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Some Empirical and Normative Aspects of Due Process of Lawmaking

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Abstract

Judicial Review and the Legislative Process: Some Empirical and Normative Aspects of Due Process of Lawmaking

Philip P. Frickey and Steven S. Smith

In recent years, the Supreme Court has expanded its review of the legislative record when evaluating the constitutionality of statutes that limit the rights or powers of states. Most recently, in *Board of Trustees v. Garrett* (121 S.Ct. 955, 2001) the Court again sought to limit Congress by reviewing the legislative record to determine whether Congress had discovered a pattern of state misconduct that warranted an infringement of the states immunity from private law suits. We evaluate the emerging theory of due process of lawmaking that justifies the Court's scrutiny of the legislative record. To date, the emerging theory lacks an adequate conceptualization of legislative actors, has an excessively narrow definition of the legislative record, and appears to reflect an inaccurate view of deliberation and the legislative process. While the Congress has the capacity to meet the Court's expectations for evidence gathering, Congress cannot and will not meet the Court's implicit assumptions about deliberation. Some models of the due process of lawmaking have merit, but the review of the deliberative process is unlikely to succeed.

Judicial Review and the Legislative Process:
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Philip P. Frickey and Steven S. Smith

Examining the American practice of judicial review — the authority of a court to declare action of a legislative or administrative body unconstitutional and therefore unenforceable — remains a cottage industry in the law schools. Law professors continue to fret over the “counter-majoritarian difficulty,” Alexander Bickel’s famous concern that judicial review authorizes unelected, life-tenured federal judges to set aside the decisions of democratically elected legislatures, especially those of the national Congress (Bickel 1962, see Friedman 2001). Leading legal commentators have attempted to “solve” the difficulty through a theory that reconciles judicial review with democracy (e.g., Ely 1980). With less grandiosity, other legal scholars have assumed that the tension between judicial review and democracy cannot be resolved in such a fundamental way and have instead proposed techniques to lessen the strain in particular contexts (e.g., Sunstein 1999).

Of course, at least some political scientists find these normative inquiries to be, at most, an amusing diversion from reality. The empirical claim that dominates political-science discourse is that, whatever theoretical justification the Court might provide for exercises of judicial review, what the Court actually does can be explained simply by assessing judicial political attitudes, (e.g., Segal and Spaeth 1993), perhaps as they play themselves out within the institutional settings in which judges find themselves (Epstein and Knight 1998, Maltzman, Spriggs and Wahlbeck 2000).

In this paper, we do not seek to resolve the wide gulf between the essentially normative world-view of most law professors and the empirical perspective of most political scientists. Instead, we bring our normative and empirical lenses into focus on one aspect of this divide that, we think, can be profitably evaluated through a joint consideration of legal commentary and empirical assessment, although here our focus will be on the political science literature about legislatures, not courts.

We examine a set of judicial techniques — some longstanding, some just now emerging — that attempt to ameliorate the supposed tension between judicial review and democracy by encouraging judges to evaluate the degree to which the policy under challenge was undertaken by a democratically legitimate actor (usually, a legislature) through appropriate procedures and with adequate and articulated deliberation. In theory, these techniques seek to avoid any conclusive judicial evaluation of the value of the policy in question. Instead, they reflect the idea that judges can force more democratically legitimate actors to improve the quality of their decision-making processes.

These techniques are familiar to administrative law. Under the Administrative Procedure Act (APA), administrative action is customarily subject to judicial review. The reviewing court

will often consider whether the agency acted arbitrarily or capriciously or contrary to law. The court will inquire whether the agency applied the correct legal standards to an appropriately generated administrative factual record. If the agency held trial-type hearings, the court will ask whether there is substantial evidence in the record as a whole to justify the agency's resolution of the controversy. This is a sort of "due process of law administration," and while mostly rooted in the APA and the judicial common-law practice preceding and surrounding the statute rather than in the Constitution, it is taken for granted in contemporary public law (e.g., Sunstein 1983).

The techniques we examine in this paper are a major expansion and transplantation of these techniques. They amount to a kind of "due process of lawmaking," under which legislatures would be judicially encouraged to gather the relevant facts, identify the legal standards applicable to the context, and reach an appropriate result through appropriate procedures and due deliberation. At first glance, encouraging the legislature to make better decisions to which judges will ultimately defer may seem a sensible way to ameliorate the tension between judicial review and democracy. At second glance, the approach may seem a strange and empirically unsound, even panglossian, attempt to subordinate the primary, political function of legislatures in favor of a deliberative function that legislatures cannot easily handle and that might, in fact, cause more harm than good.

Part I examines judicial decisions and legal commentary that contribute to this emerging "due process of lawmaking." Part II turns to an evaluation of the value of these techniques. Part III presents our normative conclusions about this venture.

I. The Various Strands of Due Process of Lawmaking

A. Hans Linde's Conception of Due Process of Lawmaking

Hans Linde coined the term "due process of lawmaking." Linde is a well-respected legal commentator who left his faculty post to serve as a judge on Oregon's highest court for more than a decade. It is important to recognize that much of what we will include under the rubric of due process of lawmaking is inconsistent with his use of the term, and indeed that he articulated serious concerns about the utility and normative attractiveness of such other techniques. We owe him a careful description of his perspective before we turn to the work of others.

A quarter-century ago, while still a law professor, Linde delivered a series of lectures that provocatively criticized some aspects of the American practice of judicial review (Linde 1976). The primary focus of this analysis was the judicial practice of assessing the rationality of legislation under the equal protection and due process clauses of the Constitution. Under this well-established approach, laws are invalid unless they represent rational means toward permissible legislative ends. Linde noted that neither constitutional clause contained any text explicitly authorizing this judicial excursion into legislative rationality. The purely instrumentalist view of law it embodied struck him as wrong-headed. He asserted that it led to a

process of litigation in which counsel defending the law are driven to ad hoc justifications for the law that may have had nothing to do with the legislative motivation behind it. Moreover, “a law, even at the time it is enacted, is rarely meant to achieve one goal at the sacrifice of all others” (208) and often reflects policy choices and compromises, practical senses of the equity of situations, or even sympathy for certain interests rather than purely instrumentalist rationality.

By way of illustration, Linde hypothesized an Oregon bill limiting a weight-per-axle limit on trucks in the interest of highway safety and maintenance, but that allowed a higher limit for log trucks (Linde 1976, 208). The exemption would be adopted not because it promoted highway safety or maintenance, but because the legislature did not wish to promote those goals in a limitless way that would hamper an important industry. Is this statutory package “irrational,” and therefore unconstitutional? Linde (1976, 212) thought the inquiry silly as formulated, for such a conclusion “means to deny the legitimacy of the government’s policy choice, not its rationality.” “[I]n the end, the constitutional question will be whether the aim of the law is out of bounds, not whether it will miss its target — a question of legitimacy, not of rationality”.

Most important for our present purposes, Linde argued that the instrumentalist model, while applicable to and capable of meaningful application in the administrative process, is hopelessly inconsistent with actual legislative practice and simply could not be forced upon the legislature by judicial fiat.¹ Linde suggested that the rationality requirement was a confused judicial technique that got the cart (of finding ways that seem feasible for judges to implement the practice of judicial review in litigation) ahead of the horse (“the central fact of American constitutional law” is that the Constitution is “a charter by which government is to govern,” not the institution, maintenance, or feasibility of judicial review).

What, then, are the constraints, if any, that notions of due process apply to the legislative arena? For Linde, “process” means “process”— following the rules laid down for the composition of the legislature, the behavior of legislators, and the enactment of legislation. Linde acknowledged that judges may be reluctant to invalidate legislation on this ground, although he urged them to do so. In any event, that is a “problem of judicial review, and in our present theoretical excursion [that is] secondary to what the Constitution demands of lawmakers. We do

¹In a representative passage, Linde wrote:

Rational lawmaking, if we take the formula seriously, would oblige this collective body to reach and to articulate some agreement on a desired goal. It would oblige legislators to inform themselves in some fashion about the existing conditions on which the proposed law would operate, and about the likelihood that the proposal would in fact further the intended purpose. In order to weigh the anticipated benefits for some against the burdens the law would impose on others, legislators must inform themselves also about those burdens. These demands on the legislative process imply others. The projections and assessments of conditions and consequences must presumably take some account of evidence, at least in committee sessions. A member who never attends the committee meetings should at least examine the record of evidence before casting a vote, or be told about it, and should certainly never vote by proxy. The committee must explain its faculty and value premises to the full body. Surely there is no place for a vote on final passage by members who have never read even a summary of the bill, let alone a committee report or a resume of the factual documentation. In the forty-nine states which are less progressive than Nebraska [Linde is lecturing at the University of Nebraska!], the second house of the legislature could hardly substitute a wholly different version of the bill without repeating the process of inquiry. These kinds of demands are implicit in due process, if lawmakers are really bound to a rule that laws must be made as rational means toward some agreed purpose. Linde at 223-24.

not assume that a law has been constitutionally made merely because a court will not set it aside” (Linde 1976, 243).

Linde’s analysis is a theoretically interesting and empirically sophisticated attempt to make sense of the relationship between the legislative process and the practice of judicial review. Its most central normative feature is the idea that the Constitution must be understood in a holistic way, as a charter for the operation of government, not merely through the lens of techniques of judicial review. Its distinction between prohibited constitutional ends (which should trigger judicial review) and the rationality of legislation (which he views as an incoherent and unmanageable concept) is provocative and insightful. As we shall see, however, it is a distinction that, at the margin, is fuzzy, and the blurriness of it has led other commentators to endorse a kind of rationality review that may be less constitutionally grounded and empirically plausible.

As Linde acknowledged, there is relatively little support in the case law for his kind of due process of lawmaking. In large part, this is probably due to the problem of remedy: if a legislature fails to follow the rules, is it too draconian for a court to invalidate the law that resulted?

Consider one state constitutional rule that fits Linde’s conception. Most state constitutions require a law to contain only one subject. The single-subject rule has rarely been enforced by state supreme courts — in part because the definition of a single subject is difficult and rather easily defeated by speaking in abstract terms (e.g., “appropriations,” rather than “funding for higher education”), in part because the rule might seem to interfere unduly with ordinary legislative conduct such as logrolling. Nonetheless, in recent years the state supreme courts are becoming more aggressive in enforcing the single-subject requirement, especially in the context of ballot measures submitted to the people through the initiative process. (Jones case in Calif.; *Fine v. Firestone* in Fla.) Whether courts will ultimately find a way to enforce the single-subject requirement without causing more problems for the legislative process than good for the citizenry is an open question.

B. Beyond Linde’s Formulation

1. *Structural Due Process and Canons of Statutory Interpretation.* Writing in the same era as Linde, a young Lawrence Tribe coined another term, “structural due process.” Tribe focused on the “structures through which policies are both formed and applied.” (269). We understand this inquiry to include a hierarchical component, under which certain kinds of constitutionally sensitive decisions should only be made by governmental institutions with special legitimacy. Judicial decisions that strike down the action of inferior institutions amount only to “suspensive vetoes,” because a superior institution can reinstate the policy in question. There are several examples of this approach in American case law.

