In *Grutter*, Justices O'Connor, Ginsburg, and Thomas discuss the amount of discrimination needed to justify prophylactic legislation. See, e.g., 539 U.S. at 341–43; *Id.* at 345–46 (Ginsburg, J., concurring); *Id.* at 351 (Thomas, J., concurring in part and dissenting in part).

11. See, e.g., *Oyama v. California*, 332 U.S. 633, 663 (1948) (Murphy, J., concurring) (stating that the U.S. Constitution requires both state and federal governments to

Contrary to the assumptions of all the Justices in all the recent cases, this Essay argues that Congress has broad power under the Amendments so long as “perfect compliance” remains unrealized.

This conclusion finds support in the text and historical circumstances of the Reconstruction Amendments, which accord Congress at least as much discretion in assessing the gravity of an admitted social evil as do the enumerated powers found in Article I, Section 8.<sup>12</sup> Current case law, however, constrains Congress’s enforcement powers far more than it does the powers to regulate interstate commerce, wage war, or tax and spend for the general welfare.<sup>13</sup> Considerations of relative institutional competence also argue that the Court should leave to Congress questions about when enough has been done to make the promises of the Reconstruction Amendments realities.<sup>14</sup>

Part II of this Essay explores the Court’s recent rulings restricting congressional power to enforce these Amendments, showing that *NAMUDNO* is but one of many recent cases assuming that it is for the Court to determine when admitted constitutional violations are pervasive or serious enough to justify a legislative response. The Essay’s third Part then sets forth the affirmative case against this view. Part III also explains why acknowledging a congressional power to pursue constitutional perfection poses no significant danger to the reserved powers of the states.

## II. PRESENT (MIS)UNDERSTANDINGS

### A. NAMUDNO

Not all parts of the country are considered equal for the purposes of the Voting Rights Act, which supplies a formula for identifying jurisdictions subject to more extensive federal oversight.<sup>15</sup> Absent prior approval by the Attorney General or the

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“respect and observe the dignity of each individual”); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (“The rights created by the first section of the Fourteenth Amendment are . . . guaranteed to the individual.”); *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) (stating that the equal protection of the laws applies to the individual).

12. Jack M. Balkin, *The Reconstruction Power* 8–9 (Yale Law Sch. Pub. Law Working Paper No. 207, 2010), available at [http://ssrn.com/sol3/papers.cfm?abstract\\_id=1558749](http://ssrn.com/sol3/papers.cfm?abstract_id=1558749).

13. See *id.* at 10–13 (comparing Congress’s broad Article I, Section 8 powers under the standard set forth in *McCulloch v. Maryland* with the narrower enforcement powers under the Fourteenth Amendment, which are limited by the “congruent and proportional” test provided in *City of Boerne v. Flores*).

14. *Id.* at 21.

15. 42 U.S.C. § 1973b(b) (2006).

U.S. District Court for the District of Columbia, section 5 of the Act prohibits covered jurisdictions from changing “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”<sup>16</sup> The theory of this “preclearance” requirement is that litigants, both public and private, can far more effectively employ the Act’s other substantive sections against a stationary rather than a moving target.<sup>17</sup> By 1965 the need to freeze covered jurisdictions’ election practices was apparent. Prior efforts to realize the promise of the Fifteenth Amendment had for nearly a century been frustrated by these jurisdictions’ demonstrated ability to circumvent federal judicial injunctions against discriminatory practices by adopting new impediments to minority voting too close to an election to permit full judicial examination.<sup>18</sup> The 1965 Act contained a sunset provision, and Congress has repeatedly extended the Act’s term, most recently for another 25 years in 2006.<sup>19</sup>

As a covered jurisdiction, Northwest Austin Municipal Utility District Number One needed pre-approval for virtually any changes to the elections used to select its five-member board.<sup>20</sup> In 2008, the utility district filed suit for a declaration that section 5 no longer applied to it, either because the district

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16. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (2006)).

17. See *Beer v. United States*, 425 U.S. 130, 140 (1976) (observing that section 5 of the Voting Rights Act responded to the practice in some jurisdictions to pass “new discriminatory voting laws as soon as the old ones had been struck down” (internal quotation marks omitted) (quoting H.R. REP. 94-196, at 57 (1975))).

18. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2522–23 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (recounting history leading to 1965 Act).

19. *Id.* at 2510 (majority opinion). A substantial body of literature moots the specific question of Congress’s power to reauthorize the Voting Rights Act in 2006. See, e.g., Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 130 (2007) (arguing that the Court may declare a permanent preclearance provision unconstitutional “[i]f the federalism revolution has any traction”); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1728–31 (2004) (arguing that section 5 of the Voting Rights Act is now defunct in light of the modern political scheme); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 192–94 (2007) (discussing the difficulties supporters of the Act face under the new constitutional standard established in *City of Boerne v. Flores*). But see Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 199–202 (2005) (arguing that the Court is not likely to succumb to the federalism revolution and declare the preclearance provision unconstitutional); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 16–19 (2007) (discussing the factors that indicate “congressional power is at its apogee” with regards to the preclearance provision).

20. *Nw. Austin*, 129 S. Ct. at 2508, 2510.

qualified for exemption under the Act's "bailout" provision or because, as applied, section 5 was unconstitutional.<sup>21</sup>

A three-judge district court<sup>22</sup> ruled that the utility district was not a "political subdivision" eligible for a bailout, but on direct appeal the Supreme Court unanimously disagreed.<sup>23</sup> According to eight of the nine Justices, the utility district's victory on its statutory argument mooted its constitutional claim.<sup>24</sup> Chief Justice Roberts stressed that this course honored the "well-established principle governing the prudent exercise of th[e] Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."<sup>25</sup> At several points in his opinion, the Chief Justice expressed the Justices' collective relief at deferring resolution of such a "difficult" constitutional issue as the validity of this key provision of the Voting Rights Act.<sup>26</sup>

Justice Thomas, however, was impatient with the delay. In his view, a ruling that the utility district qualified under the Act's bailout section simply did not accord it the same sweeping and ultimate relief as would a ruling that it was constitutionally exempt from the preclearance requirement.<sup>27</sup> Accordingly, Justice Thomas addressed the constitutional question on the merits.

For him, section 5 had overstayed its constitutional invitation, in part because it had from the outset been something of an unwelcome visitor.<sup>28</sup> Of course, the Constitution limited the federal government to its enumerated powers.<sup>29</sup> Moreover, alluding to the Rehnquist Court's States Qua States rulings,<sup>30</sup>

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21. *Id.* at 2510.

22. See Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 132–33 (2008) (discussing the Voting Rights Act's use of the three-judge district court).

23. *Nw. Austin*, 129 S. Ct. at 2510, 2516. But see generally Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance at the Roberts Court*, 2011 SUP. CT. REV. (forthcoming 2011) (doubting the validity of the Supreme Court's interpretation of the relevant statutory provision); Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 Fla. L. Rev. 991 (2009) (same). For an argument that the bailout procedure should be revised and liberalized, see Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. (forthcoming 2011).

24. *Nw. Austin*, 129 S. Ct. at 2513.

25. *Id.* (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984)).

26. *Id.* at 2508, 2513, 2516.

27. *Id.* at 2517–18 (Thomas, J., concurring in the judgment in part and dissenting in part).

28. *Id.* at 2524.

29. *Id.* at 2519.

30. *Id.* at 2519–20. Justice Thomas cites *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) and *Alden v. Maine*, 527 U.S. 706, 713 (1999), but these cases were two of a series.

Justice Thomas protested that section 5 exacted especially severe “federalism costs” because it intruded upon the very workings of state and local government: “State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority.”<sup>31</sup> He conceded that the Fifteenth Amendment limited state autonomy over elections.<sup>32</sup> But in his view, the Fifteenth Amendment thereby created a clash of conflicting constitutional values, and it fell to the Court to mediate this tension by carefully examining “any measure enacted in furtherance of the Fifteenth Amendment . . . to ensure that its encroachment on state authority in this area is limited to the appropriate enforcement” of the Amendment’s ban on purposeful discrimination.<sup>33</sup>

In light of this judicial imperative, the preclearance requirement of the Voting Rights Act was, even in 1965, strong medicine pushing the outer boundaries of congressional enforcement authority. The Warren Court’s decision to sustain the provision was explainable only by reference to the egregious circumstances Congress had then confronted and dutifully documented in the formal legislative record.<sup>34</sup> As Justice Thomas noted, the Court had explicitly invoked that record in *South Carolina v. Katzenbach*,<sup>35</sup> from which he inferred that such a record was necessary to the constitutionality of a measure as suspect as section 5.<sup>36</sup> Justice Thomas stressed the depth and

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See THOMAS B. MCAFFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS 179–88 (2006) (discussing the history of the States Qua States rulings).

31. *Nw. Austin*, 129 S. Ct. at 2519–20 (Thomas, J., concurring in the judgment in part and dissenting in part) (citing U.S. CONST. amend. X).

32. *Id.* at 2520.

33. *Id.* Subsequent passages in Justice Thomas’s opinion suggest that the other Reconstruction Amendments similarly invite the Court to set the proper balance between their aims and the values of federalism. *Id.* at 2524–25 (stating that prophylactic legislation enforcing the Reconstruction Amendments must both identify the transgressing conduct and tailor the remedy for that conduct).

34. *Id.* at 2523. *But see* Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 279–82 (2008) (emphasizing the Warren Court’s deference to Congress in its Voting Rights Act decisions).

35. *Nw. Austin*, 129 S. Ct. at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part); *South Carolina v. Katzenbach*, 383 U.S. 301, 328–36 (1966).