For example, in *Hampton v. Mow Sun Wong* (426 U.S. 88, 1976), the federal Civil Service Commission had barred all noncitizens from federal employment. Had a state adopted the same rule for its employees, it would have violated the equal protection clause of the Fourteenth Amendment (*Sugarman v. Dougall*, 413 U.S. 634, 1973). The Fourteenth Amendment by its terms only bars state action, however, not federal action. Nonetheless, often the Supreme Court will treat federal classifications based on sensitive criteria to similar equal-protection review under the aegis of the due process clause of the Fifth Amendment, which of course does apply to the federal government (e.g., *Bolling v. Sharpe*, 347 U.S. 497, 1954). But federal classifications based on alienage are often exempted from this strict review (e.g., *Mathews v. Diaz*, 426 U.S. 67, 1976), on the ground that there are surely more legitimate reasons why the federal government, as opposed to the states, might consider alienage relevant. For example, in *Mow Sun Wong* the federal government contended that its prohibition on alien federal employment could serve as a bargaining chip in foreign relations or to encourage noncitizens to become citizens. But none of the proffered reasons why the federal government might legitimately consider alienage were the business of the Civil Service Commission, as opposed to the Congress or the President, which had never considered the question. The Court (by a 5-4 vote), per Justice Stevens, invalidated the rule but stated that the same approach might be constitutional if explicitly adopted by the President or the Congress. When President Ford reinstated the exclusionary rule by executive order, the lower courts upheld its constitutionality, and the Supreme Court denied review (*Mow Sun Wong v. Hampton*, 626 F.2d 739 (9th Cir. 1980), cert. denied, 450 U.S. 959 (1981)).

Another illustration, and one in which the constitutional value at stake was more successfully protected, is *Kent v. Dulles* (357 U.S. 116, 1958). When the State Department denied passports to alleged subversives, they challenged this action as violating their constitutional rights. The Court avoided the constitutional issues by narrowly interpreting the statutes delegating to the Secretary of State responsibility over passports. Because the statutes did not explicitly authorize the Secretary to consider beliefs or associations in the passport process, the Court held that he lacked that authority. Despite President Eisenhower's urgent call for congressional action explicitly authorizing the State Department to act in this fashion, no legislation was ever forthcoming (Farber 1981).

Kent and *Mow Sun Wong* are consistent with several well-established canons of statutory interpretation that shape legal construction based on latent constitutional values (on such canons, see Eskridge and Frickey 1992). The most general of these is the "avoidance canon," under which a court is instructed to avoid a serious constitutional issue if the statute can be plausibly construed to have another meaning that does not raise the question (e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 1979). A particular instantiation of this canon is the nondelegation canon. In theory, wide-open delegations of legislative authority to administrative agencies (like the Department of State in *Kent* and the Civil Service Commission in *Mow Sun Wong*) raise serious constitutional questions under our separation of powers, for it allows agencies to make law rather than legislatures. The Supreme Court in 1935 twice invalidated statutes on this ground (*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 1935), but has never again done so. In recent years,

it has explained that the problem can be dealt with by narrow interpretation of broad delegations in light of legislative history and purposes, such that courts can construct limits to the delegated authority within which the agency must operate (*Mistretta v. United States*, 488 U.S. 361, 1989).

Mow Sun Wong, *Kent*, and the avoidance and nondelegation canons demonstrate judicial techniques designed to enforce what Larry Sager has called “underenforced constitutional norms” (Sager 1978a). For example, in *Mow Sun Wong*, the constitutional value at stake — equality — had already been judicially recognized as significant in the context of discrimination against aliens, but only when states (which rarely have any legitimate reason to consider citizenship) have acted. Sager has noted that the two proffered *federal* reasons for considering alien status — foreign policy and encouraging citizenship — were both potentially quite substantial and especially difficult for judges to assess because, among other things, judges lack the requisite background information and sense of past and future policy direction (Sager 1978b). In this context, it would be unsurprising to find judges, for institutional reasons, “underenforcing” the equality norm by broadly deferring to the President or Congress if one or the other took alienage into account. But the Civil Service Commission, which has no role in foreign policy or citizenship, made the exclusionary rule, and thus there was no reason to assume that the federal government had appropriately weighed the relevant factors. The Court’s decision in *Mow Sun Wong* “seems entirely appropriate: it in effect constitutes a remand to the decision-making body to make appropriate policy judgments for an initial assessment of the validity of the enactment” (Sager 1978b, 1417). *Kent* is surely similar: the political branch balancing the first amendment and foreign-travel rights of politically unpopular citizens as against foreign and domestic policy concerns about subversion in the charged political climate of the 1950’s should be Congress, not the Secretary of State or his subordinates.

In a few unusual contexts, the Court has applied canons of interpretation to protect values that the Court will not directly protect by constitutional review. The nondelegation canon is the most obvious example, where the Court today has transformed constitutional review into a kinder and gentler kind of narrow construction. In addition, in the idiosyncratic areas of federal immigration law and federal Indian law, the Supreme Court has accorded Congress a “plenary power” to act — in essence, for institutional reasons, the Court has deemed itself incompetent to second-guess the judgments of Congress about who should be admitted to our polity and how those who were originally not of our polity but were here in the first place should be governed (Frickey 1996). In both areas, however, canons of construction narrowly interpret federal law that invades Native or alien interests and prefer a generous to a harsh construction unless the law clearly provides to the contrary (Frickey 1993, Motomura 1990).

2. *Due Congressional Deliberation and Presumptions of Unconstitutionality.* One of the central aspects of the counter-majoritarian difficulty is reconciling judicial displacement of legislative decisions. If constitutional law seeks to protect fundamental societal values that transcend the clear mandates of the Constitution, it seems difficult, from the perspective of democracy, to justify a judicial rather than legislative determination of what counts as a fundamental social value. Nonetheless, some legislative judgments on fundamental values are

more trustworthy than others, and courts should stand ready to assist Congress in this process. So argued Terrance Sandalow, who built upon the hierarchical idea of structural due process by adding a deliberative element to it:

[I]f governmental action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate and broadly based political judgment. The stronger the argument that governmental action does encroach upon such values, the greater the need to assure that it is the product of a process that is entitled to speak for the society. Legislation that has failed to engage the attention of Congress, like the decisions of subordinate governmental institutions, does not meet that test, for it is likely to be the product of partial political pressures that are not broadly reflective of the society as a whole (Sandalow 1977, 1188).

Note that Sandalow focused not on the rationality of all legislation — Linde’s *bête noir* — but on whether particular legislation encroaches on fundamental constitutional values. In effect, the approach would amount to saying that, in circumstances in which a statute would otherwise be unconstitutional, due congressional deliberation could save it.

Justice Stevens, the author of *Mow Sun Wong*, has provided some support for the due deliberation model. The most obvious examples arise from his dissenting opinions in two cases. In *Delaware Tribal Business Committee v. Weeks* (430 U.S. 73, 1977), the Court upheld a congressional plan of distributing assets to the descendants of the Delaware Nation. Justice Stevens dissented on the ground that Congress had excluded some descendants by sheer oversight. Stevens explicitly invoked the term “due process of lawmaking” in his dissent. More vividly, in *Fullilove v. Klutznick* (448 U.S. 448, 1980), the Court upheld a federal statute requiring that at least 10 percent of the federal funds for public works projects be set aside for minority business enterprises. Justice Stevens dissented, finding nothing in the legislative history to justify the statute’s approach of assuming that six subclasses of minorities (defined as “Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts”) merited federal reparations or other special treatment, much less identical treatment. He was defining a distinctive position. Unlike the other dissenting justices, Stevens was “not convinced that the [due process clause of the Fifth Amendment] contains an absolute prohibition against any statutory classification based on race,” but he could not countenance a legislative process that had not even noted that the statute was the first time in the Nation’s history that Congress “has created a broad legislative classification for entitlement to benefits based solely on racial characteristics.” He observed that on the House and Senate floors “only a handful of legislators spoke” on the matter and that “it is unrealistic to assume that a significant number of legislators read” a committee report that addressed the minority set-aside and was cited by the majority. Stevens concluded:

Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be

considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process. [Citing Sandalow 1977.] A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination [of unconstitutionality]. * * * [T]here can be no separation-of-powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.

Although the due deliberation model has never been resurrected in a majority opinion involving a racial classification, it has influenced the evolution of equal-protection law on gender issues. A statute that takes gender into account on its face is subject to an intermediate sort of scrutiny, under which the statute is unconstitutional unless it serves important government interests and is substantially related to the achievement of those objectives (*Craig v. Boren*, 429 U.S. 190, 1976). This amounts to a presumption of unconstitutionality for such measures. In at least two cases, congressional procedure and deliberation have influenced the constitutional outcome. In upholding the exclusion of women from the selective service, the Court stressed that Congress had “carefully considered and debated” the alternatives (*Rostker v. Goldberg*, 453 U.S. 57, 1981). In contrast, in striking down a federal Social Security measure favoring widows over widowers, a plurality of the Court acknowledged that a compensatory purpose of protecting widows, who may well be more economically disadvantaged than widowers, might have supported the statute, but noted that there was no indication of any “reasoned congressional judgment” along those lines (*Califano v. Goldfarb*, 430 U.S. 199, 1977).

Finally, even in an area where the Court applies a presumption of constitutionality, the unavailability of the argument of due legislative deliberation might make a difference, although it tends to come in by disguise as an argument against the “rationality” of the law (Linde’s *bête noir*, again) that in fact appears to have been a perfectly “rational” way of expressing animosity toward a disfavored group (Linde’s preferred notion of judicial prescription of prohibited legislative goals). In *United States Department of Agriculture v. Moreno* (413 U.S. 528, 1973), the Court invalidated an exclusion from the food-stamp program for households containing unrelated persons. The Court purported to base its holding on the lack of any rational connection between the distinction drawn (households of related persons versus those containing one or more unrelated persons) and the statute’s stated purposes of alleviating hunger. In fact, the legislative history revealed that the exclusion was designed to prevent “hippie communes” from taking advantage of the food-stamp program, and thus the statute was not “irrational” — that was a rational relationship between a legislative purpose and the means chosen to effectuate that purpose. But the Court ruled that such a purpose was inadmissible because it was illegitimate: “For if the constitutional conception of ‘equal protection of the laws’ means

anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.” To the same effect is *City of Cleburne v. Cleburne Living Center* (473 U.S. 432, 1985), involving a city’s attempt to “zone out” a group home for the mentally disabled. Most recently, and most visibly, in *Romer v. Evans* (517 U.S. 620, 1996), the Court invalidated a Colorado constitutional amendment, adopted by the voters, which though ambiguous seemed designed to make gays and lesbians second-class citizens by repealing local ordinances protecting them against discrimination and preventing the state legislature from adopting any similar measures.

3. *The Current Debate in the Federalism Cases.* Due process of lawmaking, broadly defined, has been the hallmark of the current Supreme Court under Chief Justice Rehnquist in its most controversial area, federalism. In the fifteen years of the Rehnquist Court, the law has changed dramatically in ways limiting federal power over states and their citizens. Some of these developments involved constitutional invalidation of federal law, while others involved the application of newly formulated canons of statutory interpretation that narrowed the reach of federal law.

In 1986 [check], when Rehnquist was elevated to Chief Justice, the Constitution imposed virtually no cognizable constraints upon congressional authority to legislate concerning local matters. The Court had upheld the federal regulation of local conduct as an exercise of Congress’ authority to “regulate commerce . . . among the several states” in such cases as *Perez v. United States* (402 U.S. 146, 1971), upholding a federal statute criminalizing local loan-sharking, and *Katzenbach v. McClung* (379 U.S. 294, 1964), upholding a federal statute prohibiting racial discrimination by restaurants if “a substantial proportion” of their food has moved in interstate commerce, as applied to a local restaurant that had purchased \$150,000 worth of food in the prior year, around \$70,000 of which was meat that had been shipped interstate. In both cases, the Court simply deferred to congressional “findings” — formal ones written into the statute (*Perez*) or informal ones gleaned from a judicial examination of the legislative history (*McClung*) — that the federal regulation was connected to interstate commerce (loan sharking provides money for organized interstate crime; discrimination by restaurants restricted interstate travel by African Americans). In both cases, the Court did not view the defendant in isolation, but instead found the necessary interstate commerce component by aggregating the activities of all similarly situated loan sharks and restaurants, under the principle of *Wickard v. Filburn* (317 U.S. 111, 1942), which had upheld the application of a federal agricultural statute imposing a quota upon wheat production to one farmer who had fed his excess wheat to his own animals.

Nor would the Court, at the dawn of the Rehnquist era, even prevent Congress from regulating the states as entities. Congress could bring states into federal line by carrot, by conditioning federal funding to states upon their agreement to the specified terms. For example, in *South Dakota v. Dole* (483 U.S. 203, 1987), a case decided at the beginning of the era of the Rehnquist Court, the Court upheld the conditioning of 5% of federal highway funds upon the state’s agreement to raise the drinking age to 21. More controversially, Congress could even regulate the states by stick. In *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S.

528, 1985), a 5-4 decision, the majority upheld the application of the Fair Labor Standards Act's minimum wage and maximum hours provisions to state employees across the board, thereby overruling *National League of Cities v. Usery* (426 U.S. 833, 1976), which had held that Congress had no authority under its commerce power to interfere with the "States' freedom to structure integral operations in areas of traditional governmental functions," thus preventing application of the FLSA to certain state employees performing "core state functions".

The one significant area where federalism limited congressional authority involved the states' immunity, under the Eleventh Amendment, to suit in federal court. The year before Rehnquist became Chief Justice, the Court concluded that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute." *Atascadero State Hospital v. Scanlon* (473 U.S. 234, 1985). In this way the Court had transformed a more modest canon of statutory interpretation that created a presumption against congressional abrogation of the states' Eleventh Amendment sovereign immunity into a new "clear statement rule." (Eskridge and Frickey 1992). This was no doubt a constitutionally informed statutory interpretation move, but when faced with a direct attack upon the constitutionality of congressional abrogation of the states' immunity, the Court blinked. In 1989 the Rehnquist Court upheld congressional power to abrogate Eleventh Amendment immunity pursuant to its authority to regulate interstate commerce. *Pennsylvania v. Union Gas Co.* (491 U.S. 1, 1989) (plurality opinion). When coupled with the Court's earlier holding that Congress's authority, under section 5 of the Fourteenth Amendment, allowed it to abrogate Eleventh Amendment immunity to enforce substantive Fourteenth Amendment rights such as due process and equal protection (*Fitzpatrick v. Bitzer*, 427 U.S. 445, 1976), it was apparent that, at the dawn of the last decade, the states had no protection against clear congressional invasions of their authority.

The 1990's saw a radical transformation of this area of law, both in terms of constitutional interpretation and statutory construction, as the Court embarked on a mission to defend states' rights and limit congressional power. The crusade started by the kinder and gentler mode of modifying statutory construction canons. In *Gregory v. Ashcroft* (501 U.S. 452, 1991), the Court blunted the congressional power, pursuant to the commerce clause, recognized in *Garcia* to regulate the states as states by imposing an *Atascadero*-like clear statement rule, such that federal statutes do not regulate important state functions unless they clearly so provide. Again, as in *Atascadero*, the Court replaced a longstanding canon of milder force that merely presumed against such legal effect but allowed a consideration of legislative history, statutory purpose, and other factors in addition to statutory text to override that presumption.² The Court took up the constitutional cudgel in 1995, for the first time in sixty years holding that a federal statute regulating the citizenry exceeded congressional authority under the commerce power. In *United States v. Lopez* (514 U.S. 549, 1995), by a 5-4 vote, the Court invalidated the

²Soon thereafter, the Court did embark on new constitutional constraints on Congress's authority to regulate the states, holding that Congress cannot "commandeer" the state legislatures or state executive officials to carry out federal programs. *New York v. United States*; *United States v. Printz*. These cases do not involve due process of lawmaking because under them Congress could not achieve these goals no matter how carefully it deliberated.

federal Gun Free School Zones Act of 1990, which prohibited possession of a gun within 1,000 feet of a school, on the ground that the statute had nothing on its face to do with “commerce,” contained no congressional findings linking it to commerce, and had no obvious linkage to commerce. The Court concluded that the statute could be linked to interstate commerce only in the most roundabout ways: guns near schools leads to violence near schools; school violence causes economic loss spread throughout the economy through insurance; school violence affects where people choose to live, including those moving across state lines; school violence undercuts educational performance, hurting the economy.

After *Gregory* and *Lopez*, it still seemed that the Court was leaving Congress breathing room to accomplish national goals at the expense of the states and local autonomy, so long as Congress engaged in a due process of lawmaking by drafting the statutes carefully and documenting, either by formal or informal findings, a connection between interstate commerce and a statute adopted pursuant to the commerce power. Indeed, *Lopez* suggested that formal findings would be helpful when the basis for legislative power was not “visible to the naked eye.” In the six years following *Lopez*, the implications for a due process of lawmaking concerning federalism have become clearer as the Court has continued to cabin congressional power.

While *Lopez* put new limits on the commerce power generally, in 1996 the Court imposed a substantial constraint on Congress’s authority to reach admitted commercial activities of the states in particular. In *Seminole Tribe of Florida v. Florida* (517 U.S. 44, 1996), the Court overruled *Union Gas* and held that Congress has no authority under the commerce clause to abrogate the Eleventh Amendment immunity of the states to suit in federal court from private parties (in this case, to subject a state to suit in federal court from an Indian tribe for the state’s refusal to negotiate with the tribe concerning Indian gaming within state borders, as required by the Indian Gaming Regulatory Act, a statute adopted pursuant to Congress’s Article I authority to regulate commerce with the Indian tribes). The Court articulated a chronological explanation for congressional abrogation power: Article I powers such as the commerce power do not override the Eleventh Amendment (which of course was adopted later), but Congress has the authority under post-Eleventh-Amendment delegations of power, such section 5 of the Fourteenth Amendment, to abrogate the states’ Eleventh Amendment immunity because, for example, the later-adopted Fourteenth Amendment impliedly repealed that immunity. As a practical matter, *Seminole Tribe* shifted most of the action away from the commerce clause to section 5 of the Fourteenth Amendment, because of the two only the latter authorized Congress to subject states to suit in federal court for violation of federal statutory commands.

The next year, the Court continued the process of implementing the new federalism by narrowly interpreting this crucial section 5 power. In *City of Boerne v. Flores* (___ U.S. ___, 1997), it held that Congress had no authority under section 5 to enact the provisions of the Religious Freedom Restoration Act that, in effect, required state and local governments to accommodate religious groups that were substantially burdened by regulation. The same bare majority of five justices who had decided *Lopez* and *Seminole Tribe* held in *Boerne* that section 5, which empowers Congress “to enforce the provisions of [the Fourteenth Amendment] by

appropriate legislation,” authorized Congress to legislate only to remedy or to prevent judicially cognizable violations of the Fourteenth Amendment, not rewrite the substantive limits the Amendment imposes upon the states. The statute ran afoul of this approach because it protected religious groups from regulation that posed no serious risk of being associated with judicially enforceable constitutional violations. For the Constitution to be violated by regulations that burden religion but are neutral on their face with respect to religion, the regulation must be contaminated by a governmental intent to harm religion. The Court searched the legislative history in vain for documentation of a linkage between the statutory breadth and such judicially cognizable constitutional violations, much less strong reasons to suppose that the statute’s protections that went beyond the limitations the Constitution itself imposed on the states were “proportional and congruent” to preventing actual constitutional violations..

Lopez, *Seminole Tribe*, and *Boerne* put a triple whammy on congressional authority, but seemed to suggest that due process of lawmaking was a way out of the bind. A more carefully considered statute with formal findings and legislative history to back it up might persuade a Court to uphold a statute applying to the citizenry adopted pursuant to the commerce clause or a statute regulating the states adopted pursuant to section 5. *Boerne*, in particular, was subject to this understanding, for it contrasted the inadequate congressional record supporting RFRA with the thorough documentation of a pattern of judicially cognizable violations of African American voting rights contrary to the Fifteenth Amendment that Congress generated to support the enactment of the Voting Rights Act of 1965. Cases immediately emerged that demonstrated several problems with this analysis, however. The Court imposed these requirements retroactively upon existing statutes, which were of course enacted in a different time when Congress had no notice of the necessity of generating a carefully crafted legislative history. Moreover, if the legislative history of the Voting Rights Act is the baseline against which all other civil rights legislation must be measured, Congress is in big trouble. No other statute passed under Congress’ authority to enforce the Reconstruction Amendments is supported by such a thorough and well-documented record of a pattern of the denial of constitutional rights. It is therefore not surprising that, even when Congress did a more deliberative job than it did with RFRA in documenting the basis for such statutes, the Court has found them wanting.

The section 5 cases following *Boerne* have uniformly struck down the federal statutes in question. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank* (527 U.S. 627, 1989), held that Congress exceeded its authority under section 5 in subjecting states to suit for patent infringement in 1992 legislation amending the Patent Remedy Act. (Note that the most straightforward way to understand the statute — that it was adopted pursuant to Congress’s legislative power under the Patent Clause of Article I — is of no avail because *Seminole Tribe* allows the states to interpose an Eleventh Amendment immunity to suit to enforce such a statute.) The Court concluded that a patent could be “property” protected by the due process clause of the Fourteenth Amendment. The only way states could deny that property right without “due process of law” would be to fail to provide adequate state remedies for state deprivations of that right, however, and the legislative history of the statute had made no attempt to document systematic state failure to provide such remedies. The Court insisted

that Congress must find “widespread and persisting deprivation of constitutional rights” in order to justify its exercise of section 5 authority. Stevens, writing for the dissenters, objected that the legislative record included several references to state infringement of patents and a claim that instances of infringement were likely to become more frequent. He added that the states chose not to testify in opposition to the 1992 legislation.