36. *See Nw. Austin*, 129 S. Ct. at 2523 (Thomas, J., concurring in the judgment in part and dissenting in part) (arguing that the *Katzenbach* Court closely reviewed the *Congressional Record* before determining extreme circumstances existed to warrant the breadth of section 5). *But see* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 363–67 (2001) (noting the Court’s clarification in *Katzenbach* that “an exercise of congressional authority to enforce the Reconstruction

violence of the opposition to effective black suffrage during and in the decades following Reconstruction.<sup>37</sup> The undeniable progress of the intervening forty years since the Act was adopted put the burden of proving the continuing need squarely on the 109th Congress—a burden that Congress had, in his view, failed to carry.<sup>38</sup> Given “the lack of current evidence of intentional discrimination with respect to voting,” section 5 could “no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment.”<sup>39</sup>

Though passages in Justice Thomas’s opinion might be read to suggest that this perceived failure by Congress to produce supporting evidence in the formal legislative record was itself sufficient to render the renewal of the preclearance requirement unconstitutional, he did not rest his case on that point alone. Rather, he asserted affirmatively that “the Fifteenth Amendment’s promise of full enfranchisement” had in fact been substantially fulfilled.<sup>40</sup> In support of this bold and reassuring claim, Justice Thomas cited a single statistical metric: by 2006, the disparity in voter registration rates between the black and white populations in covered jurisdictions, which had been so pronounced in 1965, had “nearly vanished.”<sup>41</sup> Justice Thomas rejected the possibility that this progress might be reversed in the absence of a preclearance requirement on the ground that such a fear was “premised on outdated assumptions about racial attitudes in the covered jurisdictions.”<sup>42</sup> Similarly, he dismissed

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Amendments required neither formal findings of fact nor evidentiary support in the legislative record” (citing *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966)); Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 105 (1966) (“The Court does not review the sufficiency of the evidence in the [legislative] record to support congressional action. . . . [T]he practice of relying upon the legislative record when it exists should not be taken to show that such a record is required.”).

37. *Nw. Austin*, 129 S. Ct. at 2521–22 (Thomas, J., concurring in the judgment in part and dissenting in part).

38. *Id.* at 2526–27.

39. *Id.* at 2519.

40. *Id.* at 2527; see also *id.* at 2525 (arguing that finding section 5 constitutionally insufficient “is not a sign of defeat,” but rather “an acknowledgement of victory”). But see Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1435 (2010) (concluding that “Barack Obama’s higher vote share among minorities and his uneven performance among whites suggest” a continuation of the racially polarized voting that gave rise to the Voting Rights Act, though acknowledging that data from the 2008 election might support revisions to the list of covered jurisdictions).

41. *Nw. Austin*, 129 S. Ct. at 2525 (Thomas, J., concurring in the judgment in part and dissenting in part). Indeed, in one state, Mississippi, “black voter registration actually exceeded white voter registration.” *Id.*

42. *Id.*

the barriers to full and equal minority participation in voting cited by the 109th Congress as either altogether inapposite to the purpose of the Fifteenth Amendment or insufficiently comparable to “the record initially supporting [section] 5,” which had gone from being more than constitutionally sufficient to being constitutionally necessary.<sup>43</sup>

Remarkably, Justice Thomas conceded that unconstitutional “voter discrimination is [not] extinct,” but nevertheless deemed the breadth and frequency of the unconstitutional discrimination to be too insignificant to authorize the use of such tools as the Voting Rights Act’s preclearance requirement.<sup>44</sup> Congressional power to “employ broad prophylactic legislation” did not extend to achieving “[p]erfect compliance with the Fifteenth Amendment’s substantive command.”<sup>45</sup> Apparently what Justice Thomas characterized as “scattered infringement of the right to vote” would simply have to be tolerated.<sup>46</sup> Without perceptible awareness of the irony, Justice Thomas, in the next sentence of his opinion, observed “the Fifteenth Amendment was ratified in order to guarantee that *no citizen* would be denied the right to vote based on race.”<sup>47</sup> Insofar as those persons subject to the acknowledged “scattered infringement of the right to vote” were concerned, the Constitution could promise, but Congress could not deliver.

### B. Recent Authority

It would be unfair to place the blame for this miserly interpretation of Congress’s enforcement authority on Justice Thomas alone. In his defense, his approach is the logical consequence of the Court’s most recent relevant rulings. The Court first jumped the rails in its 7–2 decision in *City of Boerne v. Flores*.<sup>48</sup>

There, the Supreme Court invalidated the Religious Freedom Restoration Act (RFRA) as beyond Congress’s power under Section 5 of the Fourteenth Amendment.<sup>49</sup> As RFRA’s title

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43. *Id.* at 2526.

44. *Id.*

45. *Id.*

46. *Id.* at 2526–27.

47. *Id.* at 2527 (emphasis added).

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

49. *Id.* at 536. Section 1 of the Fourteenth Amendment provides, in pertinent part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Section 5 states: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” *Id.* § 5. RFRA’s defenders argued

suggests, Congress had intended the Act to restore the practice of subjecting to the strictest judicial scrutiny laws of general applicability having the incidental effect of imposing a substantial burden on the free exercise of religion.<sup>50</sup> The Supreme Court's 1990 decision in *Employment Division v. Smith* had found this practice to be unnecessary under the Free Exercise Clause of the First Amendment.<sup>51</sup>

Congress had expressly invoked its power under Section 5 of the Fourteenth Amendment, and the government defended RFRA in the Supreme Court with two quite distinct—indeed, potentially incompatible—theories to justify the statute, only the second of which is of direct relevance here.<sup>52</sup> Specifically, the government maintained that RFRA could be upheld as a prophylactic rule designed to enforce the Free Exercise Clause as the Court had construed it in *Smith*.<sup>53</sup> On this theory, by requiring heightened judicial review of *all* laws that have the *effect* of substantially burdening religious practice, RFRA would increase the likelihood that the courts would identify and strike down those *facially neutral* laws enacted for the concededly constitutionally impermissible *purpose* of discouraging or prohibiting disfavored religious exercise. The rationale for such a prophylactic rule would be that at least some facially neutral laws might be motivated by such a hidden unconstitutional intent to discriminate against religious practices.<sup>54</sup>

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that the Act “enforce[d]” Section 1’s guarantee of “due process of law” given that the phrase had been interpreted to incorporate the First Amendment’s Free Exercise Clause. *See Flores*, 521 U.S. at 517, 519. *See generally* Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 345–46, 348–50 (arguing that Congress “has the power to interpret rights in order to *expand* them beyond what the Court has concluded the Constitution grants”); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 173–74 (1998) (discussing the theory that section 5 conferred broad power on Congress to define rights); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999) (arguing that the Framers of the Fourteenth Amendment intended for Congress to have primary enforcement power).

50. *Flores*, 521 U.S. at 515.

51. *Id.* at 512–15 (discussing *Employment Div. v. Smith*, 494 U.S. 872 (1990) and the preamble to RFRA).

52. For a discussion of the first theory, see *infra* notes 180–82 and accompanying text.

53. *Flores*, 521 U.S. at 517.

54. *See id.* (discussing the respondent’s argument that congressional focus on the law’s discriminatory effect accords with Congress’s power to prevent and remedy constitutional violations); *see also* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 542 (1993) (finding ordinances were constructed to suppress specific religious practices); Brief of Respondent Flores at 29–30, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074) (noting that facially neutral laws can be motivated by an intent to discriminate); Brief for the United States at 33, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074) (same).

In rejecting this second rationale, Justice Kennedy's opinion for the Court strongly implied that intentional discrimination against minority religions was simply not a serious enough problem to justify the prophylactic remedy Congress had enacted. Justice Kennedy acknowledged that "preventive rules are sometimes appropriate," and that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"<sup>55</sup> Nevertheless, the constitutionality of such prophylactic rules "must be considered in light of the evil presented."<sup>56</sup> Justice Kennedy dismissed as misplaced the government's reliance on prior decisions of the Court—such as *Fullilove v. Klutznick*<sup>57</sup> or *City of Rome v. United States*<sup>58</sup>—which had sustained congressional prohibitions of governmental actions with discriminatory effects. The Court had done so on the ground that the prohibitions were a permissible, albeit overbroad, means to preclude the subset thereof actually infected with an unconstitutional intent to discriminate on the basis of race.<sup>59</sup> The analogy to RFRA failed, Justice Kennedy reasoned, because racial discrimination was simply a more substantial problem than religious discrimination: "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."<sup>60</sup>

The Justices' judgment that racial bigotry was by 1997 a comparatively greater national evil than religious bigotry no doubt struck most readers as reasonable. And Congress had made it all too clear that its actual intent in enacting RFRA was not to honor but rather to overturn the Court's narrowing of the scope of the Free Exercise guarantee in *Employment Division v. Smith*.<sup>61</sup> But it nonetheless merits asking how are the Justices to know the present reality about such a matter, especially when confronted with a contrary determination by the U.S. Congress?

Similar questions are raised by the Court's more recent Eleventh Amendment decisions. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court considered whether Congress's attempt to

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55. *Flores*, 521 U.S. at 518, 530 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

56. *Id.* at 530.

57. *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980) (plurality opinion).

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

59. *Id.*; *Fullilove*, 448 U.S. at 476–78.

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

61. *Id.* at 512, 515.

empower federal courts to entertain patent-enforcement actions against states constituted a legitimate exercise of Congress's Section 5 power to enforce the Fourteenth Amendment.<sup>62</sup> The Court conceded that a State violated the Amendment's first section when it both infringed a patent and failed to provide an adequate process of redress.<sup>63</sup> Nevertheless, the Court struck down the state-suit provision because the legislative record failed to document a sufficient "history of 'widespread and persisting deprivation of constitutional rights.'"<sup>64</sup> The Court observed that Congress had "identified no *pattern* of patent infringement by the States"—no "*massive or widespread* violation of patent laws by the States" such as would constitute "evidence that unremedied patent infringement by States had become a problem of national import."<sup>65</sup>

Significantly, whereas *Flores* could be understood as the Court's response to Congress's fairly transparent non-acquiescence in the *Smith* decision, *Florida Prepaid* could not be so easily limited. Congress had enacted the Patent Remedy Act *before* the Court held, in *Seminole Tribe*, that Congress may not abrogate state sovereign immunity pursuant to its Article I powers.<sup>66</sup> *Flores* might have been confined to instances in which Congress apparently attempted to exercise its Section 5 power to alter, rather than enforce, the Court's interpretation of the Constitution. But *Florida Prepaid* indicated that the Court would second-guess Congress's judgment about the congruence and proportionality of a remedial scheme whenever it seeks to exercise its authority to enforce the Fourteenth Amendment or, presumably, any of the Reconstruction Amendments.