More dramatically, in *Kimel v. Florida Board of Regents* (120 S.Ct. 631, 2000), the Court held that Congress had gone beyond its section 5 power in subjecting states to suit by their employees under the Age Discrimination in Employment Act. Distinctions based on age rarely violate the equal protection clause because they are subject only to minimal rational-basis review.³ The statute outlawed far more such distinctions in employment than the Constitution would, and the Court undertook a searching review of the legislative history to see whether the broader remedies were, in the language of *Boerne*, “congruent and proportional” prophylactic methods of preventing such constitutional violations. The Court concluded “that Congress’ 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports.” Here the Court imposed its new, stringent fact-gathering obligations upon a Congress adjourned for more than a quarter-century.

For our purposes, the most striking post-*Boerne* section 5 case is the most recent: *Board of Trustees v. Garrett* (121 S.Ct. 955, 2001). In *Garrett*, the five Justices who have bloc-voted to reestablish federalism limits on Congress struck down the application to states of the provisions of the Americans with Disabilities Act subjecting states to suit from their employees claiming discrimination because of disability. Similar to *Kimel*, the majority stressed that classifications based on disability are subject to only minimal rational-basis review, such that the refusal of states to accommodate disabled employees is constitutional so long as it is “rational.” Unlike in *Kimel*, however, this time the Court faced congressional findings of pervasive discrimination against the disabled and an elaborate legislative history recounting instances of such discrimination.

The Court applied to the legislative history a time-honored lawyerly shredding technique, the piecemeal critique, in which the evidence was examined in segmented fashion rather than for its cumulative impact. The Court noted the report of the Task Force on the Rights and Empowerment of Americans with Disabilities. The significance of the report was discounted by the Court because it did not constitute a *congressional* finding and it was not clear that Congress had relied on the report in the task force’s findings. The Court complained that evidence of state discrimination was “submitted not directly Congress but to the Task Force.”

³The theory is that taking age into account is ordinarily a rational act for government decisionmakers that is rarely rooted in animus. See *Massachusetts Bd. of Retirement v. Murgia* (427 U.S. 307, 1976).

The Court stressed that the only legislative history that counted for section 5 purposes was that found in the record of *congressional* action that documented actual constitutional violations by *states* against disabled employees — evidence from the private sector or even from local governments (which are not protected by Eleventh Amendment immunity), even if it revealed the rankest discrimination against disabled workers, was declared irrelevant. The Court did identify six possible incidents recounted in the legislative history that might have amounted to constitutional violations against the disabled by states (in dissent, Justice Breyer argued that the legislative history contained far more such evidence). The majority concluded that “these instances taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.” Furthermore, the majority argued that “had Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act’s legislative findings. There is none.” Specifically, the House and Senate committee reports offered summary statements that did not explicitly mention states. On that basis, the Court asserted “there is strong evidence that Congress’ failure to mention States in its legislative findings addressing discrimination in employment reflects that body’s judgment that no pattern of unconstitutional state action had been documented.” This contrasted, in the majority’s view, with Congress’ preparation of the Voting Rights Act, for which “Congress explored with great care the problem of racial discrimination in voting.” Finally, the majority concluded, even if such a pattern had been established, the statutory remedies requiring accommodation of the disabled were not, under the *Boerne* test, “congruent and proportional” to remedying past, or preventing future, unconstitutional conduct.

Justice Breyer’s dissent is of interest to us because Justice Stevens joined with Justices Souter and Ginsburg in a response to the majority’s argument about Congress’ burden to document discrimination by states. The minority contested the majority’s claim of inadequate evidence of adverse treatment by state officials but went further. Justice Breyer noted that “the Court’s failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard, particularly with respect to lack of justification.” He insisted that “a legislature is not a court of law.” “Congress, unlike courts, must, and does, routinely draw general conclusions—for example, of likely motive or of likely relationship to legitimate need—from anecdotal and opinion-based evidence of this kind, particularly when the evidence lacks strong refutation.” Breyer and colleagues objected to the “extensive investigation of each piece of evidence that the Court appears to contemplate.” He continues:

Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy. * * * Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification.

Unlike judges, Members of Congress can directly obtain information from constituents who have first-hand experience with discrimination and related issues.

Breyer concludes that “the Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative competencies, improperly invades a power that the Constitution assigns to Congress.”

The only post-*Lopez* commerce clause case may indicate that due process of lawmaking concerns are less relevant in that area than *Lopez* seemed to suggest. In *United States v. Morrison* (120 S.Ct. 1740, 2000), the five federalism Justices struck down the Violence Against Women Act (VAWA), which had provided a federal cause of action for the victim of a “crime of violence motivated by gender.” The majority easily disposed of section 5 by concluding that it provided Congress no authority to regulate private conduct, as here, where the defendant in the action for damages would be the alleged perpetrator, not any state official. The commerce clause issue was not so easily handled. The majority acknowledged that the legislative history of VAWA contained “numerous findings regarding the serious impact that gender-motivated violence has on victims and their families,” including the conclusion that “gender-motivated violence affect interstate commerce ‘by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.’ ” (Quoting conference committee report). Rather than quarrel with the factual predicate for this conclusion, the majority found it inadmissible because it was based on the same flaw as the predicate argument in *Lopez*. Allowing such a but-for causal connection from one violent act to the nationwide, aggregated impact of such crimes on interstate commerce would essentially allow Congress to regulate any local crime or other activity, in violation of the strategy embedded in Article I and the Tenth Amendment, whereby the local police power remains with the states and Congress is delegated only a limited set of national powers.

Read together, *Lopez* and *Morrison* suggest that, for the current Court majority, the nationwide, aggregated effects of local acts bring them within Congress’s commerce power only when those acts have an economic quality to them. Even if this is correct, however, it seems likely that due process of lawmaking concerns such as formal findings and documented legislative history will be important to justify new federal statutes regulating local activities where either the local commercial aspects or the nationwide aggregated effects on interstate commerce may be unclear. Left unanswered in *Morrison* was a positive statement of the kind of legislative record required to satisfy the Court.

II. The Viability of a Legislative Deliberation Model of Due Process of Lawmaking

A. *The Emerging Theory of Due Process of Lawmaking*

Farber and Frickey (1991) identified three strands of theory about the legislative process that are emerging in recent cases and scholarship. The *institutional legitimacy* strand concerns the identity of the policy-making institution appropriate for a given decision. In *Kent* and *Mow Sun Wong*, the courts suggested that Congress or the president could impose policies that were not properly imposed by administrative agencies. This strand does not concern us here.

The *procedural regularity* variant of due process of lawmaking is a deserving model. Linde (1976) had this variation in mind when he advocated that courts require legislatures to follow rules specified in constitutions, statutes, and perhaps even their own rules. *Powell v. McCormack* (395 U.S. 486, 1969) is the principal federal case. In *Powell*, the Supreme Court invalidated the exclusion of Adam Clayton Powell from membership, rather than seating him and then expelling him, as the Constitution implies. The model of procedural regularity is reasonable in our view, although the extent to which courts should concern themselves with the application of the internal rules of Congress remains an open question. This model is beyond our reach here, too.

The emerging *legislative deliberation* model is our primary concern. As we have noted, the character of the legislative process has become an issue in federal cases when it is argued that the prima facie unconstitutionality of legislation must be rebutted by a clear and strong rationale for federal action, at least in Commerce Clause and Section 5 cases. The search for evidence of a clear goal, a need for governmental action, and a careful consideration of alternative policies leads courts to the text of statutes and the to the record of congressional action on the legislation. This use of legislative history goes beyond a search for statements clarifying the meaning of ambiguous statutory language. Judicial review is extended to an evaluation of the quality of the legislative or deliberative process.

The emerging standards of the due process of lawmaking, which we elaborate below, involve both substantive decisions (choice of goals, evaluation of evidence, selection of policy means) and procedural elements (deliberation on goals, evidence, and policy instruments must occur, and the substantive decisions must be stated and justified in the legislative record or in the statute). As a result of *Garrett*, these appear to be necessary conditions for overcoming the constitutional objections to a statute that would otherwise be dispositive. The Court appears to believe that it must apply these standards or abandon judicial review. The Court has not articulated such standards outside of the recent federalism cases, but an inference that the standards would apply to other cases involving a balance of constitutional principles seems reasonable.

B. Critics

We are not noticing for the first time in this paper that the Supreme Court has crafted a new standard of scrutiny in the federalism cases. Beginning with *Lopez*, legal scholars wondered where the Court was heading with the suggestion that the legislative record may prove useful in determining the constitutionality of an act of Congress. As the Court proceeded from *Lopez* to *Garcia*, scholars became increasingly alarmed at the degree to which a due process of lawmaking standard was constructed. Four commentaries illustrate the critics' views.

Frickey's (1996) initial reaction to *Lopez* was that the intermediate form of scrutiny—something between strict scrutiny, which typically condemned a statute, and the rational basis test, which typically allowed nearly any approach Congress pursued—is a potentially useful alternative. He observes that in the ordinary case “the legislative process is irrelevant to the constitutionality of the congressional product. There are few cases, however, the essentially embrace the view that the quality of the legislative procedures makes a difference in assessing constitutionality.” Further, he argues that if *Lopez* was “carefully applied and thoughtfully limited,” heightened concern for congressional fact-finding “could promote a meaningful dialogue between judiciary and legislature concerning just where the difficult-to-draw lines should exist concerning important constitutional values of personal equality and federalism.” Without applying the same standard to constitutional values beyond the interstate commerce nexus of *Lopez*, however, would leave the Court looking “selectively countermajoritarian.”

Friedman (1996) argues that the new legislative record canon Frickey may be endorsing requires a more adequate rationale than Frickey or the Court provided at the time. Friedman sides with the *Lopez* Court in questioning whether a Congress that fails to consider the constitutional implications of its actions deserves the deference of the Court. Like Frickey, Friedman sees the task of defining commerce to be a shared endeavor of the Congress and the courts because it involves both legal and factual matters. The legislative record canon is useful, he suggests, because it encourages Congress to participate in the process of defining commerce in a changing world and, in principle, leaves the Court deferential to Congress when Congress demonstrates that it has considered the relevant constitutional issues. Friedman, however, insists that in *Lopez* the Court only mentioned the possibility that the legislative record could be useful and in fact ruled on the basis that the issue of guns and schools plainly did not constitute a matter related to interstate commerce.

While Frickey, Friedman, and others (see Kent 1996) were intrigued by the possibilities suggested by *Lopez*, the subsequent federalism cases have generated critical responses from scholars who disapprove of the Court's movement away from the rational basis test for congressional action. Buzbee and Shapiro (forthcoming) and Colker and Brudney (forthcoming) assert that manner in which the Court has imposed its views on federalism has made a more grievous error in undermining separation of powers. These scholars enumerate several problems with the Court's approach to legislative record review.

Busbee and Shapiro (forthcoming) draw upon Justice Breyer's dissent in *Garrett* to emphasize the comparison of legislative record review and hard look review of agency decision making. legislative record review embodies an even more demanding, less deferential form of scrutiny than employs in review of administrative action. While review of administrative action is justified as a means to retain legislative supremacy and political accountability, legislative record review undermines both goals. Moreover, legislative record review imposes a more difficult standard than the hard look review of administrative action. Rejection of agency action generally turns on agency failure to address legal or factual arguments raised in the rule-making process. In legislative record review, there is no burden on opponents to raise objections during the legislative process. The burden, under the federalism decisions, belongs with the congressional majority.