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62. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647–48 (1999). Given the Constitution's express grant of authority to Congress over patents, U.S. CONST. art. I, § 8, cl. 8, the question raised in *Florida Prepaid* would have been entirely academic three years earlier. The Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72–73 (1996), however, made "clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers[.]" but may do so when enforcing the Fourteenth Amendment. *Fla. Prepaid*, 527 U.S. at 636–37. Thus, the *Seminole Tribe* decision rendered dispositive the question presented in *Florida Prepaid*—whether provision of a federal court remedy in cases of patent infringement by the states constituted "appropriate" remedial or preventive legislation enforcing the Fourteenth Amendment's Due Process Clause. *Id.* at 636.

63. *Fla. Prepaid*, 527 U.S. at 640–43.

64. *Id.* at 630, 645 (quoting *Flores*, 521 U.S. at 526).

65. *Id.* at 640–41 (emphasis added) (citations omitted) (internal quotation marks omitted). The Court dismissed as "speculative" testimony that state patent infringement would likely increase significantly as state universities increasingly engaged in the development of marketable technologies. *Id.* at 641. *But see id.* at 656–57 (Stevens, J., dissenting) (criticizing the majority for dismissing the testimony as "speculative").

66. *Id.* at 636 (majority opinion).

In short order, the Court entrenched its superintending role by invalidating the state-suit provisions of first the Age Discrimination in Employment Act<sup>67</sup> and then the Americans with Disabilities Act.<sup>68</sup> In each case, the Court supplanted Congress's assessment of the likelihood, frequency, and seriousness of the states' violations of the rights the Acts protected with its own, more forgiving, one.<sup>69</sup> Implicit in each ruling was the assumption that Congress was precluded from employing prophylactic remedies for, and thus was effectively obliged to tolerate, some supposedly *de minimus* level of constitutional rights violations. Moreover, the Court would decide whether the existing state of affairs did or did not rise to the level authorizing Congress to employ prophylactic remedies.

How were the Justices to make these kinds of determinations? *Nevada Department of Human Resources v. Hibbs*<sup>70</sup> suggests an answer, albeit one normatively indefensible. There the Court sustained the provisions of the Family Medical Leave Act (FMLA) that authorized private suits against states.<sup>71</sup> Nevada argued that those provisions violated the State's sovereign immunity—a plausible claim, to say the least.<sup>72</sup> In the six years preceding the argument in *Hibbs*, the Court had invalidated the state-suit provisions of six federal statutes.<sup>73</sup> Indeed, two federal courts of appeals had struck down the specific provision of the FMLA at issue in *Hibbs* by the time the case was argued before the Supreme Court.<sup>74</sup> But to the surprise of many,<sup>75</sup> *Hibbs* proved to be the end of the states' long train of

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67. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000).

68. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

69. See *Garrett*, 531 U.S. at 370–72 (noting the “legislative record of the ADA” failed to show Congress had identified a “pattern of irrational state discrimination in employment against the disabled”); *Kimel*, 528 U.S. at 82–91 (finding “Congress had virtually no reason to believe” state or local governments unconstitutionally discriminated against employees based on age).

70. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

71. *Id.* at 724–25.

72. *Id.* at 741 (Stevens, J., concurring in judgment).

73. See, e.g., *Garrett*, 531 U.S. at 374 (Americans with Disabilities Act); *Kimel*, 528 U.S. at 91 (Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (Fair Labor Standards Act of 1938); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680, 687 (1999) (Trademark Remedy Clarification Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999) (Patent Remedy Act); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 47, 53 (1996) (Indian Gaming Regulatory Act).

74. *Kazmier v. Widmann*, 225 F.3d 519, 526–27, 529 (5th Cir. 2000); *Thomson v. Ohio State Univ. Hosp.*, 238 F.3d 424, No. 98-3613, 2000 WL 1721038, at \*2–3 (6th Cir. Nov. 8, 2000) (per curiam).

75. See, e.g., Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 14–15 (2003) (“The holding [in *Hibbs*] was

victories in sovereign immunity cases.<sup>76</sup> Three Justices dissented, saying among other things that the FMLA could not be meaningfully distinguished from the six laws the Court had recently ruled unconstitutional.<sup>77</sup> So the focus of the majority opinion by Chief Justice Rehnquist, who along with Justice O'Connor had joined in the majority opinions in the previous cases, was on what made the FMLA different.

Justice Rehnquist's effort to distinguish the prior cases was less than compelling. First, he characterized the substantive provisions of the FMLA as a remedy for sex discrimination<sup>78</sup>—a fairly debatable conclusion given that the Act created an entitlement to, at a minimum, 12 weeks of unpaid, family-emergency leave for all covered employees regardless of sex.<sup>79</sup> Even more questionable was the Chief Justice's reliance on data about the private sector as evidence of a pattern of governmental discrimination in the administration of leave policies.<sup>80</sup> In prior state sovereign immunity cases, the Court had deemed irrelevant evidence of private sector patent infringement, age discrimination, and failure to accommodate disabilities, stressing that only evidence of state governmental misconduct could empower Congress to authorize suit against the States.<sup>81</sup>

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unanticipated, because in the years since [*Flores*] the Court had invalidated every exercise of Section 5 power that it had confronted.”); Reva B. Siegel, *You've Come A Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1872–73 (2006) (citation omitted) (“Any reader of [the] early Rehnquist sex discrimination opinions, or Rehnquist's more recent opinions restricting Congress's power to enforce the Fourteenth Amendment, surely would not have predicted that he would conclude his time on the bench writing a pathbreaking opinion upholding provisions of the Family and Medical Leave Act . . . as a valid exercise of Congress's Section 5 power.”).

76. See *Hibbs*, 538 U.S. at 724–25, 738 (upholding the FMLA's state-suit provision).

77. *Id.* at 744–46 (Kennedy, J., dissenting).

78. *Id.* at 728, 736 (majority opinion). See Siegel, *supra* note 75, at 1882, 1884–90 (“[C]ritics found the *Hibbs* decision itself hard to reconcile with the Court's earlier Section 5 cases.”).

79. *Hibbs*, 538 U.S. at 737.

80. *Id.* at 730. To be sure, as Rehnquist observed, two sources in the entirety of the Act's near decade-long history asserted that with respect to leave policies the public and private sectors were not significantly different. *Id.* at 730 n.3, 731. But these isolated claims concerning the state of affairs seven years before the FMLA was enacted provided a rather attenuated basis for abrogating state sovereign immunity under the Court's relevant precedents. *Id.* at 747, 753 (Kennedy, J., dissenting).

81. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–72 (2001) (stating that congressional findings of disability discrimination in private sector employment were inapposite as to whether state governments acting as employers unconstitutionally discriminated); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90 (2000) (stressing congressional finding of substantial age discrimination in the private sector was “beside the point,” and that Congress had failed to make such findings with regards to the states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640–41 (1999) (noting Congress's failure to document a pattern of patent infringement by the states).

So, understandably puzzled commentators speculated aloud as to what explained Chief Justice Rehnquist's more indulgent approach in *Hibbs*.<sup>82</sup> Several argued that his otherwise perplexing embrace of the arguments in support of the FMLA were rooted in his personal experience of the needs the Act was meant to address.<sup>83</sup> His wife died after an extended struggle with cancer, and his daughter, a single mother whose career as an attorney had been placed in jeopardy by her extensive use of leave, had frequently relied upon him to provide child care, causing him to leave the Court early in the day several times during the very term in which *Hibbs* was argued and decided.<sup>84</sup> Whether these experiences affected his analysis of the arguments made in support of the FMLA we will probably never know (likely he was himself unaware of the subtle ways in which his experiences had framed his perception of the FMLA). In any event, the sequence of events supplies a cogent narrative explaining a curious development in Chief Justice Rehnquist's jurisprudence.<sup>85</sup> This explanation fits well with a radically realist vision of law as almost infinitely malleable and judging as just another mode of policymaking. Indeed, few if any would deny that a judge's life experience shapes her jurisprudence, and most would likely conclude that it should do so.

But reliance upon the life experience of the Justices to supply sound assessments concerning the existence or extent of a social evil places a colossal weight on a slender reed. The comparative advantage of legislators in making these judgments is enormous. In addition to the vastly superior ability of legislators to educate themselves about such matters through use of a wide-ranging inquisitorial process, the Justices are in no manner representative of the nation's populace.<sup>86</sup> Hence, one can expect an incalculable range of the American experience to lie beyond their familiarity.

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82. Siegel, *supra* note 75, at 1882.

83. See, e.g., *id.* (discussing "Rehnquist's own family circumstances" that may have contributed to his sympathy for the statute). *But see* Post, *supra* note 75, at 14–15, 18–22 (discussing how the *Flores* holding was unanticipated and suggesting that Rehnquist may have written the opinion to "avoid a major constitutional controversy over the constitutional status of Title VII of the Civil Rights Act of 1964").

84. Siegel, *supra* note 75, at 1882–83.

85. See *id.* at 1883 ("[Chief Justice Rehnquist's] experience might have made him more responsive to arguments advanced by the FMLA's advocates and, perhaps, by other Justices who negotiated work-family conflicts in their own careers.").

86. See W.F. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 356 (1929) (quoting President Taft's message to Congress explaining his decision to veto the admittance of Arizona and New Mexico as states because their constitutions failed to "adequately . . . protect the independence of judges").

In any event, even assuming that a judicial assessment of the extent and gravity of present social evils is to be preferred to a legislative one, the question remains: don't the Reconstruction Amendments, fairly construed, authorize Congress to remedy even rare and isolated denials of individual constitutional rights?

### III. THE POWER TO PURSUE PERFECTION

The answer to such a question must be distilled from an analysis of the text of the Reconstruction Amendments, their history, the construction that the Court has given Congress's other enumerated powers, and considerations of the relative institutional capacities of Congress and the federal judiciary. Each of these factors counsels an answer in the affirmative.

#### A. Text

Any inquiry into constitutional meaning must begin with a close study of the relevant text, which here includes both the substantive and the enforcement provisions of the Reconstruction Amendments.