Furthermore, the Court has chosen to ignore several forms of congressional fact-finding but has not specified what forms fact-finding must take, Buzbee and Shapiro continue. In fact, the outcome of agency record review is more predictable than the outcome of legislative record review. The Court's commentary on the legislative record suggests that Congress must move to more formal modes of deliberation and rely less on informal means of communication to demonstrate consideration of relevant constitutional values and evidence. Legislative record review is an illegitimate and standardless "motive review" that undermines the discretion granted Congress under the Commerce Clause, the necessary and proper clause, and Section 5 of the Fourteenth Amendment. The Court "has provided little law to guide how courts, litigants, and legislators should in the future conduct the legislative process or assess the validity of legislative judgments." Finally, Busbee and Shapiro observe that the legislative record is a new judicial construct that has no foundation in the Constitution or statute. It raises the same analytical problems that are involved in the use of the legislative record in statutory interpretation and is "vulnerable to politicized application."

Colker and Brudney (forthcoming) complain that Frickey's stipulation that his canon by "carefully applied and thoughtfully limited" is naïve—the canon is inherently problematic. The Court has changed the standards of judicial review in a manner that Congress could not have anticipated. Congress is now charged with fact-finding duties that the Court will evaluate, which subverts the legislative process in several ways. First, the insistence on a formal fact-finding record fails to recognize that Congress educates itself in many informal ways that give it a distinctive Section 5 role. Second, insistence on an evidence gathering approach fails to account for the way the essentially political legislative process necessarily produces a messy and unpredictable legislative history. And third, the requirements of fact finding imposed by the Court entail opportunity costs for Congress and therefore are not policy neutral. By setting unreasonable expectations for the legislative record, the Court is transforming "questions of fact for Congress into questions of law for the Court's determination." The Court is reserving for itself the authority to determine whether Congress acts properly under Section 5 of the Fourteenth Amendment and, in so doing, is shifting the balance of power between itself and Congress.

Colker and Brudney observe correctly that the Court is still sorting out its views on the legislative record. At the same time the Court argues for a more explicit and extensive legislative record, it also is suggesting that it will make new jurisdictional determinations in Commerce Clause and Section 5 cases. We set aside the jurisdictional issues here to focus on the implications of the Court's position on the emerging due process of lawmaking theory. In the remainder of this section, we address several issues raised by the Court's recent decisions. Our purpose is only partially to contribute to the evaluation of the Court's specific arguments. For the most part, we find the Busbee and Shapiro and Colker and Brudney arguments persuasive. But we address several larger questions that will arise if the Court continues to pursue an expansive theory of the due process of lawmaking.

C. Theoretical Perspectives

We begin with a word of caution. The new importance of the legislative record naturally leads to a search for a theory of legislative decision making that might guide the analysis. Such a theory might tell us whether the Court is right to be suspicious of congressional motivations and fact-finding, whether the Court is asking too much of Congress when it insists that the legislative record take a certain form, and whether the legislative record can generate the information that the Courts seeks. Already scholars have mentioned public choice theory as a source of inspiration for their inquiries about the federalism cases.

In our view of the state of political science, no theory of the legislative decision making exists that is capable of addressing the issues adequately. Positive political theories of legislative politics have become an important branch of legislative scholarship in political science, but the theories are many and the reliance on them remains far less the universal. Positive political theories treat legislators as instrumentalist and, given a set of assumptions about the rules or institutional setting in which they operate, deduce propositions about legislators' behavior, institutional choices, or policy outcomes.

There are a variety of positive theories of legislative politics. Theories differ in assumptions about the political motivations of legislators (policy, reelection, progressive ambition) and about the identity of other players relevant to goal achievement (the president, interest groups, the electorate, the courts, and so on). They also differ in what they seek to explain (individual voting behavior, the structure of committees and parties, policy outcomes). Simply stated, there is no single positive political theory, or even public choice theory, of legislative decision making. Rather, a variety of theories have emerged to address a variety of aspects of legislative politics.

Our approach reflects this state of affairs in the theory of legislative decision making (Shepsle and Weingast 1995). While there is reason to believe that members are at least partly instrumental, it is unwise for us, or the courts, to attribute any particular motivation to members of Congress. There is no basis, as a general rule, to assume that interest groups, the electorate, parties, or any other political actors influence or dominate the legislative process.

D. *Who Are the Legislative Actors?*

The Congress, of course, never acts collectively and seldom acts alone. Each house acts separately when it votes to approve or disapprove motions according a decision rule—by simple majority or supermajority. And the president is an Article I participant in the legislative process. Failure to account for these distinctions creates a very distorted view of the legislative record. Some background is required to fully appreciate the conceptual difficulties created by the approach of the Court in the federalism cases.

Treating Congress as a unitary actor that contemplates evidence and creates a legislative record is a convenient fiction, but it is only a fiction. “Congress,” like any other label for an institution comprised of many individuals and subunits, has at least three connotations. First, Congress is a set of individuals—members and staff. These individuals have attitudes, values, and preferences about public policy, pursue political goals, and exhibit behaviors based on habit, the expectations of others, or strategies.

Second, as an institution, Congress is a set of rules—formal and informal. This is the common social scientific definition of “institution.” In the case of Congress, important rules are set in the Constitution but most rules are adopted by the two houses. The rules explicitly extend to the support agencies of Congress—the Library of Congress, Congressional Budget Office, General Accounting Office, and Government Printing Office. The rules extend to semi-formal groups of members such as legislative service organizations. They cover member and staff behavior in and out of the legislative process and on and off of Capitol Hill. When common rules are imposed, as in the various budget acts establishing special budget procedures, language is inserted to preserve the separate rule-making authority of the separate houses. In this sense, we have two legislatures that must come into agreement before legislation is enrolled (itself a term set by congressional rules). The third meaning of Congress, Congress as a place, is of less concern to us here.

When the Court asks whether Congress identified a history and pattern of state misconduct, the Court presumably means, “did some set of members or staff identify a history and pattern?” The Court is seldom precise and, we note below, it matters when the Court analyzes the legislative record. Here we want to note that the Court frequently confuses whole and part. In *Florida Prepaid*, for example, the Court informs us that “Congress itself said nothing about the existence of state remedies in the statute or the Senate Report, and made only a few fleeting references to state remedies in the House Report, essentially repeating the testimony of the witnesses.” The reports, of course, are committee reports, written pursuant to the rules of the two houses. We might argue that the Court is giving Congress the benefit of the doubt by allowing committee reports, as official publications, to speak for Congress, when, at best, they speak for a committee majority. More likely, the Court is using language very loosely when it asserts that *Congress* did something in a *committee* report.

Tightening up the terminology seems essential to the effective use of the legislative record. We emphasize the two most important concerns.

First, and most obvious, Congress is bicameral. Bicameralism, which stands with federalism and separation of powers as structuring principles of the Constitution, limits the utility of claims about what Congress said or did not say. Relations between the House of Representatives and the Senate are akin to relations between sovereign nations. Legislation cannot be imposed by one house on the other. Mutual consent is required for legislation to be adopted. Compromise between the houses is the norm for significant legislation. The content of inter-cameral compromises may be tenuously connected to committee hearings and reports, or even floor debate before initial passage of legislation, that are generated by the separate houses.

It is important to note that the two houses seldom issue joint reports or approve joint resolutions to explain their common perspectives on policy questions. The explanations—committee reports, most prominently—are the product of one house or the other but seldom of both, and they are seldom intended for the other house. Indeed, each house has its own and somewhat distinctive requirement for the timely publication of committee reports.

Even if it is reasonable to argue that the acts of the House or Senate are based on the identification of a history and pattern of state behavior, there is little reason to assume that the compromises required to resolve differences between the houses and the president will be justified in the legislative record that precedes these agreements. Conference committee reports explain how differences were resolved but they are not accompanied by justifying documents similar to the committee reports that accompany legislation to the floor for initial consideration (see below). As a general rule, then, we cannot expect a close connection between the bicameral outcome and the evidence that either house may have generated at earlier stages in the legislative process.

Second, with the exception of floor action, neither house is acting collectively. Responsibilities for most aspects of developing legislation are delegated to individuals, or groups of individuals, in their capacities as committee and party leaders. Individual members, with the assistance of staff, inside and outside experts, the administration, interest groups, and many other write legislation. Committees hold hearings, markup measures, and vote to report legislation. Committee reports, required by internal rules, are written by staff with guidance from members. Material that is inserted into hearing transcripts and testimony, and later in the *Congressional Record*, is written by all manner of people. Legislation is scheduled by negotiation among committee and party leaders, and, in the House, often following action of scheduling committee, the Rules Committee. Floor statements are crafted by members and staff, and sometimes outsiders. We could go on. The point is plain. Statements such as “the Congress itself said nothing...in the Senate [committee] report” are misleading. If the Court wants to distinguish various congressional sources of documentation, as it did in *Garrett*, then it must exercise greater care in the attribution of congressional action and intent.

E. What is the Legislative Record?

For the Court majority, the legislative record appears to be delimited but in a poorly defined way. Judging by the documents the majority has relied upon in the federalism cases, floor debate as reported in the *Congressional Record*, exchanges between members and witnesses at committee or subcommittee hearings as reported in committee prints, and committee reports, which, under House and Senate rules, generally must accompany legislation reported from committee, are three forms of congressional publication in which evidence of congressional fact-finding can be found. We might infer that official, printed documents are the only place in which the legislative record is found, but we cannot be certain. We also might infer that the only relevant documents are those that explicitly concern the specific legislation at hand—those documents based on proceedings immediately preceding enactment and during the same Congress.

Plainly, defining the legislative record is not an easy task. Several issues deserve immediate attention.

First, there are two legislative records, a House and a Senate record (and we might argue for a presidential record). These records may not be shared. House committee reports, for example, are not routinely distributed to senators' offices. If the Court intends to impose a legislative record standard on Congress, it is reasonable to demand that an adequate legislative record be developed in both houses. To do otherwise is to allow one house to act constitutionally but not the other. Majority opinions in the federalism cases demonstrate little awareness of these necessary complications.

Second, legislative *history* is much richer than the legislative *record*. Much of the information from outside sources—the executive branch, interest groups, or independent experts—is communicated outside of hearings and may not be repeated on the floor of the House or Senate. Beyond committee hearing testimony and committee reports, members have at their disposal written documents drafted in party leadership offices, congressional support agencies, members' caucuses, and committee and personal staff. The analyses of many of these sources, including those of the Congressional Research Service, are provided to members on a confidential basis. As other observers have noted, informal communications are vital to the legislative process. Moreover, individual members are exposed to the informal testimony of constituents, lobbyists, and many others in their everyday activities. And, crucially, the information cumulates over many years, often, if not typically, long before a particular measure is debated and enacted.