1. *Substantive Commands.* The scope of the enforcement sections derives from the substantive promises the Amendments make, as it is those promises that Congress has been empowered to realize.<sup>87</sup> And the Constitution makes those promises to individuals.<sup>88</sup>

The Thirteenth Amendment's prohibition on slavery is all-encompassing and absolute.<sup>89</sup> In similar fashion, after decreeing that "[a]ll persons born or naturalized in the United States" are citizens, Section 1 of the Fourteenth Amendment bars any State from depriving "any person of life, liberty, or property, without due process of law" or denying "any person within its jurisdiction

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87. See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 83–84 (2004) (explaining that Congress's enforcement power "under the Reconstruction Amendments must be tied to enforcing . . . the substantive provisions of those amendments").

88. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are . . . guaranteed to the individual.").

89. U.S. CONST. amend. XIII. Similarly sweeping is the inferred authority to eliminate "all badges and incidents of slavery." See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (internal quotation marks omitted) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)). See generally Darrell A.H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 FORDHAM L. REV. 999 (2008) (discussing the importance of *Jones v. Alfred H. Mayer Co.* to the Thirteenth Amendment); Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855 (2007) (sketching a broad interpretation of the Thirteenth Amendment).

the equal protection of the laws.”<sup>90</sup> So too, the Fifteenth Amendment’s edict that the “right of citizens . . . to vote shall not be denied or abridged . . . on account of race” admits of no exceptions.<sup>91</sup>

In the Fourteenth Amendment context in particular, the Court has in recent decades been at great pains to distinguish between individuals’ rights, which the Amendment protects, and group rights, which the Court insists the Amendment does not recognize. Most recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice Roberts, writing for a four-Justice plurality, observed that “our precedent . . . makes clear that the Equal Protection Clause ‘protect[s] persons, not groups.’”<sup>92</sup> To be sure, this understanding of the equal protection guarantee has been criticized both on<sup>93</sup> and off<sup>94</sup> the Court. But a majority of the sitting Justices, including most emphatically Justice Thomas, have embraced this individual rights reading repeatedly in the context of a constitutional skepticism of governmental affirmative action

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90. U.S. CONST. amend. XIV (emphases added). The Chase Court reduced the Amendment’s guarantee of the privileges or immunities of citizens of the United States to an irrelevancy. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73–74 (1872) (distinguishing between citizenship of the United States and of the individual States); see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1414 (1992) (stating that the *Slaughter-House Cases* “effectively banished” the clause from the Constitution). For recent discussion of the historical context of the Fourteenth Amendment generally and the privileges or immunities clause in particular, see Richard L. Aynes, *The 39th Congress (1865–1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1019, 1040–45 (2009) and Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1296–304 (2009).

91. U.S. CONST. amend. XV.

92. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (plurality opinion) (alteration in original) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

93. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (“There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority.” (emphasis added)).

94. For the now classic exposition of the view that the Equal Protection Clause ought to be interpreted to protect groups from long-term subordination, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL & PUB. AFF. 107, 147 (1976). See also Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 266–67 (1996) (stating that the Equal Protection Clause means the government cannot pass legislation creating or sanctioning outcast groups); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428–30, 2439–41 (1994) (proposing that the Fourteenth Amendment was originally “an effort to eliminate racial caste”); Timothy Zick, *Angry White Males: The Equal Protection Clause and “Classes of One,”* 89 KY. L.J. 69, 96–98 (2000) (providing overview of the scholarly debate).

programs.<sup>95</sup> Why ought the Court enjoy the power, indeed have the duty, to remedy even isolated violations of the individual constitutional rights of persons arguably disadvantaged by such programs while Congress is obliged to acquiesce in some level of state denial of constitutional rights of the very class of persons all agree were the primary intended beneficiaries of the Amendment?

2. *Enforcement Authority.* The Reconstruction Amendments were the first to include separate, express authorization for Congress to enforce their substantive commands.<sup>96</sup> To be sure, these were the first amendments to the U.S. Constitution to *enlarge* federal power.<sup>97</sup> Still, the explicit conferral of enforcement authority is remarkable because it was not only unprecedented but also arguably superfluous. Article I, Section 8 already empowered Congress to “make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States.”<sup>98</sup> The Enforcement Clauses were added to the Reconstruction Amendments to foreclose any ambiguity on this score by placing congressional authority on an unassailable foundation.<sup>99</sup> Although the reason the Framers substituted

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95. See *Parents Involved*, 551 U.S. at 707, 743 (explaining that the Equal Protection Clause is designed to protect individual rights in a plurality opinion written by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito); *Adarand*, 515 U.S. at 202–03, 227 (providing similar analysis in an opinion authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia); see, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) (criticizing the interpretation of the Equal Protection Clause applied in *Brown v. Board of Education*).

96. See Malla Pollack, *Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 337, 346 (2002) (discussing the types of limits that can be placed on constitutional powers).

97. See Rayne L. Hammond, Comment, *Trial and Tribulation: The Story of United States v. Anthony*, 48 BUFF. L. REV. 981, 997–98 (2000) (stating that with “the passage of Reconstruction Amendments . . . the federal government . . . proclaimed Congress’ power to expand upon and enforce its privileges”).

98. U.S. CONST. art. I, § 8, cl. 18. See Wilson R. Huhn, *Congress Has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA Is Constitutional and the President’s Terrorist Surveillance Program Is Illegal*, 16 WM. & MARY BILL RTS. J. 537, 545–48 (2007) (exploring this same history); Elizabeth Reilly, *The Union as It Wasn’t and the Constitution as It Isn’t: Section Five and Altering the Balance of Powers*, 42 AKRON L. REV. 1081, 1091–92 (2009) (noting the Fourteenth Amendment’s Framers debated “whether the Necessary and Proper Clause already gave Congress sufficient power to restrict the States through legislation on matters within the scope of the Amendment, or if Congress needed a direct grant of power to ensure an enumerated power undergirded their implied powers to legislate with respect to the matters contained in the Amendment”).

99. See James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 492–94 (1999) (discussing how the Court’s history requires a more active Congressional role).

“appropriate” for “necessary and proper” eludes definitive statement, substantial evidence traces the substitution to Chief Justice Marshall’s opinion in *McCulloch v. Maryland*.<sup>100</sup> In any event, as David Currie recently observed, “‘appropriate’ is surely not a *more* confining term than ‘necessary and proper.’”<sup>101</sup>

Admittedly, in *Flores* the Court interpreted the Framers’ decision to replace the first draft of the Fourteenth Amendment—which in a single section empowered Congress to enact all laws necessary and proper to secure the privileges and immunities of citizens and the equal protection of the laws—with the Amendment’s final text as reflecting a desire to narrow congressional authority from a substantive to a remedial one.<sup>102</sup> That reading of the history has, however, been subjected to withering criticism from diverse quarters.<sup>103</sup> Moreover, as noted above, *Flores* is itself the beginning of the error this essay highlights.

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100. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (discussing how the necessity of a measure though less apparent is still appropriate and thus not for the judiciary to question). For a compelling presentation of the legislative history supporting this view, see Evan H. Caminker, “‘Appropriate’ Means-Ends Constraints on Section 5 Powers,” 53 STAN. L. REV. 1127, 1159–65 (2001). See also Balkin, *supra* note 12, at 6, 10–14, 50 (asserting that the use of the term “appropriate” by the Framers of the Reconstruction Amendments reflected their assumption that the *McCulloch* test would apply to those Amendments).

101. David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 463 (2008). See also Caminker, *supra* note 100, at 1133 (“Section 5 provides Congress with the same capacious discretion to select among various means to achieving legitimate ends as does Article I as construed in *McCulloch v. Maryland*.”).

102. *City of Boerne v. Flores*, 521 U.S. 507, 520–24 (1997).

103. See David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 59–72 (noting that “the remedial/substantive distinction” proved difficult to draw and was eventually abandoned “for a more deferential approach that left Congress substantial leeway in determining what conduct affects interstate commerce and requires regulation”); Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice In Plainclothes: Reflections From History*, 73 FORDHAM L. REV. 1415, 1438 (2005) (“[T]he Supreme Court curtailed constitutional and legislative protections of constitutional rights that Reconstruction Congresses adopted.”); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 189–92 (1997) (stating that the *Flores* decision “invites the performance of unorthodox roles” for legislatures and courts). *But see* MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 227–37 (2005) (arguing the Court only struck down “the most outrageous reaches for federal power, including the Religious Freedom Restoration Act”); Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 487–91 (1999) (arguing that the view that “the *Boerne* Court overturned the ‘will of the people’” is incorrect and advocating proportionality review by the Court (quoting McConnell, *supra*, at 168)).

## B. History

Reconstruction historiography is notoriously contentious.<sup>104</sup> One of the few matters on which the rival camps agree, however, is that the Framers of the Thirteenth, Fourteenth, and Fifteenth Amendments did not trust the Supreme Court to provide adequate protection to the freedmen.<sup>105</sup> It was for this reason that each of these Amendments contained provisions expressly granting enforcement authority to Congress.<sup>106</sup>

Indeed, in one leading theory of the time, the hegemony of “the Slave Power” in the South, and hence the horrors of the Civil War itself, directly resulted from Congress’s inability to enforce the individual rights already guaranteed by the antebellum Constitution.<sup>107</sup> John Bingham, a Republican Representative from Ohio and the principal author of the first Section of the Fourteenth Amendment, believed as much.<sup>108</sup> In keeping with antislavery constitutionalism,<sup>109</sup> Bingham thought that the Privileges and Immunities Clause of Article IV, Section 2 already forbade the state governments from invading the personal rights of national citizenship.<sup>110</sup> According to this view, the antebellum Constitution’s only, albeit nearly fatal, deficiency was that the

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104. See generally ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION: 1863–1877*, xix–xxvii (1988) (analyzing accounts of Reconstruction history to provide “a coherent, comprehensive modern account of Reconstruction”); Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 *YALE L.J.* 521, 523–29 (1989) (reviewing FONER, *supra*).

105. See, e.g., Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 *TEMP. POL. & CIV. RTS. L. REV.* 485, 506 (2004) (discussing Congress’s distrust in the sufficient enforcement of the Reconstruction Amendments by the federal courts).

106. See *id.* (stating that Congress’s enforcement authority largely resulted from Congress’s distrust in the sufficient enforcement of the Reconstruction Amendments in the court system).

107. See Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 *AKRON L. REV.* 717, 720, 730, 733 (2003) (discussing congressional debates on the meaning of citizenship and individual rights during and before the Civil War).

108. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 *OHIO ST. L.J.* 1509, 1532 (2007).

109. See generally WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848* (1977) (discussing the origins and development of antislavery constitutionalism).

110. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57, 70 (1993) (distinguishing between “citizens,” “state citizens,” and “citizens of the United States” in a reading of the Equal Protection Clause). That the Court had repeatedly rejected this view of Article IV and the Bill of Rights only provided Bingham (and other Framers of the Reconstruction Amendments) that much more reason to doubt the efficacy of judicial enforcement standing unaided. See *id.* at 72–74 (discussing Bingham’s objective to overcome the effects of the Court’s decisions by adopting the Fourteenth Amendment).

Constitution did not grant to Congress the power to enforce that guarantee (which the Court had misunderstood or willfully declined to enforce).<sup>111</sup> It was to fill this gap that Bingham introduced before both the House of Representatives and the Joint Committee on Reconstruction his proposal for what was to become the Fourteenth Amendment.<sup>112</sup> Abolitionist dissatisfaction with the Court's failure to discipline the states was severely exacerbated by the Court's infamous affront to the power of Congress in *Dred Scott v. Sanford*.<sup>113</sup>

Nor did Republican suspicions end with the 1864 death of Chief Justice Taney. With the appointment of Chief Justice Salmon P. Chase as Chief Justice Taney's successor, five of the ten Justices were Lincoln appointees.<sup>114</sup> Even so, congressional leaders remained wary of the Court, which itself remained wary of a "radical" approach toward the former Confederate states.<sup>115</sup> None of the Justices were as vigorously nationalist as the leaders of Congressional Reconstruction.<sup>116</sup> In 1866 the Court held, in *Ex*

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111. See *id.* at 71–72 (explaining that “the absence of an express clause granting Congress enforcement authority meant . . . no remedy was available when the states breached” Article IV, Section 2 of the Constitution).

112. See *id.* at 67, 71–73 (noting Bingham's concern that Congress did not have the power to enforce the Bill of Rights when he proposed the new Amendment).

113. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 464 (1856) (Nelson, J., concurring in the judgment); see Garrett Epps, *Interpreting the Fourteenth Amendment: Two Don'ts and Three Dos*, 16 WM. & MARY BILL RTS. J. 433, 455–56 (2007) (observing that the majority of the Thirty-Ninth Congress had little reason to trust the federal courts given that “the most significant use of the power of constitutional judicial review in the Justices' lifetimes had been the grotesquely pro-slavery decision in *Dred Scott v. Sandford*”); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1113 (1995) (“It was not unnatural that [the supporters of Reconstruction] would be skeptical of reliance on the institution that had produced *Dred Scott v. Sanford* . . .”); Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 376 (1993) (noting that “[n]ewspaper commentary of the time expressed the extreme congressional distrust of the Supreme Court”).

114. KENNETH JOST, *THE SUPREME COURT A TO Z* 556 (4th ed. 2007). In 1863, Congress increased the number of Justices from nine to ten; in 1866, it reduced the number to seven; in 1869, it increased the number to nine, where it has remained ever since. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 38–40 (2002) (describing the fluctuations in the number of Supreme Court Justices between 1863 and 1869).

115. See Zietlow, *supra* note 105, at 506–09 (describing Congress's efforts to legislatively effectuate the Reconstruction Amendments despite the Court's holdings in the *Slaughter-House Cases* and the *Civil Rights Cases* which “significantly limited the scope of the Fourteenth Amendment, and of Congress' power to enforce that Amendment”).

116. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1608–09 (1986) (contrasting the political and legal viewpoints of the Court's members to the “views of the vigorous nationalists who controlled the Reconstruction Congresses”).

*Parte Milligan*,<sup>117</sup> that suspected traitors could not be tried by military commission in Indiana, where civil courts remained open.<sup>118</sup> Many Republicans saw in the ruling a sign that the Court would in due course invalidate military reconstruction.<sup>119</sup> This tension between Congress and the Court eventually produced history's most salient clashes between the power of judicial review and Congress's power over the Supreme Court's jurisdiction. In the first case,<sup>120</sup> involving a Mississippi firebrand jailed for inflammatory editorials challenging the validity of the reconstruction government, Congress repealed the statutory provision authorizing his appeal to the Supreme Court for the express purpose of preventing the "calamity" of a judicial decision against the constitutionality of military reconstruction.<sup>121</sup> Less than three years later, in *United States v. Klein*, the Court rebuffed Congress's effort to dictate the outcome of a case concerning the scope of President Johnson's power to pardon former confederates.<sup>122</sup>

In short, the Reconstruction Congresses were engaged in a longstanding power struggle with the Supreme Court. This context makes it highly unlikely that they entrusted the execution of the then highly controversial policies embodied in the Era's three constitutional amendments solely, or even primarily, to the courts. But this conclusion need not rely on inference. The Framers of the constitutional amendments said as much at the time. In presenting the Amendment, a product of the Joint Committee on Reconstruction, to the Senate, Senator Jacob Howard stated that Section 5 placed on Congress "[the] power and . . . duty" of enforcing its substantive guarantees.<sup>123</sup> Another

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117. *Ex parte Milligan*, 71 (4 Wall.) U.S. 2 (1866). The Court announced its (unanimous) decision in April of 1866 but did not release its opinions until December of that year. See Alpheus Thomas Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 HARV. L. REV. 806, 819 n.52 (1956).

118. *Milligan*, 71 U.S. at 121–22.

119. See Michael Les Benedict, *Salmon P. Chase and Constitutional Politics*, 22 LAW & SOC. INQUIRY 459, 473 (1997) (discussing Court challenges to Reconstruction congressional policies and congressional counter-attacks aimed at depriving the Court of jurisdiction over cases that threatened those Reconstruction policies).

120. *Ex parte McCardle*, 74 (7 Wall.) U.S. 506 (1868).

121. See William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 236–39 (1973) (discussing historical background).

122. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

123. See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 365–66 (2006) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Howard)); see also WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 122 (1988) (observing that the Framers of the Fourteenth Amendment expected "Congress rather than the courts [to] be the principal enforcer of section one").

member of the Joint Committee, Representative Roscoe Conkling, insisted that Congress was vested with authority to interpret the Amendment's vague commitments as well. As he explained, all questions "arising upon the construction" of the Amendment would be resolved by Congress, adding almost as an afterthought that "perhaps . . . the courts" would assist in the effort.<sup>124</sup> Congress's proper role in identifying the rights protected by the substantive sections of the Reconstruction Amendments is debatable.<sup>125</sup> However that debate is resolved, the history indisputably reaffirms what the text seems to say—that the principal responsibility for carrying these Amendments' promises to fruition was committed to Congress.

### C. Other Enumerated Powers

The Court's extensive federalism jurisprudence supplies a model for judicial review of legislation enforcing the Reconstruction Amendments. Existing scholarship persuasively argues that Congress should enjoy at least "the same capacious discretion to select among various means to achieving legitimate ends" when enforcing the Reconstruction Amendments as it does under "Article I as construed in *McCulloch*."<sup>126</sup> A review of modern cases in the latter context shows that the Court has there disclaimed any significant role in second-guessing Congress's judgment about the extent of an admitted evil.<sup>127</sup> This experience teaches that the Court should likewise refrain from rulings that would in effect require Congress to tolerate any deviation from the utopian vision of the Thirteenth, Fourteenth, and Fifteenth Amendments.

Countless cases support the proposition that it is not for the Court to question Congress's judgment about the seriousness of a perceived problem provoking a federal legislative response, but

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124. CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866) (statement of Rep. Conkling). See also *supra* note 103 (discussing Congress's role in the interpretation of the Fourteenth Amendment).

125. See *infra* notes 180–82 and accompanying text (stating that *Flores* limited Congress's role to enforcing the Fourteenth Amendment while having no role in interpreting what substantive rights the Fourteenth Amendment guarantees).

126. Caminker, *supra* note 100, at 1133. See also Richard E. Levy, *An Unwelcome Stranger: Congressional Individual Rights Power and Federalism*, 44 U. KAN. L. REV. 61, 87 (1995) ("There is no compelling reason to approach the interpretation of the scope of federal power under the Reconstruction Amendments differently from the interpretation of other federal powers.").

127. See, e.g., *Perez v. United States*, 402 U.S. 146, 154 (1971) ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.") (internal quotation marks omitted).

the font of this authority is, of course, *McCulloch* itself.<sup>128</sup> Chief Justice Marshall there admonished that, were the Court “to undertake . . . to inquire into the degree of [a law’s] necessity,” it would “pass the line which circumscribes the judicial department, and . . . tread on legislative ground,” a power to which the Court “disclaim[ed] all pretensions.”<sup>129</sup> Instead, the Court would invalidate federal statutes only if Congress were to “adopt measures which are prohibited by the constitution” or, “under the *pretext* of executing its powers, pass laws for the accomplishment of objects not entrusted to the [central] government.”<sup>130</sup> So long, however, as Congress acted in furtherance of the objects committed by the Constitution to the national authority, the Court would defer to the judgment of Congress that the perceived impediment to those ends was substantial and that the remedy chosen would effectuate a cure.

The Court has, with rare exceptions, honored this counsel in cases challenging congressional exercise of Article I powers. The Court’s modern Commerce Clause jurisprudence, for example, provides numerous examples of judicial deference to often implicit determinations that a perceived problem was sufficiently serious to merit a national legislative solution.<sup>131</sup> Especially illustrative is the Court’s recent ruling in *Gonzales v. Raich*.<sup>132</sup>

Angel Raich and Diane Monson filed suit in a U.S. district court seeking a declaration that the federal Controlled Substances Act (CSA) could not be applied to their cultivation and possession of marijuana for personal medical use, as permitted by the law of their home state, California.<sup>133</sup> For several years prior to filing suit, Raich and Monson, both of whom suffered from what the Court termed a “variety of serious medical conditions,” had regularly consumed marijuana to treat some of their numerous, severe symptoms.<sup>134</sup> Their consumption of the drug conformed with both the advice of their licensed, board-certified family physicians and to California’s

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128. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

129. *Id.*

130. *Id.* (emphasis added).