Third, even if the record is defined as the formal record, *Garrett* illustrates the remaining ambiguities. In *Garrett*, as in other federalism cases, the Court appears to accept committee reports, which are usually written by staff, as a potential source of pattern identification. However, the Court rejected the report of a task force commissioned by Congress. The Court failed to mention that the task force report at issue (entitled *From ADA to Empowerment: The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities*) was

printed as a publication of the Congress by the House Subcommittee on Select Education and became a part of the official serial set of congressional publications. The Court might have argued that committee reports reflect majority views while other forms of committee prints are published for convenience and do not reflect a policy statement by the committee majority. The Court did not make this argument. Indeed, if the point is to identify the information at Congress's disposal, a committee print would seem to be a strong indication of official cognizance. Both the committee report and the task force report, we have every reason to believe, were intended to be read by interested members, staff, and outsiders. A case could be made that the report of a task force authorized for such a specific purpose is more likely to be noticed by members and staff than a routine committee report prepared days before floor action on an important measure.

In *Florida Prepaid*, the Court appears to allow the committee testimony is a potential source of pattern identification. Combined with the implicit principle of *Garrett*, it appears that testimony by administration officials, interest group representatives, or others, printed by action of a committee or subcommittee, will be treated as a stronger basis than the task force report, also printed by action of a subcommittee, for measuring congressional identification of a policy problem. The Court offered no rationale for this disparate treatment of congressional documents. None seems to exist.

Finally, the Court ignores the president and the executive branch. Under Article I, of course, the House and Senate are joined by the president in the legislative process. Indeed, if the constitutionality of statutes turns on the legislative record, it is difficult to justify exclusion of information that might have been at the disposal of the president and, through the president and the representatives of the executive branch, to Congress. An argument could be made that to be deemed relevant to *Congress*, executive branch evidence must find its way into the official publications of the Congress, but such an argument would represent a wildly unrealistic view of the communications between the branches. Private correspondence and memoranda, presidential and cabinet press conferences and press releases, executive branch studies, and other means of communication are a part of inter-branch communications on all important measures.

The Court has failed to define the legislative record. Implicitly, the Court suggests that committee reports and hearings supply the essential record, but the Court offers no rationale for excluding some congressional documents but not others. A coherent rationale would account for bicameralism while also allowing for the possibility that a breadth of forms of evidence that is legislative and extra-legislative in origin.

F. Does Congress Have the Capacity to Meet the Court's Expectations?

In several scholarly commentaries on the federalism cases it is claimed that the Court's expectations for Congress are unrealistic. Perhaps the Court intends that Congress cannot meet its new standard, thereby dooming congressional efforts to infringe on the rights and powers of the states. We do not find such arguments entirely persuasive and believe that a somewhat more

balanced perspective is required. In fact, the two houses of Congress have established expectations for themselves that are not too unlike the legislative record standards implied by the Court.

Three features of congressional rules reflect expectations that members of Congress have established for their own decision-making processes: the requirements for committee reports, the oversight responsibilities of committees, and the assigned responsibilities of the congressional support agencies. Each of these deserves brief mention.

The committee report rules come close to requiring what the Court is demanding in the federalism cases. The rules date to date to the legislative reorganization acts of 1946 and 1970, which were written to enhance the information available to members. Both House Rule XIII and Senate Rule 26 require that a committee report on a public bill or resolution

- be filed within seven days of a request by a majority of the committee, include
- include all supplemental, minority, or additional views be included in the report,
- cost estimates, and
- a comparison of the existing and proposed laws.

The House rule further requires the inclusion of a statement general performance goals and objectives, including outcome-related goals and objectives, and a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed. The Senate rule specifies that the report include a statement of the regulatory impact of the legislation. Special requirements apply to the appropriations committees and the House Rules and Ways and Means committees.

With some exceptions, House Rule XIII, Clause 4, provides that “it shall not be in order to consider in the House a measure or matter reported by a committee until the third calendar day (excluding Saturdays, Sundays, or legal holidays except when the House is in session on such a day) on which each report of a committee on that measure or matter has been available.” Furthermore, the rule states that “committee that reports a measure or matter shall make every reasonable effort to have its hearings thereon (if any) printed and available for distribution.” Senate Rule 17 requires that the report be available for two days and has the same rule on the availability of printed hearings. Points of order raised on the basis of these rules can be waived by special rule or unanimous consent by the House, or by unanimous consent in the Senate, and, of course, the either house may change its rules.

Since 1946, congressional committees have been assigned explicit oversight responsibilities. These responsibilities are broad. House Rule X, Clause 2, requires each House committee to “review and study on a continuing basis,, any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction.” The rule also requires each committee to “review specific problems with Federal rules, regulations, statutes, and court decisions that are ambiguous,

arbitrary, or nonsensical.” Senate Rule 25 requires committees to “study and review, on a comprehensive basis, matters relating” to their jurisdictions. Rule 25 also requires that the Committee on Rules and Administration “identify any court proceeding or action which, in the opinion of the Committee, is of vital interest to the Congress as a constitutionally established institution of the Federal Government and call such proceeding or action to the attention of the Senate.”

Finally, Congress has created support agencies—the Congressional Budget Office, the Library of Congress and its Congressional Research Service, and the General Accounting Office—for the purpose, among other things, of conducting studies and reporting to Congress. Studies are often reported in official publications, but analytical results also are reported on a confidential basis to individual members of Congress. The Congressional Research Service is formally charged with wide-ranging data gathering and analytical responsibilities:

It shall be the duty of the Congressional Research Service, without partisan bias--

(1) upon request, to advise and assist any committee of the Senate or House of Representatives and any joint committee of Congress in the analysis, appraisal, and evaluation of legislative within that committee's jurisdiction, or of recommendations submitted to Congress, by the President or any executive agency, so as to assist the committee in--

(A) determining the advisability of enacting such proposals;

(B) estimating the probable results of such proposals and alternatives thereto; and

(C) evaluating alternative methods for accomplishing those results;

and, by providing such other research and analytical services as the committee considers appropriate for these purposes, otherwise to assist in furnishing a basis for the proper evaluation and determination of legislative proposals and recommendations generally; and in the performance of this duty the Service shall have authority, when so authorized by a committee and acting as the agent of that committee, to request of any department or agency of the United States the production of such books, records, correspondence, memoranda, papers, and documents as the Service considers necessary, and such department or agency of the United States shall comply with such request; and further, in the performance of this and any other relevant duty, the Service shall maintain continuous liaison with all committees. (2 USC 5, Sec. 166)

Moreover, the Congressional Research Service is authorized

upon request, or upon its own initiative in anticipation of requests, to collect, classify, and analyze in the form of studies, reports, compilations, digests, bulletins, indexes, translations, and otherwise, data having a bearing on legislation, and to make such data available and serviceable to committees and Members of the Senate and House of Representatives and joint committees of Congress. (2 USC 5, Sec. 166)

Of course, the support agencies have responsibilities that extend far beyond conducting analyses for members and committees. Still, Congress has created for itself remarkable data gathering and analytical capability. Combined, the three agencies spend nearly \$750 million annually.

Plainly, members of Congress have set high expectations for their own decision-making process. A wide variety of resources, unmatched by any other legislature of the world, are at the disposal of members and their committees. The issue, therefore, is not whether Congress is capable of gathering information on states when it exercises Commerce Clause and Section 5 authority, but rather whether it uses it in a rational policy-making process, as the Court implies it must, or in a competitive, political legislative process in which the role of information is very different. We now turn to that issue.

G. Is the Kind of Deliberation Demanded by the Court Desirable?

The Court is asking that the outcome of the legislative process reflect the record of fact finding that necessarily occurs earlier in the process. In our view, this is undesirable for a competitive legislative process. To see this, we must further define the apparent expectations of the Court and their implications for the legislative process.

The Court makes explicit that it uses the legislative record to infer “the reasons for Congress’ actions” (*Kimel* at 88). Inferences about reasons might be drawn from explicit statements by members about their reasons. In *Kimel* (at 89), the Court complains that it finds only a few isolated sentences...cobbled together from a decade’s worth of congressional reports and floor debates.” In all of the federalism cases, the Court seeks evidence of state misconduct that members of Congress are likely to have considered. It is not clear what standard is applied: Would more numerous direct statements by members, groups of members (such as in committee reports), or more formal findings reported in statute be sufficient? Must the evidence be found in the record so that the Court can evaluate it whatever the reasons members offered for the record? Or, must the Court be persuaded that (1) the evidence was available and (2) members of Congress deliberated on it? The latter interpretation appears to be the most reasonable inference from the statements we can cobble together from the federalism cases.

Abstractly, the Court expects Congress to reveal information about its goals, objective conditions, and its causal reasoning. Operationally, several directives to Congress are suggested by the Court:

1. Congress must establish in the formal record of its proceedings or in the statute a clear goal for the statute.
2. Congress must demonstrate in the formal record of its proceedings or in the statute that it recognizes the constitutional considerations that might be raised by the courts about a statute.

3. Congress must establish in the formal record of its proceedings or in the statute persuasive findings of fact that are the result of systematic investigation of the relevant issues.
4. Congress must establish in the formal record of its proceedings or in the statute that there is a strong causal relationship between the goal and the statutory means for achieving the goal.
5. Congress must demonstrate in the formal record of its proceedings or in the statute that it recognized and properly balanced constitutional and policy considerations.
6. Congress must establish in the formal record of its proceedings or in the statute that the statute is the means that minimizes constitutional violations.
7. Congress must demonstrate in the formal record of its proceedings that a significant number of legislators shared the goal and, through debate and deliberation, recognized and balanced the relevant constitutional and policy consideration.
8. Congress must follow procedures that guarantee deliberation that provides for properly balancing constitutional and policy considerations.

For students of public policy, political science, and public administration, the emerging criteria for a due process of lawmaking have a familiar ring to them. They are characteristics of what is sometimes labeled rational policy-making processes that have been subject to extensive analysis and commentary. Dror (1968) observed that policymaking was lagging behind policy knowledge (about issues, how to study them, how to address them). He called for the application of an optimal model of policy making, which involves the application of scientific method to policy analysis and choice. Lowi (1969) complained that interest-group influence dominated policy making, and produced broad delegations of power to executive agencies that allow interest groups to dominate the process of policy implementation. He advocated “juridical democracy,” which he defined as “the rule of law operating in institutions.” In a juridical democracy, statutes specify clear policy goals, rules of implementation, and standards for evaluating performance. Thus, the hallmarks of juridical democracy are specificity, adherence to formal decision-making procedures, explicit consideration of the implications of legislation for larger principles of justice, and limited delegation.

The formulations of Dror and Lowi have generated reactions that form a substantial body of literature in policy analysis and political science. For example, Wilson (1990) observes that some policy tasks are inherently ambiguous and that conflicting but desirable goals often produce legislation with unspecified tradeoffs among them. Prohibiting law that reflects ambiguous or conflicting goals is to prevent a policy response in many situations. Insistence on statutory clarity of ends and means requires a reduction in the role of politics. Standards of rational policy making threaten important features of democratic policy making--the system of representation,

interest-group activism, and compromise as the central form decision making. The calculations of planning and clear choices are the realm of administrators not legislators, Wilson insists.