131. *See, e.g., Perez*, 402 U.S. at 154–55 (accepting Congress’s determination that extortionate credit transactions, though purely intrastate in nature, affect interstate commerce).

132. *Gonzales v Raich*, 545 U.S. 1, 17–19 (2005).

133. *Id.* at 6–8. Raich and Monson also argued that applying the CSA to their conduct violated the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments, and the doctrine of medical necessity. *Id.* at 8. The Supreme Court expressly declined to reach the substantive due process and medical necessity arguments. *Id.* at 33.

134. *Id.* at 6–7.

Compassionate Use Act.<sup>135</sup> As the Court acknowledged, their physicians had exhausted all alternative treatments before concluding that marijuana alone provided effective relief.<sup>136</sup> Perhaps most importantly, Raich and Monson did everything they could to distance the marijuana they consumed from any activity even arguably economic in nature.<sup>137</sup> Moreover, they also assiduously avoided any connection between their marijuana and the world outside California.<sup>138</sup> For example, the cannabis Raich used was “grown using only soil, water, nutrients, equipment, supplies, and lumber originating from or manufactured within California.”<sup>139</sup> The link between their possession of marijuana for medical purposes and Congress’s power to regulate interstate commerce was, at best, highly attenuated.

Nevertheless, the Court sustained the law as applied to them. Tacitly acknowledging that respondents’ conduct was neither “commerce” nor of an interstate nature, the Court reasoned that an all-encompassing, prophylactic prohibition on possession *anywhere for any purpose* was a necessary and proper tool in the struggle to eradicate the *interstate market* for the drug for *recreational* purposes.<sup>140</sup> To satisfy judicial scrutiny, it was sufficient that “Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market could be undercut if [respondents’] activities were excepted from its general scheme of regulation.”<sup>141</sup> When, however, the relatively trivial amount of medical marijuana permitted by California law is compared to the enormous pre-existing illegal interstate trade in the drug, the former is revealed to be but a tiny tail on a mammoth dog.<sup>142</sup>

That the Court permitted the former to wag the latter underscores the wide latitude Congress ordinarily enjoys in its

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135. *Id.*

136. *Id.* at 7; Brief for Respondents at 4–5, *Raich v. Gonzales*, 545 U.S. 1 (2005) (No. 03-1454) [hereinafter Brief for Raich].

137. Brief for Raich, *supra* note 136, at 24–25.

138. *Id.* at 6.

139. *Id.* “Monson’s cultivation of marijuana [was] similarly local in nature.” *Id.* (internal quotation marks omitted).

140. *Raich*, 545 U.S. at 17–22; *see id.* at 40–42 (Scalia, J., concurring) (“That simple possession is a non-economic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation.”).

141. *Id.* at 42 (internal quotation marks omitted).

142. *See id.* at 64 (Thomas, J., dissenting) (noting the existence of a “multibillion-dollar interstate market for marijuana” and therefore finding it “difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market”).

choice of means, including prophylactic prohibitions, when in pursuit of a constitutionally legitimate end.<sup>143</sup> And while *Raich* provides a particularly stark and recent illustration of the Court's deference to Congress's assessment of a problem and choice of remedies, it is by no means atypical. Rather, such generous indulgence is the rule not only in the context of the Commerce Clause,<sup>144</sup> but also when Congress exercises its other Article I powers,<sup>145</sup> even when acting directly on the state governments.<sup>146</sup> The Court's decisions in *United States v. Lopez*<sup>147</sup> and *United States v. Morrison*<sup>148</sup> are not to the contrary, as they rested on categorical determinations that the very objects of the invalidated laws were non-economic and therefore outside the ambit of Congress's Commerce Clause authority. That Congress

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143. Indeed, meaningful pretext review in *Raich* arguably would have disclosed Congress's actual end as a constitutionally suspect one. As Justice Thomas argued, the connection between respondents' conduct and the purported goal of suppressing *interstate commerce* in marijuana was so attenuated as to suggest that Congress's real purpose was "to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana." *Id.* at 64; *see id.* at 66 (observing that the majority's generous construction of the Commerce and Necessary and Proper Clauses threatened to convert them into tools for the accomplishment of ends not provided to the federal government).

144. *See, e.g.,* *Perez v. United States*, 402 U.S. 146, 146–47, 154–55 (1971) (sustaining a federal criminal prohibition on extortionate credit transactions as a valid exercise of Congress's Commerce Clause authority); *Katzenbach v. McClung*, 379 U.S. 294, 302–04 (1964) (sustaining the application of the Civil Rights Act of 1964 to a family-owned restaurant as within congressional power under the Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942) (sustaining federal regulation of the amount of wheat grown for home consumption). *See generally* Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) (describing the Court as "being 'asleep at the constitutional switch' for [the] more than fifty years" that elapsed between the decisions upholding New Deal legislation and *United States v. Lopez*); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 746 (1996) (concluding that since the New Deal, "the Court ha[s] engaged in only pretend review" under the Commerce Clause).

145. *See, e.g.,* *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948) (sustaining a 1947 Act of Congress freezing rents at war-time levels as a valid exercise of the war power); *Nigro v. United States*, 276 U.S. 332, 336–38, 354 (1928) (upholding the Harrison Anti-Narcotic Act, which in effect criminalized the distribution of morphine, as an appropriate exercise of Congress's power to tax).

146. *See, e.g.,* *Reno v. Condon*, 528 U.S. 141, 143 (2000) (discussing the regulation of the disclosure of information contained in state motor vehicle department records); *South Dakota v. Dole*, 483 U.S. 203, 205, 212 (1987) (highway funds conditioned on a state's enactment of a prohibition on the purchase of alcohol by persons less than twenty-one years old); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (application of Fair Labor Standards Act to municipal transit employees).

147. *See United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding that the terms of the Gun-Free School Zones Act of 1990 have "nothing to do with 'commerce' or any sort of economic enterprise").

148. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

enjoys such latitude in the exercise of its Article I powers suggests that it should be accorded at least as much discretion when enforcing the Reconstruction Amendments. Congress should be permitted to discharge its constitutional duty to eradicate voting discrimination with at least the same relentless zeal it brings to, for example, the war on drugs.

#### D. *Institutional (In)Competence*

Chief Justice Marshall concluded that the federal judiciary ought not to inquire into “the degree of [a law’s] necessity”<sup>149</sup> because such inquiry was inherently more legislative than judicial. As usual, he was right. Such matters are more appropriately committed to Congress because it enjoys greater capacity to resolve them properly. Congress is far better able to inform itself about the scope, nature, and seriousness of existing social evils. As importantly, it far better reflects society’s comparative commitments to the conflicting values implicated by a choice as to whether, and if so to what extent, law should be employed to achieve a vision of justice.

1. *(In)Capacity*. Questions about the severity of an admitted social problem are quintessential questions of legislative fact. “Legislative facts” are facts of general applicability that do (or do not) support the public policy judgment leading to the enactment of legislation.<sup>150</sup> At least since the early 1940s, commentators and jurists have distinguished legislative from adjudicative facts, which concern the application of a general rule to the unique, concrete circumstances of a particular dispute.<sup>151</sup>

Courts are notoriously bad at resolving questions of legislative fact.<sup>152</sup> The principal purpose of the judiciary, at least historically, has been to resolve discrete disputes between particular parties, and the institution is structured to that end.<sup>153</sup>

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149. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

150. 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15.03 (1958).

151. See, e.g., Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 77 & n.9 (“The phrase [‘legislative facts’] virtually belongs to Professor Kenneth C. Davis.” (citing DAVIS, *supra* note 150, § 15.03)).

152. See *McCulloch*, 17 U.S. at 423 (stating that the Court “disclaims all pretensions to” the power of “tread[ing] on legislative ground”); A. Christopher Bryant, *The Empirical Judiciary*, 25 CONST. COMMENT. 467, 472–73 (2009) (reviewing DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* (2008)).

153. Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 979 (2009) (“[D]etermining the rights of the many on the basis of a lawsuit between the few can produce bad results.”).

The adversarial system assumes that the contest between the parties will supply appropriate incentives for the discovery and disclosure of the most pertinent information and persuasive arguments, unless and until the cost of doing so exceeds either party's estimation of the dispute's value (or either party's ability to pay).<sup>154</sup> Much can and has been said on behalf of this structure as an engine for just resolution of particularized controversies.<sup>155</sup>

But it is ill-suited to ensuring the appropriate investigation and consideration of such issues as the scope of racial discrimination in voting across the United States. However strong the incentives of Northwest Austin Municipal Utility District Number One to ascertain the progress, or lack thereof, the country has made towards eradicating unconstitutional voting discrimination, those incentives do not approach those of the whole nation. Nor do courts or the litigants appearing before them have anything like the resources Congress routinely employs in investigating such questions.<sup>156</sup> In the rare cases in which the prestige of Congress proves inadequate to draw forth voluntary production of information, resort may be had to its virtually unlimited investigatory powers, including compulsory process.<sup>157</sup>

Whereas the judicial process is designed to discover the details of discrete disputes, the deliberative nature of legislative bodies enhances their ability to determine legislative facts.<sup>158</sup> Ordinarily a record is built first in parallel committees in both chambers, often over many years. That process is not merely open. It is self-consciously orchestrated to stimulate public consideration of and ultimately involvement in a national debate,

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154. DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800–1865*, at 124 (1998).

155. *But see* T.H. WHITE, *THE ONCE AND FUTURE KING* 220 (1940) (analogizing the adversarial system to trial by combat).

156. MORTON ROSENBERG, *INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY* 1 (1995) (discussing Congress's inquisitorial powers).

157. *Id.*; *see, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (reaffirming that the issuing of subpoenas is a legitimate congressional investigative power); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action."); *McGrain v. Daugherty*, 273 U.S. 135, 173–75 (1927) (holding that Congress has not only its enumerated powers but "such auxiliary powers as are necessary and appropriate" to carry out its enumerated functions, including the power of compulsion).

158. *Washington v. Glucksberg*, 521 U.S. 702, 787 (1997) (Souter, J., concurring in judgment) ("[F]acts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding . . .").

which in a feedback loop further informs and influences members of Congress. Perhaps most significantly, one aspect of the representation elected representatives provide their constituents is to reflect in miniature their constituents' experiences, interests, and values.<sup>159</sup> To be sure, the reflection is an imperfect and distorted one.<sup>160</sup> But it would be hard to find a less representative body than the federal judiciary, in general, and the U.S. Supreme Court in particular. Exacerbating the rarified nature of the Justices' backgrounds,<sup>161</sup> their extraordinary isolation and resulting insulation from the lives of most ordinary citizens leaves them exceptionally poor barometers of present social realities. By contrast, the nature of elected office compels legislators to preserve channels of communication and opportunities for interaction with their constituents.<sup>162</sup> The point of this comparison is not that no separation exists between the lives of elected representatives and those they represent, but rather merely that institutional forces preserve a far more intimate connection than would be conceivable for Article III judges, especially those serving in the highly secluded setting of the nation's highest court.

The energy of congressional mechanisms for the reception of legislative facts is underscored by the poverty of judicial counterparts. A primary medium for injecting public information and opinion into litigation is the amicus brief—a tool of indeterminate impact employed in a scandalously undisciplined fashion.<sup>163</sup> More generally, as recent decisions have made only too

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159. See generally HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60–91 (1967) (discussing descriptive representational theory).

160. See, e.g., David S. Broder, *Gingrich's Heresy*, WASH. POST, Nov. 14, 1995, at A19 (noting that representatives are heavily influenced by special interest groups).

161. All nine sitting Justices received their law degrees from three northeastern, Ivy League law schools. The Justices are not even representative of the legal profession, itself hardly representative of the population at large. See Adam Liptak, *A Well-Traveled Path from Ivy League to Supreme Court*, N.Y. TIMES, Sept. 7, 2010, at A15 (noting the Ivy League educational background of the Supreme Court); cf. Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-King's Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1141 (2004) (“Supreme Court Justices are almost always themselves products of elite academia and members of the cultural elite, seeking its approval and sharing its deep distrust of the mass of their fellow citizens.”).

162. Last summer's contentious town-hall meetings on healthcare reform—see Ian Urbina, *Beyond Beltway, Health Debate Turns Hostile*, N.Y. TIMES, Aug. 8, 2009, at A1, describing how divisions over the legislation resulted in explosive town-hall situations—are merely the most vivid, recent illustrations that members of Congress expose themselves to public expression in ways unimaginable for a Supreme Court Justice.

163. See DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 97–98 (2008) (“[C]ourts routinely accept *amicus* briefs chock-full of factual assertions from interested parties who might, or might not, have expertise on

clear,<sup>164</sup> the Supreme Court “has been inconsistent and result oriented in its approach to social fact-finding.”<sup>165</sup> The point is not that the judiciary ought never decide issues of legislative fact, but merely that its capacity to do so is grossly underdeveloped when compared to that of Congress.

2. *(II) Legitimacy.* Questions of legislative fact often involve normative considerations. Any evaluation of the present severity of racial discrimination in voting, for example, depends upon an implicit judgment about just *how* detestable and destructive the practice is. Ultimately these kinds of determinations, while of a constitutional dimension, are more political than legal. In any polity committed to popular government, the people making them must both be vested with representative authority and accountable to the citizens they represent. Of course, neither of these things can be said about federal judges.

To be sure, constitutionalism inherently places some fundamental normative commitments outside the scope of ordinary politics. As to these commitments, courts insulated from political pressure can and do serve as an essential check on members of Congress, whose very accountability to the public at times tempts them to betray those commitments to expediency, real or perceived.<sup>166</sup> No doubt Justice Thomas believes that invalidating the—in his view—unnecessary renewal of the now-gratuitously insulting preclearance requirement would vindicate the Constitution’s commitment to federalism principles.<sup>167</sup> Yet, as he has in other circumstances been among the first to note, the Court properly plays this role only where the championed normative principal is firmly rooted in the Constitution’s text or

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the subject.”); Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC’Y REV. 807, 809–10 (2004) (noting that because the Court “operate[s] in an environment of incomplete information,” the Justices seek information through public opinion and amicus curiae briefs).

164. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007).

165. John O. McGinnis & Charles W. Mulaney, *Judging Facts like Law*, 25 CONST. COMMENT. 69, 72 (2008).

166. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 9–10, 583 (1978) (asserting that the function of the judicial branch “is to protect dissenters from a majority’s tyranny”). *But see, e.g.,* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2600 (2003) (challenging view that judicial review is countermajoritarian); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6–7 (1996) (“[T]he Court’s capacity to protect minority rights is more limited than most justices or scholars allow.”).

167. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2517 (2009) (Thomas, J., concurring in part and dissenting in part) (stating that Justice Thomas would forego the avoidance doctrine in holding that section 5 of the Voting Rights Act exceeded congressional authority).

history.<sup>168</sup> Although the preservation of state autonomy and authority in most matters was arguably a paramount consideration of the Constitution of 1860, the Reconstruction Amendments altered this balance.<sup>169</sup> And, as discussed above, nothing in the text or history of those Amendments remotely suggests that Congress was obliged to tolerate any level of racial discrimination in voting or any other infringement upon the individual rights the Amendments empowered Congress to protect.<sup>170</sup> In exercising this explicit authority, Congress must as a practical matter make difficult decisions about when marginal advancement towards constitutional perfection no longer justifies the commitment of additional scarce resources or the intrusion upon competing values such as state autonomy. The Court, however, has no legitimate claim to a power to dismiss any violations of the Constitution as too trivial for congressional notice.

3. *Appropriate Limits.* A likely response to the argument so far is that it accords Congress so much discretion as to effectively free it from the constraints imposed by the Constitution's system of enumerated powers. As a general matter this concern is a grave one.<sup>171</sup> But it is misplaced here.

Congress's power to pursue perfect compliance with the Reconstruction Amendments is subject to significant limits inapplicable to its other heads of authority. Most importantly, the Enforcement Clauses of the Reconstruction Amendments authorize only those laws calculated to enforce the individual rights their substantive sections protect.<sup>172</sup> The power to enforce

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168. See *Clark v. Martinez*, 543 U.S. 371, 395–97 (2005) (Thomas, J., dissenting) (explaining the Court's traditional approach to interpreting constitutionally ambiguous statutes in a manner that preserves constitutional integrity).

169. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (observing that a line of Supreme Court cases had “sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States”).

170. See, e.g., U.S. CONST. amend. XV, §§ 1–2 (“The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State . . .”) (emphasis added).

171. This Author has found fault with interpretations of the Constitution that are insufficiently protective of the reserved powers of the states. See generally MCAFEE, BYBEE & BRYANT, *supra* note 30, at 160 (“According to this interpretation of the Tenth Amendment, it would provide no constitutional protection to the reserved powers of the states . . .”); A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL’Y 101, 122–23, 151–52 (2007).

172. *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) (explaining that Congress has the power to enforce the Reconstruction Amendments, but not to substantively define the right).

the Thirteenth Amendment is limited by the specificity of its object—the elimination of slavery and involuntary servitude.<sup>173</sup> The Fourteenth and Fifteenth Amendments, focused as they are on state action, simply have no relevance to the great range of private conduct subject to the reserved police powers of the states.<sup>174</sup> This narrow scope contrasts starkly with the more frequently invoked Article I powers, which sweep more broadly. Even if Congress's power to regulate Commerce, for example, is limited to activities of an economic nature,<sup>175</sup> that limit excludes very little in a society so interconnected and commodified as our own.<sup>176</sup> In those rare cases concerning solely non-economic activity,<sup>177</sup> Congress can always avail itself of its power to condition federal spending and thereby, as a practical matter, achieve control over the subject.<sup>178</sup> These and other Article I powers are limited by no restriction so tight as the requirement that statutes enforcing the Reconstruction Amendments must reach only that conduct logically related to ongoing—or imminently threatened—denials of those constitutional provisions' substantive promises.<sup>179</sup>

Under existing jurisprudence, these restrictions impose especially tight constraints on Congress and subject

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173. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude . . . shall exist within the United States . . .”).

174. See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982) (stating that “the Fourteenth Amendment offers no shield” against private conduct (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974))); *Terry v. Adams*, 345 U.S. 461, 473 (1953) (noting that the Fifteenth Amendment applies only to State action, not to purely private conduct).

175. Cf. *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“[T]hus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).

176. See Jonathan H. Adler, *Is Morrison Dead: Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 764 (2005) (observing that, according to the majority opinion in *Gonzales v. Raich*, 545 U.S. 1 (2005), “any privately produced item that can substitute for a commercially produced good is subject to federal control” and accordingly, “Congressional power knows few limits”).

177. See, e.g., *Morrison*, 529 U.S. at 613 (observing that crimes motivated by gender were not in any way economic activity).

178. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (holding that objectives not within Congress’s Article I powers may still “be attained through the use of the spending power and the conditional grant of federal funds”); see also Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1662 (2000) (discussing the breadth of Congress’s conditional spending power); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85, 126 (“[N]o regulatory objective realistically is outside Congress’s ken through the use of taxation and spending, and conditions attached to federal grants.”).

179. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (“While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.”).

congressional exercise of the enforcement power to searching judicial scrutiny. In *Flores*, the Supreme Court squarely rejected the claim that the power to enforce the Fourteenth Amendment accorded Congress any role whatsoever in determining the contours of the substantive rights the Amendment protects.<sup>180</sup> To be sure, this aspect of *Flores* has been sharply and widely criticized,<sup>181</sup> though it is not without its defenders.<sup>182</sup> But there is no present need to take sides in this debate. It suffices to observe that *Flores* is the law, at least insofar as the Court is concerned.<sup>183</sup> So long as this remains the case, Congress's power to pursue even perfect compliance is subject to judicial scrutiny of the relation between the means chosen and the end the Justices regard as constitutionally mandated. What makes Justice Thomas's opinion in *NAMUDNO*—and the Court's decisions in *Florida Prepaid*, *Kimel*, and *Garrett*—so startling is their acknowledgement that Congress has sought to eliminate conduct that the Court has or would itself deem unconstitutional.<sup>184</sup> Yet Congress's effort is found to be beyond its authority because the

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180. *Id.* at 519–29.