Wilson's comments were directed at Lowi's juridical democracy, not the Court's new due process of lawmaking. Still, their object, the nature of congressional decision making, is the same. The questions raised by Wilson about the purpose of legislating, the nature of policy goals and means-ends relations, and the trade-offs between democratic and rational decision making are the same questions to be asked about the legislative process suggested by the Court.

While it may appear that the Court is not imposing a particular model of decision making on Congress (it is only expecting justification for action *somewhere* in the legislative record), the Court does appear to be adopting a particular view of legislative decision making. This point of view is contested.

The Court appears to assume a deliberative legislature, where deliberation is defined as reasoned discussion in which the outcome is consensus on ends and means. Cohen (1989) defines deliberation in a similar way. For Cohen (1989, 33), deliberation aims to develop a "rationally motivated consensus—to find reasons that are persuasive to all." It might be objected that the Court never insists on a consensus, but the Court is demanding reasons that it finds persuasive, at least when Congress' actions would otherwise infringe on the rights or powers of states. And the Court is demanding revelation of those persuasive reasons, and the data to support them, in the legislative record.

Deliberation and the expectation that Congress engage in it have undeniable intuitive appeal, particularly with respect to efforts to balance constitutional values. Theorists often juxtapose deliberation and voting as modes of decision making. For example, Sunstein observes:

To be sure, there are notorious difficulties in the claim that political outcomes can actually reflect the "public will." It is doubtful that private desires or even aspirations can be well-aggregated through the process of majority rule. Even if a process of aggregation were possible, it would not be entirely desirable in light of the broader goals of deliberation in producing reasoned agreement rather than simple aggregation (Sunstein 1993, 244).

In the federalism cases, the Court seems to agree. At least for policies in which constitutional values must be weighed with care, the Court seems to be suggesting, deliberation, not simple aggregation, is expected of Congress.

Congressional decision making, however, is not, and should not be, exclusively a deliberative process. The empirical and normative claims warrant some discussion.

The empirical claim that congressional decision making is not exclusively a deliberative process follows from a constitutionally-imposed constraints to which we have alluded. Each

house decides by voting, and three institutional players—the House, Senate, and the president—generally must concur before policy is enacted. Voting implies that winners and losers are expected, even with respect to the choice of rules that govern deliberation and voting. The time devoted to deliberation and the subject matter of deliberation are, or may be, limited by rule.

Students of deliberation have observed that successful deliberation is contingent on a commonality of interests or values to be pursued in public policy (Mansbridge 1980, Przeworski 1998). If not a commonality of interests or values does not exist, discussion will take the form of debate (Smith 1989, 237-40), decisions will be made by vote rather than by consensus, and the process takes the form of building majority coalitions through a variety of means rather than persuasion on the merits. The process of building majorities or supermajorities under conditions of a conflict of interest, generate competition. Competition, in turn, produces strategies that undermine the purposes of deliberation. Legislators may selectively reveal information about their own goals, objective conditions, or their causal reasoning. Legislators may reveal incomplete or misleading information about their own goals, objective conditions, or their causal reasoning. Strategic disclosure muddies the legislative record and greatly complicates the task of applying a legal standard that asks judges to evaluate the quality of that record.

The Court might argue that Congress has an obligation to bar or limit deceptive behavior, at least when legislating on matters of the kind at issue in the recent federalism cases. As unrealistic as that may be, it clearly would put the Court in a position of dictating rules to the Congress, in violation of the right of each house to determine its own rules (Article I, Section 5).

We have noted that the constitutional structure of the legislative process may produce compromises on both ends and means. We might hope that interaction between the House, Senate, and president will take a deliberative form and yield a reasoned agreement. The Constitution does not specify any process for this interaction. Conference committees are not required to produce a detailed report, as are House and Senate committees (see below), and never do.

The Court is expecting Congress to legislate differently when its exercise of Commerce Clause and Section 5 authority threaten states' rights and powers. When there is little conflict of interest within Congress, it is easy to see how congressional, even with bicameralism and a process that builds to majority decisions, might be improved to meet the Court's expectations. However, when conflict of interest is present and when policy is therefore constructed through a competitive process of coalition building, bargaining, and voting, the Court is asking too much. It is asking that the outcome of that inherently political process be compatible with the outcome of a hypothetical rational policy-making process. It is asking Congress to become something it isn't and cannot be under a system of bicameralism, presidential veto, and competitive elections.

H. The Court's Methodology, Other Potentially Analogous Cases, and Separation-of-Powers Values

Our critique of the Court's approach in the federalism cases has been largely descriptive: the judicially imposed procedural lawmaking obligations are simply inconsistent with any sophisticated understanding of congressional processes. Does this similarly indict the Court's requirements that when Congress seemingly trenches upon established constitutional values (as in *Kent v. Dulles*, described above, concerning withholding passports from supposed subversives) or uses its supposed plenary authority over novel concerns in ways that would violate the Constitution if applied elsewhere (as in the immigration and Indian law cases described above), the Court will often require statutory text that unmistakably commits Congress to trenching upon such values?

We see important distinctions between these longstanding approaches and the new judicially proceduralized protection of federalism. In the longstanding areas, the Court is obviously protecting substantive values: free speech, equality, Indian property rights, and the like. The approach is often bound up with another longstanding technique, which is to prefer constitutional to unconstitutional readings of statutes (e.g., *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). This seems straightforward enough when the Court will actually enforce the constitutional provisions, if push comes to shove. It may be harder to rationalize in novel areas like immigration law and Indian law, in which the Court will almost always ultimately defer to Congress. But here, too, there are significant substantive values at stake: the freedom of the immigrant from indefinite detention, the freedom of the tribe from the divestment of its historical prerogatives, and so on. These values, as well, have a constitutional dimension, but because of the novel circumstances of these areas, judges have often viewed them as involving "political questions" best left for Congress to have the final say. In short, the Constitution can mean more than what the Court will enforce. Although the Court may view itself inferior to Congress in having the last say on such questions as immigration and Indian policy, the Court may very well consider itself well situated to force Congress to do any dirty work explicitly, to articulate clearly an institutional rationale for all the public to see to justify what may seem to be harsh or irrational measures.

Oddly, for a time it appeared that the Court would be satisfied in taking precisely this approach to the protection of federalism. In the early 1990's, the Court required congressional exercises of its commerce power regulating core state functions (*Gregory v. Ashcroft*, [cite]), federal statutes subjecting states to suit in federal court (*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)), and federal measures conditioning federal grants upon compliance with federal regulation (*Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)) to a stringent clear-statement requirement, whereby the state avoided the federal invasion unless the measure spoke with absolute clarity. Although there are normative concerns about judicial imposition of these requirements retroactively to statutes passed in earlier times where Congress lacked notice of these rules, we have no serious descriptive quarrel with this technique. Congress, as an institution, can be put on notice that it must speak clearly in statutory language to achieve certain

goals. Moreover, as one of us has explained, there are potential normative benefits to this approach:

This approach has significant institutional implications both for the Court and for Congress. It provides the Court with a structural lodestar to cut through the complexities of a difficult statutory case. The state [or tribe, or immigrant] gets the benefit of a strong presumption in favor of its sovereignty [or other interest], and the opposing party bears the burden of marshalling the legal complexities and finding clear evidence of congressional support for its position. If, as is often the case, state sovereignty survives the challenge, the burden of combatting inertia and seeking legal change lies with the party who sought to intrude upon state authority. If this party undertakes the lobbying effort necessary to obtain federal legislation to overturn the Court's decision, it must do so openly, by clear language in a bill. In theory, at least, this approach encourages a fair fight in Congress, which is structurally better suited than the Court to weigh state sovereignty against other interests. Because it is much easier to kill legislation than to pass it, states ultimately retain all the institutional and procedural advantages in conflicts over their sovereignty, but Congress retains the capacity to erode state sovereignty whenever the national interest is sufficiently strong (Frickey 1993, 416).

What has changed since the early 1990's concerning federalism? Two things strike us as significant, and distinguishable in important ways from the immigration and Indian cases: the Court will no longer defer to clear congressional judgments, and the Court seems to insist that Congress must provide a formal record providing a strong factual basis in for its judgments. The implication is that more facts might change things. But we think the Court had it right in the first place: require Congress to make explicit its rationale and its regulation, and then impose whatever substantive, not procedural or factual, limitations the Court finds mandated by the Constitution.

In the commerce clause area, this movement back to substantive standards is already evident. As described in Part I, in *Morrison* (the Violence Against Women Act case) explicitly, and in *Lopez* (the guns in schools case) implicitly, the Court has concluded that legislative jurisdiction under the "commerce" clause requires some sort of economic transaction being regulated. Whatever might be wrong with this as a substantive matter of constitutional law, it is apparent that more facts about how violence against women or gun violence in schools affects interstate commerce would not have changed the results in either case. Nor would have a more sanitized, administrative-agency-like legislative process have saved either statute.

To be sure, one can imagine factual issues arising in the next wave of commerce clause cases. Hypothetically, assume that Congress enacts legislation requiring all lemonade stands with annual revenues of \$10 or more that are operated by underage entrepreneurs to use beet sugar rather than cane sugar. There are plenty of transactions upon which to hang to legislative jurisdictional hook, but the overall scheme, even when all such operations are aggregated, would have a minuscule effect upon interstate commerce. After all, in contrast to *Wickard v. Filburn* (described in Part I), while there clearly is an integrated, interstate wheat market that would be dramatically affected by personal consumption by thousands of wheat producers, no such

widespread, integrated, interstate market seems affected by the hypothetical statute. If one doubted the important effects of the wheat regulation statute, congressional factual findings explicit on the face of it would explain Congress's rationale and provide all interested parties --- farm groups fighting for or against the bill, public interest organizations, lawyers and judges in any later litigation --- a sense for what Congress has institutionally committed itself to endorsing. Consider how ludicrous such findings would appear in our hypothetical "lemonade reform" act. We would trust the congressional process to flush out such measures, which suggests that in certain circumstances factual findings or a clear-statement requirement can be useful judicial tools in assisting good congressional policymaking.

If Congress enacts silly legislation justified by ridiculous findings, what then? It seems lame for the Court, as it has done, to suggest that Congress should be faulted as a matter of fact. Instead, the Court, if honest, faces a purely substantive question: should it defer to such a congressional rationale, or should it reject it as beyond congressional power? The Court has already recognized this in *Morrison*, and we would expect it to move away from factual quarrels and toward more substantive standards in other areas as well.

Of course, even this preferred approach is worrisome. We mean no endorsement of *Morrison* as a substantive matter, only that it is as a substantive, not factual or procedural matter, that the battle over *Morrison* and other similar controversies should be fought. A primary problem is whether the Court can construct substantive tests that are clear enough to provide fair notice to Congress and lower courts and that are not merely arbitrary. As Justice Souter argued in his dissent in *Lopez*, the Court's track record, pre-1936, on substantive tests limiting congressional commerce power — under which manufacturing was not "commerce" and Congress could regulate "direct" but not "indirect" effects upon interstate commerce — was dismal and is today virtually universally seen as failed, dangerous judicial intermeddling to preserve nineteenth century laissez faire conceptions of economic freedom and states' rights as against the inexorable force of modernity in the face of economic crisis. Our point is that it is on this question of substantive standards that future disputes must turn.