181. *See, e.g.*, McConnell, *supra* note 103, at 189–92 (criticizing the Court in *Flores* for not deferring to the legislature and according RFRA a presumption of constitutionality); Zietlow, *supra* note 105, at 490, 506 (“[I]t is clear that members of that Congress believed that federal courts’ enforcement of the Reconstruction Era Amendments alone would be insufficient to effectuate the promise of those measures.”).

182. *See, e.g.*, Hamilton & Schoenbrod, *supra* note 103, at 472–73 (recognizing Congress’s authority is limited to enforcement of constitutional provisions).

183. *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 113 & n.36 (2004) (“One of the vibrant constitutional debates at the turn of the twenty-first century concerns enduring questions about the appropriate role of nonjudicial entities—especially Congress and the President—in the development of constitutional meaning.”); *see also* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 79–85 (2004) (analyzing the roles of legislature, President, judiciary, and the people in enforcing the meaning of the Constitution); Symposium, *The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006) (debating “popular constitutionalism”); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1341 (2005) (discussing constitutional studies through the critiquing of two books, KRAMER, *supra*, and LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004)). For a comparison of the roles the Supreme Court and Congress have played in protecting the constitutional rights of racial minorities, *see* REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 1–11 (2006) (observing that congressional construction of the Constitution differs from the courts’ interpretation due to influences from political forces). *See also* Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 945–46, 951, 988, 991 (2005) (providing examples of protection of minorities by the Court and Congress in the case of *Brown v. Board of Education*, 347 U.S. 483 (1954) and the Civil Rights Act).

184. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2520 (2009) (listing the measures used by Congress to eliminate unconstitutional conduct).

*extent* of the conceded violations is not thought by the Justices to be sufficient to justify the challenged law.<sup>185</sup> In short, no one denies the flame, the only question being—is it worth the candle? Even if, as this essay contends, *that* question is committed entirely to Congress, the Court’s authority to say which rights the Reconstruction Amendments do and do not protect is a more than sufficient tool to keep Congress in check.

Of course this constraint supplements but does not supplant the political forces that the Court has relied upon, almost exclusively, to check abuses of Congress’s Article I powers. The structural mechanisms ensuring representation of state governmental interests in Congress<sup>186</sup> apply with at least as much force in the arena of civil rights as in that of economic and social regulation. As Chief Justice Marshall famously observed forty years before the surrender at Appomattox, the Constitution’s design looks to “[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections” to constrain overuse of the powers granted in Article I.<sup>187</sup>

These same considerations, in addition to the supervisory role for the Court sketched out above, secure against abuse of the power to compel even perfect compliance with the Reconstruction Amendments.<sup>188</sup> Indeed, since such legislation almost always targets the instrumentalities of state and local governments,<sup>189</sup> which have ample formal and informal means to make their positions known in Congress, the “political safeguards of

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185. See *id.* at 2511 (discussing improved conditions in the area of voting rights).

186. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985) (“[T]he composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”); see also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175–84 (1980) (“[T]he Senate . . . was that one branch of the legislature that would function as a representation . . . of the States. . . . The Lower house, however, is not itself wholly devoid of mechanisms for state representation.” (alteration in original) (internal quotation marks omitted) (quoting *THE FEDERALIST* NO. 58, at 249 (James Madison) (Charles A. Beard ed., 1948))); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L. Q. 779, 782–84, 800–02, 977 (1982) (“For the first 150 years of our constitutional history, the states exercised significant political decisionmaking powers.”); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543–45 (1954) (discussing three ways in which the Constitution “serve[s] the ends of federalism,” including “preserv[ation of] the states as separate sources of authority”).

187. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

188. *Id.* (discussing political safeguards against abuse of Congress’s power).

189. *Cf. United States v. Morrison*, 529 U.S. 598, 621 (2000) (discussing the requirement of state action for violations of the Fourteenth Amendment).

federalism<sup>190</sup> are more likely to prove effective constraints of Congress's enforcement authority than of Congress's Article I powers, which permit direct regulation of private conduct. So too the Court retains the power to invalidate pretextual assertions of congressional authority to enforce the Reconstruction Amendments, at least to the same extent the Court retains that authority in the context of Congress's Article I powers.<sup>191</sup>

These observations are unlikely to provide much comfort to those who, along with the present Author,<sup>192</sup> believe that Congress has largely made a mockery of the enumerated powers scheme. But virtually all of that damage to our constitutional structure has been inflicted via the exercise of Article I powers.<sup>193</sup> Hence, it is at best misguided to begin efforts to rein Congress in with an attack on congressional power to enforce the Reconstruction Amendments. It is as though the Court responded to a wave of gun violence by banning knives. Indeed, such an approach seems so obviously misdirected as to invite speculation as to its origins. Perhaps because of the passage of time or the Justices' own policy priorities, a majority of the current Court is willing to acquiesce in the New Deal Era settlement according Congress plenary power over the nation's economy.<sup>194</sup> Yet these same Justices apparently remain recalcitrant in opposition to what has been identified by some as the "Rights Revolution"<sup>195</sup> and by others as the "Second Reconstruction,"<sup>196</sup> which recognized

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190. See generally Larry D. Kramer, *Putting the Politics Back into Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278–87 (2000) (discussing how the decentralized party system acts as a political safeguard of American federalism).

191. See *City of Boerne v. Flores*, 521 U.S. 507, 511, 527 (1996) (providing examples of the Court invalidating acts of Congress enforcing the Reconstruction Amendments where the act goes beyond Congress's Section 5 power); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (asserting that were Congress to "adopt measures which are prohibited by the constitution" or "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government," the Court would be obligated to disregard them as unconstitutional) (emphasis added).

192. See *supra* note 171 (criticizing interpretations which remove power from the States).

193. See generally MCAFFEE, BYBEE & BRYANT, *supra* note 30, at 143–62 (discussing the dramatic expansion of Congress's Article I powers in the twentieth century).

194. See *Gonzales v. Raich*, 545 U.S. 1, 17–19 (2005) (upholding broad use of Congress's commerce clause power); see also MCAFFEE, BYBEE & BRYANT, *supra* note 30, at 143–75 (describing the Court's historical decisions during the New Deal era).

195. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 24–31 (1990) (describing the Rights Revolution as a period of expansion of legally protected individual rights by Congress, the President, and the Court).

196. See, e.g., Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1, 3, 30 (1989) (proposing "a fundamental change in the Court's interpretation of Title VII" occurred in the Court's 1988 term); Rebecca E. Zietlow,

congressional authority of a similar breadth over matters relating to civil rights. Whether the Court's recent jurisprudence reflects such an ideological compromise, let alone why the Justices have reached such an equilibrium,<sup>197</sup> is well beyond the scope of this essay. Whatever the explanation, however, the fact remains that hobbling Congress's power to enforce the Reconstruction Amendments would be an ill-advised way to pursue a federalism counter-revolution.

#### IV. CONCLUSION

In his separate opinion in *NAMUDNO*, Justice Thomas asserted that congressional power to enforce the Reconstruction Amendments via prophylactic legislation did not extend to the achievement of constitutional perfection.<sup>198</sup> Insofar as the last decade is concerned, his statement accurately describes the Court's case law, albeit in balder terms than had previously been employed.

Perfection is a chimerical goal. Almost by definition its pursuit calls for efforts disproportionate to the ends to be achieved. Accordingly, the normative component implicit in Justice Thomas's descriptive observation—that “[p]erfect compliance” *ought not* be “the yardstick for determining whether Congress has the power to employ broad prophylactic legislation” to enforce the Reconstruction Amendments—no doubt strikes most readers as self-evidently true.<sup>199</sup> Few if any would argue that even such laudatory goals as eradication of the vestiges of slavery or elimination of racial barriers to full and meaningful participation in elections should be pursued without any regard to the costs or the sacrifice of other important values such as the constitutional balance of federal and state authority.<sup>200</sup> But the real question is not whether Congress should pursue perfect compliance heedless of the costs, but which branch of the federal

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*Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 287–88 (2010) (discussing the Warren Court's deference to congressional acts enforcing the Reconstruction Amendments).

197. One recent study suggests that the Voting Rights Act in particular may have become a favored field for ideological contest. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 48–49 (2008) (finding that a judge's race and political leanings relate closely to whether that judge will vote for liability in a Voting Rights Act case).

198. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2526 (2009) (Thomas, J., dissenting).

199. *Id.*

200. But see Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1458–62 (2005) (discussing the Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary).

government should be the final judge as to when Congress has done enough.

Contrary to the implicit assumption of the Court's recent Enforcement Clause cases, the Constitution vests that determination in Congress alone. The judiciary has no legitimate role in second-guessing a congressional determination that a remedy is proportionate to the unconstitutionality thereby prevented. The text and history of the Reconstruction Amendments indicate that their best interpretation accords that discretionary judgment solely to Congress.<sup>201</sup> Indeed, in the context of Congress's Article I powers, the Court has repeatedly acknowledged this to be true, and the case for deference to Congress is at least as strong with respect to enforcement of the Reconstruction Amendments. This allocation of power and responsibility also best accords with considerations of the relative institutional competence of the federal legislature and judiciary. Finally, recognition of congressional authority to pursue even perfect compliance with the commands of the Reconstruction Amendments poses no grave threat to the balance of power between the central and state governments, as congressional exercise of that authority is constrained by other limits both judicial and political.

In *NAMUDNO*, the Court deferred to a future day its decision regarding the constitutionality of the 2006 reauthorization of section 5 of the Voting Rights Act.<sup>202</sup> When that day comes, the Court should seize the opportunity to acknowledge the power of Congress to pursue perfect constitutional compliance and thereby rectify the fundamental error at the heart of its recent Enforcement Clause case law.

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201. See sources cited *supra* note 181.

202. *Nw. Austin*, 129 S. Ct. at 2508.

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