The problem of developing substantive standards is particularly acute in the section 5 cases. Because the Court has tied congressional power under section 5 to remedying what the Court itself will deem a pattern of unconstitutional state action, congressional power is linked to endless, gauzy, unresolvable sociological disputes about what is happening in the real world of state government treatment of its own employees, disabled citizens, and so on. One would have thought that such disputes are the quintessential legislative, not judicial questions. A defense is that they are, but that under our system they are state legislative questions, not congressional ones. We have some sympathy for this point, but again wonder whether the Court can ever find a way to operationalize this concern through a substantive standard that avoids the pitfalls that we have identified.

The Court is now perilously close to saying that Congress, under section 5, may outlaw state action only when "everybody knows" that states, or at least a region of states, routinely

abuse constitutional rights in a certain way. The Court has consistently pointed back to the legislative history of the Voting Rights Act of 1965 as a paradigmatic example of the kind of lawmaking Congress may undertake. That legislative history was, of course, replete with example upon example of blatant discrimination in voting that was inexplicable on any ground other than pure racial animus. If that is what the current Court is asking of the current Congress concerning current controversies, Congress might as well close up shop. Our society has moved well beyond such egregious regional norms, and state decisionmakers today are sophisticated enough not to allow their missteps to be documented. This is especially so for equality claims, where often a pattern of discriminatory effects does not reach the level of unconstitutionality unless it is rooted in state discriminatory intent.

While the Court is attempting to fine-tune its substantive limits on Congress, it ought to consider some for itself. Its proceduralized, supposedly fact-based, legislative-record approach in the federalism cases seems inconsistent with its own trend in statutory interpretation, where legislative history has been systematically devalued and statutory text privileged in the last decade. More generally, the judicial intrusion into internal congressional processes seems in tension with the Constitution itself, which provides that each House is responsible for making its own rules. It is one thing for the Court to enforce explicit constitutional prohibitions on congressional lawmaking procedural innovation (as, for example, with the legislative veto, see *INS v. Chadha*, [cite], or with enacting tax legislation that originated in the Senate rather than the House, compare *United States v. Munoz-Flores*, 495 U.S. 385 (1990)). It is quite another thing for the Court to create additional procedural obligations for Congress. There is a deep separation-of-powers problem at the heart of the new due process of lawmaking. (e.g., Bryant and Simeone 2001). The Court's efforts to protect the structural values of federalism seem to flounder at their intersection with our other major constitutional structural value, separation of powers. The Court's efforts to protect the structural values of federalism seem to flounder at their intersection with our other major constitutional structural value, separation of powers.

Our discussion has demonstrated that, particularly in recent years but even earlier (in such cases as *Kent v. Dulles*), the Supreme Court has used canons of statutory interpretation based on constitutional values to impose heightened statutory drafting obligations upon the Congress. For example, under the "super-strong" clear statement rules announced in such federalism cases as *Gregory v. Ashcroft* and *Atascadero*, only very explicit text targeted to the issue in question will be sufficient to force the federal courts to conclude that Congress has sought to regulate the states. The Rehnquist Court has also promoted this enthusiasm for statutory textual solutions by relying far less upon legislative history in interpreting statutes. Indeed, two members of the current Court, Justices Scalia and Thomas, will almost never consult legislative history in construing a statute. Instead of viewing legislative intent as the touchstone of statutory meaning, these Justices seek to interpret the statute merely by giving its text the meaning most consistent with ordinary American English usage. There are a variety of arguments supposedly supporting this "new textualism"—e.g., that legislative intent is an oxymoron; that the only "law" is the text enacted bicamerally and signed by the President; that judicial reliance on legislative history encourages Members and their staffs (and lobbyists with access to them) to

stack legislative history to skew later judicial interpretation; that consulting legislative history allows willful judges to look over the materials and selectively pick out materials that support an outcome they wish to reach for their own policy reasons, while ignoring contrary information. Although the other seven Justices have no per se rule against the use of legislative history, the overall reliance on it in statutory cases has markedly declined in the Rehnquist Court.

In our view, the Court's behavior that we have traced is paradoxical. The federalism cases seem to suggest that Congress must carefully craft legislative history, and perhaps even make formal findings, documenting a close connection between a federal statute and interstate commerce or a pattern of state constitutional violations. In contrast, the new textualism has influenced the Court in statutory interpretation to diminish the importance of legislative history. Thus, the former cases may place responsibilities upon Congress that it simply cannot withstand — forcing Congress to behave like an administrative agency, despite the wildly different composition, structure, and goals of a legislature as compared to an agency — while the statutory interpretation trend may give congressional processes less respect than they deserve.

I. Where Do We Go from Here?

Congress can be expected to respond to the new legislative record demands of the Court. We can expect members of Congress to do so in a manner that largely meets the Court's expectations but does so in a manner that reflects the competitive nature of legislative decision making and minimizes the transaction and opportunity costs of doing so. The breadth of such efforts turns on an important unknown—the future direction of the Court in the application of the implicit standards of lawmaking. If the Court continues down the established path, the open question will be whether the resulting changes in congressional habits are desirable and, in the long run, the courts will be satisfied with the implications for their deliberations.

To improve Congress's ability to anticipate the courts, Garrett and Vermeule (2001) suggest a two-step procedure for all bills. In the first step at the time for referral to committee, the parliament would identify potential constitutional issues raised by a bill. This may stimulate a committee to hold hearings that address those issues. Later, a bill reported from committee would be accompanied by a "constitutional impact statement." The statement would provide a summary of committee findings on the proposal's constitutional implications. In this way, Congress be more likely to address the constitutional issues and the legislative record would reflect the deliberations. To assist Congress with this process, Garrett and Vermeule propose strengthening the staff expertise available by creating an Office for Constitutional Issues. Garrett and Vermeule would enforce the proposed process by allowing points of order to be raised against bills that lack the accompanying statement or that otherwise raise a constitutional issue (currently allowed in the Senate but not the House).

Our initial reaction to the Garrett and Vermeule proposal is that it is not necessary. As Garrett and Vermeule note, House committees are required to account for constitutional implications in their reports. Perhaps the Senate could require the same of its committees. The

framers of congressional legislation will quickly recognize that pushing the boundaries of Commerce Clause and Section 5 authority necessitates the construction of a legislative record that meets the Court's expectations. Scholars have predicted greater formalism in congressional fact-finding activities and more frequent and detailed specification of findings in legislation. Both seem quite likely, although they do not exhaust the probable responses.

In any event, the Court's demand for a particular kind of legislative record is limited to the domain of federalism so far. The burden on Congress would be great. Parliamentarians' statements would have to be attached to each of the 12,000-plus bills that are introduced in each Congress and a constitutional impact statement would have to be attached to each of the 2,000-plus bills reported to the floor.

If the Court's stance on review of the legislative record is maintained, congressional advocates of new policy initiatives are likely to turn to support agencies, the executive agencies, and other organizations for studies that can be included in the legislative record. The number of requests for formal studies from congressional support agencies will increase, and soon Congress will consider substantial increases in financial support. Special congressional task forces and commissions may be used more frequently (assuming their work kind find its way into the legislative record). And executive agencies will be required to conduct more formal studies and provide reports to Congress in anticipation of congressional action.

Moreover, advocates of policy initiatives will anticipate congressional demand for such studies and will gladly propose and produce them. Indeed, we can expect competing efforts to provide bases of findings of one's choice, and corresponding efforts to debunk the fact-finding efforts of competitors. Such competitive analytical efforts are common today, but they take on new importance when they have implications for judicial review of the new statutes. Courts are likely to be confronted with a legislative record that is far more complicated and far more difficult to evaluate than the record typically produced in the past. Committee records—hearings, reports, special printings—will be expanded to incorporate these studies.

The net result, of course, will not necessarily be a useful legislative record, at least from the perspective of guiding judicial review. The courts often will be confronted with a complex and inconsistent legislative record. If the courts insist on the presence of persuasive evidence in the legislative record of a pattern of state improprieties as a necessary condition for congressional action, the courts will have to evaluate that record. And court evaluation of that record will entail choosing from among the competing sets of facts and interpretations. Judges will be making rulings that read very much like the debating points offered by the competing parties to the legislative battles.

Devin (2001) proposes that the courts develop a selection strategy in their scrutiny of the legislative record.

On some issues, like those implicating separation of powers concerns, Congress (at least sometimes) may well have the institutional incentives to moderate its handiwork in order to preserve the balance of powers. On other issues, like those dealing with Congress's federalism-implicated powers, this investigation may reveal that Congress's desire to do that which is politically popular is far stronger than its desire to self police its powers under either the Commerce Clause or Section 5 of the Fourteenth Amendment. By observing Congress this way, the Court can sort out whether Congress has the institutional incentives to take factfinding seriously. (Devin 2000, ****)

Where the incentives for fact-finding are strong, the Court can exercise greater deference to Congress; where the incentives seems weak, the Court can pursue *Garrett*-style review.

Devin's proposal, it seems to us, asks the Court to make generalizations about political processes across a range of policy areas that it is not competent to make. It would add a layer of indeterminacy to legal standards without addressing the weaknesses in the *Garrett* approach. And, of course, it accepts the Court's position that at some point the Court must second-guess Congress's collection and evaluation of social facts.

III. Conclusion

In recent years, the Supreme Court has expanded its review of the legislative record when evaluating the constitutionality of statutes that limit the rights or powers of states. Most recently, in *Board of Trustees v. Garrett* (121 S.Ct. 955, 2001), the Court sought to limit Congress by reviewing the legislative record to determine whether Congress had discovered a pattern of state misconduct that warranted an infringement of the states immunity from private law suits. We have argued that, to date, the emerging theory lacks an adequate conceptualization of legislative actors, has an excessively narrow definition of the legislative record, and appears to reflect an inaccurate view of deliberation and the legislative process. While the Congress has the capacity to meet the Court's expectations for evidence gathering, Congress cannot and will not meet the Court's implicit assumptions about deliberation.

Our hunch is that eventually the courts will find the *Garrett* approach untenable. The courts will recognize that the pitfalls of legislative record review. When they do, they will either reverse the direction taken in the federalism cases or insist on more detailed findings in statutes. The latter approach would provide a basis for judicial review without requiring the courts to develop more explicit and detailed standards for the legislative record. Still, assuming that the courts exercise some constraint in the nature of the findings required in statute, this approach would represent a step back from the intrusive standards implied in the recent federalism cases.

The due process of lawmaking, we noted, has three distinct strands. We have a generally favorable view of the Court's efforts to account for *institutional legitimacy* in delegation and administrative cases. For the most part, the Court has successfully preserved the Congress's institutional power and the separation of powers in such cases. Similarly, progress is reflected in

the effort of the Court and, far more commonly, the state courts to insist on *procedural regularity* when constitutional provisions are explicit about features of the policy-making process.

Review of the details of the *legislative deliberation* is unviable. Staying on this path will require further specification of the legislative actors and the kind of record that must be found for each of them. Consistency will require that the justifying record be closely tied to outcomes, which involve compromised means and ends. Eventually, we are persuaded, the courts will find this to be impractical, if they do not first find it a breach of separation of powers.

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